

“Digital Trade” Doublespeak: Big Tech’s Hijack of Trade Lingo to Attack Anti-Monopoly and Competition Policies

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Introduction

As digital mega-platforms have continued to grow in size and expand their influence over every aspect of peoples' public and private lives, U.S. policymakers and those worldwide have begun wrestling with thorny questions of digital governance. Regulatory efforts span from data privacy and security to artificial intelligence transparency and accountability to labor rights for gig workers, but there is one area where Big Tech is fighting tooth and nail: policies targeting their monopoly power and promoting fair competition. Predatory behavior and lax antitrust enforcement,¹ along with network effects and “winner-takes-all” dynamics in digital markets,² have led to monopolies in the digital services that the vast majority of people use daily.

After years of abuses, and advocacy from smaller businesses, consumers, and workers in response, policymakers worldwide have begun introducing policies to rein in Big Tech's dominance over the digital economy. Some of the most common measures aim at increasing competition by establishing strict rules for app store operators' duopoly; forbidding certain anticompetitive practices from digital “gatekeepers;” addressing the power imbalance between media outlets and the mega-platforms that currently determine what kind of content ends up reaching the public; and stopping anticompetitive behavior before it happens.

Big Tech is employing all tactics to fight against these efforts. Digital firms have deployed thousands of lobbyists to sway legislators and regulators. Industry groups and the organizations and academics they fund circulate throughout every major policy center repeating Big Tech's talking points against new regulations. Executives and former lobbyists of these companies cycle back and forth between these firms and government positions, using the revolving door to try to maintain lax privacy standards, to attack antimonopoly initiatives in other countries, and to counter limitations on data mobility through international negotiations.³

However, an under-the-radar strategy has also emerged. Big Tech has begun to co-opt trade negotiating venues worldwide and hijack international trade law jargon to use trade enforcement mechanisms to attack other countries' policies that constrain digital platforms' monopolistic size and anticompetitive behavior.

1 Matt Stoller, Sarah Miller and Zephyr Teachout, “Addressing Facebook and Google's Harms Through a Regulated Competition Approach,” American Economic Liberties Project. April 10, 2020. Available at: <https://www.economicliberties.us/our-work/addressing-facebook-and-googles-harms-through-a-regulated-competition-approach/>; Matt Stoller, Pat Garofalo and Olivia Webb, “Understanding Amazon: Making the 21st-Century Gatekeeper Safe for Democracy,” American Economic Liberties Project. July 24, 2020. Available at: <https://www.economicliberties.us/our-work/understanding-amazon-making-the-21st-century-gatekeeper-safe-for-democracy/>.

2 Mariana Mazzucato, “Preventing Digital Feudalism,” Project Syndicate. Oct. 2, 2019. Available at: <https://www.project-syndicate.org/commentary/platform-economy-digital-feudalism-by-mariana-mazzucato-2019-10>. The House Antitrust Report on Big Tech, Oct. 6, 2020. Available at: <https://www.nytimes.com/interactive/2020/10/06/technology/house-antitrust-report-big-tech.html>.

3 Mekedas Belayneh, “Big Tech's Back Door to Digital Trade Rules,” The American Prospect. June 14, 2022. Available at: <https://prospect.org/power/big-techs-back-door-to-digital-trade-rules-commerce-gina-raimondo/>.

When deployed in the context of ongoing trade negotiations, this strategy is also aimed at preventing regulation in the United States by locking in binding constraints on domestic policy within the rules of international trade pacts. Simultaneously, Big Tech is seeking to harness U.S. domestic trade enforcement tools to try to roll back or chill establishment of strong policies in other countries. Getting such policies in other nations labeled as illegal trade barriers would also undermine the domestic push for greater regulation in the United States. This ploy only stands a chance to be effective because of its distracting “trade” camouflage.

The inception of so-called “digital trade” rules in international agreements is still in an early stage, particularly at the multilateral level, yet such terms already have been included in agreements signed by the United States and some other countries.⁴ One of the terms pushed by Big Tech in trade-pact negotiating venues is based on hijacking a bedrock trade concept known as “non-discrimination.”

Non-discrimination is as old as the first trade agreements and, in its most basic form, requires countries to treat products the same regardless of their national origin. When applied to trade in goods, that means a country must provide an imported good with the same treatment it gives to its own producers’ “like” goods and also not treat the imported goods from one country differently than from another country. For instance, if a country requires driver and passenger dashboard airbags in domestic automobiles, it can do the same for imported cars, but cannot only require that imported cars also have side impact airbags, or that imports from Japan get the domestic standard but imports from Korea get a tougher one. The idea was that “like goods” should be allowed to compete on equal terms regardless of where they were made. Thus, initially, the non-discrimination standard especially targeted facially discriminatory policies – or those that clearly had a discriminatory intent. However, as trade-pact rules expanded into setting policies that apply to the service sector and other areas of regulation that had previously been the sole bailiwick of domestic policy, commercial interests pushed to expand the

non-discrimination standard. Most trade agreements signed since the 1990s include language that can be used to attack origin-neutral policies that may have a disproportionate *effect* on a set of products of foreign origin. And even before trade pacts included broader language, trade-pact enforcement panels contributed to the perilous expansion of the non-discrimination standard by judging facially neutral policies with inadvertent differential impacts as illegal trade barriers.⁵

Big Tech is trying to take advantage of those extensive interpretations and rules to establish new grounds to attack policies around the world that attempt to regulate

⁴ See International Trade Union Confederation, *E-Commerce Free Trade Agreements, Digital Chapters and the Impact on Labour*. (London, 2019). Available at: https://www.ituc-csi.org/IMG/pdf/digital_chapters_and_the_impact_on_labour_en.pdf.

⁵ For instance, in 1992, a panel under the General Agreement on Tariffs and Trade (GATT) determined that certain tax benefits provided to microbreweries in the United States were inconsistent with GATT Article III (national treatment) because larger Canadian beer producers could not access them. U.S. large breweries were also ineligible. See: Panel Report, United States – Measures Affecting Alcoholic and Malt Beverages, DS23/R, adopted 19 June 1992, BISD 39S/206. Available at: <https://worldtradelaw.net/document.php?id=reports/gattpanels/usmaltbeverages.pdf>.

the most dominant digital corporations. “Non-discrimination” provisions in existing “digital trade” deals⁶ and in a proposed World Trade Organization-adjacent multilateral “e-commerce” agreement⁷ forbid domestic digital policies that may have a discriminatory effect. That lingo captures neutral policies that may have a larger impact on the largest firms simply because they are large. That is to say, even when the predominant underlying motive of a policy is not related to the place from which digital services are provided or the country of incorporation of said firms, a neutral domestic policy may have greater effect on firms that dominate a market. For example, consider a domestic policy that requires *all domestic and foreign* online ride-hailing services to register as taxi companies and meet policies applicable to other such firms. This neutral policy would not be considered discriminatory on its face, but it would have a greater effect on, say, Uber, if Uber had the largest share of a country’s online ride-hailing services.

This report documents the way in which Big Tech has used trade lingo to claim “discriminatory” treatment and seek enforcement and penalties against governments that have adopted or have even discussed the implementation of competition policies that may have a larger impact on dominant digital firms due to their size and role in the market – not their nationality. Since the Big Tech firms have not yet achieved their goal of deploying corporate-led “digital trade” deals worldwide, today these firms are using the somewhat less intrusive e-commerce chapters negotiated by the United States in the 2000s – when the digital economy was merely awakening – and also seeking to employ domestic trade enforcement tools for their attacks.

A favored vehicle for this approach has been the U.S. National Trade Estimate (NTE) report. The NTE is a statutorily required annual review of what ostensibly are trade-partner countries’ illegal trade barriers that is issued by the Office of the United States Trade Representative (USTR). The NTE, which is based in part on policies brought to USTR’s attention through a request for private sector input, has been used by corporations as a hit list. For years, the NTE has been used to attack as trade barriers other countries’ public interest policies that various industries dislike. The NTE is, effectively, a government-sponsored corporate hit list arming industry interests to attack similar policies domestically. The Internet Tax Freedom Act added “barriers to United States electronic commerce” to the list of policies under the purview of the NTE in 1998. This opened the door for Big Tech interests to demand that U.S. government officials elevate their private peeves against digital governance policies adopted by other nations into official U.S. trade policy.

6 See, for instance, Article 19.4 of the United States-Mexico-Canada Agreement: “Non-Discriminatory Treatment of Digital Products: No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.”

7 WTO Electronic Commerce Negotiations Consolidated Negotiating Text, Sep. 2021. Available at: https://www.bilaterals.org/IMG/pdf/wto_plurilateral_ecommerce_draft_consolidated_text_september_2021.pdf

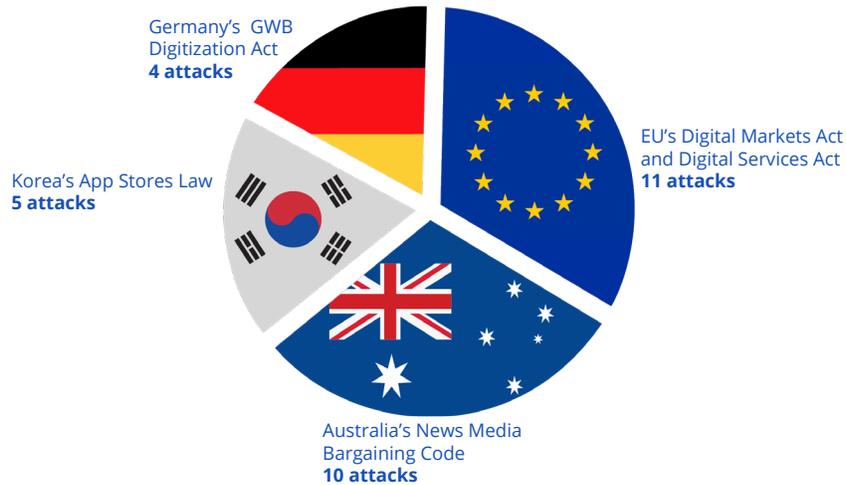
The way in which digital firms and their trade associations have tried to weaponize this review to attack pro-competition policies and label them as “discriminatory” or “barriers to digital trade” provides a preview of what they could do if Big-Tech-rigged “digital trade” rules are expanded in bilateral, regional, and multilateral trade agreements. Particularly dangerous would be the inclusion of broad, open-ended non-discrimination clauses in these deals. In order to carry out this analysis, we identified four pioneering policies around the world that are revolutionizing digital governance from a competition policy perspective:

- i. Korea’s promotion of increased competition in the app market by requiring that app stores allow diverse payment systems (not only their own) and do not forbid app developers from selling on other platforms (Korea’s App Stores Law);
- ii. Australia’s remedy for Big Tech platforms’ monopolization of ad revenue and resulting decimation of local journalism by creating the conditions necessary for digital platforms to pay for the news they distribute (Australia’s News Media Bargaining Code);
- iii. the European Union’s crackdown against abusive behavior by dominant digital firms and establishment of consumer rights online (EU’s Digital Markets Act and Digital Services Act);
- iv. Germany’s competition law revamp that proactively prevents anticompetitive actions by the biggest digital players (Germany’s GWB Digitization Act).

Countries around the world are considering adoption of similar policies, including the United States. As forerunners in the global effort to rein in Big Tech, each of these policy initiatives have come under fierce attack by the digital mega-platforms, including myriad attacks using the NTE process. The report identifies 30 NTE industry comments that used trade jargon to criticize cutting-edge competition policies. A complete list of these submissions can be found in the annex to this report.

