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Response to the UK Consultation on a Pro-Competition Regime for Digital Markets

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 United Kingdom. Indeed, the Chamber established the U.S.-UK Business Council in 2016 to help U.S. firms navigate the challenges and opportunities from the UK's departure from the European Union as well as to represent the views of business as the U.S. and UK negotiate a new trade agreement. With over 40 U.S. and UK firms as active members, the U.S.-UK Business Council is the premier Washington-based advocacy organization dedicated to strengthening the commercial relationship between the U.S. and the UK.

According to a recent U.S. Chamber study, U.S. and UK companies have together invested over $1.35 trillion in each other's economies, directly creating nearly 2.8 million British and American jobs.[1] We are each other's single largest foreign investors, and the U.S. is the UK's largest trading partner.

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.

The Chamber's U.S.-UK Business Council welcomes the opportunity to provide Her Majesty's Government ("HMG") with comments in response to the consultation on a new pro-competition regime for digital markets. We welcome further opportunities to discuss this input with colleagues from DCMS, BEIS, and other UK Government agencies as these proposals are considered in the coming weeks and months.

[1] U.S. Chamber of Commerce, *The Transatlantic Economy 2021,* https://www.uschamber.com/report/the-transatlantic-economy-2021.

Consultation question 1: What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?

The U.S. Chamber of Commerce ("Chamber) agrees with the government that the proposed DMU's statutory duty should focus on the promotion of competition for the benefit of consumers, but we caution that new rules should not include a supplementary duty to "promote" innovation. As the government notes, and as is also true in the United States, the promotion of competition necessarily includes within its purview the promotion of innovation as one element in a competitive market, along with the promotion of low prices and non-price competitive factors such as quality. Accordingly, even without the specific innovation language, the DMU already would have a responsibility to promote innovation as part of its statutory mission. Efforts to go beyond this risk placing government in the position of second-guessing the market in an effort to "optimize" innovation. A government "knows best" approach is not a reliable means to drive innovation from the market.

Consultation question 2: What are the benefits and risks of giving the Digital Markets Unit powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets? What approaches should we consider?

The Chamber agrees with the government that the proposed DMU's statutory duty should focus on the promotion of competition for the benefit of consumers, but should not include powers to engage with wider policy issues. Consumers win when there is robust competition in the market. When alleged anti-competitive activity is linked to price increases or reduced output, without any counter weighting pro-competitive benefit, the economics are very straightforward. Antitrust analysis is well suited to evaluating price competition and forms of non-price competition such as quality, innovation, and consumer choice.

To broaden the DMU's scope, however, would likely create a great deal of uncertainty for firms as they seek to compete effectively and grow their market shares. In particular, trying to assign weights to wider policy issues would create confusion and could lead to arbitrary decisions that are not consistent with the rule of law. Competition law and policy is based in economics, requiring theories of harm with testable implications.

Other criteria can often be highly subjective and not amenable to easy administration. "Fairness," for example, is an excellent virtue, but vague and subjective as an

administrable standard. Likewise, other wider policy issues, such as concerns over jobs, speech, income inequality, corporate political power, and other social interests, are political conversations, not matters for sound competition policy. Competition policy protects competitive markets, but it is not designed to address other concerns.

Consultation question 3: Should we explore the possibility of reducing the cost of the Digital Markets Unit to the public sector through partial or full levy funding?

(No answer is to be provided)

Consultation question 4: Is there a need to go beyond informal arrangements to ensure regulatory coordination in digital markets? What mechanisms would be useful to promote coordination and the best use of sectoral expertise, and why? Do we have the correct regulators in scope?

The Chamber encourages the government to provide clarity, consistency, and transparency as to the scope of each agency's role and authority. In order to avoid duplicative reviews and even inconsistent enforcement actions, the private sector should have clear guidance as to which agency has ultimate responsibility for which issues. In determining which agency should have ultimate authority for the promotion of competition, the Chamber notes that sector regulators are likely to have other statutory missions that may be in tension with the goal of protecting consumers, such as growing a particular industry, increasing employment, or advancing national economic interests.

One particular concern is the potential for overlapping jurisdiction between a potential DMU within the Competition and Markets Authority and the new investment oversight authorities within the Department for Business, Energy, and Industrial Strategy, which focus in particular on the digital economy. There is the potential for significant administrative burdens and lengthy regulatory delays that may undermine the investment climate for the UK's digital economy.

