

THE EU DIGITAL MARKETS ACT
Targets Discrimination Against U.S. Companies in Violation of WTO Commitments
and Threatens the Re-Set of Trade Multilateralism and of Trans-Atlantic Relations¹

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1. The EU Digital Markets Act (“DMA”),² which was introduced on 15 December 2020, targets U.S. digital services companies in violation of EU non-discrimination obligations under the World Trade Organization (“WTO”), which risks derailing efforts to restore trade multilateralism and to resolve politico-economic issues between the EU and the United States.

Background

2. EU officials and the European Parliament have expressed concerns for some time about U.S. digital platforms in the EU market and the desire to establish “digital sovereignty”.³ According to EU officials, U.S. platforms – which include some of the largest and most successful companies in U.S. history – represent a barrier to the development of competitive European digital platforms. While the EU has used its competition law aggressively to address these concerns,⁴ political elements in Europe believe that competition law has failed to create favorable market outcomes for EU companies.
3. Against this background, the EU introduced the DMA to address perceived shortcomings of EU competition law. The DMA proposal, as currently drafted, would impose on U.S. companies the competition law remedies and relief sought under ongoing EU antitrust investigations and appeals, without affording these companies the same rights of defense. The DMA approach plainly targets and discriminates against U.S. companies and has raised serious concerns among some U.S. policymakers – including U.S. officials who are generally supportive of stronger U.S.-EU ties.
4. The EU does not seem concerned about the obvious WTO violations arising from the DMA. The DMA clearly violates the most-favored nation (“MFN”) obligations and national treatment commitments made by the EU under the General Agreement on Trade in Services (“GATS”) in the WTO in a range of services sectors, including computer and related services, distribution services, advertising, data processing and retrieval, and others. The DMA is designed to accord “less favourable treatment” to

¹ Prepared by King & Spalding LLP for the Computer & Communications Industry Association.

² For the EU description of the DMA, see https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en#documents

³Digital sovereignty for Europe,

[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2020\)651992](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)651992) (2 July 2020)

⁴ Within the EU there have been at least 30 EU and national competition investigations into large gatekeeper platforms, several of which have forwarded novel theories of harm, https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1/language-en?WT.mc_id=Selectedpublications&WT.ria_c=41957&WT.ria_f=5961&WT.ria_ev=search (p. 6).

services and service suppliers of U.S. origin by imposing discriminatory measures, as well as suspending due process protections, that do not apply to or affect like services and service suppliers from Europe.

5. Implementing a measure that so plainly violates the EU's WTO obligations will significantly undermine U.S. and EU efforts to promote a multilateral rules-based system. The DMA initiative will raise tensions between the United States and the EU and make it harder for U.S. officials to defend working with the EU in the WTO and other contexts. The DMA will also raise concerns that the EU is adopting non-competitive tactics like "forced technology transfer" that U.S. officials tend to associate with China, and which the EU has committed to oppose together with the United States. This would complicate efforts by U.S. and EU policymakers to cooperate on efforts relating to Chinese non-market economy issues.
6. In short, the DMA as currently drafted risks undermining key EU policy goals, particularly concerning improvements in U.S.-EU economic relations. EU officials should review and address potential WTO concerns, and mitigate against negative implications for the overall U.S.-EU political-economic relations.

Competition Law and Discrimination Rules

7. Although the international community recognizes the need to address legitimate competition law issues and abuses of market power, the DMA has offended settled expectations of regulatory fairness by violating procedural due process and basic discrimination principles.
8. The preamble of the DMA states that its objective is "complementary to but different" from competition law. The DMA aims to "ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this regulation on competition on a given market". The DMA is therefore targeted at certain companies that have specific levels of services market trade, regardless of the actual positive or negative effects their conduct might have on the competitive environment.
9. The targeting of U.S. companies under the DMA is no accident. According to the EU, there are over 10,000 platforms in the EU,⁵ but the only platforms targeted under the DMA are from the United States. As recently as May 31st, the *Financial Times* reported that

The EU lawmaker who will steer the EU's flagship tech regulation through the European parliament has said it should focus on the largest five US tech companies.

Andreas Schwab, a German MEP and longtime critic of Google, spoke after France and Germany both called for the EU to be tougher on Big

⁵ https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1301

Tech. He said Google, Apple, Amazon, Facebook and Microsoft, were the “biggest problems” for EU competition policy.⁶

The Financial Times reported that Schwab rejected the idea “to include a European gatekeeper just to please [US president Joe] Biden” and observed that “[h]is position is likely to be seen as anti-American, at a time when the EU is focusing on rebuilding transatlantic ties.” Such overt targeting of U.S. companies is consistent with EU tax and regulatory approaches to U.S. tech companies in recent years⁷.