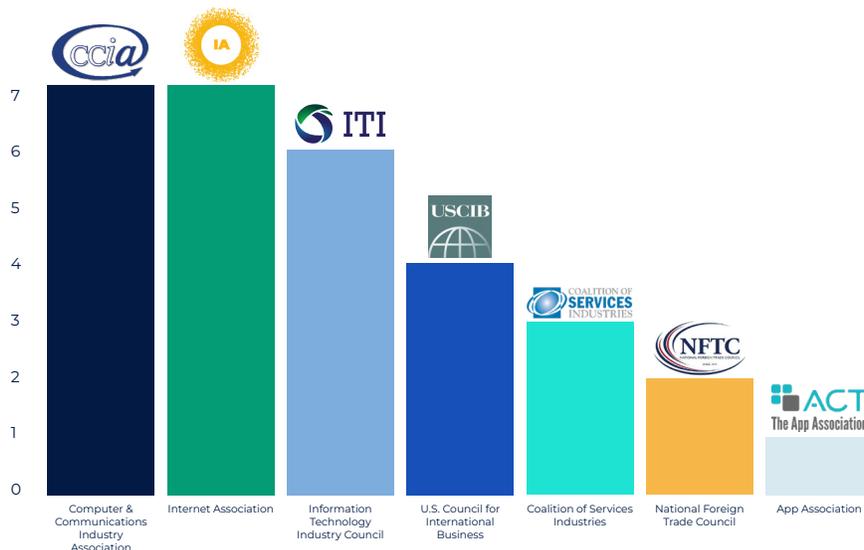
The policies that received more attacks were the EU’s Digital Markets Act and Digital Services Act with 11 comments, followed by Australia’s News Media Bargaining Code with 10 comments, Korea’s App Stores Law with five comments, and Germany’s GWB Digitization Act with four comments. This indicates that Big Tech interests are consolidating their well-coordinated attacks on the most expansive policies revolutionizing antitrust law to protect their free ability to crush competitors and abuse smaller companies.

Number of NTE Attacks Against Global Digital Competition Policies



As for the organizations, the Computer & Communications Industry Association and the now-defunct Internet Association were the groups that most often used trade lingo to attack competition policies adopted by other nations. These associations both include Amazon, Google, Microsoft, and other Big Tech companies among their membership. Other organizations that routinely used their NTE submissions to challenge the analyzed policies using trade “non-discrimination” language are the Information Technology Industry Council, the U.S. Council for International Business, the Coalition of Services Industries, the National Foreign Trade Council, and the App Association.

Number of NTE Attacks Against Digital Competition Policies by Organization



To construct a thorough inventory of those attacks, we reviewed each industry submission for the 2021 and 2022 versions of the NTE reports – hence, submissions filed in 2020 and 2021 – and analyzed how they impacted the U.S. government positioning vis-à-vis the targeted policies. We also explain how the U.S. Congress is currently discussing several bills that mirror some of the most important elements of the analyzed policies. In both years, industry submissions assailed each of the four policies as “discriminatory” and attempted to recruit the U.S. government to join Big Tech’s crusade against them. As the Biden administration develops its own digital governance strategy and after it adopted an all-government anti-monopoly policy, thankfully the U.S. government attitude has shifted. While, the current administration has not adopted the industry line without question, the industry submissions show the perils of extending a network of “digital trade” agreements that can worsen the obstacles to creating a fair and competitive digital economy.

South Korea’s Global-First Move to Foster Fair App Stores Attacked by Google and Apple

For years, digital items purchased within apps – like extra lives in Candy Crush, or a premium subscription to remove ads in Spotify – have offered Big Tech giants like Apple and Google a lucrative – and exclusive – hidden market to monopolize to the detriment of app creators and purchasers alike. When users buy digital goods in an app on Apple’s iOS or Google’s Android, Apple and Google require that their payment systems be used to process the purchase. Forcing developers and consumers to use their systems allows Apple and Google to charge a sales commission fee of up to 30%, generating massive revenues for these two dominant firms. As the sole major players in the app store market, Apple and Google have the power to dictate terms for developers and impose fees as they please.

In August 2021, South Korea became the first country in the world to try to crack open this market. An amendment to Korea’s Telecommunications Business Act bans companies that operate app stores and enjoy a dominant position in the market, like Apple and Google, from forcing app developers to use the firms’ own payment systems. Instead, companies now have to allow users the option to pay for in-app purchases with various third-party payment systems.⁸

The legislation emerged in 2020 after Google announced that all apps on the Google Play store would have to use the company’s own payment system – i.e., pay the 30% commission. Previously, that requirement applied only to gaming apps.

⁸ “South Korea: Amended Telecommunications Business Act Will Ban App Payment Monopolies,” Library of Congress, 2021. Available at: <https://www.loc.gov/item/global-legal-monitor/2021-09-16/south-korea-amended-telecommunications-business-act-will-ban-app-payment-monopolies/>

The new Korean policy protects both consumers and developers from Big Tech companies abusing their dominant market positions by forcing services on them and setting unfair prices. Violations of the amendment can result in fines up to 2% of a company's South Korean revenue.

Notably, the Korean law that was enacted to end anticompetitive app store practices is similar to U.S. House and Senate proposals that currently enjoy broad bipartisan support. Particularly, the Senate version, the Open App Markets Act, was approved by the Judiciary Committee on February 3, 2021.⁹ Senior Republican members of Congress have app store legislation as a top legislative priority,¹⁰ showing that the enactment of U.S. legislation similar to the Korean law is a real possibility and not only a Democratic Party goal.

The Korean law and American proposal also fall well within traditional antitrust prohibitions against “tying.” This is an anti-competitive practice by which a company makes the sale of one product or service conditional upon also purchasing a separate product or service. Google is in fact currently facing an antitrust lawsuit in the United States alleging that its tying of Google Play Billing to its app store is an illegal violation of the Sherman Antitrust Act.¹¹ These app store laws simply seek to enhance the clarity and enforcement mechanisms for such rules.

Despite this, Apple and Google pushed U.S. trade officials to attack the Korean legislation as “discriminatory” while it was being considered by South Korea’s parliament. They argued that it would affect them more than other businesses.¹² They claimed the Korean law was an attack against U.S. businesses, conveniently avoiding the reality that the law would impact them more because of their monopoly practices. The two firms mobilized supposedly regional organizations to hint at the potential of sparking a trade dispute. In July 2021, the Asia Internet Coalition, a group backed by Apple and Google in spite its seemingly international name, stated that the law “*could provoke trade tensions between the United States and South Korea.*”¹³

Apple and Google used the NTE process as one of the main vehicles to push their grievances and attempt to recruit the U.S. government in their fight against the Korean legislation. The Information Technology Industry Council (ITIC), a D.C.-based trade association that includes Apple and Google as members, urged the U.S. government to weigh in against the Korean policy in a public submission to USTR in October 2020. The ITIC claimed that the “*legislative intent*” of the amendment was “*to target US firms, while*

9 Lauren Feiner, “Senate Committee advances bill targeting Google and Apple’s app store profitability,” CNBC, Feb. 3, 2022. Available at: <https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html>

10 John Hendel, “Tech antitrust optimism to kick off April,” POLITICO, Apr. 1, 2022. Available at: <https://www.politico.com/newsletters/morning-tech/2022/04/01/tech-antitrust-optimism-to-kick-off-april-00022252>. David O. Williams, “Ken Buck Battles Big Tech With Bill to Unlock App Stores’ Rules,” Colorado Times Recorder, Sept. 24, 2021. Available at: <https://coloradotimesrecorder.com/2021/09/ken-buck-battles-big-tech-with-bill-to-unlock-app-store-rules/39899/>

11 See Second Amended Complaint, In Re Google Play Developer Antitrust Litigation, Case No. 3:20-cv-05792-JD (Filed 01/24/22, N.D. Cal.). Available at: https://www.docketalarm.com/cases/California_Northern_District_Court/3--21-md-02981/in_re--_Google_Play_Store_Antitrust_Litigation/182/

12 David McCabe and Jin Yu Young, “Apple and Google’s Fight in Seoul Tests Biden in Washington,” The New York Times, Aug. 23, 2021. Available at: <https://www.nytimes.com/2021/08/23/technology/apple-google-south-korea-app-store.html?searchResultPosition=10>

13 Ibid

favoring their Korean competitors,” and also argued that the policy would be a violation of market access and investment commitments under the Korea-U.S. Free Trade Agreement (KORUS).¹⁴

The 2021 NTE report, largely drafted before the current USTR took office, echoed Apple and Google’s allegations, stating that the legislation *“appears to specifically target U.S. providers and threatens a standard U.S. business model that has allowed successful Korean content developers to reach global audiences.”*¹⁵

By the time comments for the next NTE report were due, industry interests had closed ranks: Four trade associations backed by Apple and Google attacked the amendment in remarkably similar language. These associations claimed that the amendment violated commitments under KORUS by targeting U.S. companies to benefit Korean competitors. Notably, the Coalition of Services Industries and the Internet Association used the exact same language that the 2021 NTE report included to criticize this initiative, the recycled the language is: the Korean App Store Law *“threatens a standard US business model that has allowed successful Korean content developers to reach global audiences.”*¹⁶

Other NTE Industry Attacks on the South Korean App Store Legislation

- **Information Technology Industry Council (October 2021):** **“The [App Stores] law appears to run contrary to Korean trade commitments** by taking an approach that would disrupt standardized practices that ensure consumer privacy, security, and reliable access across markets, and with **legislators’ public statements effectively singling out two U.S.-headquartered companies.** The law will also restrict U.S. app developers’ ability to reach the Korean market via trusted ecosystems.” (emphasis added).
- **Coalition of Services Industries (October 2021):** **“This legislation is global-first and bans a business model that is practiced by US mobile app marketplace providers, and not their Korean equivalents.** It threatens a standard US business model that has allowed successful Korean content developers to reach global audiences, and **is at tension with Korea’s obligations under the Korea-US FTA.**” (emphasis added).
- **Computer & Communications Industry Association (October 2021):** **“The scope of the law effectively creates a band on a predominately used U.S. model, at the exclusion of local equivalents.** Further, policymakers supportive of the bill have made clear their intent to single out specific U.S. companies with the new law. **The targeting of U.S. firms could conflict with Korea’s trade commitments under the Korea-U.S. Free Trade Agreement, as well as commitments under Article XVII (National Treatment) of the WTO General Agreement on Trade in Services (GATS).**” (emphasis added).
- **Internet Association (October 2021):** **“This legislation is a global-first move that affected only two U.S. digital companies and none of their Korean competitors.** It threatens a U.S. business model that has allowed successful Korean content developers to reach global audiences, and **is at tension with Korea’s obligations under the Korea-U.S. FTA.**” (emphasis added).

¹⁴ ITI Response to USTR Request for Public Comments to Compile the National Trade Estimate Report (NTE) on Foreign Trade Barriers. P. 48. Oct. 29, 2020. Available at: <https://www.itic.org/policy/ITI2021NTEPublicCommentFinal.pdf>

¹⁵ 2021 National Trade Estimate Report on Foreign Trade Barriers, page 333. Available at: <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>

¹⁶ 2021 Coalition of Services Industries (CSI) Submission: Comments for the National Trade Estimate Report on Foreign Trade Barriers Docket Number USTR-2021-0016. P. 47. Available at: <https://www.regulations.gov/comment/USTR-2021-0016-0057>; Internet Association Submission For The 2022 USTR National Trade Estimate Report Docket No. USTR-2021-0016. P. 83. Available at: <https://www.regulations.gov/comment/USTR-2020-0034-0028>.

In the 2022 NTE report, the Korean app store policy was still listed as a barrier to digital trade and electronic commerce, although this time USTR refrained from elevating Big Tech's incriminating language against the new South Korean law and did not opine on it, nor did it suggest that the new legislation was discriminatory or that it targeted U.S. providers.¹⁷

Though Apple and Google agreed to comply with the law after it came into effect in September 2021, both were slow to follow through.¹⁸ Google seems to have failed to comply with the new policy and instead continued to charge commissions to app developers, even when users opted for third-party payment systems. In April 2022, the Korea Communications Commission began a provisional investigation currently ongoing to determine if any app market operators were in violation of the policy.¹⁹ In June, Apple announced app developers in Korea only will be allowed to use third-party service providers. But the concession comes with a series of restrictions: Alternative providers will have to apply and be pre-approved by Apple, and the company will continue to take a 26% commission for any purchases made through such providers. This means that for a third-party payment intermediary to be competitive, it would have to charge less than 4% of the transaction value.²⁰ In August, the Communications Commission began a formal investigation to determine if Apple, Google, and a domestic app store operator called One Store are not complying with the with the new law.²¹

These latest developments show Apple and Google's intent to continue and fight against the policy, and new trade-based attacks might arise. Additionally, the inclusion of a domestic company in the probe discredits the discrimination claims launched by U.S. Big Tech firms.

