



22-2 The European Union Renews Its Offensive Against US Technology Firms

Gary Clyde Hufbauer and Megan Hogan

February 2022

Revised February 22, 2022 to correct errors in table 1 on the status of five firms: Deutsche Telekom, Yahoo, Vivendi, Zalando, and Zoom.

INTRODUCTION

The European Commission and its leading member countries have raised concerns about US technology firms for many years. The focus of their anxiety has been protecting the privacy of European citizens, ensuring consumer choices, and collecting taxes from profits made by US companies in Europe. Recently, European leaders have claimed that Google, Amazon, Facebook, Apple, and other US tech firms are so successful that they preclude challenges by European competitors.

Europe has now transitioned from voicing these fears to undertaking a frontal attack on US firms. The European Union's proposed Digital Markets Act (DMA) contemplates extensive regulation of "gatekeeper" digital platforms (which we define later), scoped to include large US tech firms but few European competitors. The goal is to confer competitive advantage on European digital firms, breaching the EU commitment to national treatment of foreign firms, violating their intellectual property rights, and imposing high expenses on the "gatekeepers."

At the same time, France—with its longstanding antipathy toward giant US multinationals dating back to the economic nationalist campaign of Jean-Jacques Servan-Schreiber in the 1960s—is planning to enact its own steep barriers against US and other foreign cloud services. French officials have picked up the theme spreading in other countries, notably India and China, that **only local firms** can be "trusted" to handle and store data on their servers. The proposed French barriers disregard commitments made to the World Trade Organization (WTO) on national treatment and government procurement obligations.

The technology giants are not uniformly beloved in the United States, where Congress has found bipartisan support for new regulation that would restrain their power. A Senate Finance Committee panel [approved a bill](#) that would prohibit platforms from giving their own products advantages on search engines. Other Congressional voices have been raised [against Section 230 of the Communications Decency Act of 1996](#), which protects platforms from liability for

Gary Clyde Hufbauer, nonresident senior fellow at the Peterson Institute for International Economics, was the Institute's Reginald Jones Senior Fellow from 1992 to January 2018.

Megan Hogan, research analyst at the Peterson Institute for International Economics, is the founder and codirector of DisinfoLab, a student-led research lab based at the College of William & Mary's Global Research Institute.

Note: Some of the companies cited in this Policy Brief are past or present contributors to the Peterson Institute for International Economics, including Google, Amazon, and Facebook. They had no role in funding or approving this paper for publication.

both posting and refusing to post third-party material. With bipartisan votes, the Senate Judiciary Committee, chaired by Senator Amy Klobuchar (D-MN), approved its own measure to rein in Big Tech companies. But unlike the DMA, these proposals apply equally to US and foreign tech firms.¹

INITIAL BATTLES

Starting in 2017, after years of investigation, European Internal Market Commissioner Margrethe Vestager [imposed a series of fines on Google totaling \\$9.5 billion](#), claiming “abuse of dominant position,” a European strand of competition law. The charge is designed both to protect competitors of large firms and to give consumers more choice. Commissioner Vestager launched [a similar case against Amazon](#) in 2020 and opened investigations against [Facebook](#) and [Apple](#) in 2021. All of these cases have been appealed. In November 2021, the EU General Court (the second tier under the European Court of Justice) [dismissed Google’s appeal](#) with respect to one of the fines; further appeals by Google and other tech firms are pending. Meanwhile, the European Commission has become dissatisfied with the slow pace of resolving competition law actions and the difficulty of proving [abuse of dominant position](#).

Another front against US tech was a series of digital services taxes (DSTs), [endorsed in concept](#) by the European Commission and imposed by individual EU members—Austria, [France](#), Hungary, Italy, Poland, Portugal, Spain, Turkey, and the United Kingdom—starting in 2020. [Others are also planned](#). The DSTs are designed to reach US tech giants and perhaps a few large EU firms (namely, Spotify and SAP) but not smaller EU firms. They therefore violate both the WTO principle of national treatment and bilateral tax treaties. Faced with US trade retaliation, [an agreement under OECD auspices](#) put a stop to new DSTs until January 2024 but did not roll back existing European DSTs. Under the agreement, the quid pro quo for repeal of the DSTs is enactment by the US Congress and other legislatures of laws that would attribute part of the tax base of large firms to the countries in which they sell rather than the countries in which they produce (“Pillar One” in OECD jargon). Given the low probability that the US Congress will enact Pillar One, DSTs are likely to generate future transatlantic friction.

