

## Consultation response

# Digital Competition Expert Panel: Call for Evidence



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.

## About AmCham EU

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## AmCham EU's submission to the Treasury

AmCham EU has taken note of the open consultation on the Digital Competition Expert Panel issued by Her Majesty's Treasury on 16 October 2018.<sup>1</sup> In the present document, AmCham EU wishes to submit observations to the Treasury on a select number of questions that reflect positions advanced by AmCham EU in previous papers concerning the digital market. This includes most recently a submission to the European Commission in response to its call for stakeholder input on three broad topics relating to the future challenges of digitisation for competition policy.<sup>2</sup> This short position paper aims at placing relevant context around some of the questions raised in the United Kingdom's (UK's) open consultation regarding the state of competition in the digital economy, and addresses the opportunities and challenges for competition policy both in the UK and internationally. As the Expert Panel progresses with its review, AmCham EU stands ready to continue to engage in the evolving discussion.

## AmCham EU's observations

AmCham EU has identified a number of questions on which it wishes to submit high-level comments:

**Question 3.1:** *'What are the emerging benefits and harms from digital markets such as social media, e-commerce, search and online advertising tending towards only one or a small number of big firms?'*

First of all, we respectfully note that the formulation of this question (and of some of the other questions in the consultation), seems to assume that there is a trend towards only one or a small number of big firms in digital markets. Digital markets are extremely diverse and are often closely integrated with traditional, brick-and-mortar markets.<sup>3</sup> We would therefore caution HM Treasury not to assume that such a trend exists. Rather, a good topic for the Treasury's consultation might have been whether such a trend exists and if so in which markets.

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<sup>1</sup> <https://www.gov.uk/government/consultations/digital-competition-expert-panel-call-for-evidence/digital-competition-expert-panel>

<sup>2</sup> [http://www.amchameu.eu/system/files/position\\_papers/shaping\\_competition\\_policy\\_in\\_the\\_era\\_of\\_digitisation\\_-\\_amcham\\_eu\\_response.pdf](http://www.amchameu.eu/system/files/position_papers/shaping_competition_policy_in_the_era_of_digitisation_-_amcham_eu_response.pdf)

<sup>3</sup> See, e.g., [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf)

As to the question itself, the potential benefits and harms of hypothetically having – in the long run – only one or few large players in digital markets, are similar to such trends in any markets. Choice is generally good for the consumer and contributes to driving the development of better and cheaper products or services. There are, however, no clear rules as to the number of firms that should be active in a particular market in order to maximise consumer welfare. Moreover, in rapidly evolving markets where firms compete ‘for the market’, the competitive benefits of particular market structures cannot be assessed solely at a given point in time. This is particularly true in the case of digital markets, which are subject to rapid innovation.

As far as platform offerings are concerned, in the same way a physical infrastructure can support the operation of competition service providers, a digital platform can host several competing offerings that provide the consumer with alternative choices, and competition generally leads to the development of better offerings that ultimately benefit the consumer. The presence of multiple sellers on the same e-commerce site enables customers to easily compare competing offers by brand, quality, price, speed of delivery or other attributes and select the offers that best meet their needs. By giving the customers a unique voice and providing them with a rating system to inform others, these digital platforms contribute to transparency and product quality.

**Question 3.2:** *‘What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?’*

As in our response to Question 3.1 above, we do not perceive that there is a general trend towards the same small number of firms being active in digital markets. Nor do we see a trend towards the same small number of firms systematically expanding across product or service segments to develop a presence in neighbouring upstream or downstream markets. Whether or not a firm, small or big, decides to expand its offering into neighbouring digital markets depends on a wide range of factors that are particular to the respective firm. As we have seen with the emergence, and in some cases break-up, of conglomerates in the non-digital/brick-and-mortar economy, a wide range of manufacturers or service providers have sought to optimise their revenues and profits by expanding their portfolio of products or services. We note that such strategies are generally not considered harmful to competition, except in rare cases where a firm has a dominant position in one market and seeks to leverage that strength into another market in which its competitive position is less. The Court of Justice of the European Union (CJEU) has developed a body of case law that deals with the leveraging of a dominant position into secondary markets. As in our response to Question 3.1 above, we consider that existing competition law tools are perfectly satisfactory to address developments and potential problems with the digital economy that may or may not occasionally occur.