¹⁷ 2022 National Trade Estimate Report on Foreign Trade Barriers, page 326. Available at: <https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf>

¹⁸ Joyce Lee, "S. Korea lawmaker says Apple, Google not doing enough to comply with app store law," Reuters, Nov. 16, 2021. <https://www.reuters.com/technology/skorea-lawmaker-says-apple-google-not-doing-enough-comply-with-app-store-law-2021-11-16/>

¹⁹ Simon Sharwood, "Google snubs South Korea's app store law," The Register, Apr. 6, 2022. Available at: https://www.theregister.com/2022/04/06/google_south_korea_app_payments_illegal/. Mariella Moon, "Korean authorities tell Google it can't remove apps that link to external payment," Yahoo!Finance, Apr. 6, 2022. Available at: <https://finance.yahoo.com/news/korea-kcc-app-store-law-google-external-payments-114054384.html>. See also "Korea regulator to examine app payment practices of Google, Apple, One Store," Telecompaper, May 19, 2022. Available at: <https://www.telecompaper.com/news/korea-regulator-to-examine-app-payment-practices-of-google-apple-one-store--1424948>.

²⁰ Jon Porter, "Apple lets apps in South Korea use third-party payment systems," The Verge, Jun. 30, 2022. Available at: <https://www.theverge.com/2022/6/30/23189384/apple-south-korean-app-store-third-party-payment-systems-in-app>

²¹ Laura Dobberstein, "South Korean regulator worried Apple, Google, may be working around app store payment choice law," The Register, Aug. 10, 2022. Available at: https://www.theregister.com/2022/08/10/apple_google_south_korea_investigation/

Australia's Strategy to Level the Playing Field in News Media Advertising and Big Tech's Staunch Opposition

When journalists publish new stories, nowadays they rely on digital platforms like Facebook and Google to help their content reach users. Facebook and Google in turn rely on news media content to generate revenue through user engagement. It's an interdependent relationship, but one with a serious power imbalance: Media businesses need their content on the major digital platforms to reach the public, but the digital platforms don't need any one news business' content to entice users. This asymmetry means that although news content generates massive revenue for digital platforms, journalists and publishers don't receive a cut to continue funding their journalism.

Australia set out to address this imbalance with a mandatory code of conduct. It allows eligible news businesses to bargain individually or collectively with designated digital platforms, which could include Facebook and Google, to be paid when the platforms link to the news businesses' content on platform news feeds or in search results. The new policy passed the Australian parliament in February 2021. By ensuring news businesses are fairly paid for their content, the code aims to sustain local public interest journalism.

The code has four components.²² First, designated digital platform companies must bargain in good faith with registered news business corporations. To be registered, news businesses must apply to the Australian Communications and Media Authority and meet a series of eligibility criteria. Designation of digital platforms is done by the Australian Treasurer, who must consider whether there is a significant bargaining power imbalance between the platform and news media businesses. Second, compulsory arbitration rules come into effect when bargaining parties are unable to negotiate an agreement. In these instances, both the digital platform and the news business present a final take-it-or-leave-it offer, an arbitral panel makes a final decision between the two.

The compulsory arbitration rules put the digital platforms and the news media businesses on more even footing: Neither party wants to risk the arbitral panel choosing the others' final offer, so it is in their best interest to come to an agreement without triggering the compulsory arbitration rules. The third component of the code dictates how platforms deal with the news content they host. Under these requirements, digital platforms are required to give news businesses a 14-day notice of any planned algorithmic changes or internal practices likely to have a significant effect on referral traffic to their content.

²² See News Media and Digital Platforms Mandatory Bargaining Code Act of 2021. Available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6652.

Digital platforms must also provide news businesses with clear explanations of the types of data collected by the digital platform as users interact with news content. Finally, non-differentiation requirements prevent digital platforms from treating registered news businesses differently from unregistered news businesses in terms of making news content available.

The Australian law is similar to the Journalism Competition and Preservation Act (JCPA), which is currently under consideration in the United States.²³ The JCPA, like the Australian law, creates a temporary antitrust “safe harbor” for certain publishers (smaller ones) to organize and collectively negotiate with large digital platforms in order to address the major disparity in bargaining power between news publishers – who have been struggling with bankruptcy – and platforms. Like the Australian law, the JCPA also outlines a framework for collective negotiations between publishers and platforms. The Senate Judiciary Committee voted in favor of the JCPA in September 2022 and sent the bill toward floor consideration by the full Senate.²⁴

The push for the legislation in Australia began in 2017, when the Australian Competition and Consumer Commission (ACCC) was directed to consider the impact of online search engines, social media, and digital content aggregators on competition in the media. The subsequent 2019 Digital Platform Inquiry found an imbalance in bargaining power between digital platforms and news businesses. The Inquiry concluded that this imbalance excludes news businesses from getting a share of any revenue generated by the content they create when it is posted on digital platforms. According to the Inquiry, Facebook and Google are “unavoidable trading partners” news media rely on for referral services. Therefore, both mega-platforms have substantial bargaining power that influences the ways news outlets conduct business with Facebook and Google.²⁵

After the release of the Inquiry, the Australian government directed Google and Facebook to develop voluntary agreements with news media. The government warned that if voluntary agreements could not be met, alternative options, including a mandatory code, would be explored. Attempts to develop a voluntary code were unsuccessful and the ACCC concluded that reaching such an agreement would be “unlikely.”²⁶ Meanwhile,

23 S.2710 – 117th Congress (2021-2022): Open App Markets Act. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2710>.

24 Senate Committee on the Judiciary, ‘Judiciary Committee Advances Bipartisan Journalism Competition and Preservation Act,’ Sept. 22, 2022. Available at: <https://www.judiciary.senate.gov/press/dem/releases/judiciary-committee-advances-bipartisan-journalism-competition-and-preservation-act>.

25 Australian Competition and Consumer Commission Digital Platforms Inquiry. Available at: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

26 Nour Haydar, “Facebook and Google to face mandatory code of conduct to ‘level playing field’ with traditional news media,” ABC, Apr. 19, 2020. Available at: <https://www.abc.net.au/news/2020-04-20/facebook-and-google-to-face-mandatory-code-of-conduct/12163300>.

the pandemic led to a surge in visitors to news websites, but advertising revenue sharply dropped as consumers spent less, further stressing the already shrinking media industry and prompting the government to develop a mandatory code.²⁷

Big Tech swept in to protest the development of the mandatory code, again using trade lingo in an attempt to block the policy from moving forward.

In a submission to the ACCC, the U.S. Chamber of Commerce claimed that the law would restrict access to digital services in Australian markets and violate both the Australia-U.S. Free Trade Agreement (AUSFTA) and the World Trade Organization's General Agreement in Trade in Services' (GATS) national treatment obligations (i.e., non-discrimination) by exclusively targeting leading U.S. technology companies to help domestic companies. The Chamber of Commerce argued that two American companies, Google and Facebook, were repeatedly being singled out by Australian officials drafting the code and that this was precisely what national treatment obligations were designed to counter.²⁸ In another submission, the Software and Information Industry Association (SIIA), a D.C.-based trade association that includes Facebook and Google among its members, echoed concerns over discriminatory targeting of U.S. companies in a submission to the Australian Senate. The SIIA also suggested that the code's requirement for digital platforms to provide news media with information regarding planned changes in algorithms was a violation of AUSFTA intellectual property protections and that the lack of options for appeal of regulators' decisions violates AUSFTA's minimum standard of treatment for investors and transparency rules.²⁹ In another submission, the Information Technology Industry Council likewise argued that the code violated AUSFTA national treatment and most-favored nation rules by targeting American companies.³⁰ In its own submission, the Internet Association wrote that the code is "fundamentally discriminatory towards U.S. companies, sets a harmful global precedent, and undercuts critical principles of an open internet."³¹

27 Josh Taylor, "Facebook and Google to be forced to share advertising revenue with Australian media companies," The Guardian, Apr. 19, 2020. Available at <https://www.theguardian.com/media/2020/apr/19/facebook-and-google-to-be-forced-to-share-advertising-revenue-with-australian-media-companies>.

28 US Chamber of Commerce Submission on News Media Bargaining Code, Aug. 27, 2020. Available at: <https://www.accc.gov.au/system/files/US%20Chamber%20of%20Commerce.pdf>.

29 PDFs of all submissions regarding the code to the Australian Senate Standing Committee on Economics can be viewed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions.

30 Ibid

31 Internet Association Submission on News Media Bargaining Code, Jan. 15, 2021. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=e73c1237-ef36-4fdc-878e-1db2af19668a&subId=700038>.

Other 2020 NTE Industry Attacks on the Australian News Media Code

- **Information Technology Industry Council (October 2020):** “The Code not only requires digital platforms to carry domestic Australian news content but would also require U.S. digital companies to transfer revenue to Australian competitors and disclose proprietary information related to private user data and algorithms. It explicitly and exclusively targets two U.S. companies without any indication of the selection criteria for these companies and their various services, or whether similar criteria was or will be applied to companies in or outside of Australia. (...) **In solely targeting U.S. companies, the Code conflicts with basic trade principles of national treatment and non-discrimination under the Australia-U.S. Free Trade Agreement (AUSFTA) and the WTO General Agreement on Trade in Services (GATS).**”
- **United States Council for International Business (October 2020):** “The proposed Code would interfere with the legitimate business decisions of two specific US digital platform businesses, and conveys unfettered discretionary power on the Australian Treasurer to designate other companies to which the Code should apply. (...) **The draft code, if enacted in its current form, would run counter to Australia’s trade obligations in the over fifteen-year-old Australia-U.S. Free Trade Agreement (AUSFTA) as well as the WTO General Agreement on Trade in Services (GATS).** It is also at odds with Australia’s history of leadership in promoting cross-border digital trade.”
- **Computer & Communications Industry Association (November 2020):** “Motivated by a desire to empower domestic news publishers, the new rules would dictate that online services negotiate and pay Australian news publishers for online content, and also disclose proprietary information related to private user data and algorithms. As drafted, the Australian Treasury would have the utmost discretion to determine which companies these mandates are applied to, and currently only two companies – both American – have been identified at this time. **There are significant concerns from a procedural, competition, trade, and intellectual property perspective that USTR should pay close attention to.**

In addition to submitting comments to the Australian Senate, these industry-backed groups used the NTE as a vehicle to attack the code and to recruit the U.S. government to help do so. Multiple trade associations that count Facebook and Google among their members listed the code as a violation of non-discrimination commitments in trade agreements. The now-shuttered Internet Association (IA) claimed in a NTE submission filed in October 2020 that *“The internet industry has strong concerns that the Code violates Australia’s trade obligations and unfairly discriminates against U.S. companies. IA is expressly concerned that the Code targets two U.S. digital companies to assist a class of domestic players in a way that runs counter to Australia’s international trade commitments.”*

³² Five other industry associations joined the Internet Association in assailing the Australian media code proposal and urging USTR to intervene.

In response, in January 2021, USTR filed a submission before the Australian parliament asking it to *“suspend any plans to finalize this legislative proposal.”* In doing so, USTR argued that the code *“explicitly and exclusively (as an initial matter) targets two U.S. companies through legislation without first having established a violation of existing Australian law or a market failure.”*³³

Leaving aside the fact that this submission by USTR is the perfect example of how industry groups use the NTE process in their assault against policies they dislike, a sovereign legislature does not need to prove that an existing law has been violated in order to pass or introduce a new one. If that were to

³² Comment from Internet Association, United States Trade Representative National Trade Estimate Report on Foreign Trade Barriers. Posted Oct. 30, 2020. Available at: <https://www.regulations.gov/comment/USTR-2020-0034-0028>. P. 21.

