

# DIGITAL REGULATION PROJECT

## International Coherence in Digital Platform Regulation: An Economic Perspective on the US and EU Proposals

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Policy Discussion Paper No. 5<sup>†</sup>  
August 9, 2021

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<sup>†</sup> The Tobin Center for Economic Policy at Yale hosts the papers of the Digital Regulation Project as a way for some of the world's leading economists and regulatory experts to present policy recommendations, based on their relevant research and expertise. The Tobin Center does not take policy positions and therefore the content does not represent the positions of the Tobin Center or Yale University.

# INTERNATIONAL COHERENCE IN DIGITAL PLATFORM REGULATION: AN ECONOMIC PERSPECTIVE ON THE US AND EU PROPOSALS<sup>1</sup>

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There is broad consensus, in many countries, that *ex ante* regulation is needed to address the market dominance of the very largest digital platforms. This paper takes that as a given.

There is also general agreement as to the benefits of having broadly coherent regulatory approaches across jurisdictions. The transnational nature of the firms concerned and the issues arising means that regulation in any one jurisdiction will have extra-territorial effects, and that inconsistent regulation will create unnecessary costs, reduce service quality, and dampen innovation. The different legal and political frameworks across countries make absolute consistency unrealistic and probably undesirable. However, greater *coherency* should make regulation more effective, more proportionate, and better able to limit any negative consequences.<sup>5</sup> It should give users clarity as to what to expect from these platforms, as well as

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<sup>1</sup> This is the fifth in a series of papers prepared by a collection of economists and policy experts in the United States, the UK, and the European Union who have studied, and are committed to the improvement of, competition in digital markets. Previous papers addressed consumer protection in online markets, regulating the market for general search services, the concepts of “fairness” and “contestability” as used in the Digital Markets Act, and the use of “equitable interoperability” as a “super tool” to restore and encourage competition in online markets.

<sup>2</sup> Authors’ full titles and conflict disclosures can be found in Appendix 1.

<sup>3</sup> Many thanks to Alexandre de Stree, Giorgio Monti, and Richard Feasey for useful comments.

<sup>4</sup> Omidyar Network and the James S. and James L. Knight Foundation have provided funding and other support for this paper and other papers relating to regulation of digital platforms. Omidyar Network employed one of the authors of this paper during a portion of its preparation.

<sup>5</sup> We use the term ‘regulation’ in this paper to mean any framework of interrelated prescriptions and proscriptions governing the conduct and/or structure of firms operating in particular markets. We are aware, for instance, that most of the proposed US standards would be imposed by legislation, and that US law and politics sometimes draw

offering greater legal certainty and lower compliance costs to the platforms themselves. At a political level, greater coherence should reduce concerns about protectionist motivations for regulation.

The need for international coordination in policy development and implementation is reflected in a recent G7 Ministerial Declaration: “By working together, including in existing international and multilateral fora, we can find coherent and complementary ways to encourage competition and support innovation in digital markets.” (April 28, 2021). Its importance is also clear from the creation, on June 15, 2021, of a new EU-US Trade and Technology Council, part of whose remit is to cooperate on regulatory policy and enforcement in the digital arena.

At the same time, there are a variety of distinct regulatory proposals being developed across the globe to address the market power of digital platform, most notably in the US, EU, and UK. On June 11, 2021, the antitrust subcommittee of the Judiciary Committee of the US House of Representatives introduced five bills, which would together constitute a strong and wide-ranging new regime. This followed announcements in December 2020 from the EU, with its proposed Digital Markets Act (DMA), and the UK, with its Advice of the Digital Markets Taskforce.

This article considers the US and EU proposals in particular.<sup>6</sup> We compare and contrast these two proposals through an economic lens, with a focus on substance rather than legal process and enforcement. We note, however, that there are clear links between these elements. An important difference between the EU and the US approaches is that the EU approach is clearly regulatory, with enforcement intended to drive compliance with the *ex ante* regulation, while the US proposals are more heavily enforcement-based, with a smaller role for the regulator and a greater role for the courts. As is highlighted below, this overarching difference of architecture has implications for some of the substantive proposals.

In what follows, we look first at how the US and EU proposals approach the issue of scope and the associated ‘designation’ of relevant platforms, then at the substantive rules that would apply to designated platforms, and finally at structural remedies. In respect of each, we highlight a number of broad similarities between the proposals, but also reflect on some important differences of detail. As well as being relevant for regulatory coherence, examining these differences may be useful for enabling each regime to learn from the other, with a view to improving both proposals.

For some of the differences we identify, we believe that the US proposals have advantages which are worthy of further consideration in the EU. Indeed, some EU commentators have already proposed changes to the DMA that would move it in the direction of the US proposals. We reflect below in particular on the recent recommendations of CERRE, the Draft Report of the

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sharp distinctions between legislation (which is something Congress does) and regulation (which is something administrative agencies do). We aim, however, to promote *substantive* coherence between the US and EU frameworks. We do not focus here on who drafts, promulgates, and enforces the standards or on the nomenclature used to describe those actors and their processes.

<sup>6</sup> The UK proposals involve the regulator establishing a ‘code of conduct’ for each platform as part of the designation process, rather than rules being set out upfront in legislation. As such, although there is likely to be significant substantive overlap between the UK code of conduct and the rules proposed in the US and EU, this cannot currently be fully assessed.

Committee on the Internal Market and Consumer Protection, and the Draft Opinion of the Committee on Economic and Monetary Affairs.

We also, however, identify some differences where the EU proposals have advantages over those in the US. In these instances, the EU would be wise to retain its proposals, or at least not to amend them simply in order to mirror those proposed in the US, and there may be merit for the US in adopting elements of the EU approach.

For the US, the focus here is on the bill that is most similar to the EU DMA proposals, the American Choice and Innovation Online Act of 2021 (H.R. 3816). The complementary Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 (H.R. 3849) and Ending Platform Monopolies Act of 2021 (H.R. 3825) are also discussed, however.

Although our focus in this paper is on the relationship between the EU and US proposed frameworks, the issue of international coherence of the regulation of digital platforms is of course much wider. We mention the UK efforts above, but all around the world competition agencies and governments are developing policy in this area. A comparison of all of these international efforts would be valuable but is beyond the scope of this paper. Nonetheless there may be lessons from his paper for these other jurisdictions, given that they mostly face the same substantive challenges.

Finally, we should note a diversity of opinion among authors such that not all authors agree with all of the observations and recommendations in the paper – in part because various elements of both proposed frameworks still await further definition and refinement – but all authors agree that the issues highlighted merit further consideration and discussion.

