



April 17, 2023

Ms. Lael Brainard
Director, National Economic Council
1650 17th St NW
Washington, DC 20500

Mr. Jake Sullivan
Director, National Security Council
1650 17th St NW
Washington, DC 20500

Dear Directors Brainard and Sullivan:

The U.S. Chamber of Commerce is profoundly concerned by indications the Department of Justice’s Antitrust Division (DOJ) and the Federal Trade Commission (FTC) are seeking to apply their vision of competition policy in a way that undermines U.S. economic and security interests abroad — and that runs counter to the objectives of both this Administration and Congress. We urge the Administration to consider these concerns, consult more broadly with Congress and industry, and take steps to remedy them.

First, both agencies are reportedly preparing to help foreign governments implement protectionist policies that directly harm U.S. companies. Following last month’s meeting with counterparts in the European Union, DOJ and the FTC announced plans to send their employees to “assist with the implementation of the Digital Markets Act (DMA).” While the DMA affords formally identical treatment for all companies, it was carefully crafted to apply to a select number of U.S.-headquartered firms almost exclusively. WTO rules clearly prohibit this kind of discriminatory treatment as a violation of national treatment obligations the EU and its member states have assumed.¹ As such, we were troubled to learn that DOJ and the FTC are actively assisting the European Union in implementing these protectionist policies.

Biden Administration officials have expressed agreement with these views and have opposed EU efforts to advance the DMA specifically and to promote the EU’s “tech sovereignty” agenda more generally. Multiple cabinet-level and senior White House officials have raised concerns with European officials. As one cabinet secretary explained, “we have serious concerns that these proposals will disproportionately impact U.S.-based tech firms and their ability to adequately serve EU customers and uphold security and privacy standards.” Congressional leaders from both sides of the aisle have echoed these concerns. Yet now our antitrust agencies, which claim to lack sufficient resources, are planning to send staff to help Europe promote its protectionist digital policy agenda.

¹See [The EU’s Proposed Digital Markets Act: Key Concerns and Recommended Adjustments](#) (U.S. Chamber).

Even if the DMA did not undermine U.S. economic interests, it would still be improper for the FTC and DOJ to send U.S. employees to assist with its implementation. The DMA is regulation, not antitrust law. The DOJ and the FTC are ex-post enforcers of U.S. antitrust law, not ex-ante regulators. Accordingly, there is no justification for U.S. agencies to help implement the DMA's regulations as there is no parallel approach in U.S. law.

Moreover, sending DOJ and FTC staff to help implement the DMA could undermine law enforcement efforts here at home by adding to the mounting recusal concerns surrounding both agencies' leadership. Given that the DMA targets many of the same American companies that the DOJ and the FTC are suing or investigating, their eagerness to support the DMA raises questions of implicit bias.

Similarly concerning, the FTC and DOJ also are undermining U.S. economic interests in Asia. In the attached letter sent to U.S. Trade Representative Katherine Tai earlier this year, we strongly supported the inclusion of due process and procedural fairness provisions in the competition chapter of the Indo-Pacific Economic Framework (IPEF). These provisions were part of the U.S.-Mexico-Canada Agreement (USMCA), which won broad bipartisan support in Congress. Such provisions are consistent with American values, constitutional protections, and the agencies' past practice and legal duties. We have yet to receive a response to our letter to Ambassador Tai.

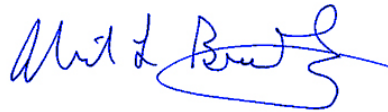
Our letter to Ambassador Tai was intended to highlight the fact that FTC and DOJ were blocking USTR from tabling text as part of the IPEF competition chapter negotiations. This long interagency stalemate effectively amounts to a refusal by the FTC and DOJ to support due process and procedural fairness norms in competition investigations around the globe. We understand that the agencies' leadership recently sent another letter to USTR, again objecting to the competition provisions in IPEF but also objecting to digital trade provisions found in an entirely different chapter. Digital trade provisions ensure that foreign governments do not erect trade barriers that exclude American workers and businesses that rely on data flows to deliver products and services.

The recent DMA announcement, coupled with ongoing interference with IPEF, represent a troubling effort by the DOJ and FTC to conduct international economic policy outside their mandate to enforce the antitrust laws in a manner that runs counter to America's national interest.

Both the Biden Administration and Congress recognize these facts. Accordingly, we ask (1) that the DOJ and FTC abandon plans to provide staff support to help the European Commission implement the DMA and (2) that IPEF provisions in the competition chapter and the digital trade chapter move forward to the negotiating table, building on the bipartisan congressional consensus reflected in the USMCA.

