European-Style Online Marketplace Regulation: Good or Bad for American Growth?

ACT
The App Association

Introduction

Policymakers across the globe are grappling with political pressure to "rein in" some of America's most successful online marketplaces. These efforts underappreciate that small businesses benefit from the global reach and scale of these marketplaces, leading to an American comparative advantage in tech-driven products and services. In general, legislative proposals to drastically curtail platform offerings and management would harm small business prospects. This white paper examines platform proposals—in particular, those pending in foreign jurisdictions that target American marketplaces—through a trade and small business lens.

The smartphone-driven entry of social media platforms, curated online retail marketplaces, software platforms like the major app stores, and search platforms has brought a formidable expansion of choices and value for individual consumers and small businesses. The rapid growth of these marketplaces and platforms led to increased scrutiny of competition and consumer welfare in the markets in which they compete. Although momentum behind the "reining in" efforts in Congress has faltered, their well-resourced proponents are appealing to American policymakers to match—or at least enable—the deep, sweeping government interventions in platform-driven markets taking place in other parts of the world. For example, the largest sellers on the major app stores recently banded together with the major players selling on other kinds of marketplaces to urge the Biden Administration to remove protections for American interests in the Indo-Pacific Economic Framework (IPEF) in order to achieve their policy goals overseas.[1] If IPEF includes protections for American companies against trade discrimination, proponents would be less able to recruit IPEF governments to reshape global marketplaces in a way that fits their specific business and revenue goals. Of course, the goals of these special interests conflict with the need to protect our competitive advantage in technological innovation. Global consumers and businesses alike use U.S.-based online marketplaces to buy and sell products. U.S.-based companies in tech-driven industries are succeeding on the global stage and this engine of growth and job creation is worth protecting and supporting.

How did American innovators find themselves in a leading position? In comparison with other nations like China, the United States' secret sauce is in its regulatory humility. We have managed to cultivate online marketplaces' success without major domestic industry subsidies or regulatory advantages versus foreign competitors. Instead, the law has enabled these markets to evolve and flourish with maximum flexibility to meet demand while also protecting competition and consumers. Viewed in this light, measures like the European Union's (EU's) Digital Markets Act (DMA)—which significantly limit certain platforms' flexibility to prevent and respond to consumer harms, including activities considered pro-competitive under American antitrust standards—are an odd fit for the United States. In other words, just because European government officials seek to interject themselves into online marketplaces does not mean governmental control of online marketplace conduct is universally appropriate or advisable. Congress and the Biden Administration must also consider how these efforts might disadvantage our domestic interests. Depending on how their respective governments implement them, government interventions into online marketplaces abroad could raise trade barrier concerns. **This report explores the DMA—and other proposals modeled after it—in light of its trade implications for American industry, including direct impacts on domestic businesses, as well as indirect effects related to privacy and security.**

Trade Issues with the Digital Markets Act

American policymakers should recognize the DMA as a trade barrier intended to discriminate against those viewed by the EU as foreign competitors in the digital economy, in particular American digital innovators. In fact, the United States Trade Representative (USTR) did so recently when it categorized the DMA as a barrier to digital trade in its annual National Trade Estimate.[2] As such, the DMA is antithetical to the free and fair trade principles and conditions that have enabled American success and growth, and the potential of its replication in the United States is a threat to American innovation and job creation. This conclusion emerges through analyses of the DMA from several angles:

- The DMA's "Gatekeeper" Scope
- DMA Prohibitions as Non-Tariff Trade Barriers (NTBs)
- Non-Discrimination Under World Trade Organization Agreements
- DMA Trade Concerns in a Global Context

The DMA's "Gatekeeper" Scope

Even on its face, the scope of the DMA raises discrimination concerns. The DMA applies only to entities the European Commission (EC) deems to be "gatekeepers." In making such a determination, the EC analyzes whether a given entity meets each of these three qualitative criteria: (1) "it has a significant impact on the internal market"; (2) "it provides a core platform service that is an important gateway for business users to reach end users"; and (3) "it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future."[3] However, a set of quantitative factors creates a presumption for the EC that an entity meets the qualitative test: "(1) it had annual EU turnover of at least EUR 7.5 billion in each of the last three financial years, or where its average market capitalization or its equivalent fair market value was at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States; (2) it provides a core platform service that in the last financial year has at least 45 million monthly active end users and at least 10,000 yearly active business users in the EU; and (3) the thresholds in (2) were met in each of the last three financial years."[4]