10. The DMA establishes criteria tailored at U.S. companies to designate them as “gatekeepers” of digital platforms on which *ex ante* restrictions will be imposed. This approach is a major departure from the normal competition policy approach which is based on *ex post* case-by-case enquiries to determine whether there is a case of abuse of market power or anti-competitive practices and, if so, the appropriate remedy action. The DMA approach also goes far beyond the advice of the EU’s own expert report on competition policy, which instead advocated at most for shifting the burden of proof for specific forms of particularly harmful conduct.⁸ Instead, the DMA tailors to U.S. companies a presumption of a negative impact on the internal market simply based on the size of the company and its market presence, without considering the impact of EU competitors with similar market power.
11. The DMA also sets targeted quantitative criteria for designating “gatekeepers” whose conduct is presumed to have a harmful effect on the EU internal market. Any entity that has the annual turnover of EUR 6.5 billion or more, within the European Economic Area (EEA) in the last three financial years, or with market capitalization of EUR 65 billion or more in the last financial year, would be considered a “gatekeeper” and would be subject to the obligations of the DMA. Draft amendments have recently been prepared that would raise DMA gatekeeper thresholds for annual turnover to 10 billion euros and increase the core service requirement from one to two, which would further limit the application of the measure to U.S. companies. European companies that supply services identical to those supplied by foreign gatekeeper companies will not meet the quantitative criteria for the gatekeeper status – and thus by definition will not be subject to restrictive provisions of the DMA.
12. The DMA imposes *ex ante* onerous obligations on foreign platforms identified as gatekeepers. These obligations force them to disclose proprietary information, inflict high costs of compliance on these platforms, and reduce their competitive capabilities in a variety of ways including by restricting their use of data, forced sharing of their infrastructure and investments, and prohibition of some of the pro-competitive business models pioneered by such platforms. These outcomes will harm the platforms and make their services less attractive to European users, to the advantage of their European competitors.

⁶ <https://www.ft.com/content/49f3d7f2-30d5-4336-87ad-eea0ee0ecc7b>

⁷ <https://www.piiie.com/publications/policy-briefs/european-unions-proposed-digital-services-tax-de-facto-tariff>

⁸ <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

13. In addition, the procedures for developing and applying the DMA do not provide due process for targeted companies to ensure objective justifications or consideration of efficiency arguments.

GATS Violations

14. The DMA directly violates the EU's MFN and national treatment obligations under the GATS.
15. According to Article XVII of the GATS, the national treatment commitment scheduled by the EU in a range of sectors supplied by in-scope companies, so called "gatekeepers", stipulates that the EU must provide to services and service suppliers of other Members "treatment no less favourable" than that provided to its own like services and service suppliers.
16. The same provision also clarifies that such treatment may be "formally identical" or "formally different", but it must provide at least equal conditions of competition. This interpretation has been settled in WTO jurisprudence.⁹
17. The EU may argue that the DMA provides "formally identical" treatment to all platforms through the application of the same qualitative and quantitative criteria for designating "gatekeepers". However, the application of the targeted criteria referred to above clearly "modifies conditions of competition" to the detriment of U.S. platforms. In other words, the DMA *de facto* discriminates in favour of suppliers of European origin and fails to satisfy the legal standard of national treatment in Article XVII of the GATS.
18. This conclusion draws further support from the DMA Inception Impact Assessment Report by the Commission. The Report reveals that the main objective behind the measure is to impose new obligations and prohibitions on core platform services supplied by foreign companies, obligations and prohibitions that would not apply to EU companies so that the latter could "scale broadly" and contribute to the EU's "technological sovereignty". In other words, the DMA was intended to discriminate against non-EU companies. In addition, the design of the DMA clearly targets and in fact applies exclusively to leading U.S. digital companies.
19. In addition, Article II of the GATS obliges the EU to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." The targeting of U.S. companies under the DMA while excepting "like" services suppliers from Russia, China and other countries clearly violates the GATS MFN obligation.

⁹ See, e.g., WTO dispute settlement reports *EC - Bananas III*, *China - Publications and Audio-visual Products* and *China - Electronic Payment Services*.