**Question 3.3:** *‘What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?’*

Again, this question assumes facts that are not actually demonstrated but that might have made a good subject for an inquiry. We further submit that the question is worded so broadly that the responses the Treasury receives risk being materially misleading. In a world where virtually all firms are constantly collecting data, a meaningful question would need to specify the types of data and relevant markets in question. Even assuming that the question relates to personal data of consumers collected by platforms engaged in business-to-consumer markets, we are not aware of any clear evidence for the assumption underlying the question. Indeed, the

European Commission has had time to examine the concentration of data in a number of merger cases in recent years and has consistently concluded that data concentration was not a concern.<sup>4</sup>

In any event, in our view, the accumulation and concentration of data, whether within a small number of big firms or a firm of any size, may confer market power if the data is a tradeable commodity or otherwise give the holder a significant competitive advantage. Again, there is no fundamental conceptual difference in this regard between the digital economy and the traditional economy.

In the case of data, moreover, it should be taken into account the same data can be held by an unlimited number of firms (eg, they are ‘non-rivalrous’), that their value may decline rapidly over time, and that the incremental value of additional data may decline over a relatively small volume of data points. In today's economy, where consumers purchase products and services digitally, or use several social media platforms in parallel, a particular consumer's data will rapidly become available to a significant number of potential resellers. Then that same data may be exchanged in a number of different and overlapping configurations within the boundaries of the General Data Protection Regulation (GDPR). There should therefore not be a generalised presumption that holding large amounts of data confers market power, even where that data is held by big firms.

**Question 3.4:** *‘What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?’*

AmCham EU respectfully submits that this question is too broad to be meaningful. The impact of a large firm acquiring a smaller firm depends on the companies and markets in question. The European Commission, the UK Competition and Markets Authority (CMA) and other competition authorities consider such cases on a case-by-case basis. Although they have not, and could not, make generalised statements about the economic impact of such transactions, it is generally agreed that transactions involving small or zero increments in market share raise fewer competition concerns.

More generally, mergers and acquisitions activity are normally seen as an indicator of a healthy economy in which financial assets are reorganised between buyers and sellers for mutual benefit and to the advantage of consumers. Moreover, the possibility of being acquired by a larger firm, or otherwise achieving a significant return, is an important incentive for entrepreneurs and venture capitalists to invest in small firms.

Indeed, the EU State aid rules on risk capital financing have been designed to encourage the creation of start-ups in view of these companies being sold on in the event that they are successful. This is based on the policy assumption that many innovative ideas originate in small companies that do not have the potential to grow and

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<sup>4</sup> See, e.g., Case M.8788 – Apple/Shazam, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m8788\\_1279\\_3.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf); Case M.8124 – Microsoft/LinkedIn, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m8124\\_1349\\_5.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf); Case N. COMP/M.7217 – Facebook/WhatsApp, available at, [http://ec.europa.eu/competition/mergers/cases/decisions/m7217\\_20141003\\_20310\\_3962132\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf).

implement their own modernisations due to a lack of management or financial resource. Therefore, the acquisition of smaller firms by larger firms, if they happen, are in line with the usual business cycle of companies.

Separately, it would be incorrect to assume, especially in the digital space, that small companies necessarily hold smaller market shares than larger companies. Smaller companies frequently innovate by creating a successful new product or service that allows the company to achieve a significant market share. Thus, there is no intrinsic link between the size of a company and the size of the company's market share.

There is also no presumption that an acquisition of one firm by another harms competition simply because of their respective sizes.

Finally, we submit that there is no reason to believe that the impact of acquisitions by a larger company of a small company is of a greater magnitude in the digital space than in other sectors. To the contrary, in the digital space high market shares, if any, are particularly likely to be quickly eroded by rapidly emerging competing offers, as there are very few innovations that are so unique that they cannot be replicated by others.