Concurrently with the DMA, the European Commission submitted the [Digital Services Act \(DSA\)](#) to the European Parliament and the Council in December 2020. Unlike the DMA, which governs digital platforms with a systemic role in the internal market, the DSA addresses the legal responsibilities of online intermediaries and platforms—such as social networks, app stores, and online travel and accommodation platforms—regarding user content and privacy. On January 20, 2022, the European Parliament [voted overwhelmingly](#) to give initial approval to the DSA, endorsing provisions on content moderation, accountability, and transparency of targeted advertising practices and banning “dark patterns” (deceptive tactics online platforms use to lure users to pay for services and products). The approved legislation is Europe’s most aggressive attempt yet to regulate technology

Unlike the DMA, US proposals to rein in Big Tech companies apply equally to US and foreign tech firms.

¹ A later version of the Klobuchar bill, the [American Innovation and Choice Online Act \(AICOA\)](#), would regulate “certain large online platforms,” barring them from preferencing their own products on their platforms or unfairly limiting “competing products.” It appears to regulate US firms primarily if not exclusively. A managers’ amendment was added on January 19, 2022 that could cover at most one Chinese company (ByteDance, which owns the social media platform TikTok), leaving foreign rivals such as Alibaba, Baidu, and Tencent out of scope.

companies. It would force companies to remove content considered illegal in the country in which it is viewed, prohibit companies from targeting advertisements toward children, and allow Europeans both to opt out of targeted advertising and to ask platforms which personal characteristics led them to become advertising targets. The approved text is awaiting negotiations between the European Parliament and EU governments. Some proposed DSA measures may raise US concerns because they violate trade secrets and impose undue costs on tech firms.

THE DIGITAL MARKETS ACT

The European Commission released its [draft DMA](#) in December 2020, together with an [Impact Assessment](#) study. With few changes, the DMA is now awaiting enactment by the European Parliament. In its current form, the DMA violates core international obligations, although forceful US protests might still yield significant changes. At stake are national treatment commitments under the WTO's General Agreement on Trade in Services (GATS) and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). In addition, the draft DMA breaches the protection of trade secrets afforded to US firms by the TRIPS Agreement.

Gatekeeper Scope

The DMA establishes a two-part test for designating a digital platform a gatekeeper. First, the firm must perform a “core platform service” in the European Union, defined as online intermediation, online search, social networking, video sharing, electronic communication, cloud services, or online advertising. Second, the firm must have a significant impact on the EU internal market, serve as an important gateway between business users and end-users, and enjoy an entrenched and durable position. The DMA establishes a rebuttable presumption that the second test is met if the firm reports an annual turnover of €6.5 billion or more and a fair market value of €65 billion or more and did business in at least three Member States. The Commission may also designate a firm a gatekeeper on the basis of various quantitative criteria.

Although the definition of gatekeeper may not equate to *de jure* discrimination against US tech firms, surrounding events almost prove discrimination *de facto*:

- The Commission's own [Explanatory Memorandum](#) asserts that “a small number of large online platforms capture the biggest share of the overall value generated” in the digital economy and asserts that these platforms “have substantial control over the access to, and are entrenched in” digital markets, leading to adverse effects on EU consumers.
- The Commission's [Inception Impact Assessment](#) issued in June 2020 states that a few large platforms are obstructing the “EU's technology sovereignty.” The [Impact Assessment Report](#) issued in December 2020 provided a graph of market capitalization of solely US firms. The same day, Commissioner Thierry Breton tweeted a political cartoon showing himself and Commissioner Vestager holding a pitchfork piercing the logos of Apple, Facebook, and Google.
- The Commission's staff recommendation for a “high” gatekeeper threshold would single out just 7 firms—5 US platforms and 2 Chinese platforms—

In its current form, the DMA violates core international obligations, although forceful US protests might still yield significant changes.

from roughly 10,000 online firms operating in Europe. European companies that are direct competitors of the likely targets—namely, Deutsche Telekom (cloud service), Ahold Delhaize (online marketplace), and Criteo (advertising technology)—will very likely not meet the gatekeeper thresholds.