## **1. Key similarities between the US and EU proposals**

We start by highlighting some important high-level similarities between the EU and US proposals. These are very welcome, given the huge potential benefits, which we have highlighted above, of international coherence in this area.

First, the two proposals have a similar core rationale and intent.

- The rationale is the recognition that a small number of major digital platform firms have become very dominant in particular product markets, and that these positions are being extended into new markets, creating powerful ecosystems. This situation reflects the underlying economic characteristics of these markets, such as economies of scale and scope and network effects, as well as potentially anti-competitive conduct. The market position and conduct of these platforms makes it difficult for other firms – whether rivals or business users – to compete on a fair basis. This allows the large platforms to extract an increasingly large share of gains from trade to the detriment of both business users and end consumers. It also likely inhibits innovation.

The intent of regulation in both jurisdictions is twofold. First, to open up these markets (or elements within them) to more competition. Second, to limit the dominant platforms' ability to restrict or distort competition in related markets, thereby limiting the harmful impact of their strong market positions and also the degree to which these positions are extended into ever new areas. Under the EU proposals, these aims are framed as two core regulatory objectives: 'contestability' and 'fairness,' albeit the precise definition of – and distinction between – these concepts is not made clear.<sup>7</sup>

Second, the two proposals are based on similar framework, which is effectively built on three lists. The first list sets out what types of digital activities or services are in scope of the regulation. The second list sets out which firms are in scope of the regulation. The third list sets out practices that are forbidden or required. Much of the comparison between the two frameworks below involves comparing how the two proposals define and utilise these three lists. There is significant substantive overlap between them, alongside some noteworthy differences.

A third key similarity between the proposals is the focus on speedy outcomes and maximum legal certainty, thanks to a regulatory framework that is readily administrable, with as few nuances and ambiguities as possible. The aim is to limit the potential for extended litigation, which would eat up resources and delay the positive impact of the regulation. Both seek to achieve this by setting clear quantitative criteria for designation, stipulating a set of conduct rules that are intended to be prescriptive and unambiguous, providing only limited pathways for regulated firms to defend conduct that conflicts with the rules, and allowing for strong sanctions in case of breach.

Despite these headline similarities, however, there are also some notable differences of approach once one gets into the weeds of the different proposals. These divergences in turn highlight important questions as to the best way to regulate these companies.

## **2. EU and US approaches to the scope of regulation and associated designation**

In designing the scope and designation process for regulation, both the US and EU appear to have three key aims. First, to focus regulatory attention on the very biggest online platform firms. Second, to identify the individual platform services within those firms that merit regulation. Third, to utilise quantitative criteria to ensure that designation is as straightforward and indisputable as possible.

Designation is, unsurprisingly, described identically across the US bills. The US and EU proposals, however, take slightly different approaches. This partly reflects greater uncertainty in the EU as to exactly which companies should be covered. It also seems to reflect a greater focus in the EU on retaining some flexibility on designation. Such flexibility comes at a cost, but is potentially valuable.

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<sup>7</sup> See [Crémer et al. \(2021\)](#) and [CERRE \(2021\)](#) for discussions of these DMA concepts.

## ***2.1 Firm-level designation***

The US and the EU substantive proposals primarily relate to individual platform services, rather than the firms which operate them. However, the size of the overall firm is also critical; individual platform services will only ever be in scope if they are operated by a firm that is itself designated under the regulation, and this in turn depends heavily on firm size. In the US, regulated firms are referred to as 'covered platform operators,' whereas in the EU they are referred to as 'designated gatekeepers.'

Both proposals utilise quantitative criteria for designating the large firms to which the regulation applies. These criteria relate primarily to the overall turnover or market capitalization of the firm:

- US: \$600 billion in net annual sales (presumably global) or market capitalisation.
- EU: EUR 6.5 billion EEA annual turnover or EUR 65 billion market capitalisation (and a core platform service in at least three Member States).

These criteria are clearly designed to ensure that the regulation covers the platforms of the very biggest firms, which have extensive digital ecosystems, and which have given rise to the vast majority of the competition concerns highlighted in this area, namely Google, Apple, Facebook, Amazon, and Microsoft.

There seems little ambiguity about this outcome in the US, where the criteria appear likely to capture the five very largest firms and only those firms (at least based on current sales and market cap). In the EU, the precise situation is somewhat less clear. Additional firms could also be captured by the quantitative criteria, whether deliberately or unintentionally. We note that the DMA does also provide flexibility for firms not to be designated, even if they meet the quantitative criteria, if they can demonstrate that they do not meet certain qualitative criteria (set out in Article 3(6)). This may be a high threshold to meet in practice, but it does at least provide some flexibility for the Commission to limit its designation to the very largest firms within the scope of the US proposals, irrespective of the precise quantitative criteria adopted.

The greater ambiguity over scope in the EU may reflect a stronger focus on ensuring proportionality (a comparison of the significance of the regulatory burden to the size and scope of the consequent benefit) and on avoiding targeting certain firms without good justification, especially firms that happen to be non-EU firms. It may also reflect a desire to ensure that the designation criteria are more future-proof and less gameable. Finally, it may reflect genuine uncertainty as to whether it would be proportionate to allow for regulation of a wider set of firms, with particular debate around Booking.com, Spotify, and also the large Chinese platforms, if they attempt to grow their activity in the EU.

Nonetheless, there is also likely to be benefit in focusing regulation on the very largest firms, and to doing so in a straightforward and unambiguous way, given the novelty and complexity of the new regulation, the substantial time and resources that are likely to be involved in implementing it, and the weight of concern raised by these specific firms.

**We would therefore support a reset of the EU designation criteria to limit the scope of the DMA to the five largest digital firms, for example through setting higher thresholds. This would increase coherence with the US proposal, even if the precise designation criteria remain divergent. At the minimum, it should only designate a small set of firms at the beginning, expanding the set as it gains more experience with the implementation of the regulation.**

In this context, we note that the recent Draft Report of the Committee on the Internal Market and Consumer Protection also proposes an increase in the firm-based turnover and market capitalization thresholds (to EUR 10bn and 100bn, respectively). In order to reflect the ecosystem nature of the firms to be regulated, it also proposes a requirement that firms operate at least two core platform services, a suggestion also supported by the German Monopolkommission. It seems that these proposed changes are intended to limit the scope of the regulation to the very largest digital platform firms.