Consultation question 5: How can we ensure that regulators share information with each other in a responsible and efficient way?

(No answer is to be provided)

Consultation question 6: What are your views on the appropriate scope and powers for the Digital Markets Unit's monitoring function?

The DMU's proposed monitoring function should focus on practices most likely to harm competition and consumers, not on specific companies. It is important that the DMU treat all market participants fairly and equally, regardless of their national origin. In contrast, if the DMU is charged with policing select companies instead of monitoring potentially harmful conduct, it is much more likely that the DMU will lead to overenforcement against those companies. If such enforcement actions particularly target foreign investors, for example, this could lead to significant trade disputes.

Consultation question 7: What are the benefits and risks of limiting the scope to activities where digital technologies are a 'core component'? What are the benefits and risks of adopting a narrower scope, for example 'digital platform activities'?

Efforts by the government to regulate in response to the digital transformation of the economy should always be narrowly targeted to address well-identified concerns arising from conduct in the market. A narrow scope, focused on conduct that is identified as concerning that does not single out any firm is consistent with established best practices for sound regulation.

Further, a narrow approach ensures that any attempt to regulate for a particular identified concern arising from the market addresses the "market-failure" without imposing broader burdens. It is critical that regulatory responses do not overreach and chill pro-competitive behavior.

Consultation question 8: **What are the potential benefits and risks of our proposed SMS test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?**

The Chamber agrees with certain aspects of the proposed SMS test. For instance, the Chamber approves of the government's language acknowledging that digital firms "may have significant size or scale or have many business and consumer users, but that does not in itself indicate a competition problem." Moreover, the Chamber agrees that it is appropriate to direct more competition scrutiny to firms with market power. In the United States, history has shown that, in certain circumstances, the competitive practices of firms with market power can create greater risks to competition and consumers than the practices of firms without market power. For instance, a horizontal merger of two competitors with market power creates more

risks to competition than would a horizontal merger of two competitors without market power.

The Chamber, however, urges the government to require formal market definitions as part of any test. Market definition is an indispensable step in evaluating whether there is a genuine competitive problem at all. The goal is to define a relevant market so that other things like concentration levels, market power, and market shares can be determined. Market definition aims to describe a market of all companies that constrain each other's ability to raise prices or lower quality or innovation. This testing, guided by objective, empirical economic data, ensures that market definitions fit the market, neither too narrow, making markets seem more concentrated than reality, or too wide, making markets seem less concentrated than reality.

A formal market definition ensures that any enforcement actions will address genuine competitive problems, based on objective evidence of harm to consumers. Though enforcement agencies might find this step inconvenient, a formal definition protects against impressionistic or politicized enforcement. With a formal definition, an enforcement agency must identify with some precision the markets in which prices are rising or non-price competition is suffering. Without a formal definition, agencies could easily slide into the trap of bringing enforcement actions against companies -- particularly companies headquartered outside the UK – based on their "significant size or scale," with little or no evidence of actual harm to consumers, and contrary to the government's policy objectives.

Recent examples highlight the need for formal market definitions. In the United States, the Federal Trade Commission brought a lawsuit alleging that Facebook had violated the antitrust laws, but upon closer review, a federal court, independent of political concerns, determined that the Commission had failed to establish that Facebook held monopoly power at all. The court noted that, despite its size, Facebook had numerous competitors and that consumers could switch easily among them (the Commission has since refiled its lawsuit with additional allegations of Facebook's market power). In the same vein, many observers were surprised that the European Union brought a case against Google's Android that excluded Apple's iPhones as a competitor from their market definition, even though most consumers see iPhone and Android as each other's biggest competitors in the smartphone market.

In short, formal market definitions ensure that any competitive inquiry focuses on the welfare of consumers. Without a formal market definition, any current or prospective competitor would be free to complain about their rival's routine competitive practices, without any evidence of harm to consumers in the form of higher prices or lessened

non-price competition. The Chamber urges the government not to abandon that requirement.

Consultation question 9: How can we ensure the designation assessment provides sufficient flexibility, predictability, clarity and specificity? Do you agree that the strategic position criteria should be exhaustive and set out in legislation?

The Chamber agrees with the government's goals of providing flexibility, predictability, clarity, and specificity as part of the process of enforcing its competition laws. The Chamber also agrees that purely mechanical metrics, such as market share, are ill-suited to competition law, and that the proposed DMU should consider a range of evidence, including competitive interactions between firms, customer switching, market shares, and barriers to entry. Accordingly, the Chamber believes that it would be helpful for legislation to lay out a non-exclusive list of criteria that the DMU should examine as part of the process, a solution that would provide notice to the private sector and flexibility to the DMU.