Although the qualitative factors give the EC wide discretion to deem large businesses "gatekeepers" and subject them to the DMA, much of the debate has focused on the quantitative factors, since those create the presumption that the qualitative factors are met. The presumption appears tailored to apply to American large platform companies while excluding European counterparts with which they compete. Even the largest European companies that operate online marketplaces, such as Spotify, may not meet the criteria: although Spotify's value has fluctuated recently, it remains well below the EUR 75 billion enterprise value threshold. Europe's other largest companies do not appear to meet the qualitative thresholds at this point, so Spotify tends to be cited most in the context of whether the DMA declines to cover all European platforms or just almost all of them.

American policymakers should recognize the DMA as a trade barrier intended to discriminate against those viewed by the EU as foreign competitors in the digital economy, in particular American digital innovators. In fact, the United States Trade Representative (USTR) did so recently when it categorized the DMA as a barrier to Interestingly, Booking.com is frequently cited by EU policymakers as a European company that could be subject to the rules, but it is a fully-owned subsidiary of Booking Holdings headquartered In Connecticut, further underlining the de facto reality that the rules only apply to non-EU firms. Regardless of what the numbers say, there is some evidence that European policymakers intended to cover American companies but not favored European firms. As Member of the European Parliament (MEP) Andreas Schwab (who headed the development of the European Parliament's position on the DMA) told the *Financial Times,* "Let's focus first on the biggest problems, on the biggest bottlenecks. Let's go down the line—one, two, three, four, five—and maybe six with Alibaba. But let's not start with number seven to include a European gatekeeper just to please [U.S. President Joe] Biden."[5]

On top of this legislative history, the DMA targets several online marketplaces and platforms with business models that have very little in common and that compete in completely different markets. The fact that the same DMA provisions apply to both a social media platform—which derives a substantial amount of its revenue from behavioral advertising—and to a retail platform, which derives revenue from sellers and subscribers, is a clear indicator that the scope's purpose is unrelated to the kind of markets in which covered entities compete or whether any harm to customers, competition or the EU Internal Market has occurred. One would expect policymakers to tailor regulations intended to mitigate harms to competition and consumers more to companies that compete in at least the same kinds of markets, such that potential harms arising from their conduct have similar enough attributes to be subject to common rules. In a period of high inflation, reducing competitive pressure between retailers, for example—some of which are regulated under DMA and some of which are not—could be counter-productive.

The evidence from both the legislative intent of the DMA and its quantitative factors suggests that the scope itself of the DMA may raise discrimination questions under a WTO agreement analysis. Under the General Agreement on Trade and Services (GATS), a member government may exhibit discriminatory conduct if it accords to competitors based in another member's jurisdiction "less favourable" treatment than "like services and service suppliers" based domestically. Ironically, one of the DMA's pillars is a prohibition on favorable treatment by a covered platform for its own services offered via the platform. So it may be that the EC is culpable of the same kind of discriminatory conduct the DMA sets out to mitigate and prevent. A notable difference, however, is that the DMA's scope is not limited to companies with demonstrable market power that might enable price increases or output restrictions that would go unpunished by market discipline. The EC, meanwhile, may exercise political power in substantial excess of any form of market power contemplated under EU competition law analyses or American antitrust law doctrine. That is, it can unilaterally affect the output or price of a market or market actors with the adoption of a new law. Therefore, there is at least an equally strong, trade-related public interest in scrutinizing the use of government power to discriminate against certain companies based on their national origin, as there is in pursuing a law to prevent analogous discrimination in online markets.