- Statements by five members of the European Parliament also suggest discrimination. They include the following: “We must state the truth: These proposals target US companies” (Dita Charanzova, Czech Republic); “Eternally long competition proceedings against Google and other platform operators” demonstrate that “stricter rules with teeth are needed” (Markus Ferber, Germany); “The EU plans mean less sales and profits for [American Internet companies]” (Axel Voss, Germany); “Fines on [Google, Apple, Facebook and Amazon] haven’t changed anything. It’s good that we impose structural measures [but we] should be acting in a more decisive manner” (Nicholas Gonzales Casares, Spain).

In decided cases, the WTO Dispute Settlement Body has strictly interpreted the national treatment commitment. De facto discrimination is just as great an offense as de jure discrimination. Yet at its inception, the DMA singles out US tech firms for the onerous label of “gatekeepers.”

Table 1 lists our best guess at which American and European companies could be captured under the European Commission’s definition of a gatekeeper digital platform based on average market capitalization and the number of monthly active end-users and business users.² Of the 24 firms selected for this analysis, 11 would be labeled gatekeepers (10 American and 1 European) and 13 firms would not (8 American, 5 European). Five firms (Ahold Delhaize of the Netherlands, Vivendi of France, and Expedia, Slack, and Yahoo of the United States) would not meet all three criteria of part two of the DMA’s gatekeeper test. One firm (Netflix of the United States) would not meet the “important gateway” and “entrenched/durable position” criteria. One firm (Uber of the United States) would not meet the “entrenched/durable position” criterion. Six firms (Criteo of France, Zalando of Germany, Spotify of Sweden, and eBay, Twitter, and Zoom of the United States) would not meet the “significant impact” market capitalization requirement of €65 billion or more. [Bruegel has conducted a similar analysis](#) of the DMA but excludes Ahold Delhaize and Criteo.

The DMA clearly discriminates against American technology firms: Only one of the 12 potential “gatekeepers”—SAP—is a European firm, and even so, its designation of “gatekeeper” is contested. There is debate whether cloud service providers such as Oracle and SAP are designated as “gatekeepers” under the European Commission’s proposed DMA. In a February 2022 letter, four major associations for cloud infrastructure service providers (CISPE.cloud, Danish Cloud Community, Dutch Cloud Community, and PlayFrance.Digital) urged EU lawmakers to designate legacy software platforms that provide their own cloud infrastructure (such as SAP) as “gatekeepers” in the proposed DMA.

From a European perspective, the “big boy” defense may say it all, but that is no justification for the United States to accept de facto discrimination and abandon its claim to national treatment and intellectual property rights for US firms operating abroad.

2 Table 1 has been revised since it first appeared in this Policy Brief to correct an error on the status of five firms: Deutsche Telekom, Yahoo, Vivendi, Zalando, and Zoom. Contrary to what was previously reported in the earlier version of this Policy Brief, Yahoo, Vivendi, Zalando, and Zoom did not meet all the DMA’s “gatekeeper” criteria. Deutsche Telekom was excluded from the analysis as regulated electronic communications networks and services are explicitly exempted from the DMA, as indicated by Article 1(3). The authors regret the errors.

Table 1
Digital platforms possibly designated as “gatekeepers” under the European Commission’s proposal

Company	Country of origin	Part 1			Part 2			Gatekeeper?
		Core platform service ^a	Significant impact ^b	Important gateway ^c	Entrenched/durable position ^d			
Ahold Delhaize	Netherlands	Online intermediation	X	X	X	No		
Airbnb	United States	Online intermediation	✓	✓	✓	Yes		
Amazon	United States	Online intermediation	✓	✓	✓	Yes		
Apple	United States	Operating systems	✓	✓	✓	Yes		
Booking Holdings	United States	Online intermediation	✓	✓	✓	Yes		
Criteo	France	Advertising services	X	✓	✓	No		
eBay	United States	Online intermediation	X	✓	✓	No		
Expedia	United States	Online intermediation	X	X	X	No		
Facebook	United States	Social networking	✓	✓	✓	Yes		
Google	United States	Online search engine	✓	✓	✓	Yes		
Microsoft	United States	Operating systems	✓	✓	✓	Yes		
Netflix	United States	Video-sharing	✓	X	X	No		
Oracle	United States	Cloud services ^e	✓	✓	✓	Yes		
PayPal	United States	Online intermediation ^f	✓	✓	✓	Yes		
Salesforce	United States	Cloud services ^e	✓	✓	✓	Yes		
SAP	Germany	Cloud services ^e	✓	✓	✓	Yes		