As part of this process, however, the Chamber must emphasize the paramount importance of identifying an objective measure to evaluate a firm's conduct. In the United States, that measure is the consumer welfare standard, a standard that has served for the touchstone for antitrust law for more than four decades, with broad bipartisan support across political administrations. Irrespective of the SMS designation process, such an objective measure would provide the private sector with predictability and specificity while still affording the DMU sufficient flexibility to identify competitive threats.

Consultation question 10: What are the potential benefits and risks of the Digital Markets Unit prioritising SMS designation assessments based on the criteria in paragraph 77?

The Chamber urges the government to adopt an objective measure such as the consumer welfare standard in evaluating which cases to assess. As explained in response to consultation questions 8 and 9, such an objective standard best protects consumers and guards against politicized enforcement.

In contrast, the proposed criteria have little or no bearing on whether a firm is engaged in pro- or anti-competitive conduct. Quite frankly, a company's aggregate revenue has no probative value as to whether the company is harming consumers – to the contrary, high revenue may simply indicate that the company is providing consumers with goods and services that they want at prices they are willing to pay.

The Chamber is particularly surprised that the government would consider a firm's worldwide revenue as a relevant factor, as a company's competitive decisions outside of the UK should fall outside of the UK government's enforcement decisions. For instance, both the Organisation for Economic Co-Operation and Development and the International Competition Network have stated best practices that jurisdictions should only review mergers where there is a local nexus.

Unfortunately, the other proposed criteria lack objectivity or a nexus to consumer welfare. Factors such as network effects, economies of scale, and the level of fixed costs are all relevant to understanding a market, but all susceptible to subjective evaluations -- and ultimately should be irrelevant without a showing of harm to consumers. In particular, the Chamber fears that the proposed DMU would find it tempting to subjectively determine that every digital market contains network effects, economies of scale, and high fixed costs, and use that belief to impose significant sanctions targeted at American companies, without any showing that those companies are harming consumers in the UK For instance, many observers express concern about network effects and high fixed costs in digital markets, but the past two years have seen explosive growth of new entrants such as Zoom and TikTok, belying the notion that these supposed barriers preclude entry or that any company has "entrenched and durable" market power at all, particularly in the digital economy. Ultimately, the only question that should matter is whether competitive practices harm consumers.

Consultation question 11: What are the benefits and risks of the proposed SMS designation process? What are the benefits and risks of a statutory deadline of 9 months for SMS designation?

The Chamber strongly disagrees with the idea that SMS designation should apply to the whole corporate group forming the firm, and not just to the part of the corporate group currently undertaking specific activity or activities assessed. Across industries, many large companies compete in many markets where they have no market power and where there are no competitive concerns whatsoever. To the extent that there is a concern that a corporate group may attempt to circumvent the effect of an SMS designation by shifting around assets, surely the DMU could issue an order that would prevent, or severely penalize, such gamesmanship, without the need for the severe consequence of placing an entire company under the thumb of the government. Accordingly, the aspect of the proposal threatens to chill competition in numerous markets with no offsetting benefit.

One issue merits special mention. Under the proposal, all of an SMS-designated company's mergers would face heightened scrutiny from the DMU, even if those

proposed acquisitions occur in markets where the company has no market power, or perhaps no presence at all. This restriction is likely to reduce investment in smaller companies, slow innovation, and deprive consumers of the benefits of vertical integration, with no offsetting benefits.

Finally, to the extent that the government moves forward with this process, the Chamber advises against such a lengthy designation period. In the digital space, five years is several eternities. As recent history has shown, digital markets move quickly, with some companies becoming global household names in a matter of months, and others rapidly losing market share just as quickly. Instead, if the government continues down this path, we advise a designation period of one year, with the DMU having the option to pursue redesignation annually for up to three years if it can demonstrate ongoing risks to competition and consumers.

Consultation question 12: Do these three objectives correctly identify the behaviours the code should address?

As stated previously in answers to consultation questions 8-10, the Chamber believes, and long experience confirms, that competition policy should promote consumer welfare and the competitive process, rather than other, more amorphous policy goals. To that end, the Chamber agrees with the objective of promoting trust and transparency, as both are important to the functioning of a competitive marketplace.