DMA Prohibitions as Non-Tariff Trade Barriers (NTBs)

Inextricable from the question of whether the scope of the DMA is discriminatory is the problem of whether the content of its requirements imposes unjustifiable burdens on marketplaces and platforms within its scope. Although Member States have yet to adopt WTO agreements specific to competition policy in the context of NTBs, there are relevant analytical and diplomatic frameworks to draw from on this issue. For example, Member States agreed to establish "a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework."[6] Similarly, the recently established U.S.-EU Trade and Technology Council (TTC) provides a bilateral venue for negotiators to address potential NTBs and align policy approaches on a variety of tech-related issues.[7] In fact, one of TTC's subgroups—Working Group 5—specifically covers "data governance and technology platforms."[8] In the U.S.-EU joint statement establishing TTC, the signatories stated that they "recognize the global nature of online platform services and aim to cooperate on the enforcement of our respective policies for ensuring a safe, fair, and open online environment."[9] The recognition of the global nature of online platforms may help guide whether and to what extent a signatory's policy related to online platforms constitutes an NTB or similar barrier under any agreement the parties choose to adopt.

Two sets of DMA obligations may interfere with the global nature of platforms as well as the extent to which they can foster a safe, fair, and open online environment.

First, the DMA's Art. 6(4) would require a covered gatekeeper to "allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper."[10] Two caveats attempt to ameliorate the obvious security and privacy issues this mandate would create. The first is that the gatekeeper "shall not be prevented" from taking measures to ensure that third-party apps or app stores do not "endanger the integrity of the hardware or operating system," but only to the "extent they are strictly necessary and proportionate" and if they are "duly justified by the gatekeeper." The second is that the gatekeeper "shall not be prevented " from applying measures and settings other than defaults that enable end users to effectively protect security against third parties, but again, only "to the extent that they are strictly necessary and proportionate" and "duly justified by the gatekeeper."

Even if the evidentiary burden implied by "strictly necessary and appropriate " and "duly justified" were relatively easy to meet (and it likely is not), limiting the exceptions to threats that "endanger the integrity of the hardware or operating system " is rather narrow and fails to include a wide range of cyber threats and consumer harms. Thus, the presumption in Art. 6(4) weighs heavily against any security measures and certainly precludes the proactive security structure that currently protects small app companies and users, at least presumptively. For example, the major global app stores currently vet apps before approving them for sale, verifying that they limit their data collection activities and access to sensitive device functions like the camera and precise geographic location only to those necessary to serve the apps' purposes.

The stores effectuate removal of the apps that trick consumers into allowing collection of more sensitive data for nefarious purposes by revoking their access, which was only granted in the first place based on having passed the vetting process. Now, if the DMA illegalizes that structure, app stores may be required to allow apps that intentionally harm consumers to appear on the store alongside legitimate developers' software, while also eliminating the technical mechanism app platforms use now to revoke access. Unless these issues are addressed in implementation, the result would greatly increase threats to safety and fairness on the platforms and ultimately, to the global nature of the online platforms themselves. These consequences would likely be a focus of TTC negotiators and other trade venues focused on potential digital trade NTBs.

A second set of requirements in the DMA, Articles 6(7) and 6(10), work together to inadvertently provide an advantage to China-based competitors and bad actors. Specifically, Article 6(7) would require the gatekeeper to provide the same level of interoperability with the operating system and other software and the device features as are provided to the gatekeeper's own offerings.[11] On top of this, Article 6(10) would require the gatekeeper entity to provide "high-quality, continuous and real-time access to . . . non-aggregated data, including personal data . . .."[12] The DMA limits the applicability of the requirement only to personal data that is directly connected to a "use effectuated by the end users in respect of the products or services offered by the relevant busi-ness user . . . and where the end users opt-in to such sharing by giving their consent."[13] Unfortunately, this limitation may not be narrow enough to undo the mandate for gatekeepers to share personal information with platforms or online marketplaces owned by foreign adversary-controlled entities.