## ***2.2 Platform-level designation***

Both the EU and US proposals utilize additional criteria to identify which of the platforms operated by these major firms are to be designated and thus subject to the proposed rules. In the US these are referred to as ‘covered platforms.’ In the EU, the terminology is a little loose. They are typically referred to as ‘core platform services’ (CPS), but in fact they are only subject to regulation if they are in themselves ‘important gateways’ for a ‘designated gatekeeper.’ Below, we refer to a platform that meets the criteria to be a ‘designated CPS.’

The EU and US proposals involve two steps.

- (i) *Does the platform provide a category of service that is within scope?*

The EU proposals list 8 categories of core platform service (CPS) that can be designated under the DMA. Several of these categories are derived from other EU legislation, presumably to enhance consistency across EU legal instruments applicable to digital platforms. The US identifies only 3 categories of ‘online platform[s],’ but these are more broadly defined.

Overall, there is substantial overlap between the primary categories of platforms that will be designated in the two jurisdictions, as is shown in Table 1 below.

**Table 1: Categories of platform service within the scope of US and EU proposals**

<b>American Choice and Innovation Online Act</b>	<b>Digital Markets Act</b>
(A) A website, online or mobile application, operating system, digital assistant, or online service that enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform	(c) online social networking services (d) video-sharing platform services  Possibly: (e) number-independent interpersonal communication services?
(B) A website, online or mobile application, operating system, digital assistant, or online service that facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform	(a) online intermediation services (albeit limited to B2C intermediation, based on the cross-reference to the EU Platform to Business regulation)
(C) A website, online or mobile application, operating system, digital assistant, or online service that enables user searches or queries that access or display a large volume of information	(b) online search engines
[Included in the above categories to the extent they play a role in such services]	(f) operating systems (g) cloud computing services
[Not covered separately]	(h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g)

There also are some important differences, however. On one hand, the US does not cut the categories in quite the same way as the EU, and may exclude some important categories that the EU includes:

- First, the US does not include advertising services as a distinct category. It is likely that the various intermediation platforms in the ad tech chain (demand-side platforms, supply-side platforms, and ad exchanges) will fall within category (B)). As for the proprietary sales of advertising space on covered platforms (such as Google Search or Facebook’s social network), the intention may be to include advertising services within the scope of the core platform to which they relate, taking the view that (for example) Facebook’s advertising services are an intrinsic part of Facebook’s social network service. However, this is not made clear. Given that there are significant concerns about conflicts of interest in the sale and placement of digital advertising, especially in relation to Google’s various services used to place advertisements on the open web (as highlighted by the UK CMA in its [Digital Advertising market study \(2020\)](#)), it would seem important that these were clearly within scope of the regulation.
- Second, the US categorisation does not include as a distinct category number-independent interpersonal communications services, such as Facebook Messenger and WhatsApp or Google’s Gmail service. Given that these have some social network functionality, they may be included within Category (A), which is fairly broadly defined. But this is not entirely clear. Given the important interrelationship between, for example, Facebook’s social network service and its interpersonal communications services, it would seem important to include them.



- Third, the US does not include operating systems or cloud computing services as specific distinct categories. The term “online platform,” however, means a website, online or mobile application, **operating system**, digital assistant, or **online service**. As such, it does include operating systems and cloud services (‘online services’) insofar as they enable the sharing of content, sales intermediation, or search. There could be some merit to constraining the scope of the regulation in this way, and indeed the recent Draft Report of the Committee on the Internal Market and Consumer Protection proposes that the DMA should only cover cloud computing services where these are provided by another core platform service. However, there are also risks with such a narrowing, especially in the context of operating systems and perhaps also cloud services. Would the US criteria include the entire Android and iOS operating systems, for example, or only those aspects of them that relate to categories (A)-(C)?

On the other hand, within its core categories (A)-(C), the US proposals appear more expansive than the EU proposals. For example, the US rules would seem to capture certain services, such as virtual assistants and browsers, that the EU regulations do not appear to capture. Given the current importance of browsers, and the likely future importance of virtual assistants, this would seem to be a useful broadening of scope. Moreover, by focusing on the core functions, however they are provided, the US approach may be more robust to changes relating to which elements of the service sit within the core operating system, as opposed to within the apps.

We note that the Draft Opinion of the Committee on Economic and Monetary Affairs proposes that browsers and virtual assistants should be explicitly included in the DMA as new core platform services, and we would support this change. However, additional examples are likely to arise over time. The EU proposals have the potential to add new core platforms following a market investigation (Article 17), which provides useful flexibility and future-proofing of the regulation. They also have the advantage that the categories used so far are consistent with other relevant EU legislation. Nonetheless, the greater generality of the US categories also may mean that they are less liable to require reformulation over time.

**Overall, the more general approach of the US in stipulating the categories of online platforms within scope has merit and is worth considering in the EU. This need not unduly compromise legal certainty so long as there is still a process of upfront designation to confirm, for each platform, what services are in scope. At the very least, the EU should consider adding browsers and virtual assistants to the list of core platform services (at Article 2).**

**The US, meanwhile, should ensure that its approach more clearly ensures that regulation covers advertising services and number-independent communications services, and also that operating systems and cloud services are sufficiently covered, at least where these are associated with another covered platform service.**

(ii) *Does the individual platform service warrant designation?*

The proposed criteria for assessing whether an individual platform service warrants designation are effectively quantitative.

- US: At least 50 million monthly active US users each month **or** at least 100,000 monthly active US business users.
- EU: At least 45 million monthly active EU end users **and** more than 10,000 yearly active EU business users.

In the US, there is an additional requirement that the platform should be a critical trading partner. This might appear to be a strong additional criterion, but in practice the definition of critical trading partner means that this is likely to be satisfied by any platform that meets the quantitative criteria.<sup>8</sup>

A key difference between the EU and US platform-level designation criteria is that the EU regulation is framed in terms of ‘gateways’ between business users and end users. The term gateway, combined with the reference to different types of users, means that platforms would seem to be in scope only if they are (at least) two-sided. Under Art 3(1)(b), a platform can only be designated if it provides such a gateway. This is also reflected in the quantitative criteria relating to both end users **and** business users.

By contrast, the US legislation talks about ‘critical trading partners’ which can restrict or impede **either** the access of a business user to its end users **or** the access of a business user to a tool or service that it needs to effectively serve its users or customers. This is reflected in the quantitative criterion relating to end users **or** business users.