Company	Country of origin		Part 1		Part 2		Gatekeeper?
			Core platform service ^a	Significant impact ^b	Important gateway ^c	Entrenched/durable position ^d	
Slack	United States	United States	Interpersonal communication	X	X	X	No
Spotify	Sweden	Sweden	Social networking	X	✓	✓	No
Twitter	United States	United States	Social networking	X	X	X	No
Uber	United States	United States	Online intermediation	✓	✓	X	No
Vivendi	France	France	Video-sharing	X	X	X	No
Yahoo	United States	United States	Online search engine	X	X	X	No
Zalando	Germany	Germany	Online intermediation	X	✓	X	No
Zoom	United States	United States	Interpersonal communication	X	✓	X	No

a. Core platform services include online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, and advertising services provided by a provider of any of the services listed before.

b. A company has “significant impact” if the undertaking to which it belongs achieves an annual European Economic Area turnover equal to or above €6.5 billion in the last three financial years or the average market capitalization or equivalent fair market value of the undertaking to which it belongs amounted to at least €65 billion in the last financial year, and it provides a core platform service in at least three Member States.

c. A company is an “important gateway” if it provides a core platform service that has more than 45 million monthly active end users established or located in the European Union and more than 10,000 yearly active business users established in the Union in the last financial year.

d. A company has an “entrenched and durable position” if the thresholds for an “important gateway” were met in each of the last three financial years.

e. It is contested whether cloud service providers such as Oracle, Salesforce, and SAP are designated as “gatekeepers” under the European Commission’s proposed Digital Markets Act (DMA). Though cloud services are a “core platform service,” the technology groups CISPE.cloud, Danish Cloud Community, Dutch Cloud Community, and PlayFrance.Digital urged EU lawmakers in a February 2022 letter to designate legacy software platforms (including Oracle and SAP) as “gatekeepers” in the European Commission’s proposed DMA.

f. It is contested whether PayPal performs a “core platform service,” as financial services are not considered “core platform services” while online intermediation services are. Note: Monthly active EU user data and monthly active EU business user data are not readily available online. We frequently determined whether or not a company would meet the “important gateway” and “entrenched/durable position” criteria using global monthly active user data or other publicly available data. See our list of sources here for more detail. As of February 2022, it is very likely that Andreas Schwab’s or the European Parliament’s proposal will prevail over the European Commission’s proposal, meaning that the number of digital platforms designated as “gatekeepers” will likely be fewer than those listed in this table. According to Bruegel, under the Schwab proposal, only 7 American firms will be designated as “gatekeepers”: Amazon, Apple, Booking Holdings, Facebook, Google, Microsoft, and Yahoo (Verizon).

A common defense of discrimination against American technology firms is that they are the “big boys” and accordingly the natural targets. In France, this sentiment dates back at least to 1967, when Servan-Schriver published *Le Défi Américain (The American Challenge)*. From a European perspective, the “big boy” defense may say it all, but that is no justification for the United States to accept de facto discrimination and abandon its claim to national treatment and intellectual property rights for US firms operating abroad. Moreover, the European Commission’s proposed DMA does not exclusively target the tech giants of Google, Amazon, Facebook, Apple, and Microsoft. It would also target at least five smaller (albeit huge) American technology firms: Airbnb, Booking Holdings, Oracle, PayPal, and Salesforce. As our analysis is not exhaustive, the actual number of American firms affected by the European Commission’s proposed DMA will likely be higher.³

Gatekeeper Obligations

The DMA imposes multiple requirements on firms designated as gatekeepers. We focus on those that most obviously breach the European Union’s obligation to ensure “no less favorable treatment” to foreign suppliers of core platform services and its obligation to protect intellectual property.