**Question 3.5:** *'To what extent is it relevant for any identified benefits and harms that consumers receive "free" services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?'*

The concept of 'free' services 'paid for' by data risks oversimplifying a phenomenon that is well known in both traditional and digital markets. This is the 'two-sided' market (or 'multi-sided' market), which is when a particular product or service generates revenue from two or more distinct groups of customers, enabling a firm to prioritise different revenue streams in an effort to maximise profits. A classic example is the newspaper industry, in which publishers receive revenues from both newspaper buyers and advertisers. The fact that the publisher receives advertising revenue enables it to offer newspapers at a price that is lower than would otherwise be possible, or even for free. In a sense, newspaper readers 'pay for' some or all of the cost of producing the paper by the attention they give (or are assumed to give) to advertisements, in return for the benefit of a lower (or zero) newspaper cost.

The same dynamic applies in the digital economy, where services offered to consumers for free are paid for in other ways. To say that consumers pay for these services with their data is simplistic. More specifically, providers of such services achieve revenues by selling other products or services in the two-sided market, such as online advertising. The provider of the consumer service may be able to increase the value of its advertising by using non-personal data collected on the consumer, in which case the consumer service provider benefits through higher advertising revenue and consumers benefit by seeing more relevant ads. In any case, the newspaper example demonstrates that such two-sided markets existed long before the development of digital markets and collection of personal data. The legal framework around the collection and use of personal data has in any case significantly changed as a result of GDPR. AmCham EU submits that a more meaningful question to examine would be the extent to which the value of services provided on one side of specific digital two-sided markets, depends on the data that is collected from consumers in another side of such markets, and the extent to which the equation has changed as a result of GDPR.

For the avoidance of doubt, AmCham EU acknowledges that suppliers seeking to optimise revenues from different sides of multi-sided markets can potentially 'distort' competition from other suppliers following a different model. For example, in mainland Europe the distribution of 'free' newspapers in subway stations has triggered complaints by paid-for newspapers, but such complaints are largely unsuccessful because such decisions are part of the normal evolution of competitive markets. In the UK, free evening newspapers are commonly accepted.

Further, regardless of whether there is a co-relation between ‘free’ services and ‘free’ data, data is not a scarce resource whose allocation is governed by price. Users commonly ‘multi-home’, meaning that many companies gather data on the same users and end up with similar datasets. Data is also often a by-product of ordinary business activity – which means it is now available to most businesses. Even smaller companies engage in data sampling, because of the large volume of data available. Data and the value created through the use of data are not directly proportional.

In AmCham EU’s view, drawing any inferences about regulatory intervention from such a simplistic question could be extremely dangerous. Requiring a company that collects data on its customers to make a monetary payment would risk creating a serious distortion of competition and would fundamentally misunderstand the functioning of multi-sided markets. It would also create enormous practical issues in valuing such data, because a consumer making available their personal data does not limit in any way their capacity to make the same data available in an unlimited number of other cases. Therefore, the fact that one e-commerce platform obtains tradeable consumer data does not in itself limit the possibility of many other e-commerce providers obtaining the same data for similar purposes.

However, it is important to establish a consistent framework for all companies that collect and use personal information. In a connected world, where individuals use multiple devices and services from different providers, the most effective way to protect consumers is through one set of rules which apply to the collection and use of consumer data. Privacy regulations that apply to only one set of technologies, one data class or one segment of industry players, will create customer confusion and distort competition. While context is a relevant factor in determining whether data collection, retention, use and sharing is reasonable, this analysis should begin from a standpoint that is neutral in terms of both the technology and the industry involved.

**Question 3.6:** *‘How do technologies such as Artificial Intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?’*

Artificial Intelligence (AI), machine-learning software and algorithms are at a very early stage of development. Although these technologies have already generated significant competitive benefits, it is in our view far too early to offer a general assessment of how they affect competition, if indeed such a general assessment will ever be possible. The same may be said of these technologies’ implications for competition policy. AmCham EU notes, however, that competition authorities that have looked at these issues so far have all come to the conclusion that existing concepts and tools of competition law are adequate to address concerns arising from behaviours in digital markets. Competition law is based on the fundamental dichotomy between bilateral and unilateral conduct. The latter can only infringe competition law where a company is dominant, while bilateral conduct may infringe competition law if it is based on collusion. Collusion requires a minimum contact between two independent companies. Merely parallel but unilateral conduct, as quickly as it may occur, is not collusion and remains lawful below the level of dominance. The acquisition or implementation of a self-learning price adaptation software is unilateral conduct, unless it has been agreed with a competitor or other third party for anti-competitive purposes.

