

Consultation response

Shaping competition policy in the era of digitisation

Response to the European Commission's call for input



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

On 6 July 2018, European Commissioner for Competition, Margrethe Vestager issued a call for input from stakeholders on three broad topics relating to the future challenges of digitisation for competition policy. This is in anticipation of a conference to be held on 17 January 2019 and a report to be delivered by 31 March 2019 on three main topics: 1) competition, data, privacy and artificial intelligence (AI) 2) digital platforms' market power 3) and preserving digital innovation through competition policy. The American Chamber of Commerce to the EU (AmCham EU), which represents over 150 US companies committed to and invested in Europe, and operating across all sectors of the economy, welcomes the Commission's initiative and the opportunity to provide input on these important topics.

The digitisation of the economy is contributing to increased competition and greater consumer welfare across a wide range of industries. AmCham EU members share the Commission's goal of ensuring that the European Union participates fully in these benefits and believes that rigorous enforcement of EU competition rules will play an essential role. At the same time, AmCham EU cautions against developing new, sector-specific rules for the emerging digital economy, as premature and overly-prescriptive intervention may chill, rather than encourage, innovation. As Commissioner Vestager noted in her address to the EDPS-BEUC Conference on Big Data on 29 September 2016 (the Big Data address), 'the competition rules weren't written with big data in mind. But the issues that concern us haven't changed'.¹

Panel I - Competition, data, privacy and AI

In a world of ubiquitous data, thanks to, for example, 5G, the Internet of Things (IoT) and connected cars, where would we have data bottlenecks – or, conversely, data access, data sharing or data pooling – causing competition issues? In which ways should privacy concerns serve as an element of the competition assessment? Since data is the raw material of artificial intelligence, how do we ensure that AI technology is as competitive as possible?

1. Data bottlenecks

At this stage, it is unclear whether the digitisation of the economy is likely to create data bottlenecks or, if it does, whether those bottlenecks are likely to be competitively significant. The French and German competition authorities noted in their May 2016 joint report on Big Data² that competitive advantage is associated with

¹ Available at, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en

² Available at, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html

access to a large volume of data, and will depend on the specific market at issue and particular set of facts. As Commissioner Vestager noted in her Big Data address, ‘that doesn’t mean there’s a problem, just because you hold a large amount of data. (...) We don’t just assume that holding a large amount of data lets you stop others competing. After all, it might not be difficult for other companies to get hold of the same data, by collecting it from their own users or even buying it in. Or the data we’re talking about might not be all that important in order to compete’.

AmCham EU respectfully submits that there is no reason at this stage to believe that the collection of large amounts of data is likely to create data bottlenecks. On the contrary, data is generally ubiquitous and non-rivalrous, therefore data bottlenecks are in principle unlikely to arise. Given the absence of any reason for suspicion that data collection is likely to give rise to bottlenecks, and the risk that ad hoc antitrust enforcement policies developed to address emerging issues may dampen innovation, AmCham EU urges caution and stresses the importance of analysing data-related issues on a case-by-case basis.

2. Data access/sharing/pooling

The digitisation of the economy often requires cooperation across and sometimes within industry sectors. As such, companies may share or pool data from a range of sources, and a variety of undertakings may have access to such data, sometimes including competitors. The sharing of competitively sensitive information can of course give rise to competition issues, which are well analysed in the Commission’s Communication on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operating agreements.³

On the other hand, sharing information is often pro-competitive. As Commissioner Vestager noted in the Big Data address, sharing ‘data is one way to get the most out of it. Because if bigger is better, then combining companies’ data into a single, big pool might give you insights that you couldn’t get from each one on its own. (...) In fact, data pooling might even help competition’.

AmCham EU submits that there is no reason for concern that data access, voluntary sharing or pooling in the context of the digitisation of the economy gives rise to more serious issues, or issues that are different in nature, than those involved in information sharing generally. Again, AmCham EU cautions against developing ad hoc theories of harm or enforcement policies that may inadvertently chill competition, rather than encouraging it. In particular, AmCham EU cautions that remedies involving compulsory sharing of information would be required only in exceptional situations and subject to conditions developed in decades of EU competition law for compulsory licensing of intellectual property rights or access to essential facilities. While industry should be able to use public data sets and share data responsibly, a government mandate requiring access to privately held data is not justified or necessary and could chill private sector investments in collecting, processing and analysing data to deliver new and innovative services. To the extent such a tool is established, strong encryption

³ Available at, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2011:011:FULL&from=EN>.

and other safeguards will be essential. As Commissioner Vestager stated in her Big Data address, 'Our guidelines on horizontal cooperation shed light on how to share data in a way that doesn't harm competition'.