Thank you for your attention to this matter.

Sincerely,



Neil L. Bradley
Executive Vice President, Chief Policy Officer,
and Head of Strategic Advocacy
U.S. Chamber of Commerce

cc: The Honorable Antony Blinken, Secretary of State
The Honorable Gina Raimondo, Secretary of Commerce
The Honorable Merrick Garland, Attorney General
The Honorable Katherine Tai, U.S. Trade Representative
The Honorable Lina Khan, Chair of the Federal Trade Commission
The Honorable Jonathan Kanter, Assistant Attorney General
The Honorable Dick Durbin, Chair, Senate Committee on the Judiciary
The Honorable Lindsey Graham, Ranking Member, Senate Committee on the Judiciary
The Honorable Jim Jordan, Chair, House Committee on the Judiciary
The Honorable Jerrold Nadler, Ranking Member, House Committee on the Judiciary
The Honorable Ron Wyden, Chair, Senate Committee on Finance
The Honorable Mike Crapo, Ranking Member, Senate Committee on Finance
The Honorable Jason Smith, Chair, House Committee on Ways and Means
The Honorable Richard Neal, Ranking Member, House Committee on Ways and Means
The Honorable Maria Cantwell, Chair, Senate Committee on Commerce, Science, & Transportation
The Honorable Ted Cruz, Ranking Member, Senate Committee on Commerce, Science, & Transportation
The Honorable Cathy McMorris Rodgers, Chair, House Energy & Commerce Committee
The Honorable Frank Pallone, Ranking Member, House Energy & Commerce Committee

Attachment: Chamber Letter to Ambassador Katherine Tai



U.S. Chamber of Commerce

Myron A. Brilliant
Executive Vice President and
Head of International Affairs

January 30, 2023

The Honorable Katherine Tai
United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Tai:

The U.S. Chamber of Commerce greatly values and welcomes your efforts to promote the expansion of inclusive trade and investment through the Indo-Pacific Economic Framework (IPEF) and we urge you to ensure it includes a robust competition chapter.

We have appreciated the opportunity to engage with USTR and the broader interagency to advocate for an agreement that achieves the highest standards, including binding commitments that benefit U.S. workers and businesses and harmonize trade rules across the Indo-Pacific region.

Internationally, the United States has been the leading actor promoting best practices for competition enforcement, initially via conversation at the OECD and later through the establishment of the International Competition Network in 2001. More recently, the U.S. has advanced this work by requiring our trading partners to commit to a series of due process and procedural fairness provisions in negotiated agreements.

Competition chapters in trade agreements endorse competition on the merits, and they safeguard against discriminatory and extraterritorial application of the law by requiring enforcement to have a legitimate nexus to the reviewing jurisdiction. Provisions ensure transparency and clarity regarding the investigative process. Targets of an investigation are also guaranteed the ability to access evidence, including exculpatory evidence that must be maintained by an enforcement authority.

Further, the competition chapters the U.S. has championed in recent trade agreements guarantee the right to cross-examine evidence collected, which is



important to ensure that those under investigation can mount an adequate defense. Further, the commitments lend support for legal representation, legal privilege, and meaningful judicial review. These are among the provisions found in the competition chapter of the latest U.S. trade agreement—the U.S.-Mexico-Canada Agreement (USMCA)—that reflect core values embedded in the Constitution.

These provisions are sorely needed as both mature and emerging competition jurisdictions at times stray and fall short of these basic commitments. For example, the U.S. has engaged repeatedly with the South Korean government under KORUS due to well-documented concerns about questionable practices by South Korea's competition authority.

Given their firm grounding in the U.S. Constitution and U.S. law, there should be no debate within the interagency over the wisdom of continuing to press for provisions like those the United States most recently advanced through USMCA. While there are always improvements that could be made, there should be no effort to water down the USMCA text.

The Department of Justice's Antitrust Division and the Federal Trade Commission are comfortable with the level of accountability that they are required to maintain and that the United States has already committed to support with other trading partners. Extending those same commitments to additional trading partners in return for other countries agreeing to do the same should present no issues or concerns regarding U.S. antitrust enforcement practices.

We welcome the opportunity to continue to engage with you and your team regarding the importance of including a strong competition chapter in IPEF.

Sincerely,

cc: The Honorable Gina Raimondo, Secretary of Commerce
The Honorable Lina Khan, Chair of the Federal Trade Commission
The Honorable Lisa Monaco, Deputy Attorney General
The Honorable Jonathan Kanter, Assistant Attorney General