GATS Exceptions

20. Although the EU may attempt to invoke exceptions to justify violations of the GATS, the exceptions would not apply in the context of the DMA. Article XIV of the GATS (General Exceptions) provides a list of legitimate policy objectives for which Members would be allowed to deviate from their legal obligations to protect. These objectives include, *inter alia*, protection of public morals or maintaining public order, prevention of deceptive and fraudulent practices and, protection of the privacy of individuals in relation to the processing and dissemination of personal data.
21. Article XIV includes important requirements to ensure that these exceptions are not abused. First, such measures must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. Second, Article XIV requires that any measure taken under this provision be “necessary”. The application of the “necessity test” in this context means that the measure in question must contribute to the attainment of the objective which it is stated to serve and that the measure would be the least trade restrictive means of achieving the desired result. In other words, if the authority imposing the measure has reasonably available to it an alternative measure that serves the same purpose and is less trade restrictive, the measure in question would be deemed not “necessary”.
22. In the context of the DMA, the EU would not be able to establish a nexus between the DMA and any policy objective listed in Article XIV of the GATS.
23. Finally, the DMA intentionally discriminates against non-EU companies, particularly U.S. companies. Under WTO rules, this makes the DMA a “disguised restriction” on trade in services, that cannot be justified under GATS Article XIV. Therefore, the measure will be found to violate EU GATS obligations.

TRIPS Violations

24. Article 3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS Agreement”) provides that each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. According to Article 1 of the TRIPS Agreement, intellectual property includes “undisclosed information” such as trade secrets.
25. The DMA violates TRIPS Article 3 because it requires “gatekeepers” to disclose proprietary information, user data, internal tools, details of technical infrastructure, and other intellectual property to competitors. The DMA also requires gatekeepers to provide competitors access to key system hardware and software features and to provide continuous real time access to data generated on their platforms.
26. In addition, the DMA also requires gatekeepers that supply search engine services to disclose to their competitors how they rank answers to a given query. This requirement would require U.S. companies to disclose sensitive trade secrets and

expertise while their EU competitors are not subject to the same requirement. Additional requirements compel gatekeepers to disclose information on interoperability and performance-measuring tools.

27. Imposing such requirements on U.S. companies and not on their domestic counterparts, without an effects-based assessment into the proportionality or necessity of these requirements that affords the defendants due process and rights of defence, violates the national treatment obligation in Article 3 of the TRIPS Agreement, as well as the substantive provisions of Article 39 of the TRIPS Agreement regarding the protection of undisclosed information.

Political Considerations

28. As shown above, the DMA as drafted plainly and deliberately violates numerous EU WTO obligations. Choosing to violate the WTO in this manner would be troubling under any circumstances, but raises very serious concerns at this particular time regarding the EU commitment to multilateral rules generally, and to collaboration with the United States in particular.
29. After years of heightened controversy in the U.S.-EU relationship, the United States has a new Administration that is publicly committed to improving relations with the EU. However, the United States, including important elements in Congress, should not be expected to accept the imposition of such a high-profile measure that is plainly designed to harm some of the largest and most important U.S. businesses in violation of fundamental international trade rules. Recent achievements have shown the benefits of EU-U.S. cooperation, including the G7 agreement to apply a global minimum tax. However, continuing coordination on new international tax rules will be conditioned on “the removal of all Digital Services Taxes, and other relevant similar measures, on all companies.”¹⁰
30. Furthermore, a controversy over the DMA will complicate cooperation between the United States and the EU on the critical issue of non-market forces to secure a level playing field. For years, EU officials have urged the United States not to act independently on such issues, but rather to coordinate with the EU. The new U.S. Administration has shown willingness to work with the EU – but it will be difficult to collaborate in confidence with the EU on such key issues if the EU adopts approaches such as *de facto* discrimination against U.S. technology companies and the requirement of technology transfer from the targeted U.S. companies.
31. The same concerns apply to potential efforts to reform the WTO. Many stakeholders in the United States remain sceptical of the benefits of the WTO, and of the willingness of WTO Members such as the EU to address basic issues regarding the market-oriented nature of the multilateral trading system. This scepticism will be aggravated if the EU makes it impossible for U.S. technology companies to compete in Europe, while providing favourable access for other competitors.

¹⁰ G7 FINANCE MINISTERS & CENTRAL BANK GOVERNORS COMMUNIQUÉ, 5 June 2021, see para. 16 (emphasis added), <https://home.treasury.gov/news/press-releases/jy0215> .

32. In addition, by pressing forward with the DMA, unless significantly amended, the EU risks undercutting plurilateral negotiations on digital trade at the WTO. If the United States and the EU have a dispute over the DMA, the chances of their working together on the digital trade agenda will be significantly diminished, and other countries will apparently continue non-market and coercive economic behavior in Europe with respect to digital trade with no consequence.
33. Given all these concerns, moving forward with the DMA, as currently drafted, risks undermining major EU priorities and creating major new trade tensions with the United States. Under these circumstances, the EU should review and significantly amend the DMA and engage with the new U.S. Administration to create a constructive dialogue. Such an approach would be consistent with the EU's approach on other recent trade disputes, such as Boeing-Airbus and global tax reform, and would strengthen the foundation for bilateral and multilateral cooperation between the United States and the EU.