There is merit to the US approach. CERRE (2021) highlights a concern with the EU focus on two-sided gateways. A number of the core platform services identified by the EU (such as some cloud services) cannot readily be described as gateways between business users and their consumers, while some other services can only be described thus when viewed in combination with other services (such as social networks and their associated advertising services). There is thus a risk that the current DMA proposals could exclude from designation, unintentionally, some important platform services with primarily one-sided network effects, such as Facebook’s WhatsApp service or even its social network.<sup>9</sup>

The US wording may not be perfect. It would be useful to consider further whether it fully encompasses every predominantly one-sided platform that the regulation seeks to address. However, it certainly has advantages over the EU formulation. In our view, **the EU should**

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<sup>8</sup> Sec 2, Subsection (g)(6): “The term ‘critical trading partner’ means a trading partner that has the ability to restrict or impede (A) the access of a business user to its users or customers; or (B) the access of a business user to a tool or service that it needs to effectively serve its users or customers.”

<sup>9</sup> Indeed, if advertising services are assessed separately, then even Google’s search service could potentially be excluded, unless one classifies businesses whose websites are crawled for Google’s organic search engine as ‘business users.’

**consider how to ensure that it is able to designate predominantly one-sided platforms. This would be valuable in its own right and would also increase coherence with the US.**

### *2.3 Clarity and flexibility in designation*

The US scoping criteria are designed to be as unambiguous as possible, and designation then lasts for ten years by default. Designation can be removed upon the passage of time, but only if the quantitative criteria are found no longer to hold.

On one reading, the US rules are intended to be so unambiguous that upfront pre-designation, while expected, is not in fact required in order for the rules to apply. This reading is based on the definition of ‘covered platform,’ which states that the term means a platform that has been designated **or** that meets the relevant criteria for designation. In the EU, by contrast, prior designation is expressly required before the rules apply (albeit the firms are responsible for self-assessing this and notifying the Commission, to enable the Commission to carry out the designation).

More generally, the EU designation rules provide for rather more flexibility. This flexibility is two-way:

- Even if a platform meets the quantitative criteria, there is the potential for the Commission to consider arguments put by its operator as to why it does not meet the underpinning qualitative designation criteria, and why the presumption of designation should thus be rebutted.
- At the same time, even if a platform does not meet the quantitative criteria, it may nonetheless be designated by the Commission if it is found to meet the qualitative designation criteria.

It could be argued that the EU’s greater flexibility might give rise to a heightened risk of litigation relating to its use or lack of use. However, it is not obvious that this is a significant risk; the EU proposals put the use of such flexibility firmly within the discretion of the Commission. Moreover, it is likely that we will see litigation in relation to designation decisions in both jurisdictions, irrespective of the flexibility provided for within the respective legislation. The US bills provide for an immediate right of appeal for any designation decision, and the firms would seem likely to utilise this right, perhaps drawing on constitutional and other legal arguments even if the quantitative criteria for designation are factually met. As such, it is not obvious that the additional flexibility within the EU will increase the extent of litigation or indeed alter the likelihood of success, relative to the US situation.

Moreover, the EU’s greater flexibility has some clear benefits. First, it helps to future-proof the regulation. Second, and more critically, the flexibility to designate platforms that do not meet the quantitative criteria may enable the EU to address an important issue that arises in both jurisdictions. As well as operating a number of dominant platforms, the largest digital platform operators preside over extensive ecosystems of services. Consider, for example, the highly fragmented Amazon ecosystem, shown in the figure below.



small players, even sometimes providing much needed new competition to established incumbents (such as Apple recently announcing development of its own search engine, or Amazon moving into cell phones) or creating whole new services (such as autonomous vehicles).

The US and EU proposals both seem to reflect an acceptance that, on balance, regulation should be focused on particular services, rather than each firm's entire ecosystem. This approach is cautious, and perhaps over-cautious. However, the US focus on using quantitative criteria alone for platform-by-platform designation, with no flexibility, worsens the situation. In some instances, this is inherent, for example where the criteria exclude particular services that are critical complements to regulated platforms but do not meet the quantitative criteria in their own right. The approach also risks being gameable as discussed above. We note that the DMA does include anti-circumvention rules but these relate to circumvention of the obligations, not circumvention of designation, and there are no such anti-circumvention rules of any sort in the US.

**Overall, we would support a more expansive approach to designation that provides for greater coverage of the wider ecosystems of designated firms. In the absence of that, however, the EU's more flexible approach may eventually prove itself valuable in better enabling the designation – as appropriate – of the various services that merit regulation within an extensive digital ecosystem. The EU should also consider extending its anti-circumvention rules to include circumvention of designation. The US could usefully consider how to enhance its proposals to address this issue.**

### **3. EU and US approaches to substantive rules**

Both the EU and US set out a whole series of substantive obligations and prohibitions within the text of the legislation.

In general, the EU rules are relatively narrowly defined. This reflects the intention that they should be self-executing and limit unintended harm, albeit there is also potential for some rules of the to be further specified. The intention is that compliance should be primarily enforced by the Commission. By comparison, the US rules are substantially more expansive, which may partly reflect the fact that they are to be primarily enforced through a US court system that has historically been reluctant to support regulatory intervention. There is also more potential for firms to challenge the applicability of the rules within the US proposals, via a so-called 'affirmative defense,' which is intended to limit unintended harm.

More specifically:

- The EU DMA sets out 18 obligations for regulated core platform services. Seven of these (in Article 5) are intended to be sufficiently clear to be fully self-executing, while 11 of them (in Article 6) are potentially open to a further specification process between the platform and the Commission (as set out in Article 7) to confirm the measures that are

needed to meet the objectives of the obligations. These rules include obligations relating to end user data portability (Article 6(1)(h)) and interoperability (Article 6(1)(f)).

- The US sets out a similar set of requirements across two bills that are intended to apply to the same platforms. The proposed American Choice and Innovation Online Act of 2021 contains three general nondiscrimination requirements (subsections (a)(1)-(3)) and ten specific nondiscrimination requirements (subsections (b)(1)-(10)). It seems to be intended that these should be self-executing. There is no further specification process, but the Federal Trade Commission and Department of Justice are required to publish joint enforcement guidelines, which could potentially play a similar role. The proposed Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 contains requirements on data portability and interoperability. These provisions would be overseen by the FTC, which would be responsible for issuing technical standards, having established a technical committee for this purpose.

Below we first examine the EU and US proposals for rules relating to discriminatory conduct, then discuss the proposals relating to interoperability and data portability, and finally highlight a few elements of the EU proposals that do not have a direct analogue in the US proposals.