There has been a lot of debate as to whether the fundamentals of antitrust law should be changed to accommodate the particularities of the digital economy, but in the view of AmCham EU, and every competition authority that has so far examined the question, the current system is perfectly able to protect against anti-competitive actions in the digital economy.

**Question 3.7:** *‘What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?’*

Antitrust law and policy systems in the Western world are mostly built on the principle on *ex post* enforcement (with the notable exception of merger control), where regulators investigate allegedly unlawful conduct that is brought to their attention. The question whether a sector requires *ex ante* regulation has been frequently debated in the past. As far as competition law issues are concerned, the existing *ex post*-system is well placed to deal with any arising issues. The many facets of the digital economy actually facilitate – for regulators and third parties – the gathering of information and the bringing of a complaint, and to the extent that they are appropriately staffed, the quick turnaround of issues that are brought to their attention. To the extent that some of the larger firms in the digital space are particularly mediatised also contributes to a broad general debate that allows regulators to follow evolutions of relevance to these companies. Furthermore, the digital economy makes it easier for the consumer to contour any hypothetical attempts by suppliers to restrain competition, as consumers can easily source products and services from a myriad of suppliers around the globe. The digital economy by its very nature tends to be more competitive than some segments of the traditional brick-and-mortar economy.

In order to deal with arising issues in a swift manner, regulators need to reflect thoroughly about potential theories of harm and, as they progress in experience, embody their learning in guidance and best practice documents that can be used by industry and other regulators. For example, today it occasionally happens that even uncomplicated transactions trigger lengthy reviews, as the regulators are not always certain what to look for. We are confident that over time this concern will be addressed through experience.

**Question 3.8:** *'Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?'*

Outside of competition tools, new entry, competition and economic outcomes are influenced by a myriad of government policies. To that extent and for the digital transformation of the economy to continue taking hold there are a couple of essential elements that need to be in place at various levels: consistent, coordinated and forward-looking technology and data policies, trust, infrastructure, education and skills and an enabling environment.

It is crucial that before deciding on policies, legislation or regulation, policy-makers evaluate all existing tools and new market realities. Analysis should be conducted for how these tools could impact digital innovation and transformation, and any policy actions, if needed, should be targeted, flexible, and future-proof. Policy actions must be focused on synergies and measured against the impact on the digital transformation of the economy and its main industry sectors. Technology neutrality should be the cornerstone of policy-making.

Fragmenting the global market and the single market by introducing localisation requirements for data and/or infrastructure will damage the vast potential of the global digital economy as we know it today. The goal should be to remove obstacles while avoiding creating new ones. Any industrial strategy should aim at further aiding the digital transformation and avoid fragmentation.

In order to harness the changes and opportunities created by the digitisation of the economy, education and skills play a critical role, including integrating Information and Communications Technology (ICT) skills into education and vocational training across sectors, there needs to be cooperation between industry and governments to help public authorities and small companies provide reskilling and lifelong learning initiatives.

**Question 3.9:** *'What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?'*

On 6 July 2018, the 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; and (3) preserving digital innovation through competition policy.

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 stifle, 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'.<sup>5</sup>

In this context, AmCham EU has submitted comments to the European Commission on a number of issues, which is available here:

[http://www.amchameu.eu/system/files/position\\_papers/shaping\\_competition\\_policy\\_in\\_the\\_era\\_of\\_digitisation\\_-\\_amcham\\_eu\\_response.pdf](http://www.amchameu.eu/system/files/position_papers/shaping_competition_policy_in_the_era_of_digitisation_-_amcham_eu_response.pdf)

**Question 3.10:** *'Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?'*

Please see our response to Question 3.9 above.

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<sup>5</sup> Available at, [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en)