³³ PDFs of all submissions regarding the code to the Australian Senate Standing Committee on Economics can be viewed at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions.

be the case, neither the Sherman Act nor any other competition law would have been ever adopted. As for the assertion that the legislation targets two U.S. firms, competition and antitrust rules have long sought to principally rein in the outsized power of the most dominant firms. Antitrust cases by their very nature target specific firms that dominate their industries. This also means that when crafting laws, legislators have specific companies in mind, even if the policy intent is that no company, regardless of nationality, should have so much power. This is true in the United States as well, where, for example, the 1936 Robinson-Patman Amendment to the Clayton Antitrust Act was passed specifically with the dominant retailer A&P in mind.³⁴

A year later, after the code was enacted, the Internet Association continued its assault in its 2021 NTE submission, listing Australia among foreign governments *“imposing or pursuing restrictive measures that target U.S. technology companies, leaving domestic competitors free to innovate.”*³⁵

Particularly with respect to the News Media legislation, it stated: *“USTR should continue to pay close attention to the implementation of the Code and its adherence to the principles of transparency, fairness and non-discrimination as consistent with the AUSFTA.”*³⁶

Facebook and Google both claimed to support the principle behind the code, but that did not stop either from punishing Australian consumers in retaliation as the legislation moved through parliament. Google threatened to pull its search function entirely from Australia. Facebook temporarily blocked access to news content in Australia. Facebook’s block inadvertently also blocked several government resources, including

Other 2021 NTE Industry Attacks on the Australian News Media Code

- **Information Technology Industry Council (October 2021):** “While companies have not yet been designated, the Code accords the Australian Treasurer unfettered discretionary power to designate companies to which the Code should apply. **As the Code would only affect U.S. companies, it appears to conflict with basic trade principles of national treatment and non-discrimination under the Australia-U.S. Free Trade Agreement (AUSFTA) and the WTO General Agreement on Trade in Services (GATS).**” (emphasis added.)
- **Computer & Communications Industry Association (October 2021):** “Under the [Australian News Media Bargaining] Code, the Australian Treasury would have the utmost discretion to determine which companies these mandates are applied to by determining whether the platform holds significant bargaining power imbalance with Australia news media businesses. The Treasurer must also consider if the platform has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses. **Only two companies have been identified throughout deliberations. There are significant concerns from a procedural, competition, trade, and intellectual property perspective that USTR should pay close attention to. In particular, U.S. officials should monitor the implementation of the Code and its adherence to the principles of transparency, fairness and non-discrimination as consistent with the U.S.-Australia FTA.**” (emphasis added.)

³⁴ See Harry Ballan, “The Courts’ Assault on the Robinson-Patman Act,” *Columbia Law Review*, Vol. 92, No. 3, April 1992, pp. 635-636. Available at: https://www.jstor.org/stable/1122955?seq=2#metadata_info_tab_contents.

³⁵ Comment from Internet Association, Request for Comments: Significant Foreign Trade Barriers for the National Trade Estimate Report. Posted Oct. 28, 2021. Available at: <https://www.regulations.gov/comment/USTR-2021-0016-0064>.

³⁶ Comment from Internet Association, Request for Comments: Significant Foreign Trade Barriers for the National Trade Estimate Report. Posted Oct. 28, 2021. Available at: <https://www.regulations.gov/comment/USTR-2021-0016-0064>. P. 6 and 14.

emergency services pages, and charities, a move which sparked local support for the code among Australians frustrated by corporate bullying.³⁷

However, as imminent passage of the code approached in 2021, Google and Facebook both signed separate deals with several of Australia's largest publishers and smaller, regional, and digital-only platforms to avoid use of the legislation. The terms of these deals are deemed as commercial in confidence, meaning it is unknown how much money outlets are paid and how newsrooms use that money. Yet, the Australian Treasurer estimates that a total of over AU\$200 million (about \$140 million USD) has been paid to news media companies in the year since the law was enacted, and news companies have already announced increased staffing and rural coverage as a direct result of the new funds received from the deals with Big Tech.³⁸

To that extent, the clear market failure that the Australian code spotted was successfully resolved. Dominant digital platforms have been profiting immensely off of the work of publishers who are not compensated for the work that they do. Australian journalism, like journalism elsewhere in the world, had been struggling for decades. But, after the new code last year, the Australian news media has been injected with millions of dollars, and hiring of journalists has significantly recovered.³⁹

The European Approach to Digital Markets Regulation Under Assault: The Digital Markets Act and Digital Services Act

As their role in society has grown, a small number of digital platforms have gained a dominant position that allows them to crush competitors and exert sole control over consumer choices, often to consumers' detriment. Standard competition policy has been criticized as ineffective to keep up with changing market realities in light of new technologies and practices in the digital age. While existing antitrust and competition rules already prohibit many forms of anticompetitive behavior that appear to be common in digital markets, the enforcement of these rules has been lackluster.

³⁷ Nick Baker, "Outrage as Facebook blocks access to news content in Australia," NBC News, Feb. 18, 2021. Available at: <https://www.nbcnews.com/tech/tech-news/outrage-facebook-blocks-access-news-content-australia-rcna297>

³⁸ Bill Grueskin "Australia pressured Google and Facebook to pay for journalism. Is America next?" Columbia Journalism Review, March 9, 2022. Available at: https://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php

³⁹ Anya Schiffrin, "Australia's news media bargaining code pries \$140 million from Google and Facebook," Poynter, Aug. 16, 2022. Available at: <https://www.poynter.org/business-work/2022/australias-news-media-bargaining-code-prises-140-million-from-google-and-facebook/>.

To prevent abuse of market power by the largest digital platforms in European Union countries and protect competition in European digital markets, the European Union designed twin legislation: The Digital Markets Act (DMA) and the Digital Services Act (DSA), which together create a single set of rules spanning the EU.

The Digital Markets Act establishes a list of obligations for designated gatekeepers and sanctions for gatekeepers who fail to comply.⁴⁰ The DMA regulates certain behaviors that could reduce competition in digital markets ex ante, or before they happen, alongside traditional antitrust legislation.

Companies can be deemed gatekeepers if they provide services in one of eight different areas called Core Platform Services and have a significant impact on the European market. These areas include online search engines, online intermediation services, social networks, video sharing platforms, communications platforms, advertising systems, operating systems, and cloud services.⁴¹ Plus, to be considered a gatekeeper, companies must have at least 45 million monthly active users and more than 10,000 active business users in the EU, as well as a market capitalization of at least €75 billion or an annual European turnover equal to or above €7.5 billion for three years in a row.⁴²

Under the DMA, gatekeepers must follow a list of “dos” and “don’ts.” Gatekeepers’ new obligations include:⁴³

1. A prohibition from self-preferencing proprietary systems or having discriminatory ratings for competitor services and products.
2. A ban from combining data collected from different services owned by a single company.
3. A prohibition from setting proprietary software as the default option when users set up devices.
4. A requirement to ensure interoperability with smaller digital platforms and data portability.
5. An obligation to meet advertisement pricing transparency guidelines.

40 Morgan Meaker, “Europe’s Digital Markets Acts Takes a Hammer to Big Tech,” Wired, March 25, 2022. Available at: <https://www.wired.com/story/digital-markets-act-messaging/>.

41 Questions and Answers: Digital Markets act: Ensuring fair and open digital markets, European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349; Mario Mariniello and Catarina Martins (2021) ‘Which platforms will be caught by the Digital Markets Act? The ‘gatekeeper’ dilemma’, Bruegel Blog, 14 December. Available at: <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma>.

42 Ryan Browne, “EU targets US tech giants with a rulebook aimed at curbing their dominance,” CNBC, March 25, 2022. Available at: <https://www.cnbc.com/2022/03/25/digital-markets-act-eu-targets-big-tech-with-sweeping-new-antitrust-rules.html>.

43 Questions and Answers: Digital Markets act: Ensuring fair and open digital markets, European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349

In essence, gatekeepers must operate according to rules that aim to create a level playing field in the market for all digital companies – from mega platforms to start-ups.

While designed to update European regulations to the digital age, each of these provisions has analogues in either longstanding American laws and regulations or current American proposals for similar rules. For each of the DMA provisions in turn:

1. Prohibiting platforms from self-preferencing their own products via their platform is the aim of the American Innovation and Choice Online Act, currently awaiting a vote in the U.S. Senate after being approved in committee.⁴⁴
2. Prohibiting the combinations of collected data between business subdivisions has been a frequently considered remedy for mergers in the past 10 to 15 years in the United States, even as technology firms have frequently violated such promises when they have informally made them.⁴⁵
3. The pre-installation and integration of proprietary software was the exact topic of the 1990s American litigation against Microsoft. The company was initially found to have abused an illegal tie-in by integrating Internet Explorer (IE) with Windows and foreclosing competition for browsers.⁴⁶ Even though Microsoft had a more favorable ruling on appeal, the appellate court nonetheless found that Microsoft violated Section 2 of the Sherman Act by integrating IE and Windows.⁴⁷
4. Interoperability, while a term specifically for digital markets, refers to relatively mundane regulatory practices of setting standards for products, services, processes, and systems. The American National Bureau of Standards was founded in 1901, and it continues to this day as the National Institute of Standards and Technology.
5. The United States has consumer protection rules around transparency in advertising specific to digital markets. The FTC outlined their requirements for online advertising in 2000⁴⁸ and 2013,⁴⁹ clarifying that the same standards for consumer protections that are used offline also apply in digital markets. The FTC is likewise currently undergoing a rulemaking process to update their guidance on advertising disclosures in digital markets.⁵⁰

44 S.2992 – 117th Congress (2021-2022): American Innovation and Choice Online Act. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>

45 Most notably, in 2016, Google merged its own data with that of DoubleClick after its 2007 acquisition, despite having promised Congress that it would not do so.

46 *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

47 *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

48 “Dot Com Disclosures,” Federal Trade Commission. Available at: <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf>.

49 “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,” Federal Trade Commission, March 2013. Available at: <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

50 “FTC Staff Requests Information Regarding Digital Advertising Business Guidance Publication,” 2022. Available at: https://www.ftc.gov/system/files/ftc_gov/pdf/Digital%20Advertising%20Business%20Guidance%20Request%20for%20Information.pdf.

The Digital Services Act focuses on granting consumers greater control over the content they see online and better protections from abuses by dominant corporations. Unlike the DMA, the DSA applies to all digital services, defined as “a large category of online services, from simple websites to internet infrastructure services and online platforms” that operate in the EU, regardless of size or where the business is actually located.⁵¹ More specifically, the DSA regulates digital services that connect consumers with goods, other services, and content.

The DSA provides better user protections, creates a set of user rights online, and establishes a transparency and accountability framework for algorithms and terms and conditions on online platforms. As with the DMA, the DSA establishes obligations and prohibitions for digital companies. For example, the DSA bans so-called ‘dark patterns’ that confuse and mislead users into making unintended choices and prohibits targeted advertising based on protected categories like race or religion. It also includes new measures to monitor illegal content online, obligations to mitigate risks of disinformation, election manipulation, or cyberviolence against women and minors on online platforms, and transparency standards to protect consumers in online marketplaces.⁵² In essence, the DSA deals with the way online platforms handle the content they host and more directly protects users.

The DSA and DMA also come with strict enforcement mechanisms. In the case of the DMA, a single violation could result in a fine of up to 10% of a company’s global revenue. Repeated violations can result in fines up to 20% of a company’s global revenue. Three violations in less than eight years could result in a market investigation and structural remedies, including potential breakup.⁵³

Big Tech companies have made a concerted effort to portray the DMA as a legislative strategy whose main target is undermining the competitiveness of American firms – this despite so many elements of the policy having U.S. counterparts.

Big Tech friendly groups have argued that the DMA is a form of discriminatory tech protectionism that would restrict market access for U.S. tech firms in Europe and could violate WTO commitments by benefiting European companies at the deliberate expense of American firms.⁵⁴ A bipartisan group of lawmakers, led by Reps. Suzan DelBene (D-Wash.) and Darin LaHood (R-Ill.) and including other Big Tech friendly legislators like Rep. Zoe Lofgren (D-Cal.) wrote a letter to President Biden in early 2022 stating that the DMA uses deliberately discriminatory and subjective thresholds to designate U.S. tech

51 The Digital Services Act package, European Commission. Available at: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

52 Questions and Answers: Digital Services Act, European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348.

53 Ryan Browne, “EU targets US tech giants with a rulebook aimed at curbing their dominance,” CNBC, March 25, 2022. Available at: <https://www.cnbc.com/2022/03/25/digital-markets-act-eu-targets-big-tech-with-sweeping-new-antitrust-rules.html>.

