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August 22, 2024

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The U.S. Chamber of Commerce is the largest business advocacy organization in the world, operating in over 50 countries to promote free enterprise and advance American trade and investment globally, representing companies of every size and from every sector. The Chamber's Australia Working Group promotes the bilateral economic relationship via high-level meetings, briefings, and other events, while fostering a policy dialogue aimed at the removal of barriers to trade and investment and enhancing U.S. - Australia trade promotion efforts.

The Chamber is also a leading business voice on international competition policy. We support the International Competition Network and its principles of non-discrimination and procedural due process for all competitors in all jurisdictions. We regularly engage with competition agencies and policymakers around the globe on best practices and sound policy frameworks to promote trade, support economic growth, and foster innovation. Moreover, the Chamber is at the forefront of shaping digital economy policies globally, including on data privacy, cross-border data flows, cybersecurity, digital trade, artificial intelligence, and e-commerce.

The Chamber is pleased to offer comments to the Australian Competition & Consumer Commission (ACCC) regarding its Digital Platform Services Inquiry. Years of evidence have demonstrated that markets and ex-post competition regimes have combined to foster dynamic competition. However, the European Union has advanced a novel *ex ante* approach predicated less on promoting competition than on managing competitive outcomes. The result is a wholly untested regulatory regime that runs afoul of sound competition, regulatory, and trade policy norms. Accordingly, the Chamber encourages the ACCC to continue to adhere to traditional competition concepts that focus on consumer welfare. As you continue to study markets and other regulatory approaches, including *ex ante* regulation, we would advise you to proceed with great caution and avoid putting forward proposals that stray from these time-tested principles.

Principles of Sound Competition Policy

At the outset, it is worth repeating that competition law should promote the welfare of the consumer, rather than individual competitors, and the consumer's interests in terms of price, quality, and other competitive factors. Such a policy relies on competitive forces to police the market, avoids picking winners and losers, and

acts only to ensure that the competitive process is benefitting consumers via such objective metrics as low prices, high output and quality, and innovation of new products.

Prior to enacting significant changes, the Chamber encourages Australia to study the evidence and conduct a robust impact assessment to evaluate benefits, weighing those against costs. In terms of competitive concerns, the dynamism and pace of change in many markets, including digital ones, are all reasons to *maintain* the current high bar for governmental intervention into the marketplace.

First, dynamic markets are very likely to adjust on their own, without any involvement from the government, whereas government intervention actually may cement the status quo instead of allowing for these dynamic markets to evolve. In just the last two years, we have seen substantial changes across the global economy, with some companies rising to challenge global leaders, some of which have seen significant downgrades in their market share and capitalization, and legacy companies investing heavily in digital tools to compete more effectively. Excessive governmental involvement is more likely to harm, rather than help, competition.

Moreover, Australia already has numerous enforcement tools to address any genuine concerns, including enforcement actions against digital platforms to combat any of the topics listed in the report, such as anticompetitive self-preferencing, tying and bundling, barriers to switching, access to third-party applications, and the use of consumer data. Should the evidence show that a platform's actions harm consumers, the ACCC should bring an enforcement action in a court of law. Australia should continue to enforce its existing competition and consumer protection laws in an even-handed manner across the economy. It should exercise caution before intervening in markets and affording itself extraordinary new powers to micromanage economic behavior.

***Ex Ante* Regimes**

Ex ante regulatory regimes can hinder innovation, deter investment, and limit the ability of companies to respond swiftly to evolving market dynamics. *Ex ante* regulatory regimes, when required, should be narrowly tailored to address specific concerns in the market, limiting specific conduct without targeting only certain companies. By comparison, sweeping *ex ante* approaches that apply selectively to some companies but not others set up a series of perverse incentives antithetical to open and competitive markets, and potentially violate Australia's trade commitments on non-discrimination.

Specifically, *ex ante* regimes targeting companies, instead of market practices, carry these risks:

- Incentivizing competition will not be served to the degree that an *ex ante* approach is taken that only captures select – and often the largest – players in a given market. Not only does such a regime punish success on the merits, which chills competition, but burdening the most successful players with special responsibilities with respect to competitors and those that use their platforms to sell goods and services will lead to those captured platforms becoming even more essential in the marketplace. It will disincentivize other platforms from competing unless they can offer the same benefits as those that are regulated, and bring about regulatory capture, in which the regulated are able to entrench their market positions.

