

European Tech Alliance Position on Ex-Ante Rules

September 2020

Foreword

The EUTA welcomes the European Commission's objective to address competition issues that have emerged in the European market. We believe that fair competition is a fundamental driver of a dynamic economy in Europe. As young companies born and developed in Europe, we need a level playing field in order to operate and compete. We see clear problems in the market at the moment that require corrective action before it is too late.

We agree that existing European competition rules have brought many benefits to Europe's economy and helped the Commission gain insights into the types of business practices and conduct that can be detrimental to competition and markets. Nevertheless, we believe new ex-ante rules should complement existing competition law in order to provide fast and effective relief from widespread and unfair practices emerging from specific online platforms acting as gatekeepers.

A revision of the P2B Regulation is not a well-suited policy option to address targeted problems among a few powerful players, as the legislation applies to all platforms regardless of their market power.

In addition, we call for a strong focus on alignment and complementarity between existing antitrust tools, the proposed New Competition Tool (NCT) and the proposed ex-ante regulation. The revision of competition rules is a complex exercise and reform should be based on a deep understanding of the dynamics and nuances of digital markets. At this stage of the debate, the EUTA would like to share a number of high-level recommendations for ex-ante regulation:

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Our key recommendations

Ex-ante rules must be targeted to gatekeeper platforms having a systemic role in a market - We agree that an ex-ante regulation on gatekeeper platforms having a systemic role in the market would be a useful complement to European competition law. It is vital that these rules are limited to gatekeeper platforms, flexible enough to take into account the wide diversity of business models, and future-proof against the evolution of these business models and technology.

Gatekeeper platforms should be clearly defined - To ensure legal certainty, clear and objective criteria should be used to identify global online platforms having a gatekeeper role in a market. These criteria should be cumulative and include a proper balance of complementary quantitative and qualitative elements to ensure that the scope of regulation is not overly broad, nor too restrictive. Quantitative criteria will ensure that the scope of the ex-ante rules remains focused on very large platforms at least at EU-wide level, while qualitative criteria allow the identification of a platform's gatekeeper role and impact on competition in the EU. Such criteria should be assessed on an EU-wide basis (i.e. not at a national level), due to the wide geographical reach of gatekeeper platforms.

The cumulative criteria should enable an assessment of three main elements characteristic of gatekeeper platforms: their market power, their ability to influence the market and expand into others in an unfair way, and their size at EU level, including the platform's share of consumer attention. Such criteria could include for instance: platforms that are unavoidable trading partners for businesses (defined by the concept of single-homing), exert control over digital ecosystems, are able to unreasonably leverage their power across different adjacent markets especially by cross-subsidising different and non-complementary activities, have unprecedented and unique financial capabilities, data access and consumer reach, and whose strong position in the market is likely to remain unchallenged over a significant period of time (e.g. due to high barriers to entry/expansion on the market, strong network effects and large economies of scale and scope). It is also important to determine how these criteria to define gatekeeper platforms relate to pre-existing and well-known competition concepts of dominance and essential facility.

A clear and flexible list of ‘dos and don’ts’ should be introduced – The EUTA welcomes guidance from the EU on what gatekeeper platforms should and should not do. Regarding the Terms of Reference of the Commission’s study, we believe that certain practices such as unjustified self-preferencing, unrestrained data cross-use, conditioning access to the gatekeeper platform to the use of its ancillary services in ways that distort competition, and impeding interoperability and unjustified information asymmetries in data sharing should be addressed as a priority. When defined broadly, these behaviours are not automatically negative, so it will be crucial to define precisely when practices are problematic and should therefore be prohibited or regulated in order to preserve competition. For example, some forms of self-preferencing can be harmful, however if self-preferencing is defined too broadly, a blanket prohibition might lead to unintended consequences, such as reducing efficiencies.

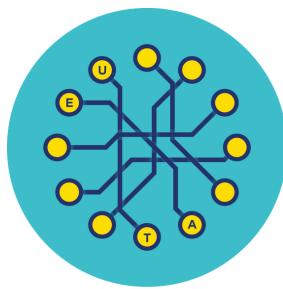
The proposed list of problematic practices, or “blacklist”, should be:

- targeted to clearly unfair and harmful practices of gatekeeper platforms that have arisen time and again over years of antitrust enforcement;
- specific enough to avoid confusion of what is and is not permitted; and
- adaptable to a dynamic, fast moving sector, for instance with the possibility to update them regularly and easily.

We agree that a case-by-case approach to some practices might be necessary to complement the blacklist. It will be vital that case-by-case assessments and remedies do not result in the lack of speed that ex-ante regulation is designed to address.

Ex-ante rules should foresee effective remedies – The only effective solution to harmful conduct is a change in such practices. Monetary fines alone will not be sufficient to deter bad behaviour among platforms that have amassed mass financial resources and for whom regulatory fines are often just the cost of doing business. Remedies also need to be identified and enforced swiftly to avoid irreparable harm to the market.

An EU-wide authority should be appointed to ensure an effective enforcement – We support enforcement at the EU level, preferably by the European Commission. Gatekeeper platforms typically hold significant power across all or many EU countries, and certain harmful practices are per definition cross-border. This EU-wide authority responsible for enforcing an ex-ante regime for gatekeeper platforms should have adequate resources and powers to act quickly, deep knowledge and expertise of digital markets, and it should be clear to all market actors how enforcement interrelates with existing ex-post competition law and the proposed NCT. Furthermore, better enforcement of existing regulations towards all players acting within the digital single market will help address competition issues that have emerged in the European market.



European Tech Alliance

The European Tech Alliance (EUTA) brings together and gives a voice to the major European digital champions, scaleups and leading startups. We believe that Europe is good at tech and our sector is driving jobs and growth across the continent. With an overarching goal of fostering innovation in Europe, EUTA members are keen to provide expert insights to the EU institutions and promote the EU competitiveness in the global tech space.

This paper has been developed at a preliminary stage in the policy discussions in order to share our members' expertise and inform the debate. It is not directly attributable to any individual member and we invite you to contact our members, should you like to better understand their specific situation.

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