54 Meredith Broadbent, “Implications of the Digital Markets Act for Transatlantic Cooperation,” CSIS, Sept. 15, 2021. Available at: <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>

firms as gatekeepers.⁵⁵ High-level Big Tech friendly Biden administration officials, such as Commerce Secretary Gina Raimondo, publicly criticized the DMA and DSA, repeating the industry claims that the policies target American companies.⁵⁶

A 2021 paper prepared by corporate law firm King and Spalding for the Computer and Communications Industry Association, a U.S. group including Amazon, Apple, Facebook, Google, Intel, and Twitter, argues that the DMA violates WTO most favored nation and national treatment rules by targeting and discriminating against U.S. companies.⁵⁷ The paper contends that the DMA de facto grants less favorable treatment to U.S. companies in ways that do not apply to European companies, and argues that this is a violation of the GATS. In multiple statements, the U.S. Chamber of Commerce has denounced both the DMA and the DSA as discriminatorily targeting American companies based solely on their success.⁵⁸

These “trade discrimination” claims pay little attention to the fact that, based on the thresholds ultimately established, the DMA would include at least three European companies as meeting the requirements to be considered a digital gatekeeper.⁵⁹ While launching these broad attacks on both policies, industry groups also fail to mention that the DSA obligations apply to all firms that provide digital services in the EU and, unlike the DMA, there are no quantitative thresholds for its application.

55 Lauren Feiner, “Bipartisan lawmakers want Biden to tell Europe to stop ‘unfairly’ targeting US tech companies,” CNBC, Feb. 23, 2022. Available at: <https://www.cnbc.com/2022/02/23/lawmakers-ask-biden-to-tell-eu-to-stop-unfairly-targeting-us-tech-companies.htm>

56 Jorge Liboreiro, “EU and US vow to boost microchip supplies and promote trustworthy AI,” Euronews, Jan. 10, 2021. Available at: <https://www.euronews.com/my-europe/2021/09/30/eu-and-us-vow-to-boost-microchip-supplies-and-promote-trustworthy-ai>.

57 ‘The EU Digital Markets Act Targets Discrimination Against US Companies in Violation of WTO Commitments and Threatens the Re-Set of Trade Multilateralism and of Trans-Atlantic Relations,’ King and Spalding LLC, June 8, 2021. Available at: https://www.kslaw.com/attachments/000/008/860/original/EU_Digital_Markets_Act_-_Trade_law_and_systemic_implications_8_June_2021.pdf?1624300896.

58 US Chamber Concerned by European Commission Digital Services and Digital Markets Proposals, Dec. 15, 2020. Available at: <https://www.uschamber.com/technology/us-chamber-concerned-european-commission-digital-services-and-digital-markets>. See also: ‘The EU’s Proposed Digital Market’s Act: Key Concerns and Recommended Adjustments.’ Available at: <https://www.uschamber.com/international/the-eus-proposed-digital-markets-act-key-concerns-and-recommended-adjustments>.

59 Considering that under the higher thresholds proposed in December 2021 by the European Parliament’s Internal Market and Consumer Protection Committee, Germany’s SAP, Netherlands’ Booking, and France’s Vivendi would have been covered, it is clear that the final legislation includes these European companies. See Mario Mariniello and Catarina Martins (2021) ‘Which platforms will be caught by the Digital Markets Act? The ‘gatekeeper’ dilemma’, Bruegel Blog, 14 December. Available at: <https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma>.

Big Tech-funded groups once again used the NTE to attack the DMA and DSA. The first NTE submissions criticizing these pieces of legislation came in even before there was clarity about the precise aim of each of the proposals. A submission by the U.S. Council for International Business filed in November 2020 shows that industry groups started assaulting the twin legislation even before knowing their different reach and objectives: *“Most significantly, as part of the Digital Services Act, the European Commission proposes an ex ante regime to control behavior of ‘large online platforms’ designated as ‘gatekeepers.’ Such firms, broadly anticipated to be mostly US firms, could be forced to share data with competitors and be restrained from certain conduct that is common across many economic sectors, regardless of specific evidence or proven harm.”*⁶⁰

When the European Commission finally unveiled the text of the legislative proposals in December 2020, U.S. industry groups’ attacks intensified, with organizations like the Computer & Communications Industry Association writing in a 2021 NTE comment that the DMA’s *“thresholds have been set at levels where primarily US technology companies will fall under scope,”* and that *“(t)he list of “core platform services” furthermore carves out non-platform-based business models of large European rivals in media, communications, and advertising.”*⁶¹

The U.S. Council for International Business went a step further in its 2021 NTE submission, claiming that: *“These unilateral regulations [the DMA and DSA] appear designed to discriminate against U.S. companies and to take aim at a slice of the \$517 billion U.S. digital export market. (...) As the EU considers structural measures to address the digital marketplace, we urge USTR to work with the EU to ensure that it does not discriminate against U.S. companies through its laws and regulations, and that it upholds principles of non-discrimination, regulatory transparency, and technology neutrality in laws and regulations.”*⁶²

60 Comment from U.S. Council for International Business Regarding Foreign Trade Barriers to U.S. Exports for 2020 Reporting, page 48. Posted Oct. 27, 2020. Available at: <https://www.regulations.gov/comment/USTR-2020-0034-0015>.

61 Comment from Computer & Communications Industry Association, USTR National Trade Estimate Report on Foreign Trade Barriers. Posted Oct. 28, 2021. Available at <https://www.regulations.gov/comment/USTR-2021-0016-0049>.

62 Comment from U.S. Council for International Business, USTR National Trade Estimate Report on Foreign Trade Barriers. Posted Oct. 28, 2021. Available at <https://www.regulations.gov/comment/USTR-2021-0016-0042>.

Other NTE Industry Attacks on the DMA/DSA

- **Internet Association (October 2021):** “The European Commission published its Digital Markets Act (DMA) proposal in December 2020. **The DMA includes an array of extraordinary prohibitions that will apply exclusively to a small group of U.S. platforms.** EU officials have been clear that they aim to use the DMA to reduce “dependence” on U.S. services and to support local industry, furthering the EU’s current agenda of digital sovereignty.
As proposed, the DMA would impose sweeping competitive restrictions on companies labeled as “gatekeepers,” which the EU has defined narrowly to refer to a specific subset of U.S. technology providers, while excluding European digital rivals and other EU industries that compete with the U.S. technology sector. If enacted, US companies would be forced to comply with new obligations and regulatory restrictions that would damage their competitiveness with foreign firms, while the EU – as well as Russia, China, and other foreign rivals – would be entirely free of these restrictions.” (emphasis added).
- **Information Technology Industry Council (October 2021):** “ (...) previous proposals have progressed through the legislative process. These include the bloc’s new rules for online platforms in the Digital Services Act (DSA), the new Digital Markets Act (DMA), which sets out to address the challenges posed by “gatekeepers,” and new rules for re-use of sensitive data held by the tech sector in the Data Governance Act (DGA).
ITI is closely involved in these legislative procedures and continues to underscore the need for the EU to pursue its policy objectives in a manner that eschews protectionism and discrimination.” (emphasis added)
“Concerns remain that the DMA’s application may be limited to a handful of primarily U.S.-headquartered firms. The DMA is currently being amended in parallel by the Council of the EU and the European Parliament, with a final deal expected in 2022. **ITI encourages USTR and the U.S. administration to engage with the EU to ensure that the rules are targeted to proven and clear market failures and remain non-discriminatory in nature.** We also continue to advocate for the establishment of a regulatory dialogue in the context of the DMA to ensure that rules are fairly and transparently applied.” (emphasis added)
- **Coalition of Services Industries (October 2021):** “In December 2020 the European Commission issued the Digital Markets Act, a complex proposal that seeks to impose new restrictions on large online service providers, deemed “gatekeepers,” in the name of promoting competition. **The scope of the law could impact U.S. companies disproportionately.**
As the EU considers structural measures to address the digital marketplace, **we encourage USTR to work with the EU to uphold principles of non-discrimination and technology neutrality in laws and regulations. It is important that regulatory approaches impacting digital services and technologies are not protectionist, but rather developed in a deliberate and consultative manner subject to traditional trade principles, including non-discrimination and national treatment.”**

Big Tech’s pressure on the U.S. government has been relatively effective. Although USTR Tai has refrained from attacking these European initiatives and the 2022 NTE report merely included a description of the DMA and DSA,⁶³ this has not been the case with other parts of the administration. Certain U.S. officials from other agencies have continuously pressed the EU and repeated digital mega-platforms’ erroneous claims that the DMA is designed to target only U.S. firms, including through the EU-US Trade and Technology Council. These officials have gone even further, suggesting reducing the scope of services covered, lowering the amount of fines to be imposed to violating firms, and extending the timeframe to implement the legislation.⁶⁴

63 2022 National Trade Estimate Report on Foreign Trade Barriers, pages 216-217. Available at: <https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf>

64 Samuel Stolton, “US pushes to change EU’s digital gatekeeper rules,” Politico, Jan. 31, 2022. Available at: <https://www.politico.eu/article/us-government-in-bid-to-change-eu-digital-markets-act/>.

Ultimately, the DMA was adopted in July 2022⁶⁵ and the DSA a couple of months later in October.⁶⁶ Yet, the fact that some U.S. officials have answered Big Tech’s call to attack these policies in Europe has served industry’s interests in the United States. U.S. officials’ public criticism of the DMA has been leveraged to try to undermine similar legislative proposals making their way through the U.S. Congress. For instance, the U.S. Chamber of Commerce argues that “the White House needs to read its own talking points [regarding the DMA], before it takes a final position on the legislation [the American Innovation and Choice Online Act]. Providing support for similarly misguided domestic bills, the administration could transform the world’s most innovative economy into one that reeks of stagnation.”⁶⁷

Germany Revamps its Competition Policy to Counter Big Tech Abuses

The DMA and DSA will apply to Germany as a member of the EU. However, after several antitrust investigations of digital platforms by the German Federal Cartel Office (FCO), in January 2021 Germany passed its own version of the DMA with amendments to the German Act Against Restraints of Competition, also known as the GWB Digitization Act.⁶⁸ These amendments made Germany the first country in the world with preventative rules to regulate abuse of market dominance by large digital platforms.

Like the DMA, the GWB Digitization Act allows the FCO to prohibit certain “super dominant firms” from engaging in certain anticompetitive behaviors. These behaviors include self-preferencing, using competitively relevant data in a way that raises barriers to market entry, impeding interoperability, expanding the dominant position to a new market, or providing insufficient information about services.

“Super dominant firms” are those that have “overwhelming importance for competition across multiple markets.”⁶⁹

65 “Digital Markets Act: European Union Adopts New “Competition” Regulations for Certain Digital Platforms,” JDSupra, Aug. 3, 2022. Available at: <https://www.jdsupra.com/legalnews/digital-markets-act-european-union-5708655/>.

66 DSA: Council gives final approval to the protection of users’ rights online. Oct. 4, 2022. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/10/04/dsa-council-gives-final-approval-to-the-protection-of-users-rights>

67 “Striking Similarities: Comparing Europe’s Digital Markets Act to the American Innovation and Choice Online Act,” U.S. Chamber of Commerce. June 17, 2022. Available at: <https://www.uschamber.com/finance/antitrust/striking-similarities-dma-american-innovation-act>.

68 ‘Germany Adopts New Competition Rules for Tech Platforms,’ Jones Day, January 2021. <https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules>

69 “Germany Adopts New Competition Rules for Tech Platforms,” Jones Day, Jan. 2021. Available at: <https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules>.

The GWB Digitization Act also includes major reforms to Germany’s competition policy framework, including:⁷⁰

1. A revamped definition of dominance that includes intermediary power (control over access to supply and sales markets) as a factor to analyze when determining if a firm is dominant.
2. Limits on dominant firms from using certain behaviors that can lead markets to “tip” into monopolistic structures.
3. A prohibition forbidding dominant firms from denying access to “essential facilities,” which could include access to data.
4. New powers to issue “interim measures” to halt certain business practices, which are likely to be anticompetitive, before an antitrust probe concludes.

In sum, the amendments to the German competition regime aim at preventing mega platforms from using their outsized position in the digital space to box out smaller competitors.