- Applying *ex ante* regulations selectively to some companies could cause Australia to violate its international trade obligations on non-discrimination in relation to cross-border trade in services, particularly if only foreign companies are subject to the regulation. Many proposed *ex ante* regulations appear to target a handful of American companies, a phenomenon that has attracted the attention of many members of the U.S. Congress.

- There could be an adverse impact on existing players, including both Australian and foreign companies, as they may be restricted from improving their products; in Europe, for example, *ex ante* regulations have discouraged companies from introducing the latest versions of products there. Digital markets evolve quickly; legislative frameworks to regulate them risk becoming quickly outdated, even as large players will still need to provide their services within the confines of the outdated law.

- More profoundly, there could be an adverse impact on small digital market players in Australia. Australian tech startups attract foreign investment at high valuations both because of their unique business models and due to their future prospects of attaining scale. A law that only "kicks in" when a business manages to succeed and attain scale will limit the scope for innovation and monetization and will have a direct impact on valuation of such businesses, eventually impacting the digital sector's growth.

- Selective, overly aggressive *ex ante* regulations could reduce choice for Australian consumers. Today, almost all large tech companies launch products in Australia, similar to those offered in other countries around the world. However, if prescriptive and preemptive laws are put in place, Australia would not remain the "first market" for digital companies globally, as there would be uncertainty that does not exist in other jurisdictions that promote innovation. We are seeing this play out in Europe.

- Additionally, selective, overly aggressive *ex ante* regulations could reduce competition outside of digital markets. Some jurisdictions have considered *ex*

ante proposals that would restrict the lines of business in which technology companies can operate, even if there are no concerns about robust competition in those other areas. To the extent that the government considers *ex ante* regulations, we strongly encourage it to limit restrictions to the competitive issues of actual concern.

International Experience

The business community understands Australia's interest in keeping pace with regulatory trends around the world but questions whether Australia will benefit from adopting models that could disrupt daily life for businesses, government, and consumers. Europe's regulatory regime has harmed European consumers and hamstrung its economy. The Chamber encourages Australia to continue to study Europe's experience and the ramifications of its regulatory overreach prior to adopting a similar framework.

Europe

At a minimum, Australia should move cautiously and allow time to study, via a complete economic analysis, the implementation of the Digital Markets Act (DMA) and its impact on consumers and businesses. The European Union itself has yet to determine how to administer and enforce the DMA given the complexity involved in applying the vague standards found in the law to real world situations. As the U.S. Chamber pointed out, "The EU has a failed track record of remedies as part of its ex-post approach to competition enforcement. Unfortunately, the DMA marks the beginning of an era of failed *ex ante* enforcement. Europe cannot regulate its way to a more innovative economy."

Consumer Impact

In the short time that the DMA has been in effect in Europe, multiple problems have already emerged for both consumers and local businesses. For example, the DMA has degraded the usefulness of certain mobile mapping apps, which have become much more cumbersome to use and caused consumers to complain, or even develop work-arounds through browser extensions to bring back the previous experience. Similarly, search engines have had to adjust to the DMA, leading users to describe their experience as "a nightmare." Businesses have suffered too. Some businesses, such as hotels and airlines, have seen a significant drop in organic traffic and may have to pay more for advertising to maintain qualified traffic to their websites.

Moreover, at a time when inflation is beginning to stabilize globally, this model likely would increase prices for services. Millions of businesses use digital tools to reach customers, market their products, ship goods, and generally run their businesses on a day-to-day basis, all at low costs and great value. To the extent that

regulations disrupt the current tech ecosystem – something that is happening in Europe due to the DMA – Australian businesses could incur higher costs. Consumers likely would suffer, too. In Europe, companies have introduced subscription models in response to excessive regulatory regimes; in other words, consumers could have to pay out-of-pocket for services that they previously received at no cost, such as social media and mapping services. In other instances, companies have avoided introducing new products into Europe altogether.

Long-term Economic Impact

Moreover, Europe's aggressive regulatory model has damaged its economy and growth prospects. Europe lags well behind the United States, Japan, and China in innovation and investment in research and development. According to a McKinsey study, from 2017 to 2019, there were roughly twice as many venture capitalists in the United States as there were in Europe. Over this same time period, total venture capital in Europe increased by $18 billion, while in the U.S., venture capital increased by $46 billion. In 2022, the EU attracted just 7.8% of venture capital investments, even though it has 110 million more people than the U.S. Investors rightly believe that U.S. companies are poised for far greater growth or profitability. None of the world's largest tech companies are European.

