



U.S. Chamber of Commerce

The EU's Proposed Digital Markets Act: Key Concerns and Recommended Adjustments

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The U.S. Chamber of Commerce supports the European Union's desire to strengthen its digital economy and expand the benefits of digitalization to more of its citizens. Indeed, a thriving European digital sector would be beneficial for the many U.S. companies who are heavily invested in Europe, employing hundreds of thousands of workers across the continent, as well as those for whom digital trade has opened new markets. Indeed, the transatlantic digital relationship is already a huge success story: the EU and the U.S. are the two largest net exporters of ICT-enabled services in the world, and two-way trade in such services in 2020 totaled \$57 billion.¹

At the same time, we are concerned about the extent to which some EU policymakers seek to bolster the EU's digital competitiveness at the expense of major American investors in Europe. The EU is proposing rules that may appear to afford formally identical treatment for all companies but that are in fact carefully crafted to apply to a select number of U.S.-headquartered firms 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. Moreover, such an approach risks creating unnecessary frictions in the transatlantic relationship at a time when greater transatlantic coordination is needed, especially on issues related to technology policy.

The Chamber appreciates that the digital transformation of the economy raises significant public policy questions that merit serious consideration and debate. However, it is far from clear that a horizontal "one-size-fits all" approach to competition policy and platform regulation, as contemplated in the proposed Digital Markets Act (DMA), is the right answer. Indeed, as Europe, the United States, and other countries consider many of the same questions, a considered approach that engages stakeholders and policymakers from other markets throughout the process is essential to avoid unintended market disruptions which could undermine competition.

We urge policymakers to fully utilize the EU-U.S. Trade & Technology Council and other fora to address shared challenges in the regulation of the digital economy. This would foster greater coherence, minimize regulatory fragmentation, and help avoid measures that may ultimately undermine competitiveness on both sides of the Atlantic. This is especially important as the EU and the United States face growing

¹ "U.S. Trade in ICT and Potentially ICT-Enabled Services, by Country or Affiliation," U.S. Bureau of Economic Analysis, <https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4#reqid=62&step=9&isuri=1&6210=4>.

economic and geopolitical challenges from autocratic regimes that do not share our commitment to promoting market-based economic principles, the open exchange of information, and the rule of law.

Outlined below are several key concerns about the DMA along with recommended adjustments to mitigate those concerns.

Key Concerns

1. Scope: As drafted, the DMA places a disproportionate burden upon and impacts only a small number of mainly U.S.-based companies and risks hindering closer transatlantic coordination.

Legislation should focus on promoting competition. DMA targets companies based on a series of arbitrary thresholds, rather than focusing on specific business practices or addressing perceived market failures. This approach is contrary to principles of good regulatory practice and obligations the EU has undertaken in the WTO agreements. It makes little sense to heavily regulate or preclude certain market participants from business practices that are allowed or even encouraged for other market participants. Banning certain practices for only a discrete number of firms neither makes for defensible policy, or good law.

Arbitrary thresholds may undercut incentives for growth. Selectively applying the DMA's obligations is likely to dissuade future growth of European enterprises who want to avoid increased regulatory burdens.

A one-size-fits-all approach is not appropriate. Captured enterprises are engaged in various lines of business. Not every line of business holds "gatekeeper"-like authority. For instance, companies' provisions of cloud services, which do not have a gatekeeping function, should be considered separately from their activities in marketplace services, search, social media, or other subscription services.

- **Recommendation: Tailor legislation to address anticompetitive business practices with specific recognizable consumer harms, rather than targeting entire companies.**

2. Forced Data Sharing: Target companies should not be required to share data with their competitors, especially where consumers have not authorized such sharing. Data is what companies should be encouraged to compete with in the market. Further, consumers' personal data privacy needs be respected. The DMA should not create a backdoor exemption to GDPR, nor should it create clear conflict of law scenarios. Forced sharing of consumer data between competitors is not a legitimate basis for processing. Inherent conflicts between the DMA's obligations and GDPR requirements

must be resolved in advance of the DMA's entry into force, otherwise companies could be held criminally liable for using data beyond its originally intended use.

Non-personal, industrial data is a property right, and companies should be able to protect their intellectual property and trade secrets in line with longstanding international rules and legislation such as the EU's own Trade Secrets Directive. Proposed obligations for "gatekeepers" to share business sensitive data with their competitors include insufficient protections for trade secrets and other intellectual property.