Again, corollaries to these provisions exist or have existed in American law, and as such it is difficult to frame them as discriminatory against American companies. Some of these principles include:

1. American law includes and has included many different tests to determine whether a firm is a monopoly or has market power. New York State’s proposed “21st Century Antitrust Act” includes an abuse-of-dominance standard that incorporates many different tests to determine if a firm is dominant, including market shares as either a buyer or seller, as well as direct evidence of like the power to unilaterally set contract terms of prices.⁷¹ The proposed Competition and Antitrust Law Enforcement Reform Act of 2021 likewise uses a combination of factors to determine whether a company has market power.⁷²
2. American antitrust policy prohibits the anticompetitive leveraging of dominance in one market to attain a monopoly in another.⁷³

70 ‘Major Amendments to German Act Against Restraints of Competition Take Effect,’ JDSupra, Jan. 25, 2021. <https://www.jdsupra.com/legalnews/major-amendments-to-german-act-against-1056069/>; ‘Germany Adopts New Competition Rules for Tech Platforms,’ Jones Day, January 2021. <https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules>

71 Senate Bill S933C, <https://www.nysenate.gov/legislation/bills/2021/s933/amendment/c>.

72 S.225 - Competition and Antitrust Law Enforcement Reform Act of 2021. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/225/text>

73 Although the doctrine of monopoly leveraging has been weakened over time, American antitrust law does recognize that is illegal to leverage monopoly power in one market to obtain dominance in another. *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263, 275 (2d Cir. 1979) (“[A] firm violates [Section 2 of the Sherman Act] by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market.”)

3. While significantly weakened in recent decades, essential facilities doctrine has its origins in American antitrust law, going back to the Supreme Court's 1912 Terminal Railroad decision.⁷⁴
4. While the German proposals for "interim measures" are a new form of enforcement, they are not categorically different from American courts issuing preliminary injunctions, which are occasionally used in antitrust cases.⁷⁵

Like the DMA, the German approach has been attacked in NTE submissions by industry-backed groups as protecting domestic companies by discriminating against American technology firms based on their size and market dominance.⁷⁶ In its 2022 comment, the Computer & Communications Industry Association directly called the amendments a trade barrier and claimed that they "*were written to be enforced solely against US companies*" and "*are starkly inconsistent with longstanding US and global competition norms.*"⁷⁷

Other NTE Industry Attacks on the GWB Digitization Act

- **Internet Association (October 2021):** Under the "Discriminatory Or Opaque Application Of Competition Regulations" heading: "A new competition law entered into force in Germany in January 2021 that allows the German Federal Cartel Office ("FCO") to subject certain companies to prohibitions and penalties even if there has been no showing of an abuse of a dominant market position, which would be flatly inconsistent with U.S., EU and global practice. The companies targeted are online platforms and other companies that German authorities accuse of "transcending" their market power in a given market because, for example, they are vertically integrated or control sensitive business data. After the new law became effective, the FCO immediately used its new powers and initiated investigations against US-based companies Facebook, Google, Amazon, and Apple alleging that these companies are of "paramount significance for competition across markets." Other rules in the new law also target online platforms, including a rule that makes it easier for competition authorities to oblige platforms to provide access to data. Many of the rules include fuzzy definitions of longstanding concepts in competition law (such as "essential facilities") and depart from global competition norms, including by shifting the burden of proof away from the FCO and towards targeted companies. **Together these rules come close to introducing a sector-specific regulation of online platforms by means of antitrust law and could serve as a model for other countries worldwide that are looking to challenge or undermine U.S. businesses operating in this sector.** Overall, the new regime is likely to negatively affect U.S.-German digital trade."
- **Computer & Communications Industry Association (November 2020):** Germany is currently in the process of reforming its competition rules, with a draft bill introduced in 2020. Reports indicate that a central part of the reform will be to "move to a preventative level (ex ante) imposing precautionary antitrust responsibilities on companies rather than waiting for an abuse to take place before taking action." German authorities have also proposed targeting online platforms and other companies supposedly "transcend" their dominance in a given market based on vertical integration concerns or access to sensitive data. Another proposed rule would shift the burden of proof away from competition authorities and towards targeted companies. **Many of these proposals are starkly inconsistent with longstanding U.S. and global competition norms and, if adopted, could serve as trade barriers.**

⁷⁴ *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912).

⁷⁵ For example, see: natlawreview.com/article/second-circuit-affirms-preliminary-injunction-antitrust-suit-against-drug-companies.

⁷⁶ 'On the Rise: Europe's Competition Policy Challenges to Technology Companies,' CSIS, Oct. 26, 2020. <https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies>

⁷⁷ Comment from Computer & Communications Industry Association, Request for Comments: Significant Foreign Trade Barriers for the National Trade Estimate. Posted Oct. 28, 2021. Available at: <https://www.regulations.gov/comment/USTR-2021-0016-0049>.

In the year and a half since the GWB Digitization Act came into force, the FCO has found that Meta, Google,⁷⁸ and Amazon⁷⁹ are of “paramount significance across markets,” meaning that they must comply with the stricter new regulations. Apple is currently also under review by the FCO.

Conclusion

As policymakers in the United States and around the world have begun introducing policies to rein in the mega-platforms dominating the digital economy, Big Tech is employing every trick in the book to fight these efforts. This includes trying to co-opt trade concepts and trade negotiations in a stealthy attack on cutting-edge digital governance policies around the world. Their goal is to rig trade rules so as to get key digital governance tools labeled as illegal trade barriers even though these policies have nothing to do with trade.

This report shows Big Tech interests are trying to hijack the international trade law concept of non-discrimination and redirect it to push their own agenda of avoiding regulation and maintaining their dominant positions and monopolistic behavior. The trade non-discrimination standard is in theory meant to equalize treatment of foreign and domestic goods. But runaway trade tribunals and various commercial interests have worked to expand the trade non-discrimination standard to include facially neutral policies that may have disproportionate effects. Now Big Tech is seeking to exploit this expanded definition to claim that origin-neutral policies that may have a larger impact on the largest firms due simply to their size are discriminatory illegal trade barriers. Put simply, industry groups backed by Big Tech have taken to calling foreign digital governance policies that they do not like trade barriers in order to mask their real objection, which is to being regulated, despite their endless abuses.

This report documents instances of industry use of such claims in the context of the annual National Trade Estimates process to attack foreign policies they dislike. More than seven industry associations launched 30 attacks using “non-discrimination” trade lingo against four policy initiatives that other countries have employed to create more competitive digital markets. A significant number of them were successful in mobilizing U.S. officials against other nations’ digital competition policies. The most salient case is related to the Australian News Media Bargaining Code since, following the scalding 2021 NTE submissions of more than five industry associations, USTR filed a submission before the Australian parliament criticizing the legislation and demanding the suspension of any plans to finalize the proposal. These attacks against foreign policies, in turn, have served

78 Laura Kabelka, “German competition authority tightens grip on Meta,” EURACTIV.dc. Available at: <https://www.euractiv.com/section/digital/news/german-antitrust-body-to-adopt-stricter-measure-against-meta/>.

79 Laura Kabelka, “Germany’s antitrust body tightens grip on Amazon over market dominance,” EURACTIV.de. Available at: <https://www.euractiv.com/section/digital/news/germanys-anitrust-body-tightens-grip-on-amazon-over-market-dominance/>.

Big Tech’s strategy against key legislative proposals in the United States that replicate these foreign initiatives.

The tone of the Biden administration National Trade Estimate reporting is less hostile to the concept of digital governance even as some of the policies noted in this report are described, albeit without the hostile comments included in past NTE editions.

Previous NTEs included language so friendly to Big Tech that the mega-platforms repurposed it for their own statements and subsequent NTE submissions. An example of this practice is the way in which the Coalition of Services Industries and the Internet Association adopted the exact same language that USTR used in its 2021 report to criticize the Korean App Store Law when they filed their NTE submissions later that same year.

Big Tech’s agenda to restrict governments’ abilities to constrain their monopolistic power and anticompetitive behavior is consistent, but political leadership is subject to change. Policymakers must be aware of Big Tech’s hijacking of trade concepts such as non-discrimination, also called “national treatment”, to block domestic policymaking and continue to expand their power.

The industry NTE submissions detailed in this report make clear how Big Tech interests are willing to manipulate “non-discrimination” notions in trade lingo in order to attack digital governance policies around the world. To safeguard both domestic and foreign policymakers’ ability to protect consumers, workers, and small businesses from monopolistic abuses by mega-platforms, it is critical that any “non-discrimination” obligations included in agreements related to the digital economy are narrow and only capture policies whose main objective is discriminating against foreign rivals. If vague “non-discrimination” obligations are included in bilateral, regional, and multilateral “digital trade” agreements, Big Tech will continue to weaponize trade jargon and trade-pact enforcement to attack pro-competition and pro-consumer policies worldwide, further undermining the legitimacy of trade agreements.



List of Industry Association NTE Submissions Attacking Digital Competition Policies

I. Industry Submissions to the 2021 National Trade Estimate Report

a. Korea's App Store Law

- i. Information Technology Industry Council: "In October 2020, Korean legislators in the National Assembly proposed six bills that would amend the Telecommunications Business Act to ban app stores from requiring that app developers use a uniform billing system. **While the proposals appear origin-neutral on the surface, Korean legislators have made clear through public statements that the legislative intent is to target U.S. firms, while favoring their Korean competitors. If enacted into law, the legislative proposals would restrict U.S. app stores' ability to charge a service fee through their own payment platforms, thereby limiting the ability to provide services in a safe, secure, and efficient way.** Industry is concerned that the conditions imposed on U.S. companies by the proposed amendments would significantly impede affected companies' ability to supply global services on a cross-border basis to Korea, and would potentially run afoul of Korean market access and investment commitments under the Korea-United States Free Trade Agreement (KORUS). The conditions would also restrict U.S. app developers' ability to reach the Korean market via trusted U.S. ecosystems." (pg.48) *(emphasis added)*

b. Australia's News Media Bargaining Code

- i. *Internet Association*: "The internet industry has strong concerns that the Code violates Australia's trade obligations and unfairly discriminates against U.S. companies. IA is expressly concerned that the Code targets two U.S. digital companies to assist a class of domestic players in a way that runs counter to Australia's international trade commitments. The ACCC's proposed Code would improperly require proprietary information sharing by U.S. digital platforms without transparent standards or safeguards, and would set a dangerous precedent of political interference in Australia's digital economy. Finally, the Code presents an unfair and arbitrary treatment of foreign investors. Given the wide ramifications, we believe the ACCC should reconsider its proposed legislation and pursue a balanced solution for Australia's digital economy and consumers. **The draft code, if enacted in its current form, would run counter to Australia's trade obligations in the over fifteen-year-old AUSFTA as well as the WTO General Agreement on Trade in Services (GATS).** It is also at odds with Australia's history of leadership in promoting cross-border digital trade." (pg. 21) *(emphasis added)*
- ii. *Information Technology Industry Council*: "In August 2020, the Australia Competition and Consumer Commission released a Draft Media Bargaining Code to address perceived imbalances in financial arrangements between news media publishers and digital

platforms that may feature news content. The Code not only requires digital platforms to carry domestic Australian news content but would also require U.S. digital companies to transfer revenue to Australian competitors and disclose proprietary information related to private user data and algorithms. **It explicitly and exclusively targets two U.S. companies without any indication of the selection criteria for these companies and their various services, or whether similar criteria was or will be applied to companies in or outside of Australia.** The Code also accords the Australian Treasurer with unfettered discretionary power to designate other companies to which the Code should apply. **The draft Code would impose discriminatory and burdensome responsibilities on U.S. companies where Australian, Chinese, Japanese, European, or other third-country technology businesses would not incur the same responsibilities. In solely targeting U.S. companies, the Code conflicts with basic trade principles of national treatment and non-discrimination under the Australia-U.S. Free Trade Agreement (AUSFTA) and the WTO General Agreement on Trade in Services (GATS)."** (pg. 6) (*emphasis added*)