3. Privacy concerns and competition policy

The European Union is a world leader in developing rules to protect privacy and personal data, notably through the adoption of the General Data Protection Regulation (GDPR).⁴ AmCham EU members support the European Commission's key role in developing these rules and ensuring that they are applied in a fair and consistent manner. However, AmCham EU cautions against a blurring of the boundaries and objectives of competition law and data protection law. As Commissioner Vestager noted in her address on innovation on 7 November 2017 (the Innovation address)⁵: 'we need the right rules in place. Like the new privacy rules that will apply in Europe from next May', to 'ensure that Europeans can "trust online businesses to protect their personal data".' She added, 'competition enforcement can also make a difference. Because it can give people confidence that online businesses are playing fair'. Effectively, privacy rules instil trust in consumers, while competition law ensures business are playing fair.

AmCham EU submits that there is no need to develop new competition policies or enforcement tools to address privacy concerns, precisely at the moment when a new legal framework and powerful enforcement regime to protect Europeans' privacy has come into force. To seek to deploy competition policy as a separate tool to protect privacy would create a risk of duplication and overlap with existing regulations and potential confusion as to which authorities are responsible for ensuring consumers' trust in this area. If ever new policy frameworks are introduced, such frameworks should be completely aligned with existing ones to avoid barriers and additional costs.

4. AI technology and competitiveness

AI is a combination of technologies which allows systems to understand, reason, and learn. AI is diverse, with different uses and applications, depending on the sectors, private or public, the business models, business-to-business (B2B) or business-to-consumers (B2C), etc. AmCham EU members are at the forefront of research on machine learning and are investing in making Europe a leading power on AI. Our members are working with the Commission to develop Europe as a competitive market power on AI through measures to attract investment, promote research and re-skill the workforce. In doing so we wish to ensure a structured and inclusive dialogue with all stakeholders, adopting a global approach on the overall policy direction and applicable standards as these emerge, and for the provision of voluntary measures, such as codes of practice.

⁴ Available at, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:119:FULL&from=EN>

⁵ Available at, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/clearing-path-innovation_en

As AI research develops in this innovative environment, AmCham EU is counting on the European Commission to continue applying EU competition law to ensure that the AI sector continues to be as intensively competitive as it is today. AmCham EU believes that the Commission already has the tools it needs to protect this competition in AI, where the issues are no different than those in other sectors. Indeed, AmCham EU cautions that any effort to develop ad hoc, sector-specific rules in an effort to help competition may inadvertently do the opposite, especially in a sector that is as diverse and innovative as AI.

AmCham EU encourages policy makers to promote collaborative policy development and implementation that includes government and industry, and avoids regulatory and legislative solutions that are overly prescriptive. Although there is no one-size-fits-all solution or approach, growth-oriented public policies include:

- an enabling regulatory environment that supports competition and flexible spectrum use;
- an examination of economic, social and safety policies from the consumer perspective, based on the current competitive landscape and not on the landscape that policymakers know from the past and have comfortably regulated in traditional ways; and
- multi-stakeholder engagement.

The innovation that has propelled the growth of IoT technologies, devices and business has largely been achieved in the absence of, and not because of, strict government oversight and intervention. The same light touch approach should also be applied to AI. Policy makers around the world should be looking at already existing policy frameworks and analyse whether they are fit for purpose before adopting new ones.

Panel 2 – Digital platforms’ market power

The interests of platforms are not always aligned with the interests of their users, which can, as a result of platforms’ market power, give rise in particular to: a) leveraging concerns (digital platforms leveraging their positions from one market to another); and b) lock-in concerns (network externalities, switching costs, better service due to accessibility of data make it difficult for users to migrate to other platforms, and allow platforms to ‘exploit’ their user bases). What should/can competition policy do to address these concerns and how?

The definition of ‘platforms’ is inherently broad and encompasses a wide range of businesses, websites, and organisations. In fact, the concept of a platform has existed since commerce began, with buyers and sellers being brought together by intermediaries in markets of all kinds. The diversity of platforms in terms of activity, sector, business model, and size is striking. Platforms that connect suppliers and consumers range from small shops with a local reach to worldwide companies generating billions of revenues. Moreover, the multi-sided nature of platforms exerts a strong market pressure from all sides. Platforms need to carefully consider the balance between suppliers and consumers, in order to keep the use of the platform attractive for both.