### ***3.1 Rules relating to discriminatory conduct***

Despite the somewhat different overarching approaches of the two EU and US proposals, there is in fact substantial congruence between the two jurisdictions in terms of the issues covered by the rules.

In particular, as is set out in Table 2 below, there is close alignment between 13 of the 18 DMA obligations, on one hand, and the ten specific nondiscrimination requirements and third general nondiscrimination requirement in the American Choice and Innovation Online Act of 2021, on the other. It seems clear that the architects of the US proposals have had a close eye on the EU proposals.

**Table 2: Specific conduct rules within the US and EU proposals**

<b>American Choice and Innovation Online Act</b>	<b>Digital Markets Act (in summary)</b>
(a)(1) No advantaging the covered platform operator’s own products, services, or lines of business over those of another business user	Not covered beyond specific rules below
(a)(2) No excluding or disadvantaging the products, services, or lines of business of another business user relative to the covered platform operator’s own products, services, or lines of business	Not covered beyond specific rules below
(a)(3) No discrimination among similarly situated business users	Art 6.1.k: Requirement for fair and nondiscriminatory terms of access to app stores
(b)(1) No restriction or impeding the capacity of a business user to access or interoperate with the same platform, operating system, hardware, and software features that are available to the covered platform operator’s own products, services, or lines of business	Art 6.1.f: Requirement that business users and ancillary services have access to and interoperability with the same OS/hardware /software as do proprietary ancillary services
(b)(2) No conditioning access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator (i.e., no tying)	Art 5.e: No tying to business users from CPS to ID services Art 5.f: No tying from CPS to other CPS Art 6.1.c: Allow ‘side loading’ of third-party apps or app stores, unless threatens integrity
(b)(3) No use of nonpublic data obtained from or generated on the platform by the activities of a business user or its customers that is generated through an interaction with the business user’s products or services to offer or support the offering of the covered platform operator’s own products or services	Art 6.1.a: No use of nonpublic data related to business users to compete against them
(b)(4) No restricting or impeding a business user from accessing data generated on the platform by the activities of the business user or its customers through an interaction with the business user’s products or services, such as contractual or technical restrictions that prevent the portability of such data by the business user to other systems or applications	Art 6.1.i: Provide real-time data sharing for business-users
(b)(5) No restricting or impeding covered platform users from uninstalling software applications that have been preinstalled on the covered platform or changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator	Art 6.1.b: Allow uninstalling of apps, unless essential
(b)(6) No restricting or impeding business users from communicating information or providing hyperlinks on the covered platform to covered platform users to facilitate business transactions	Art 5.c: Allow businesses to promote offers to end users acquired via the core platform service, and contract outside the service.
(b)(7) In connection with any user interfaces, including search or ranking functionality offered by the covered platform, do not treat the covered platform operator’s own products, services, or lines of business more favorably than those of another business user	Art 6.1.d: No self-preferencing in rankings
(b)(8) No interference or restriction of a business user’s pricing of its goods or services	Art 5.b: Allow business users to offer the same products or services to end users through third party online intermediation services at different prices or conditions (No wide MFNs)

(b)(9) No restricting or impeding a business user, or a business user’s customers or users, from interoperating or connecting to any product or service	Art 6.1.e: No technical restriction of switching or multi-homing across apps to be accessed using OS
(b)(10) No retaliation against any business user or covered platform user that raises concerns with any law enforcement authority about actual or potential violations of State or Federal law	Art 5.d: No prevention or restriction of business users raising issues with public authorities
Not covered within this Bill, but covered within the <u>Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021</u>	Art 6.1.h: Requirement for effective end user data portability Art 6.1.f: Requirement that business users and ancillary services have access to and interoperability with the same OS/hardware /software as do proprietary ancillary services
Not apparently covered	Art 5.a: No data sharing across services without active user consent. Art 5.g: Price transparency for ads Art 6.1.g: Performance transparency for ads Art 6.1.j: Obligation to share search query and click data with rival search engines

That said, there are also several noteworthy differences. Below, we discuss (i) the US proposal to include general nondiscrimination requirements that are more expansive than what the EU is proposing; (ii) differences in relation to specific nondiscrimination requirements; (iii) differences in the proposed role of the regulator in clarifying and refining rules; and (iv) the US proposal to provide for an ‘affirmative defense.’

(i) *The US proposal to include general nondiscrimination requirements*

Although there is a strong overlap with the specific nondiscrimination requirements in subsection (b) of the US proposals, the three US general nondiscrimination requirements in subsection (a) go far beyond what the EU is requiring.

The US approach – of utilizing general nondiscrimination provisions alongside more narrowly defined ones – has positives and negatives.

- On the positive side, the general requirements should be helpful in future-proofing the US regulations, enabling regulatory flexibility, and limiting gaming, alongside the narrower provisions which should help to enhance clarity and legal certainty.
- On the negative side, the general US nondiscrimination requirements are strong and wide-ranging provisions that may be hard to enforce in practice and create some downside risks. For example, they could make it harder for platforms to retain some of the benefits that arise from an integrated ecosystem, such as smooth interoperability between services within a ‘walled garden.’<sup>10</sup> They might also limit the ability of these

<sup>10</sup> For example, if a user asks Siri to set up a diary appointment for her, using her iPad, it does so very smoothly, but automatically enters it in the Apple Calendar app. It does this even if the user specifically asks Siri to enter the appointment in Outlook. And even if her diary appointment could be set up in Outlook, the process might become more complicated, for example by requiring the user to provide information different than or additional to the information required when she asks Siri to set up an appointment and Siri defaults to the Apple Calendar app. It may



platforms to enter or expand in new markets, where they might be small players providing valuable extra competition.<sup>11</sup> This could act to the detriment of consumers and innovation.

The EU has opted for relatively narrow requirements, presumably because it feels confident that the positive effects of these will outweigh any downside risks. In doing so, the EU has apparently given greater weight to negative points listed above. There would, however, be four possible routes to introducing more general rules within the EU framework, while still ameliorating such downside risks.

First, there may be potential to make the specific obligations within the DMA more expansive without moving all the way to general prohibitions. For example:

- Article 6(1)(d), which prohibits self-preferencing in ranking services, could usefully be extended. We note that the Draft Opinion of the Committee on Economic and Monetary Affairs proposes extending this EU article to prohibit additional categories of self-preferencing, such as self-preferencing in display, in pre-installation, in activation, or in default settings. This would be both an improvement and bring the EU at least somewhat closer to the US approach.
- Likewise, Article 6(1)(k) requires that access to app stores be given on fair and non-discriminatory terms. This is very narrow in application compared to the US equivalent requirement at subsection (a)(3), which prohibits all discrimination among similarly situated business users. The Draft Opinion of the Committee on Economic and Monetary Affairs recommends that this obligation be widened out to all (or at least a wider set of) core platform services. This would again be both an improvement and help to bring the EU closer to the US proposals.