- iii. ***U.S. Council for International Business:*** "The proposed Code would interfere with the legitimate business decisions of two specific US digital platform businesses, and conveys unfettered discretionary power on the Australian Treasurer to designate other companies to which the Code should apply. The Code not only requires digital platforms to carry domestic Australian news content but would also require U.S. digital companies to transfer revenue to Australian competitors and disclose proprietary information related to private user data and algorithms. **The draft code, if enacted in its current form, would run counter to Australia's trade obligations in the over fifteen-year-old Australia-U.S. Free Trade Agreement (AUSFTA) as well as the WTO General Agreement on Trade in Services (GATS).** It is also at odds with Australia's history of leadership in promoting cross-border digital trade." (pg. 4-5) (*emphasis added*)
- iv. ***Computer and Communications Industry Association:*** "Motivated by a desire to empower domestic news publishers, the new rules would dictate that online services negotiate and pay Australian news publishers for online content, and also disclose proprietary information related to private user data and algorithms. As drafted, the Australian Treasury would have the utmost discretion to determine which companies these mandates are applied to, and **currently only two companies – both American – have been identified at this time. There are significant concerns from a procedural, competition, trade, and intellectual property perspective that USTR should pay close attention to.**" (pg. 19) (*emphasis added*)
- v. ***Coalition of Services Industries:*** "The proposed Code would interfere with the legitimate business decisions of two specific US digital platform businesses and confer unfettered discretionary power on the Australian Treasurer to designate other companies to which the Code should apply. The Code not only requires digital platforms to carry domestic Australian news content but would also require U.S. digital companies to transfer revenue to Australian competitors and disclose proprietary information related to private user data and algorithms. **The draft code, if enacted in its current form,**

would run counter to Australia’s trade obligations in the over fifteen-year-old Australia-U.S. Free Trade Agreement (AUSFTA) as well as the WTO General Agreement on Trade in Services (GATS). It is also at odds with Australia’s history of leadership in promoting cross-border digital trade.” (pg. 7) (*emphasis added*)

- vi. **National Foreign Trade Council:** “Over the past year, some foreign governments have also devised new ways of targeting U.S. digital companies and reducing their space to operate in foreign markets while protecting their domestic industries. One particular example of concern is Australia’s draft News Media and Digital Platforms Mandatory Bargaining Code which would require U.S. digital companies to carry domestic Australian news content, transfer revenue to Australian competitors and disclose proprietary information related to private user data and algorithms.” (pg. 6-7) (*emphasis added*)

c. EU’s Digital Markets Act/Digital Services Act

- i. **U.S. Council for International Business:** “Most significantly, as part of the Digital Services Act, the European Commission proposes an *ex ante* regime to control behavior of ‘large online platforms’ designated as ‘gatekeepers’. Such firms, broadly anticipated to be mostly US firms, could be forced to share data with competitors and be restrained from certain conduct that is common across many economic sectors, regardless of specific evidence or proven harm. In the context of the proposal the EU policymakers further suggest the establishment of a new EU regulator to oversee and enforce rules. **While Europe wants to tighten competition rules and enforcement for US tech firms, the EU is also seeking to loosen competition rules for EU industrial champions.** (pg. 37-38) (*emphasis added*)
- ii. **Internet Association:** “Since the European elections in 2019, EU leaders have actively promoted a multi-pronged approach towards “technological sovereignty” or “digital sovereignty” as a main policy objective. In updates to the EU’s digital and industrial agenda calls for “technology sovereignty” have been advanced with regards to data, artificial intelligence, cloud services, as well as on the responsibility of online platforms and competition policy with the latter two packaged as the Digital Services Act and Digital Markets Act.

While the precise meaning of sovereignty or autonomy in the realm of technologies remains ambiguous, EU leaders have emphasized the desire to limit the market position of U.S. providers. For example, some EU officials have called for a range of policies to support “a European way of digitization, to reduce our dependence on foreign hardware, software and services.”

A recent draft document from the European Commission –A European Strategy for Data – calls the amount of data held by “Big Tech firms” a “major weakness” for Europe, and proposes several regulations to require sharing of data between public and private firms to create a “European data space.” This document also proposes subsidizing European cloud providers while contemplating potential *ex ante* competition rules that would be applied against foreign firms.

It is important for the U.S. to engage with the EU on this issue to ensure that any proposals on sovereignty and European data do not include tools that would result in protectionism and discrimination against U.S. firms.” (pg. 36-37) *(emphasis added)*

- iii. Computer & Communication Industry Association: “The Commission is preparing extensive regulatory proposals (under the planned Digital Markets Act). In recent years, U.S. technology firms have seen a rise in protectionist actions relating to competition in the forms of antitrust enforcement and new regulations.

First, the EU has announced plans to impose new regulations on certain “structurally significant” digital businesses. This “ex ante” proposal is expected to be released in December 2020, and will restrict the competitive capabilities of large technology companies, making it harder to operate in European competitively. These regulations would largely apply to large U.S. platforms and exclude most European competitors.

According to media reports, these proposals will operate under the assumption that restoring “competitiveness” to Europe’s digitally enabled markets requires outright prohibitions of certain types of conduct (e.g. so-called “self-preferencing”), structural separation obligations (“line of business restrictions”), and even opening up assets and infrastructure to less capable rivals (access obligations), helping European companies piggy-back off rivals’ innovations and investments. In December, the Commission is expected to present its “Digital Markets Act” (a combination of both “ex ante” regulation and new digital market-only investigation and remedy powers, originally intended to apply horizontally as a “New Competition Tool”, or NCT.

It is possible that other jurisdictions will follow the European approach to restricting the competitive threat of U.S. companies.

If implemented, these reforms would push competition law in a new direction towards a structural approach that favors smaller European competitors while ignoring the dynamic competition that takes place, the consumer welfare generated by the existing framework, and the innovation and investment incentives necessary to generate future technological breakthroughs. (pg. 36-37) *(emphasis added)*

- iv. Information Technology Industry Council: “A new European Commission took office in May 2019 and has since pursued an active digital policy strategy under the banner of “technological sovereignty”, which is geared towards boosting the capacity of Europe’s domestic technology industry and may affect the conditions under which non-European firms can compete in the European single market. Under a new, sweeping Digital Services Act the EU is proposing new ex ante regulatory rules that may affect various aspects of U.S. platforms’ business models. Other initiatives, described in more detail below, center on data governance, artificial intelligence, and cloud services. Maintaining and increasing the ability to develop key technologies and ensure their availability to the EU in the future is a legitimate goal, and ITI strongly supports the pursuit of these objectives in a manner that eschews protectionism and discrimination.”

(pg. 18) *(emphasis added)*

- v. **National Foreign Trade Council:** “Notably, since the European elections in 2019, EU leaders have actively promoted an aggressive, multi-pronged approach towards “technology sovereignty” as one of the two main policy objectives to be pursued by the current EU Commission. **Under this new policy umbrella, the EU is proposing new regulatory “ex ante” rules that would apply almost exclusively to U.S. platforms (under a new, sweeping Digital Services Act),** as well as restrictions on cloud services, artificial intelligence and data. **EU officials have stated that the purpose of digital sovereignty is to create a “new empire” of European industrial powerhouses to resist American rivals. These unilateral regulations appear designed to discriminate against U.S. companies and to take aim at a slice of the \$517 billion U.S. digital export market.”** (pg. 4-5) *(emphasis added)*

d. Germany’s GWB Digitization Act

- i. **Internet Association:** “Germany is reportedly considering allowing competition authorities to subject certain market-leading companies to prohibitions and penalties even if there has been no showing of anti-competitive abuse, which would be flatly inconsistent with U.S. and global practice. The companies that would be targeted are online platforms and other companies that German authorities accuse of “transcending” their dominance in a given market because, for example, they are vertically integrated or control sensitive business data. Other proposed rules would also target online platforms, including a rule that would make it easier for competition authorities to oblige platforms to provide access to data. Many of these proposed rules include fuzzy definitions of longstanding concepts in competition law (such as “dominance” and “essential facilities”) and depart from global competition norms, including by shifting the burden of proof away from competition authorities and towards targeted companies. Together these rules could stifle U.S.-German digital trade **and could serve as a model for other countries that are looking to challenge or undermine U.S. businesses operating in this sector.** (pg. 53-54) *(emphasis added)*
- ii. **Computer & Communications Industry Association:** “Reports indicate that a central part of the reform will be to “move to a preventative level (ex ante) imposing precautionary antitrust responsibilities on companies rather than waiting for an abuse to take place before taking action.” German authorities have also proposed targeting online platforms and other companies supposedly “transcend” their dominance in a given market based on vertical integration concerns or access to sensitive data. Another proposed rule would shift the burden of proof away from competition authorities and towards targeted companies. **Many of these proposals are starkly inconsistent with longstanding U.S. and global competition norms and, if adopted, could serve as trade barriers.”** (pg. 47) *(emphasis added)*

II. Industry Submissions to the 2022 NTE

a. Korea's App Store Law

- i. **Information Technology Industry Council:** "On August 31, 2021, the Korean Legislative Assembly's Legislation and Judicial Committee passed the "In-App Legislation," which bans large app store operators from requiring app developers to use their respective in-app payments systems. **The law appears to run contrary to Korean trade commitments by taking an approach that would disrupt standardized practices that ensure consumer privacy, security, and reliable access across markets, and with legislators' public statements effectively singling out two U.S.-headquartered companies.** The law will also restrict U.S. app developers' ability to reach the Korean market via trusted ecosystems." (pg. 56) (emphasis added)
- ii. **Coalition of Services Industries:** "In August 2021, the Korean National Assembly passed legislation that requires mobile application marketplaces to permit users to make in-application purchases through payment platforms not controlled by the marketplace itself. **This legislation is global-first and bans a business model that is practiced by US mobile app marketplace providers, and not their Korean equivalents. It threatens a standard US business model that has allowed successful Korean content developers to reach global audiences, and is at tension with Korea's obligations under the Korea-US FTA.** In the absence of a payment service integrated into a mobile application marketplace, it is unclear how the application distributor could recover the costs it incurs in maintaining the mobile application marketplace, and monetize the broad benefits accorded to all application developers, including those from Korea." (pg. 47-48) (emphasis added)
- iii. **Computer & Communications Industry Association:** "In August 2021, the Korean National Assembly passed legislation that requires mobile application marketplaces to permit users to make in-application purchases through payment platforms not controlled by the marketplace itself. **The scope of the law effectively creates a band on a predominately used U.S. model, at the exclusion of local equivalents. Further, policymakers supportive of the bill have made clear their intent to single out specific U.S. companies with the new law. The targeting of U.S. firms could conflict with Korea's trade commitments under the Korea-U.S. Free Trade Agreement, as well as commitments under Article XVII (National Treatment) of the WTO General Agreement on Trade in Services (GATS).** U.S. operators of application marketplaces are disincentivized to operate in a region where it is unclear how the application distributor could recover the costs it incurs in maintaining the mobile application marketplace." (pg. 80-81) (emphasis added)

- iv. **Internet Association:** “In August 2021, the Korean National Assembly passed legislation that requires mobile application marketplaces to permit users to make in-application purchases through payment platforms not controlled by the marketplace itself. **This legislation is a global-first move that affected only two U.S. digital companies and none of their Korean competitors. It threatens a U.S. business model that has allowed successful Korean content developers to reach global audiences, and is at tension with Korea’s obligations under the Korea-U.S. FTA.** In the absence of a payment service integrated into a mobile application marketplace, it is unclear how the application distributor could recover the costs it incurs in maintaining the mobile application marketplace, and monetize the broad benefits accorded to all application developers, including those from Korea.” (pg. 83) *(emphasis added)*

b. Australia’s News Media Bargaining Code

- i. **Information Technology Industry Council:** “The Code requires U.S. digital platform companies that display domestic Australian news content to create a contract for revenue sharing and notify news outlets of any changes to the company’s internal algorithms. While companies have not yet been designated, the Code accords the Australian Treasurer unfettered discretionary power to designate companies to which the Code should apply. **As the Code would only affect U.S. companies, it appears to conflict with basic trade principles of national treatment and non-discrimination under the Australia-U.S. Free Trade Agreement (AUSFTA) and the WTO General Agreement on Trade in Services (GATS).**” (pg. 18) *(emphasis added)*
- ii. **Computer & Communications Industry Association:** “Under the Code, designated platform services companies are required to engage in negotiations with Australian news publishers for online content. **Motivated by a desire to empower domestic news publishers,** the new rules would dictate that online services negotiate and pay Australian news publishers for online content, and disclose proprietary information related to private user data and algorithms.