As a result, generic concerns on platforms overlap with wider issues on the development of the digital economy. These include valid concerns around intellectual property rights, privacy, security, data protection, competition, consumer rights and more. However, bearing in mind that many platforms do not have market power, broad attempts at formulating special rules on ‘platforms’ risks overlap with existing regulation at many levels, including EU-wide, national, and sectoral rules which operate in these different domains. Creating overlapping or conflicting rules must be avoided as it would lead to legal uncertainty with potentially far-reaching consequences for consumers and businesses.

Platforms are successful businesses in themselves, but are also key drivers of the economy –businesses right across the European economy use successful ‘platforms’ to drive their own innovation, unlock new value in the way they operate, engage with new and existing customers and suppliers resulting in economic growth, jobs and better consumer choice. Indeed, the platform model is so fundamental to the functioning of the economy that it is difficult to separate out the benefits of platforms from the benefits of the economy as a whole.

Again, AmCham EU is counting on the European Commission to continue applying EU competition law to ensure that the diverse and evolving world of internet platforms continues to be intensively competitive, as it is today. AmCham EU believes that the Commission already has the tools it needs to protect this competition, where the issues are no different than those in other sectors. Furthermore, AmCham EU cautions that any effort to develop ad hoc, sector-specific rules in an effort to help competition may inadvertently do the opposite, especially in a sector that is as diverse and innovative as t platforms.

Panel 3 - Preserving digital innovation through competition policy

Do network effects, economies of scale and 'copycat' products impede innovation? In digital merger cases, is there scope to apply theories of harm based on a loss of innovation and/or loss of "potential competition" more often? Would a focus on innovation require updating our analytical tools?

The competitive significance of network effects and economies of scale have long been recognised in EU competition law. As is well known, they can deliver significant benefits to consumers in the form of improving quality, user experience and efficiency. By definition, the value to a consumer of a good or service with positive network effects increases with each additional user. However, network effects can also increase the costs of switching, leading to consumer lock-in. In certain cases, significant network effects may allow platforms to foreclose competition to the detriment of consumers. The implications of network effects for innovation are similarly varied. Network effects, for example, could work to spur innovation by facilitating entry and speed adoption of a new platform or technology that benefits from network effects, while possibly disincentivising entry or innovation by potential competitors outside the network.

With these countervailing potential outcomes, the implications of network effects – including for innovation – must be analysed on a fact-specific, case-by-case basis. AmCham EU believes that the digitisation of the economy does not give rise to any unique issues in relation to network effects and economies of scale and believes that the Commission’s existing legal framework and enforcement tools are sufficient to address such issues.

Similarly, we submit there is nothing unique to the digitisation of the economy in relation to ‘copycat’ products. The concept of copycat products is not clearly defined in antitrust law, and AmCham EU believes that the question of how closely an undertaking may mimic the products of a competitor is properly within the scope of intellectual property law, rather than competition law.

AmCham EU notes that the potential significance of a loss of innovation or potential competition in merger review has long been recognised in the Commission’s guidelines and practice. Although the digitisation of the economy has driven and will continue to drive innovation and new entry in a wide range of markets, we submit that the digitisation of the economy does not give rise to any new or unique concerns in relation to loss of innovation- or potential competition-based theories of harm. Indeed, the most prominent case in which the Commission has developed these theories of harm, Dow/DuPont, did not concern digital markets. We respectfully caution against developing different theories or standards of harm for particular sectors of the

economy, as future developments may reveal that the concerns were misplaced. Worse, sector-specific theories of harm may inadvertently hamper competition by deterring pro-competitive transactions.

That being said, AmCham EU submits that further guidance on how the Commission intends to apply innovation- and potential competition-based theories of harm would be helpful. We note that the Commission developed a number of new concepts and tools in Dow/DuPont. While each case must be evaluated on a fact-specific, case-by-case basis, it would be helpful to understand whether and if so how the Commission intends to apply those tools in other sectors, including in markets where innovation may be less susceptible to measurement based on patents.

AmCham EU appreciates the opportunity to provide input on the important issues related to the implications for EU competition policy of the ongoing digitisation of the economy. AmCham EU would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional information that may be of assistance to the Commission.