Second, in its recent report on the DMA, CERRE (2021) recommends a variant of the US approach, whereby the DMA would include one or more new – and more general – prohibitions, but these would always require specification by the Commission before adherence is required. This would seem to ameliorate the downside risk, given that Article 7(5) of the specification process requires consideration of the proportionality and effectiveness of measures in achieving the key objectives of the DMA (i.e., contestability and fairness).

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be that Apple's decision to allow Siri only to interface with the Apple Calendar results from strategic anti-competitive conduct. It perhaps is more likely, however, that Apple has invested resources in ensuring that Siri can set up appointments effectively within the Apple walled garden, which is not straightforward in programming terms, and that it would take significant extra effort to enable Siri to interface with other calendars, even if users express little demand for such functionality. This specific instance of self-preferencing might not in fact be of great concern to regulators. On the other hand, similar self-preferencing by Siri towards Apple Music over Spotify (or other streaming sites) would be more problematic from a competition perspective. Intervention may be merited in this latter case, even if it risks making the Siri experience less smooth for consumers.

<sup>11</sup> Consider that Facebook could enter into competition with Amazon's dominant marketplaces by integrating its own marketplace offering with its social network, or that Amazon could enter the small business credit market by offering credit to its business users.

Third, the German Monopolkommission recently argued for including within the DMA a general prohibition relating to self-preferential treatment by gatekeepers of their own core platform services. To consider the impact of this, it is worth noting that regulated platforms can potentially self-preference in two ways:

- they can self-preference *from* their core platform *to favor their* proprietary complementary lines of business, and thus *leverage* their core market position into new markets; or
- they can self-preference *to favor their* core platform, and thus *protect or enhance* their existing market power.

Both forms of self-preferencing can be problematic, especially given the strong market positions of the regulated platforms. The first of these forms of self-preferencing is, however, somewhat less likely to be anti-competitive, as leverage into new markets might not create or enhance market power in those markets and could even introduce new competition, depending on the market context. The German proposal, although more general than the existing DMA provisions, would therefore focus on discriminatory conduct that is especially likely to merit regulation, though it does risk missing situations in which market power is leveraged from a core platform service to monopolize other markets.

Fourth, while the US nondiscrimination requirements are more general still, covering any discriminatory conduct “*in connection with the operation of the covered platform,*” the US proposals allow parties to make an ‘affirmative defense’ in relation to their conduct. This option is discussed further below, but it potentially provides another route to allowing for more general nondiscrimination requirements while limiting the downside risks.

**Overall, we support the German Monopolkommission proposal, which appears proportionate and unlikely to have significant negative effects. We would also support a widening of Article 6(1)(d) and Article 6(1)(k), as recommended by the Draft Opinion of the Committee on Economic and Monetary Affairs. We also, however, recommend that the broader US approach is given further consideration in the EU. The downside risks could be ameliorated either through requiring further specification under Article 7 (as proposed by CERRE) or through some form of ‘affirmative defense’ (as in the US).**

(ii) *Differences in relation to specific nondiscrimination requirements*

Many commentators on the DMA have raised reasonable questions about whether the wording of the 18 proposed rules is sufficiently clear to be ‘self-executing,’ as is intended. Although we share this concern, our focus below is not on the precise wording of these rules, but rather on comparing the EU and US proposals in terms of the economic substance of what each rule seems intended to achieve.

As highlighted above, there is in fact a high degree of overlap between the EU and US proposals in relation to many of their specific nondiscrimination requirements, but there are also some subtle and interesting differences. For example:

- The US proposals include an expansive ‘no tying’ rule (subsection (b)(2)), whereas the EU only prohibits a few narrow categories of tying. For example, Article 5(f) only prohibits tying between services that are both regulated (i.e., where the firm already has an entrenched gateway position). It does not prohibit tying of additional services more generally, even though such tying could be seen as a strong form of self-preferencing and has substantial potential to enable leverage of market power into these additional markets. There would be merit in expanding one or more of the EU tying obligations to prohibit a wider range of tying. We note that the tying of payment services to designated core platform services has, in particular, been very contentious, and indeed the Draft Opinion of the Committee on Economic and Monetary Affairs recommends expanding Article 5(e) of the DMA to prohibit the tying of payment services as well as ID services.
- The US proposals prohibit platforms from restricting or impeding a platform user from “changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator” (subsection (b)(5)). This seems important but is not apparently covered within the DMA obligations. We note that the Draft Opinion of the Committee on Economic and Monetary Affairs recommends expanding Article 6(1)(b) to address this concern. This would both be an improvement and bring the EU proposals closer to those in the US.
- The US proposals prohibit any interference or restriction of a business user’s pricing of its goods or services (subsection (b)(8)). By contrast, EU Article 5(b) requires that platforms allow business users to offer the same products or services to end users through third-party online intermediation series at different prices or conditions. It therefore appears that the US prohibits both narrow and wide Most-Favored-Nation clauses (MFNs), whereas the EU only prohibit the wide version.<sup>12</sup> At the same time, the EU obligations prohibit comparable restrictions on non-price conditions, which seems useful, whereas the US prohibition relates only to price.
- In some cases, the rules appear intended to be identical in application, but are worded differently – for example, Art 6(1)(a) and subsection (b)(4). Greater consistency in this wording would be useful for both clarity and regulatory coherence.

**In each of the examples above, we consider that there is merit in adopting the more expansive variant of the prohibition.** In the particular case of MFNs, we note that the EU position reflects an ongoing debate in general antitrust, where it has been suggested that the efficiency benefits from narrow MFNs are more likely to outweigh their anticompetitive effects than is the case for wide MFNs. Without wishing to opine on this contentious issue in the broader antitrust context, we consider that, the use of any MFNs by the designated platforms is highly likely to be anti-competitive and highly unlikely to be indispensable for efficiency benefits. As such, **we would support a widening of the DMA to prohibit both narrow and**

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<sup>12</sup> A wide MFN, imposed by a platform, prohibits business users from pricing lower on any other sales channel, whether another platform or directly, for example through their own websites. A narrow MFN only prohibits business users from pricing lower when selling direct to consumers, for example via their own website.

