

## Regarding media reports about the next Chief Competition Economist

*May 2<sup>nd</sup>, 2023*

Dear Executive Vice-President Vestager,

Dear Vice-President Jourová,

Dear Commissioner Breton,

We, a group of civil society organisations, are writing to express our concern about news reports that the European Commission will soon appoint Fiona Scott Morton as Chief Competition Economist at the Directorate-General for Competition, DG Comp.<sup>1</sup>

We appreciate that a decision has not been confirmed or announced. Nevertheless, given that Bloomberg News as the author of the cited article is a highly reputable news organisation, and they reportedly confirmed their story with "three people familiar with the appointment" – we believe it is necessary to write pre-emptively to share our deep concerns.

These concerns include i) conflicts of interest; ii) unusual aspects of the appointments process itself, and iii) the fact that her opinions reflect an outdated approach to tackling excessive concentrations of economic power, which are no longer sufficient to ensure that consumers, businesses and citizens are protected from concentrated economic power.

It is especially important to maintain European citizens' faith in the institutions of the European Union.

Prof. Scott Morton's views are also at odds with the new orientation taken by regulators including Germany's Bundeskartellamt, the Netherlands Authority for Consumers and Markets, France's Autorité de la Concurrence, the UK's Competition and Markets Authority, and also the U.S. Federal Trade Commission under Lina Khan and the Department of Justice under Jonathan Kanter.

Indeed, her appointment could in our view lead to serious disagreements between international regulators, creating uncertainty for stakeholders.

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<sup>1</sup> For example, Bloomberg [reports](#): "The European Commission is poised to name former Obama administration antitrust enforcer Fiona Scott Morton as its next top competition economist, according to three people familiar with the appointment." (We have also separately heard the same, from three of our own contacts familiar with the process.)

## Conflicts of interest

We are concerned that Prof. Scott Morton has potential conflicts of interest. She has consulted for “a variety of large corporations” that include Apple, Amazon, Microsoft, Sanofi and Pfizer.<sup>2</sup>

Indeed, she has recently been advising Microsoft on its proposed merger with Activision Blizzard<sup>3</sup>. In November 2022, the European Commission announced an in-depth investigation into the Microsoft-Activision merger, and yet in December of that year Prof. Scott Morton said in a submission for Microsoft that “the merger does not pose a competitive harm and, in contrast, is likely to promote competition in a variety of markets.”<sup>4</sup> We strongly disagree and fear that Prof. Scott Morton’s proximity to Big Tech firms will hamper her ability to enforce the EU’s competition laws neutrally and effectively against them.

Her conflicts mean that in cases involving Apple, Microsoft, Amazon, Pfizer and any other firms for which she has recently advised, she would have to recuse herself from the case, meaning that the Commission would not have a Chief Economist at its disposal, able to intervene in cases against some of the most powerful corporations in the world. This would be especially problematic in light of the landmark incoming Digital Markets Act, and several ongoing antitrust investigations into Apple, Google and other Big Tech firms.

In addition to this, Prof. Scott Morton has been criticised for publishing articles without disclosing conflicts of interest in the past. For example, in an article in *The Washington Post* titled “Why Breaking Up Big Tech Probably Won’t Work,”<sup>5</sup> she did not disclose her relevant consultancy work. This raises a different, but related set of concerns about transparency, which would likely also be relevant for her work.

Even if she were able to somehow comprehensively address these conflicts of interest, a perceived lack of objectivity among observers and stakeholders could still affect Prof. Scott Morton’s ability to execute her responsibilities effectively.

While we accept that the unfortunate reality is that many academics in the field of antitrust economics consult for large firms, many also do not.

Given that there are some 450 million people living in the European Union, among them many citizens with expertise in economics and competition policy, it would be surprising if there were not another candidate available who is both a citizen of an EU member state, and who does not have such significant conflicts of interest.

## Appointments process

The job advertisement states that the selection and appointment process will be conducted according to the EC's selection and recruitment procedures.

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<sup>2</sup> See for example: [How Will the Digital Markets Act Regulate Big Tech?](#) ProMarket, Jan 11, 2021.

<sup>3</sup> Her contribution is available at <https://news.microsoft.com/wp-content/uploads/prod/sites/642/2022/12/Principles-for-platform-mergers-with-an-application-to-Microsoft-Activision.pdf> It says: “Professor Scott Morton is serving as an economic expert on behalf of Microsoft in connection with their proposed acquisition of Activision Blizzard.”

<sup>4</sup> Ibid.

<sup>5</sup> Why ‘breaking up’ big tech probably won’t work, By Fiona Scott Morton, Washington Post, July 16, 2019.

The [relevant link](#) in the footnote (7,) under "Senior Officials Policy" Section 3.3. states:

*"recruitment shall be directed to securing for the institution the services of officials [...], recruited on the broadest possible geographical basis from among nationals of Member States of the Communities", "*

As we understand it, Prof. Scott Morton is not a citizen of any EU Member State<sup>6</sup>.