The Chamber, however, has serious concerns about the objective of promoting "fair" trading. As explained in response to consultation questions 2-3, "fairness" is highly subjective and is not an administrable standard. Trying to assign weights to vaguely defined notions of fairness would create confusion and could lead to arbitrary decisions that are not consistent with the rule of law. The manufacturer, the distributor, and the customer all will have very different notions of what constitutes a "fair" price. A firm and its rival will have their own notions as to whether a particular competitive practice is "fair" or not.

Similarly, the proposed "open choices" objective would chill healthy, vigorous competition. Although the Chamber agrees that a competitive marketplace should afford consumers multiple choices, as written, the proposed standard actually protects competitors, rather than consumers or the competitive process: by stating that consumers should face "no barriers" to choosing among rivals, this objective would empower competitors to challenge a range of pro-competitive practices. For instance, a competitor could reasonably argue that a rival's decision to offer long-term contracts to consumers, at lower total prices, represents a "barrier" to choosing freely among firms. This concept also would imperil other routine, pro-competitive

conduct such as bundling, volume discounts, exclusive contracts of any variety, and even routine price competition, which could be viewed as an effort to "entrench" market power by preserving and growing a firm's share of the market.

Consultation question 13: Which of the above options for the form of the code would best achieve the objectives of the pro-competition regime, particularly in terms of flexibility, certainty and proportionality? Why?

Of the proposals, the Chamber believes that Option 2 best promotes competition. This proposal provides the most notice to competitors and best ensures that the proposed DMU would treat all companies in an even-handed manner. Option 2 is also most consistent with principles of transparency and democratic processes by requiring the legislature to enact the principles that will govern the economy.

In contrast, both Options 1 and 3 would give the DMU excessive power over the companies subject to its control. As the government acknowledges, these proposals would allow the DMU to impose multiple, shifting obligations on competitors for many years, with only the DMU's vague assurance that its dictates will be effective and proportionate. These proposals would effectively transform the digital firms subject to the DMU's dictates into virtually state-run public utilities, which would undermine innovation, limit competition, and ironically serve to entrench their market power.

Consultation question 14: What are your views on the proposal to apply principle 2(e) (see Figure 4 below) to the entire firm? Should any explicit checks and balances be considered?

The Chamber finds very disturbing the government's proposal that firms "not [ ] make changes to non-designated activities that might further entrench the firm's position in its designated activity/activities, unless that change can be shown to deliver significant benefits." This proposed authority would far exceed anything conceivably necessary to address any anticompetitive practices. It would prohibit the full range of pro-competitive activity that presents no risk of harming competition and would turn private economic actors into supplicants of the DMU.

Given the severity of this proposal, the Chamber must ask whether the government intends to designate any British companies as having SMS-status. Or, is this proposal simply designed to allow the DMU to exercise significant discretionary authority over American competitors, to their everlasting detriment? Unfortunately, this proposal echoes the unilateral digital services taxes imposed by several EU member states,

which are cleverly crafted to apply almost exclusively to American companies in a manner that clearly violates international commitments. The European Commission's proposed Digital Markets Act is another such discriminatory measure that will undermine broader cooperation between the U.S. and the EU on future digital policy priorities if adopted as written. We urge the UK not to follow a similar approach.

The UK has the right to regulate its marketplace and enhance its regulatory environment in accordance with its societal objectives. It also has a requirement to abide by its trade commitments and to champion the non-discriminatory, market-based, least-trade-restrictive principles it has long maintained as its essential philosophy. Internationally, the UK knows what it is like to be restrained in foreign markets when, in the name of security and sovereignty, regulatory frameworks are closely aligned with industrial policy priorities and unilaterally imposed.

Consultation question 15: How far will the proposed regime address the unbalanced relationship between key platforms and news publishers as identified in the Cairncross Review and by the CMA? Are any further remedies needed in addition to it?

(No answer is to be provided)

Consultation question 16: How can we ensure the appropriate use of interim code orders?

The Chamber recommends that the proposed DMU issue interim code orders only rarely, in circumstances similar to the standards whereby a court might issue a preliminary injunction: where irreparable harm would occur without immediate relief, and where an order serves the public interest, and not just the interest of a competitor.

Beyond that, any interim order should last only so long as necessary for the full legal process to play out to resolution. Indeed, because digital markets move quickly, long-term or indefinite interim orders could seriously damage the companies subject to such orders. For these reasons, the Chamber proposes that interim orders last no longer than 30 days.