**wide MFNs.** We note that this change has also been advocated by CERRE (2021), and the Draft Opinion of the Committee on Economic and Monetary Affairs.

**More generally, the US and EU could usefully review the wording of these equivalent provisions when finalising the regulations, with a view to ensuring clarity and coherence.<sup>13</sup> Where one provision is more expansive, we would recommend that – rather than seeking the lowest common denominator – consideration is given to adopting a more expansive approach, albeit recognizing that the overarching differences between the proposed regimes may make perfect congruence on rules unrealistic and potentially undesirable.**

*(iii) Differences in the proposed role of the regulator in clarifying and refining rules*

In recognition of the fact that the obligations (or at least those within Article 6) may not be sufficiently clear and self-executable for every platform to which they might relate, the EU proposals set out a process by which the Commission can – at its discretion – specify them more fully (Article 7).

We note, and broadly support, a number of proposals that have been made by CERRE (2021) and the Committee on the Internal Market and Consumer Protection and the Draft Opinion of the Committee on Economic and Monetary Affairs to enhance the EU specification process, especially in relation to transparency and participation of third parties. In general, though, this process should generate important benefits in terms of ensuring that regulations are clear, well designed, and more likely to be both effective and proportionate. By giving the Commission significant discretion in this area, the EU proposals also limit the risk that this process would create additional litigation risk.

One might think that such regulatory oversight and engagement would be even more critical in the US, given the more general framing of the US subsection (a) nondiscrimination provisions. However, there is no such provision. The US proposals do provide for the FTC and DOJ to issue joint enforcement guidelines, at least every four years, with the goal of promoting transparency and deterring violations. The process of developing these should be valuable in terms of engaging with stakeholders and enhancing legal clarity, but the guidelines are intended to relate only to the agency enforcement of the Act, and it is explicit that they would not be binding upon the courts.

This caveat is important because the intention in the US is that regulation should effectively take place via the courts, rather than via administrative decision making by a regulator. This increases the importance of creating a framework that is easily administrable, but it also potentially creates a greater risk of unintended harmful consequences. There are clear risks of relying on a court system that lacks the relevant expertise, and addresses issues as they arise on piecemeal basis, without being able to see the big picture.

The US presumption may be that the platform operators will in practice ask the FTC for further specification, even if this is not addressed within the legislation, and thus that there will be

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<sup>13</sup> In some cases, the rules appear almost identical in coverage but use different wording. As discussed above, an example might be Art 6(1)(a) and subsection (b)(4).

greater congruence between the EU and US approaches than is immediately apparent. Even if this is true, however, it would be useful to formalize this process. This would help to ensure that it occurs on a timely basis, that it is well designed to ensure effective participation by third parties, as well as by the regulated firms, and to minimize the risk of regulatory capture.

**Overall, we believe this is an area in which the US could usefully adopt some of the EU's thinking and give a more central role to the FTC in clarifying and specifying regulatory requirements, without creating unwanted ambiguity or additional litigation risk.**

(iv) *The US proposal to provide for an 'affirmative defense'*

The US proposals – unlike the EU's – allow firms to mount an 'affirmative defense' of conduct that breaches the regulatory requirements. This requires the firms to establish that the conduct would not harm the competitive process or is necessary to prevent a violation of the law, or for data protection.

In fact, the US proposals set a high hurdle for firms seeking to rely on this defense. The burden is placed on the firm to support its affirmative defense with 'clear and convincing evidence.' Furthermore, firms are unable to offset a harm to competition with any benefits such as efficiencies or quality enhancements, as might be possible in a standard antitrust case.

It is interesting that the US does not go so far as to allow an efficiency defence. This is entirely appropriate given that some of the competition concerns arising in digital platform markets arise from intrinsic factors (economies of scales and scope and network effects) that could be framed as short-term efficiencies. Historically, the US courts have tended to give far stronger weight to efficiency justifications than have the EU authorities, and this has created major barriers to US regulators when endeavouring to enforce behavioural rules or block mergers.

Even with this high hurdle, however, the potential for an affirmative defense should provide a helpful route to avoiding unduly harmful regulatory side effects. Such a feature also could be valuable in adapting the regulation to very different future business models. By comparison, the EU proposals only allow for exception/exemption on very narrow grounds, relating to public interest or economic viability in the EEA.

We note that [CERRE \(2021\)](#) and [Crémer et al. \(2021\)](#) both recommend that the EU should also allow for a form of defense, at the regulator's discretion, albeit on the basis that adherence to an obligation would harm contestability or fairness, because these are the core DMA objectives. This would go beyond what is already possible within the Article 7 specification process, as that process can only alter the measures required to meet an obligation. It cannot (it seems) exempt a platform from a particular obligation completely.

**Overall, allowing for some form of defense, albeit with a high hurdle, seems worthy of consideration in the EU. It would improve coherence with the US approach, and – as discussed above – may support the adoption in the EU of a more general nondiscrimination requirement.**

### 3.2 *Interoperability and end user data portability*

Interoperability and data portability are critical pro-competitive tools for opening up digital platform markets. As emphasised in [Scott Morton et al. \(2021\)](#), the network effects that characterise these markets tend to tip them towards concentration, with the most likely source of competition often taking the form of competition *for* the market. Indeed, some of the EU and US regulatory requirements can be seen as designed to enhance such competition *for* the market.

Although such interventions can be valuable, competition *for* the market is inherently imperfect and cannot be relied upon. The power of interoperability and data portability is that they can help to overcome the negative consequences of network effects for competition, while retaining their benefits, and thereby facilitate competition *in* the market. More generally, they can play a key role in ensuring that users are treated fairly by the regulated platforms.

In recognition of this, the EU and US proposals both include relatively strong provisions in relation to end user data portability and interoperability. There are three significant points of difference in their approaches, however.

First, in relation to end user data portability, the US rules are clear that covered platform are required to maintain a set of transparent, third-party accessible interfaces (including application programming interfaces (APIs)) that allow data transfer to occur in a structured, commonly used, and machine-readable format. There is, however, no requirement that the data feed should be real time and continuous (or even timely). By contrast, the EU proposals (Article 6(1)(h)) stipulate that data portability should be possible in real time and be continuous, but there is no requirement that end user data portability and interoperability should be provided for in a structured way over time or via APIs, unless this is implicit within the obligation that portability should be ‘effective.’