Yet in this context, we would like to point out a further unusual feature. We have compared the previous 2018 job advertisement for Chief Competition Economist (COM/2018/10383) with the latest job advertisement for the same post (COM/2023/10427).<sup>7</sup> The two advertisements are mostly identical, and nearly all of the differences between them are cosmetic, or matters of sentence order or timing. However, we note a glaring difference.

a) The advertisement from 2018 states:

**Candidates must (eligibility requirements)**

Candidates will only be considered for the selection phase on the basis of the following formal requirements to be fulfilled **by the deadline for applications**:

- **Nationality:** Candidates must be a citizen of one of the EU Member States of the European Union.
- **University degree or diploma:** Candidates must have:
  - Either a level of education which corresponds to completed university studies attested by a diploma when the normal period of university education is 4 years or more:

b) By contrast, the latest recruitment advertisement from 2023 states:

**Candidates must (eligibility requirements)**

Candidates will only be considered for the selection phase on the basis of the following formal requirements to be fulfilled **by the deadline for applications**:

- **University degree or diploma:** Candidates must have<sup>1</sup>:
  - Either a level of education which corresponds to completed university studies attested by a diploma when the normal period of university education is 4 years or more;

In addition, the recruitment advertisement from 2023 states that “Until the personal security clearance has been granted by the Member State concerned . . . the candidate will not be able to access EU Classified Information (EUCI) at the level of CONFIDENTIEL UE/EU CONFIDENTIAL or above, nor attend any meetings at which such EUCI is discussed.”

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<sup>6</sup> As we understand it, she is a U.S. citizen but also has a U.K. passport.

<sup>7</sup> For convenience, the 2018 job advert is available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2018/460A/02&from=EN> and the 2023 job application is available here: [https://ec.europa.eu/dgs/human-resources/seniormanagementvacancies/CV\\_Encadext/act/act\\_getAvis.cfm?dossier=449427&langue=EN](https://ec.europa.eu/dgs/human-resources/seniormanagementvacancies/CV_Encadext/act/act_getAvis.cfm?dossier=449427&langue=EN)

It is unclear which EU Member State she would obtain security clearance from, given that she is not an EU Citizen.

Tommaso Valletti, who was the EC's Chief Competition Economist from 2016-2019, has also confirmed to us that the job requirements have most likely changed: he recalled that it was necessary, when he applied, to be a citizen of an EU Member state.

We do accept that the Staff Policies (2010, *Art. 28, p28*<sup>8</sup>) state that an official may be appointed only on condition that:

*"he [sic] is a national of one of the Member States . . . unless an exception is authorized by the appointing authority"*

So we are not alleging actual irregularity here: there appears to be a difference or slight conflict between these two policies.

However, appearances are important. Given that the general policy is to appoint citizens of an EU Member State, and the policy indicated in the job application unambiguously reinforces this, without an exception, and that the 2018 and 2023 recruitment advertisements are so similar but with this particular requirement removed, it is likely to raise the question in the minds of many people whether this job recruitment process was specially tailored to favour a particular candidate who is not a citizen of a Member State<sup>9</sup>.

If Prof. Scott Morton, a U.S. citizen, is the successful candidate, then these suspicions may be reinforced, raising questions whether this has been an unusual appointment process.

### **Outdated thinking**

Prof. Scott Morton is a leading figure in competition economics, well respected by economists in the international competition establishment. However, her opinions and record, in our view, reflect an outdated approach that is fast falling out of favour worldwide.

Competition regulators around the world are displaying a remarkable change in approach, particularly (but not only) in light of the immense challenges of tackling the power and reach of big tech firms. We would cite, for example:

- **Germany's** draft amendments to its Competition Act from April this year, following the introduction of Section 19a of its 2021 Competition Act.
- Immense change in antitrust philosophy and enforcement in the **United States**, especially since 2021 when the Biden Administration's [Executive Order](#) flagged a whole-of-government approach to revitalising competition, and cases by the Federal Trade Commission, Department of Justice, state attorneys-general challenging significant mergers and seeking to break up dominant firms.
- The **United Kingdom's** [Digital Markets, Competition and Consumer Bill](#), announced

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<sup>8</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20140501>

<sup>9</sup> A source also told us via email (on condition of anonymity) that they already knew Prof. Scott Morton was the Commissioner's "hand pick" as front runner at the time the latest job advertisement was placed, adding "this has been circulating inside DG Comp and some academic circles for months."

on April 25<sup>th</sup> of this year, and the Competition and Markets Authority's announcement on April 26<sup>th</sup> that it would block an imminent merger between Microsoft and Activision Blizzard.

We recognise that the European Commission is making and has made tremendous strides too in addressing some of the immense challenges that come with tackling concentrated economic power in tech and other sectors. In particular, we would highlight the incoming **Digital Markets Act** that also reflects the changing regulatory mood in terms of creating powerful new tools and approaches to tackling excessive concentrations of power.