Most importantly, the DMU should tie any proposed interim orders to objective criteria demonstrating that the order is necessary to protect the interests of consumers, not individual competitors. The Chamber discusses the importance of objective criteria in response to consultation questions 8-10.

Consultation question 17: What range of PCI remedies should be available to the Digital Markets Unit? How can we ensure procedural fairness?

(No answer is to be provided)

Consultation question 18: To what extent is the adverse effect on competition ('AEC') test for a PCI investigation sufficient for the Digital Markets Unit to achieve its objectives?

(No answer is to be provided)

Consultation question 19: What are the benefits and risks associated with empowering the Digital Markets Unit to implement PCIs outside of the designated activity, in the circumstances described above?

(No answer is to be provided)

Consultation question 20: How appropriate are the proposed flexibility mechanisms set out above? Are there any associated risks?

(No answer is to be provided)

Consultation question 21: What is an appropriate statutory deadline for a PCI investigation?

(No answer is to be provided)

Consultation question 22: What powers and mechanisms does the Digital Markets Unit need in order to most effectively investigate and enforce against conduct occurring both domestically and overseas?

The U.S. Chamber of Commerce believes that the DMU's proposed enforcement mechanisms egregiously exceed anything necessary to address genuine competitive harms. In the first place, the proposed financial penalties, of up to 10% of an undertaking's worldwide turnover, appear untethered to any consumer harm, much less to any harm suffered by consumers *in .UK.* Instead, this proposal appears specifically designed to punish foreign competitors, discourage vigorous market-based competition, and perhaps transfer wealth from foreign companies *to the UK.* Instead,

this proposal appears designed to punish foreign competitors, discourage vigorous competition, and perhaps transfer wealth from foreign companies to the U.K. Outside of legal violations such as naked price-fixing, few competitive practices clearly violate the competition laws, yet to punish those practices so severely would violate all norms of notice and proportionality. For similar reasons, it would be improper, and harmful to the competitive process, to hold individuals personally liable for conduct that may or may not later be deemed to harm competition.

Consultation question 23: What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively?

(No answer is to be provided)

Consultation question 24: Is there anything further the government should consider to ensure that the regime is proportionate, accountable and transparent?

As stated previously in answers to consultation questions 8-10, the Chamber believes, and long experience confirms, that competition policy's most important safeguards involve objective standards, focused on consumer welfare. Such a standard ensures objectivity, transparency, and proportionality, and guards against the influence of politics and protectionism in the enforcement of competition policy.

Consultation question 25: What standard of review should apply to appeals of the Digital Markets Unit's decisions?

The Chamber urges the government to provide *de novo* review for the proposed DMU's decisions. Under the various proposals, the DMU would receive extraordinary authority to manage foreign firms, including the possibility of dismembering them, forcing them to provide sensitive information to their competitors, forbidding them from engaging in entire lines of commerce, and imposing fines that could total billions of dollars. Given the severity of such penalties, an independent, objective court should review such orders on a *de novo* basis to protect the concept of due process.

Consultation question 26: What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with SMS?

As an initial matter, the Chamber urges the government to suspend a proposed order pending an appeal, unless the proposed DMU can show that immediate relief is

necessary to avoid permanent harm. As outlined, the DMU would have extraordinary authority to inflict serious punishment on foreign companies, including dismemberment, the release of sensitive proprietary data, and billions of dollars in fines. Absent a showing of immediate irreparable harm, an appeal should suspend all of those severe penalties until a court can review the matter fully and objectively.

In terms of redress, the Chamber agrees that the DMU should not have and does not need this power to carry out its functions to benefit the public, rather than private competitors. Moreover, should the DMU receive this power, that grant would provide even more incentives for domestic companies to prod the DMU into suing and seeking damages from their foreign competitors.

Consultation question 27: What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with SMS?

At the outset, the Chamber agrees with the government that mergers and acquisitions provide many benefits to consumers, including access to capital for innovative companies and the ability for acquiring companies to bring new products to market more quickly and cheaply.

To the extent that the government adopts an "in advance" reporting requirement, the Chamber urges the government to adopt such a requirement across all industries and companies, both foreign and domestic. An even-handed requirement would spread the costs across the economy, providing a check against overly burdensome requirements, and help to ensure that the proposed DMU focuses its resources on acquisitions that might raise genuine competitive concerns, rather than focusing on the conduct of a handful of mostly foreign companies. As discussed in response to consultation question 11, consumers could suffer from proposals to heighten scrutiny of all of an SMS-designated company's proposed mergers. Many such acquisitions likely would occur in markets where the company has no market power, or perhaps no presence at all. Such heightened scrutiny could reduce investment in smaller companies, slow innovation, deprive consumers of the benefits of vertical integration, and unfairly single out foreign competitors.