Data-sharing mandates will undermine market-based competition. These requirements will discourage businesses from growing large enough to face the same requirements. They also threaten to create new cybersecurity risks, override existing legal protections for intellectual property, and provide critical trade secrets to other companies, including state-owned enterprises domiciled in authoritarian countries.

- **Recommendation: Bolster safeguards to better protect privacy, intellectual property, and trade secrets, and to ensure consumer protection.**

3. Restrictions on integrated offerings: Proposed limitations on offering integrated products and services will harm consumers without diversifying the market. Among other examples, consumers will lose integration between their email systems and calendars and will be unable to search for map results. The Chamber is concerned about potential amendments that would ban the offering of "ancillary services," which could prevent the integration of basic product features. Companies should not be required to treat their own services as separate legal entities.

- **Recommendation: Instead of blanket limitations on the provision of integrated services, focus legislation to target quantifiable consumer harms.**

4. Potential limitations on M&A activities: The DMA provides for **significant additional notification requirements that selectively apply only to those captured companies.** Merger notification threshold needs to be universally applied. Further, any imposed notification requirements should be consistent with agreed international best practices. Both merging parties need to have a sufficient local nexus for a jurisdiction to assert its authority to review a transaction. Simply having one party with a material nexus to the Europe Union is not sufficient. Without strict adherence to a legitimate local nexus, merger review in an increasingly global marketplace will be fraught with difficulties.

- **Recommendation: Merger notification rules that safeguard market competition must require a legitimate local nexus and should be applied evenly instead of selectively enforced against a discrete number of companies.**

5. Lack of firm commitment to stakeholder dialogue. Certain proposals envision a DMA that only *encourages* the Commission to engage with companies in scope of the legislation in advance of its implementation. This should be a *requirement*. As part of this dialogue, regulators should be obligated to assess specific companies' good faith efforts at compliance ahead of any infringement proceedings. Companies will struggle to comply with the legislation if the specific list of "do's and don'ts" isn't explicitly discussed and understood in advance. Ongoing cooperation between regulators and companies identified as gatekeepers is critical to facilitate compliance and minimize unintended consequences.

- **Recommendation: Clarify the legislation's objectives in advance of implementation and commit to regular and proactive consultation with companies.**

6. Unreasonable implementation timeline: Rushed implementation of sweeping new regulations will undermine companies' ability to comply and risk confusion and dysfunction in Europe's digital economy. The Commission allowed 24 months to comply with the General Data Protection Regulation (GDPR) upon its entry into force. For a measure such as the DMA, which will be at least as complicated to implement, the proposed 6-month implementation timeframe is already aggressive—and certainly should not be shortened.

- **Recommendation: Agree upon reasonable implementation timeframes with consistent stakeholder dialogue throughout the process.**

7. Potential regulatory fragmentation: A core priority of the DMA is to strengthen the EU's digital single market by providing a consistent set of rules across all 27 member states. To avoid inconsistent interpretations and regulatory fragmentation—as we have seen with the GDPR—the Commission should retain central authority to enforce the provisions of the DMA.

- **Recommendation: Minimize divergent enforcement approaches by maintaining a single regulator at the EU level.**

8. Undermining the Single Market: As currently crafted, provisions of the DMA apply only if a company provides core platform services in "at least three member states."

This arbitrary threshold seems designed to encourage the development of national champions in specific member states, rather than promote competition or benefit consumers. It also perversely encourages companies to limit their offerings to only one or two countries. A better approach would be to continue encouraging development of a truly integrated and connected digital single market, promoting competition and the same regulatory structure across all 27 member states.

In some cases, domestic European players may already have dominant market position in 1 or 2 member states. In such instances, companies potentially subject to the DMA are sources of new competition that benefits consumers. Ultimately, EU policy should actively encourage more market actors to operate across multiple member states, not discourage such a practice.

- **Recommendation: Remove the requirement for so-called “gatekeepers” to be providing core platform services in at least three member states.**

9. Future amendment of the “gatekeepers” list: As drafted, the Digital Markets Act foresees the ability to add additional gatekeepers in the future but provides no similar mechanism to remove companies or lift obligations, even if certain business practices or services become obsolete or are superseded by innovative new approaches.

- **Recommendation: Provide a mechanism for removing obligations and amending the list of “gatekeepers” as appropriate in the future.**

The U.S. Chamber believes that taking the aforementioned steps would improve compliance, minimize market fragmentation, and ensure consistent application and enforcement of the DMA. We look forward to working with policymakers and other stakeholders on both sides of the Atlantic to ensure that this proposed legislation is tailored to achieve specific regulatory objectives and does not become a new obstacle to transatlantic cooperation.