This is all positive, and to be welcomed. However, we believe that if Prof. Scott Morton were to be appointed as the European Commission's Chief Competition Economist, this would constitute a backward step going against the grain of a rapidly changing global approach to competition policy, hamper the Commission's enforcement priorities, and potentially generate conflict with other competition authorities. We would cite two examples:

First, Prof. Scott Morton has been an advocate of the **Consumer Welfare** standard, which prioritises maximizing output and sales to consumers at the lowest prices, tending to ignore or downplay other actors and issues affected by concentrated economic power, including workers, small businesses, the environment, democracy and the wider public interest.

Recently, we joined a coalition of civil society actors in a submission to the European Commission on enforcement Article 102 TFEU Guidelines which stated:

"We are encouraged by the recognition in the Commission's policy brief that "the enforcement of competition rules also contributes to achieving objectives that go beyond consumer welfare" including "fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy".<sup>10</sup>"

While Prof. Scott Morton accepts on paper a broad interpretation of consumer welfare, beyond simply prices and quality for consumers, she has nevertheless opposed bringing these broader societal concerns explicitly into play, other than inside the narrow consumer-welfare frame.<sup>11</sup> This is at odds not only with what some civil society organisations believe, but appears to be at odds with what the European Commission said in the example given above.

A second example of her (in our view) problematic stance is exemplified by an article she wrote titled "Why 'breaking up' big tech probably won't work."<sup>12</sup> There are many good reasons why it is necessary and important to break up large technology (and other) firms in smart ways,<sup>13</sup> and as mentioned above, competition authorities around the world are re-gaining confidence to address the structure of markets and break up dominant firms.

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<sup>10</sup> Joint submission to Call for Evidence on TFEU Article 102 Guidelines, available here <https://www.balancedeconomy.net/wp-content/uploads/2023/04/Joint-civil-society-submission-TFEU-Article-102-.pdf>

<sup>11</sup> See, for example, "[What Economists Mean When They Say "Consumer Welfare Standard"](#)" By Leah Samuel, Fiona Scott Morton, *ProMarket*, February 16, 2022 and especially the section "The Real Antitrust Debate"

<sup>12</sup> Why 'breaking up' big tech probably won't work, By Fiona Scott Morton, Washington Post, July 16, 2019.

<sup>13</sup> See for instance, "[Break Them Up](#)," The Counterbalance, Jan 18th, 2023.

## Conclusion

While we again acknowledge that no official announcement has been made yet, for the reasons outlined above - conflicts of interest, an unusual appointment process, and outdated thinking - we call on the European Commission not to appoint Prof. Scott Morton as its Chief Competition Economist.

Should the reports of Prof. Scott Morton's appointment be true, we would like to ask the Commission for the following clarifications to be provided publicly:

- 1) Prof. Scott Morton declared when consulting for Apple and Amazon that she “work[s] for companies that I’m comfortable are not breaking the law.”<sup>14</sup> We understand this statement to mean that her official position is that Apple and Amazon do not break the law. This statement is de facto prejudging the outcome of any ongoing investigation into these two companies, as well as all other companies Prof. Scott Morton consulted for. In this case we would urge Prof. Scott Morton to recuse herself from any investigation into these two companies as well as any other companies she has consulted for either now or in the past, and also from any investigation in markets where these companies are active.
- 2) Prof. Scott Morton should publicly declare the size and nature of all considerations obtained from Apple, Amazon, Microsoft, Pfizer, Sanofi and any other firms for which she has provided consultancy services, in view of the statement that she considers that all such companies do not break the law, and to ensure her appointment takes place under conditions of full transparency. In particular, Prof. Scott Morton should immediately reveal any involvement in all ongoing investigations. We would urge the Commission to publish a complete list of all markets, in respect of which the advice by Prof. Scott Morton may be conflicted.
- 3) May we invite the Commission to publish its approach to conflicts of interest as applied to economic consultants and academics, including how it applies to cooling-off periods? Specifically, in the case of Prof. Scott Morton, the Commission Could clarify what cooling off periods would be applicable in respect of her past and ongoing consulting work. In view of Prof. Scott Morton's long-term role in advising Amazon, we suggest that the cooling-off period in respect of Amazon, as well as all the antitrust markets related to Amazon, should be at least as long as her ongoing involvement with the company.<sup>15</sup>
- 4) Finally, given the untypical nature of the recruitment process outlined above, the Commission should issue a public statement explaining why the process has unfolded the way that it did, particularly the removal of the requirement of EU citizenship.

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<sup>14</sup> <https://www.bloomberg.com/news/articles/2020-07-17/amazon-apple-hire-one-of-big-tech-s-most-prominent-u-s-critics>

<sup>15</sup> However as stated in 1) in combination with her statements in respect of the *a priori* legality of the conduct of all her clients, this consideration may be redundant, as Prof. S Scott Morton would be expected, we would hope, to recuse herself from any such investigation, in the first place.

Thankyou for your consideration

Signed,

**Balanced Economy Project**

**Corporate Europe Observatory**

**European Digital SME Alliance**

**Irish Council for Civil Liberties**

**LobbyControl**

**Open Markets Institute (Europe)**