(...)

Only two companies have been identified throughout deliberations. There are significant concerns from a procedural, competition, trade, and intellectual property perspective that USTR should pay close attention to. In particular, U.S. officials should monitor the implementation of the Code and its adherence to the principles of transparency, fairness and non- discrimination as consistent with the U.S.-Australia FTA.” (pg. 23-24) *(emphasis added)*

- iii. **U.S. Council for International Business:** “In February 2021, the Australian Government passed the News Media and Digital Platforms Mandatory Bargaining Code... To date, no platform has been designated, although the Code is subject to an annual review by the Treasurer commencing February 2022. In view of the impending Federal election and that news publishers are integral to the election, the process is politicized.

USTR should continue to pay close attention to the implementation of the Code and its adherence to the principles of transparency, fairness and non-discrimination as consistent with the U.S.-Australia FTA.” (pg. 6-7) *(emphasis added)*

- iv. **Internet Association:** “In February 2021, the Australian Government passed the News Media and Digital Platforms Mandatory Bargaining Code... To date, no platform has been designated, although the Code is subject to an annual review by the Treasurer commencing February 2022. In view of the impending Federal election and that news publishers are integral to the election; the process is politicized. **USTR should continue to play close attention to the implementation of the Code and its adherence to the principles of transparency, fairness and non-discrimination as consistent with the AUSFTA.”** (pg. 14) *(emphasis added)*

c. EU’s Digital Markets Act/Digital Services Act

- i. **Computer & Communications Industry Association:** “Under the proposed text, companies that operate a “core platform service” must notify the European Commission upon meeting pre-defined thresholds for European turnover, market capitalization, and number of European consumer users and business users. **These thresholds have been set at levels where primarily U.S. technology companies will fall under scope, and some policymakers have proposed amending the thresholds to ensure that only U.S. firms fall under scope.** The list of “core platform services” furthermore carves out non-platform-based business models of large European rivals in media, communications, and advertising.

Once under the scope of the DMA, companies will be prohibited from engaging in a range of pro-competitive business practices (e.g., benefiting from integrative efficiencies). Furthermore, the Commission will be vested with gatekeeping authority over approval for future digital innovations, product integrations, and engineering designs of U.S. companies. The DMA would also in some cases compel the forced sharing of intellectual property, including firm-specific data and technical designs, with EU competitors, effectively requiring U.S. firms to subsidize rivals to promote competition. Unlike traditional competition enforcement, the Commission will be able to impose these interventions without an assessment of evidence, of any effects-based defenses, or of pro-competitive justifications put forth by the companies targeted.” (pg. 52) *(emphasis added)*

- ii. **U.S. Council for International Business:** “Since the European elections in 2019, EU leaders have actively promoted an aggressive, multi-pronged approach towards “technology sovereignty” as one of the two main policy objectives for the current EU Commission. Under this new policy umbrella, the EU is proposing new regulatory ‘ex ante’ rules that would apply almost exclusively to U.S. platforms (under the sweeping Digital Services Act and Digital Markets Act), as well as restrictions on cloud services, artificial intelligence and data. **EU officials have stated that the purpose of digital sovereignty is to create a “new empire” of European industrial powerhouses to resist American rivals. These unilateral**

regulations appear designed to discriminate against U.S. companies and to take aim at a slice of the \$517 billion U.S. digital export market.

The recent years have already been marked by aggressive enforcement where U.S. tech companies have been subject to Europe’s highest profile competition enforcement cases, often receiving record fines unheard of in the rest of the world. The European Commission has imposed record fines and essential facility-style rules on U.S. companies for conduct most other regulators and courts have found to be legal. The Commission has also required record repayments of tax revenues as part of its state aid cases.

(...)

The European Commission has proposed new legislation and enforcement tools for the digital marketplace (“Digital Markets Act”). **As the EU considers structural measures to address the digital marketplace, we urge USTR to work with the EU to ensure that it does not discriminate against U.S. companies through its laws and regulations, and that it upholds principles of non-discrimination, regulatory transparency, and technology neutrality in laws and regulations. It is important that regulatory approaches impacting digital services and technologies are developed in a deliberate and consultative manner subject to traditional trade principles, including non-discrimination, national treatment and most favored nation treatment.** In keeping with transatlantic regulatory principles, such regulatory frameworks must also include clear protections for due process and regulatory dialogue, as well as safeguards for IP, privacy, and security.” (pg. 59) *(emphasis added)*

- iii. **Internet Association:** “The European Commission published its Digital Markets Act (DMA) proposal in December 2020. **The DMA includes an array of extraordinary prohibitions that will apply exclusively to a small group of U.S. platforms. EU officials have been clear that they aim to use the DMA to reduce “dependence” on U.S. services and to support local industry, furthering the EU’s current agenda of digital sovereignty.**

As proposed, the DMA would impose sweeping competitive restrictions on companies labeled as “gatekeepers,” which the EU has defined narrowly to refer to a specific subset of U.S. technology providers, while excluding European digital rivals and other EU industries that compete with the U.S. technology sector. If enacted, US companies would be forced to comply with new obligations and regulatory restrictions that would damage their competitiveness with foreign firms, while the EU – as well as Russia, China, and other foreign rivals – would be entirely free of these restrictions.

Specifically, the DMA imposes a large number of restrictions on business activities that have previously been permissible under U.S. and EU law. Further, U.S. companies would have to meet a number of new requirements and restrictions under the DMA, including obligations to provide foreign rivals with access to proprietary and private information, ranking data, and internal tools; and restrictions on offering integrated services regardless of consumer welfare, security, and privacy considerations. For example, one of the most striking requirements under the DMA is an obligation for U.S. search engine providers

to “provide access, on fair, reasonable and non-discriminatory terms, to search ranking, query, click and view data to other providers of such services.” This sort of obligation has no parallel in any other national law, and would present significant privacy, security, and intellectual property concerns to consumers and business users of search services, while appropriating highly valuable trade secrets from U.S. companies. The DMA’s enforcement provisions would also lower the bar for EU officials to impose structural remedies on U.S. companies. In addition to potential fines of up to 10% of global turnover, the DMA includes a long list of potential sanctions, divestment requirements, structural separation requirements, and broader remedies for “systemic non-compliance.” This framework gives the EU substantial new authority to potentially restructure the operations of U.S. companies.

... It appears that the EU’s goal in circumventing competition norms is to lower evidentiary standards, shift burdens of proof, and eliminate opportunities to rebut findings—making it faster and simpler to issue crippling penalties and structural remedies on U.S. companies.” (pg. 35-36) (*emphasis added*)

- iv. **Information Technology Industry Council:** “In parallel, previous proposals have progressed through the legislative process. These include the bloc’s new rules for online platforms in the Digital Services Act (DSA), the new Digital Markets Act (DMA), which sets out to address the challenges posed by “gatekeepers,” and new rules for re-use of sensitive data held by the tech sector in the Data Governance Act (DGA).

ITI is closely involved in these legislative procedures and continues to underscore the need for the EU to pursue its policy objectives in a manner that eschews protectionism and discrimination.

- » **The Digital Services Act (DSA)**, published in December 2020, is aimed at harmonizing rules for the removal of illegal content online and rules related to the responsibility and liability of online platforms. It proposes new harmonized rules for flagging and taking down illegal content online, a verification mechanism for traders on online platforms, and the regulation of trusted flaggers (i.e., certified entities tasked with removing illegal content from platforms). The DSA also proposes differentiated obligations for what it identifies as very large online platforms, such as annual audits, data sharing with authorities and researchers, transparency of recommending systems, and risk management. The proposal is currently being amended by the Council of the EU and the European Parliament, with a final deal expected in 2022.
- » **The Digital Markets Act (DMA)** is a draft law that targets large online platforms determined by Commission parameters to have a systemic role in the market. The DMA introduces obligations and prohibitions for companies that are designated as “gatekeepers” based on quantitative indicators related to revenue, number of users, and cross-border reach (across a minimum of three EU Member States). As drafted the Commission retains ample flexibility to perform a qualitative assessment and designate a firm as a gatekeeper regardless of the quantitative criteria. The DMA also gives the Commission far-reaching investigative powers over gatekeepers, including

the possibility to carry out on-site inspections, and practices perceived as having a distortive effect on competition. **Concerns remain that the DMA's application may be limited to a handful of primarily U.S.-headquartered firms.** The DMA is currently being amended in parallel by the Council of the EU and the European Parliament, with a final deal expected in 2022. **ITI encourages USTR and the U.S. administration to engage with the EU to ensure that the rules are targeted to proven and clear market failures and remain non-discriminatory in nature.** We also continue to advocate for the establishment of a regulatory dialogue in the context of the DMA to ensure that rules are fairly and transparently applied." (pg. 28) *(emphasis added)*

Coalition of Services Industries: "In December 2020 the European Commission issued the Digital Markets Act, a complex proposal that seeks to impose new restrictions on large online service providers, deemed "gatekeepers," in the name of promoting competition. **The scope of the law could impact U.S. companies disproportionately.**

... **As the EU considers structural measures to address the digital marketplace, we encourage USTR to work with the EU to uphold principles of non-discrimination and technology neutrality in laws and regulations. It is important that regulatory approaches impacting digital services and technologies are not protectionist, but rather developed in a deliberate and consultative manner subject to traditional trade principles, including non-discrimination and national treatment.** (pg. 21) *(emphasis added)*

- vi. **App Association:** "The European Commission has already carried forward numerous regulations, directives, consultations, and proposals under the DSM that raise significant concerns for the App Association, including:
- **A range of competition-themed activities and policies focused on the EU's "digital sovereignty" that stand to cause damage to the digital economy and American small businesses' ability to operate in the EU.**¹⁹
 - A proposal to regulate online platforms, via the Digital Markets Act, to address contractual clauses and trading practices in relationships between platforms and businesses. Additionally, there are attempts to regulate the free flow of information online through things such as the EU's Digital Services Act which centers around tackling illegal hate speech with the goal, moving forward, of removing illegal content from the internet.

¹⁹ European Commission, The Digital Services Act package, available at <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>." (pg. 12) *(emphasis added)*

d. Germany's GWB Digitization Act

- i. **Internet Association:** “A new competition law entered into force in Germany in January 2021 that allows the German Federal Cartel Office (“FCO”) to subject certain companies to prohibitions and penalties even if there has been no showing of an abuse of a dominant market position, which would be flatly inconsistent with U.S., EU and global practice. The companies targeted are online platforms and other companies that German authorities accuse of “transcending” their market power in a given market because, for example, they are vertically integrated or control sensitive business data. **After the new law became effective, the FCO immediately used its new powers and initiated investigations against US-based companies Facebook, Google, Amazon, and Apple alleging that these companies are of “paramount significance for competition across markets.**

Other rules in the new law also target online platforms, including a rule that makes it easier for competition authorities to oblige platforms to provide access to data. Many of the rules include fuzzy definitions of longstanding concepts in competition law (such as “essential facilities”) and depart from global competition norms, including by shifting the burden of proof away from the FCO and towards targeted companies. **Together these rules come close to introducing a sector-specific regulation of online platforms by means of antitrust law and could serve as a model for other countries worldwide that are looking to challenge or undermine U.S. businesses operating in this sector.** Overall, the new regime is likely to negatively affect U.S.-German digital trade.” (pg. 52) *(emphasis added)*

- ii. **Computer & Communications Industry Association:** “Germany recently reformed its competition rules, with a new law effective January 19, 2021. The rules were amended to de-emphasize causality requirements and the Federal Cartel Office (FCO) was provided with completely new enforcement instruments, especially for digital platforms, providing much lower intervention thresholds and limiting possibilities for judicial review.

(...)

Many of these rules are starkly inconsistent with longstanding U.S. and global competition norms and effectively serve as trade barriers. Most importantly, the new competition rules were written to be enforced solely against U.S. companies. Current investigations under this new regime are limited to U.S. tech companies.” (pg. 63-64) *(emphasis added)*