Article 5 of the DMA recites seven “self-executing” obligations that gatekeepers must observe or pay fines. Examples include the following:

- Individual users must consent to have their personal data from one service combined with data from another service.
- Business users must be able to offer their products on another platform with different conditions.
- Subscriptions or user registrations may not be bundled with different services.

These obligations may be well and good, but, if they are, they should apply with equal force to EU firms that compete with gatekeepers.

Article 6(1) requirements—11 in total—are more onerous. Most objectionable is Article 6(1)(j) of the DMA, which requires gatekeepers to provide “any third-party providers of online search services” access to “ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper.” This article would require US tech firms to turn over valuable trade secrets to their European competitors, which face no such requirement, as they are not gatekeepers. Article 6(1)(j) violates three obligations set forth in the TRIPS Agreement: Article 2.1, incorporating Article 10*bis* of the

³ At the time of publication of this Policy Brief (February 2022), two proposals appear likely to prevail over the European Commission’s proposed DMA: a proposal by Member of the European Parliament Andreas Schwab and a proposal by the European Parliament. Both proposals may impose more limits on the number of digital platforms designated as gatekeepers, targeting fewer such firms than those listed above. Schwab’s proposal would raise the quantitative threshold on average market capitalization from €65 billion to €100 billion and on European Economic Area turnover from €6.5 billion to €10 billion. According to Bruegel, under the Schwab proposal, only 7 American firms would be designated as “gatekeepers”: Amazon, Apple, Booking Holdings, Facebook, Google, Microsoft, and Yahoo (Verizon).

Paris Convention of (1967), prohibiting “unfair competition”; Article 39.2, which protects “undisclosed information” (i.e., trade secrets); and Article 3, which guarantees national treatment.

Other Article 6(1) gatekeeper obligations are also suspect for breaching the national treatment guarantee of TRIPS Article 3, as European competitors may not be subject to equivalent obligations. For example, gatekeepers must allow third-party apps to be installed outside the core platform service, gatekeepers must refrain from treating their products and services more favorably in platform rankings, and gatekeepers must give advertisers and publishers free access to their performance-measuring tools.

FRENCH PROTECTION OF CLOUD SERVICES

The French national cybersecurity agency—the Agence nationale de la sécurité des systèmes d’information (ANSSI)—is in the midst of revising its cybersecurity certification program, known as SecNumCloud, to exclude foreign cloud firms from serving government agencies and some 600 French firms that provide “vital” services. The rationale is that foreign firms cannot be “trusted” to handle or store data, a view very similar to that of the Chinese. In addition to ownership and board requirements that preclude majority foreign ownership, the proposed regulations would require cloud firms to store and process all customer and technical data in the European Union and carry out supervision and administration within the European Union. These requirements essentially undercut the advantages inherent in the distributed nature of cloud services. The core message to US tech firms that offer cloud services: Keep out.

French protection arguably violates EU national treatment obligations with respect to “computers and related services” in both the [GATS](#) and the [WTO Government Procurement Agreement](#). The legal question is whether cloud services are covered. Although they clearly fall within the domain of “computers and related services,” they did not exist when the agreements were negotiated. As a last resort, France could rely on the national security exception to trade commitments—an exception that was broadened almost beyond recognition by President Donald Trump’s tariffs on steel and aluminum and that President Joseph R. Biden Jr. has so far not revoked.

Unlike France and China, the United States is open to using foreign firms for cloud and other digital services. Though data localization has been debated by US policymakers over the past five years, the practice was forbidden under the (now obsolete) North American Free Trade Agreement (NAFTA) and is banned by the United States-Mexico-Canada Agreement (USMCA), indicating that the United States “trusts” foreign firms in a way that France and China do not. The Federal Risk and Authorization Management Program’s [list of compliant and authorized vendors and services](#) includes several foreign firms, such as CGI (headquartered in Montreal); BlackBerry (headquartered in Waterloo, Canada); and Huddle (headquartered in London). Although American tech firms are popular in US government procurement, they do not have a lock against foreign competitors.