Different countries' approaches to competition policy explain at least part of the discrepancy. For the past forty years, the U.S. has enjoyed a predictable and transparent antitrust framework that allows larger companies to invest in innovative start-ups, compete in new product markets, and grow organically without artificial regulatory restrictions. The United States doesn't "shoot the winner" of the competitive marketplace. On the other hand, Europe discourages such investments and cross-market growth by holding larger companies to an amorphous "abuse of dominance" standard that often leaves smaller companies without the financing they need to grow and prosper. Under the DMA, for example, regulators will review all potential acquisitions by large tech companies, especially those involving startups. According to the McKinsey survey, European start-up founders mention the burden of regulation and administration as one of their biggest challenges.

Perhaps the most persuasive arguments come from Europeans themselves. In a recent interview, Ericsson CEO Börje Ekholm said the continent is on its way to becoming "a museum" because of its regulations. Similarly, Nicolai Tangen, chief executive of the $1.6 trillion Norwegian sovereign wealth fund, has observed that it was "worrisome" that American companies were outpacing their European rivals on innovation and technology, leading to vast outperformance of US shares in the past decade. "There's a mindset issue in terms of acceptance of mistakes and risks. You go bust in America, you get another chance. In Europe, you're dead," he said. He added that in recent discussions with US chief executives, they had complained about the difficulty of doing business in Europe because of tough regulations and red tape.

"I'm not saying it's good but in America you have a lot of AI and no regulation, in Europe you have no AI and a lot of regulation."

Precisely because of the rise of European concerns, the new European Commission is widely expected to pause additional regulatory measures and focus instead on evaluating those that have been put in place. Australia should consider carefully which economic model to follow.

Cybersecurity

In Europe, the DMA threatens to compromise the world's cyber defenses by allowing developers to circumvent current security systems and place their software applications directly onto platforms with fewer security constraints. These provisions also prohibit the platforms from restricting or downgrading these applications, including those with links to foreign governments hostile to Western democracies. As one report explained:

> Most Chinese platforms such as Tencent, Baidu, Alibaba, and Huawei that remain outside the DMA's coverage should be pleased as they now can engage in activities U.S. companies cannot: offering interlinked services, prioritizing their own services, operating closed ecosystems, and safeguarding their data. In addition, DMA provisions requiring platforms to provide data to third parties can enable U.S. rivals, including from China and Russia, to access sensitive user data and even trade secrets. The CEO of the Munich Security Conference Benedikt Franke recently suggested that these security concerns were not sufficiently addressed in the making of the DMA. ... By limiting platforms' ability to combine data across different core platform services, the DMA can impede the targeted companies' access to cross-platform data to detect and shut down threats.

Other Jurisdictions

As far as the Chamber knows, no other major jurisdiction has fully embraced Europe's model. Other countries have either rejected European-style proposals, continue to gather evidence, or have moved to enact narrower proposals to address particular issues of concern. The UK, which recently gave its competition authority broader authority, is still in the early stages of enforcing its new law.

To the extent that other jurisdictions, including India, South Korea, Japan, and Brazil, have explored *ex ante* approaches similar to the DMA, the Chamber and other stakeholders have cautioned against following Europe's misguided approach. We have emphasized that countries should prioritize existing competition laws, and that to the extent that new regulations are introduced, they should eschew the DMA's example and be narrowly targeted and apply to all actors in a given market segment, rather than singling out a few based on arbitrarily applied criteria.

Similarly, in the U.S., Congress concluded that existing competition law provides a flexible framework to address competitive challenges in any market, including digital markets. A bipartisan congressional commission determined that "there is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features." In recent years, the U.S. has declined to enact the types of *ex ante* proposals embodied in the DMA, nor is Congress seriously considering any such legislation now. If competitive practices are pro-competitive or competitively neutral, they will survive antitrust scrutiny, but if those practices harm consumers, enforcement agencies already have tools to combat them.

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The Chamber thanks the ACCC for the opportunity to provide these comments. We would welcome further engagement with interested agencies and policymakers in the coming months.

Best regards,

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