Similarly, Article 6(7) may require American gatekeepers to provide the best possible access to European and American consumers' devices, operating systems, and other software on their devices to entities controlled by foreign adversaries. Congress has considered similar mandates, which we have analyzed in more depth, exploring how they would presume the illegality and greatly complicate efforts to remove cyber threats such as SharkBot, Anatsa, and SpyFone.[14] Just as problematically, such must-carry mandates complicate or thwart efforts to remove business users with a repeated and persistent track record of violating consumer protection law with dark patterns and privacy violations.[15] Coupled with Article 6(10)'s requirement to provide continuous access to sensitive information, the mandates could also be a form of mandatory tech transfer from American industry leaders to rival governments that do not protect fundamental human rights and democracy. Viewed in this light, the DMA may constitute an extraordinarily costly barrier to trade for American businesses while also undermining the EU's global diplomatic and economic interests.

Non-Discrimination Under World Trade Organization Agreements

In each of the three main World Trade Organization (WTO) agreements, signatory governments must generally treat domestic and foreign goods and services covered under the agreements equally. Specifically, Article 3 of the General Agreement on Tariffs and Trade (GATT),[16] Article 17 of the General Agreement on Trade and Services (GATS),[17] and Article 3 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS)[18] each outline this non-discrimination obligation. Each of the provisions handles the non-discrimination slightly differently, but the most relevant agreement for purposes of the DMA, GATS, is fairly straightforward in how it likely applies to the regulatory treatment of online marketplaces. Article 17 provides that each Member, " shall accord to services and service suppliers of any other Member . . . treatment no less favourable than that it accords to its own like services and service suppliers."[19] The obligation only applies once a service has entered the EU market, and it is likely that the major American online marketplaces and platforms meet that threshold, given how widespread their use is in Europe.

DMA Trade Concerns in a Global Context

As TTC and IPEF negotiators continue to discuss trade implications of tech-related policies in the EU and the United States, the DMA's potential discriminatory effect on American online marketplaces will undoubtedly be a focus. Given the EC's willingness to assert its own interests in the context of TTC discussions—as seen during EC president Ursula von der Leyen's visit to raise concerns about domestic tax provisions of recently enacted American laws—U.S. policymakers should not shy away from firmly articulating critical national and global interests of American innovators. The objections American negotiators will have run deeper than the fact that the DMA's scope intends to capture only American platforms and that compliance with it is costly. The content of the DMA's restrictions also potentially contravenes the TTC joint statement's call to protect the global nature of these valuable platforms as well as their ability to foster fair and safe online exchanges and commerce. It will also be hard for negotiators to ignore that the imposition of costs specifically on U.S.-based marketplaces would hamper their ability to invest heavily in research and development of cutting-edge technologies. A substantial diminution of our industry leaders' investment incentives would weaken our economic and national security. Protecting against this outcome will be a high priority for U.S. trade officials.

These issues arise at a critical time when several countries are seriously considering similar regulatory frameworks targeting American online marketplaces, including Japan,[20] Australia,[21] India,[22] and Turkey.[23] These proposals have, albeit in slightly different ways, tentatively sought to incorporate some of the fundamental elements of DMA into their frameworks. Not only that, but the EU has also built on the basic DMA framework in further legislative work. For example, EU legislators have begun to carry the "gatekeeper" concept into new legislative proposals like the EU Data Act. Under this new legislation a DMA gatekeeper would be prevented from exercising rights given to other companies, regardless of its competitive strengths or weakness, thus further reducing competitive pressures. The DMA's trade implications, therefore, warrant further study and analysis to better understand why policymakers should resist its wholesale importation to the rest of the globe and to inform its implementation by the EC. U.S. policymakers should take note and push back on the key assumptions that undergird DMA to help government officials around the world evaluate the significant costs interventions like it would impose with open eyes.

Conclusion

A healthy trade relationship requires both an alignment of core principles and a robust exchange of priorities and goals that may be in tension. In this instance, negotiators would be justified in bringing forward the discrimination and trade barrier concerns the DMA raises. A robust discussion of those issues in trade negotiations and diplomatic discussions would benefit all parties and strengthen the mutual benefit the United States and the EU derive from each other and the rest of the world.

Taking the policy and its legislative history at face value, the DMA must be recognized as a trade barrier intended to discriminate against those viewed by the EU as foreign competitors in the digital economy, in particular American digital innovators. As such, the DMA is antithetical to the free and fair trade principles and conditions that have enabled American success and growth, and the potential of its replication in the United States is a threat to American innovation and job creation.

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