Above all, any transaction reporting requirements under UK law should be required to have a tangible UK nexus.

Consultation question 28: What are the benefits and risks of introducing a transaction value threshold, combined with a 'UK nexus' test, for firms designated with SMS?

At the outset, the Chamber notes that these types of mergers -- vertical mergers and acquisitions of so-called "nascent" competitors with little or no market power -- raise few competitive concerns. These types of mergers generally benefit consumers, improve access to capital for smaller companies, and enhance competition across various markets. Accordingly, there is no reason to adopt new thresholds for these types of mergers.

Moreover, the Chamber continues to worry that the SMS-process will be used to target American companies and discourage them from competing vigorously. In particular, this proposal could result in American companies becoming disinclined to invest in smaller technology companies based in the UK, an outcome that would harm both consumers, the UK's economy, and undermine the innovative technology sector that the UK has carefully cultivated over the past several decades. Many of these start-ups might decide that another market would be a more suitable place to set up shop, rather than subjecting themselves to these overbearing UK rules and restrictions.

Consultation question 29: What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with SMS?

The Chamber agrees with the government that mandatory merger review would impose additional costs on businesses and unduly burden and delay the review process. These sorts of transactions likely already satisfy the existing criteria to trigger merger review, and if not, the CMU certainly retains discretion to review them on a case-by-case basis. Additionally, as explained in response to consultation question 28 and elsewhere, the Chamber continues to worry that the SMS-process will be used to target American companies and discourage them from competing vigorously in the UK market.

Consultation question 30: What are the benefits and risks, particularly with regard to innovation and investment, of amending the substantive test probability standard used during in-depth phase 2 merger investigations to enable increased intervention in potentially harmful mergers involving firms with SMS?

The Chamber strongly opposes any lowering of standards that would allow the government to forbid private market activity based on speculative harms. Economic freedoms that allow two companies to merge should not be blocked based on bias, but instead held to a legal standard that shows harm outweighing any benefits to consumers. A lowered standard would prohibit and deter beneficial mergers that

result in significant efficiencies that benefit consumers. In fact, the U.S. Federal Trade Commission has done multiple merger retrospective studies and concluded that most of them benefit consumers.

Competition law, particularly the consumer welfare standard, protects the free market and disciplines governmental agencies. Agencies should not interfere with private competitive practices, whether on behalf of favored political groups or domestic industries, absent an empirical showing that those private practices are more likely than not to harm consumers. To lower those standards would be to invite politicization, protectionism, and untethered prophesizing.[2]

Consultation question 31: What alternative proposals should the government be considering to improve UK merger control for firms with SMS in a way that is proportionate, effective and minimises any risk of chilling investment or innovation?

The Chamber encourages the government to formally adopt the consumer welfare standard. This standard, which has served the United States well for almost half a century, brings objectivity, consistency, and transparency to competition policy. It protects consumers, not individual competitors, rewards innovation, and encourages investment. The UK would service both its consumers and its domestic economy by adopting such a tested and objective standard. The adoption of such a standard would likely also yield an increase in bilateral investment flows, which could help jumpstart the post-pandemic economic recovery.

Finally, the Chamber reminds the government of a point that the government has made repeatedly itself: markets are dynamic. To the extent that the government is concerned about concentration in any particular digital market, it is very likely that market forces, rather than government intervention, will bring robust competition to that market far sooner than the government could. In recent years, some startups have become global household names in just a few years, or even less time (e.g., Zoom and TikTok, or perhaps Deliveroo and Revolut), in response to consumer demand. As has happened so often throughout history, if any of the currently large tech companies lose their edge or rest on their laurels, new entrants will soon pass them by. The government should, of course, continue to enforce its existing competition laws in an even-handed manner across the economy, but should hesitate before affording itself extraordinary new powers to disturb the most dynamic segment of the world's economy.

[2] See https://cei.org/opeds_articles/uk-antitrust-bureaucrats-could-kill-american-startups/.

Conclusion

We look forward to opportunities to collaborate and provide additional input as these policies continue to be developed and implemented.

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