Relatively open US government procurement of computer services furnishes no answer, however, to another central EU complaint: the technical ability of

The DMA would require US tech firms to turn over valuable trade secrets to their European competitors, which face no such requirement, as they are not gatekeepers.

the National Security Agency (NSA) to access personal data stored on Big Tech servers, as [Edward Snowden revealed](#) in 2013. In the eyes of many Europeans, as well as the European Court of Justice, the porosity of Big Tech to security surveillance is reason enough to bar US firms from transatlantic transfers of personal data—and more generally to circumscribe their activities in Europe.

Three practical considerations argue against broad EU commercial barriers imposed under a national security flag. First, it seems likely that British and European intelligence agencies possess technical abilities on par with those of the NSA; no government foresees surveillance when confronted with terrorism and other existential threats. Second, US tech firms have now declared that they will cooperate with NSA demands only when ordered to do so by a competent court (normally the Foreign Intelligence Surveillance Court [FISA]). Third, with the advent of quantum computing, it is only a matter of time before the NSA can access encrypted personal data stored on European, Chinese, Russian, and other foreign servers. Whether these practical considerations, possibly buttressed by understandings among allied intelligence agencies, will make a difference to the commercial landscape remains to be seen.

US GOVERNMENT RESPONSE

On June 9, 2021, the National Security Council [complained to the European Commission](#) about the discriminatory tone of the draft DMA, noting that the European Parliament rapporteur had suggested that the act should unquestionably target the five biggest US firms. Commerce Secretary Gina Raimondo spoke privately to European Commissioner Thierry Breton, with no effect. At a US Chamber of Commerce meeting on December 10, 2021, Secretary Raimondo publicly expressed “[serious concerns](#)” about the DMA, prompting Commissioner Breton to state that he was “[a little bit astonished](#)” that Raimondo was campaigning for Big Tech.

Judging from this exchange, a much stronger US response will be needed to deter the European Union’s campaign against US tech firms. On February 1, 2022, Senate Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Mike Crapo (R-ID) [sent a joint letter](#) to President Biden calling for a strong response to the DMA and raising concerns about the DSA. One way the United States could respond would be to invoke Section 301 of the Trade Act of 1974, which authorizes retaliatory restrictions on trading partners that impose measures that are “unreasonable or discriminatory or burden or restrict US commerce.” It is worth noting, [as Rob Atkinson has done](#), that the European Union enjoyed a trade surplus of \$130 billion with the United States in 2019, much of it high-tech products, while the US bilateral surplus in digital trade with the European Union was under \$2 billion.

US Trade Representative Katherine Tai must either fashion an effective retort to France’s localization of cloud services or concede that data localization is here to stay, not only in China and developing economies but also in Europe and perhaps other advanced economies. Preventing the proliferation of data localization policies is a major challenge for US policy, especially as President Biden has proclaimed Buy America as the touchstone of all federal expenditure and has not reversed President Trump’s abuse of the national security

In the eyes of many Europeans...the porosity of Big Tech to security surveillance is reason enough to bar US firms from transatlantic transfers of personal data....

exception to trade obligations. If President Biden decides to mount a serious campaign on behalf of open markets and US commercial rights abroad, he must simultaneously reform practices at home.

The United States is eager to enlist European cooperation in the nascent Cold War with China and to present a united front against Russian aggression. One costly and unnecessary casualty of larger geopolitical goals could be weakened US defense not only of tech firms but also of other commercial interests.



© 2022 Peterson Institute for International Economics. All rights reserved.

This publication has been subjected to a prepublication peer review intended to ensure analytical quality. The views expressed are those of the authors. This publication is part of the overall program of the Peterson Institute for International Economics, as endorsed by its Board of Directors, but it does not necessarily reflect the views of individual members of the Board or of the Institute's staff or management.

The Peterson Institute for International Economics is a private nonpartisan, nonprofit institution for rigorous, intellectually open, and indepth study and discussion of international economic policy. Its purpose is to identify and analyze important issues to make globalization beneficial and sustainable for the people of the United States and the world, and then to develop and communicate practical new approaches for dealing with them. Its work is funded by a highly diverse group of philanthropic foundations, private corporations, and interested individuals, as well as income on its capital fund. About 35 percent of the Institute's resources in its latest fiscal year were provided by contributors from outside the United States.

A list of all financial supporters is posted at
<https://piie.com/sites/default/files/supporters.pdf>.