There is the potential for two-way learning between the US and EU in this area:

- If data portability is to be effective in facilitating multi-homing, and not just switching, then it is important that it is real time and continuous. **The US could usefully borrow from the EU proposals in requiring this.**
- On the other hand, if data portability is to be genuinely effective at all, it is critical that data is provided on a consistent and standardized way through open interfaces. **The EU could usefully borrow from of the US proposals in requiring this.**

We note that the [Draft Opinion of the Committee on Economic and Monetary Affairs](#) has recommended the additional requirement that data be ‘technically accessible’ (and also free), which constitutes a useful step in this direction. The [German Monopolkommission](#) has also argued for greater specification in this regard.

Second, the proposals differ in the extent of oversight that is envisaged for the regulator. In the EU, the obligations imposed on firms in relation to interoperability (Article 6(1)(f)) and end user data portability (Article 6(1)(h)) are treated in the same way as other obligations within Article 6.

Although there is some potential for specification under Article 7, firms are essentially expected to self-execute and therefore determine what interoperability and data portability they should offer, with what functionality, through what interface design. There is a worrying lack of targeting as to where data portability and interoperability requirements would be most effective in driving competition and innovation, and least likely to cause harm.

By contrast, under the US proposals these two key regulatory tools are subject to separate legislation, the ACCESS Act, with a far greater role envisaged for the FTC in terms of establishing and overseeing a technical committee that would take the lead in setting standards and supporting implementation.

We have significant concerns with the EU approach. CERRE (2021) and the German Monopolkommission have expressed similar concerns and CERRE has proposed that the data portability and interoperability obligations be moved to a new section of the DMA ('Article 6a') for which further specification by the Commission would be positively required (not just possible) prior to the obligation coming into force. This could also help to address the lack of requirements around consistency and the use of APIs.

**The CERRE proposal has some similarities to the US approach, but the US proposals sets out far more detail about how the regulator might fulfil such a remit in practice. In our view, both proposals are worthy of further consideration in the EU.**

Third, the US proposals provide for more extensive interoperability than the EU's, with provisions relating to interoperability across two different bills. The US ACCESS Act requires covered platforms to maintain a set of interfaces (including APIs) to facilitate and maintain interoperability with competing (and potentially competing) businesses. The American Choice and Innovation Online Act of 2021 (subsection (b)(1)) requires covered platforms to provide the same interoperability to business users as they have in place with their own proprietary lines of business.

By contrast, the EU proposals only require access and interoperability between complements (i.e., between the core platform service and its business users and ancillary services), and even then, *only* where access and interoperability are available to the platform's own ancillary services (Article 6(1)(f)). This EU obligation is far closer to the interoperability requirements of the American Choice and Innovation Online Act of 2021 than to the general interoperability requirement within the ACCESS Act.

Moreover, the EU obligation is arguably weaker than the equivalent US provision in that there is no 'equitable interoperability' requirement that the quality of access and interoperability should be the same as is available to the platform's own services or that any conditions should be fair, reasonable, and nondiscriminatory (FRAND). We note that the Draft Opinion of the Committee on Economic and Monetary Affairs proposes that Article 6(1)(f) be revised to include such a condition.

We do have some concerns that the focus of the US ACCESS Act is solely on interoperability between competitors, with mention of complementors. Interoperability between competitors can

be hugely valuable.<sup>14</sup> However, interoperability with complementors, using open standards, can also play a critical role in enabling user multi-homing and switching and thus driving competition between – and on – digital platforms.

The US addresses interoperability with complementors within the American Choice and Innovation Online Act of 2021, but in doing so it does not provide for the same architecture (technical committee, etc.) as the ACCESS Act sets up for interoperability with competitors. Moreover, in some situations, one might imagine that introducing competition into a market will require a mix of interoperability with competitors and interoperability with complementors. It may be clunky to try and achieve this utilizing two different bills. Overall, therefore, although we consider the more expansive US approach to interoperability to be an important step in the right direction, **we recommend that the US consider extending the ACCESS Act to cover interoperability with complementors.**

As for the EU, if interoperability and data portability are to be truly effective as instruments for opening up competition *in* these core platform markets, **the EU could usefully review, and potentially even build on, the US proposals for end user data portability and interoperability. At the least, the EU should require ‘equitable interoperability’ within Article 6(1)(f) by requiring that access and interoperability for third parties should be the same (or equivalent) as for the platform’s own services.**

We note that the German Monopolkommission has also argued for stronger DMA obligations in relation to data portability and interoperability, including in relation to the need for consistency and use of APIs and a more expansive approach to interoperability.

### ***3.3 EU rules that do not have a direct analogue in the US proposals***

The following EU obligations have no direct analogue in the US proposals. It could be argued that they are addressed by the general nondiscrimination provisions. This is not obvious, however. Indeed, the first provision below could potentially result in greater self-preferencing, given that it may be easier for a platform to gain active user consent for sharing data with its own additional proprietary services, within the ‘walled garden,’ than it would be with additional third-party services.

- Art 5(a): No data sharing across services without active user consent.
- Art 5(g): Price transparency for ads
- Art 6(1)(g): Performance transparency for ads

The only other EU provision that does not appear to be included (unless it is somehow achievable under the ACCESS Act) is:

- Art 6(1)(j): Sharing obligation for search query and click data to rival search engines on FRAND terms.

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<sup>14</sup> See Scott Morton et al (2021) for a discussion of how greater interoperability between rival social networks could help to open up competition in that market.



This is a potential remedial outcome from the ongoing antitrust cases against Google relating to the general search market. It likely will be years before this litigation concludes and any remedies are imposed, however.

**These various provisions, which are present in the EU proposals, would be worth further consideration in the US.**

#### **4. Structural remedies**

The potential for structural remedies is addressed once in the EU proposals, and in two separate bills in the US proposals.

- The DMA (Article 16) provides for structural (and behavioral) remedies when a firm has systematically infringed the obligations laid down in Articles 5 and 6 and has further strengthened its gatekeeper position. A finding of systematic non-compliance requires at least three non-compliance or fining decisions within a five-year period. Remedies must be necessary and proportionate. A structural remedy can only be applied if a behavioural remedy would not be as effective.
- By contrast, the US proposed American Choice and Innovation Online Act of 2021 *requires* that divestiture be considered “if a violation of the Act is found to arise from a conflict of interest related to the covered platform’s concurrent operation of multiple lines of business.”
- The proposed Ending Platform Monopolies Act of 2021 makes it unlawful for a covered platform operator to own or control another line of business which it either ties to the covered core platform, or which otherwise provides the platform operator with the incentive and ability to favour its own products over those of rivals.

There is clearly some overlap between the two US provisions, but the key point to note is that the US allows for structural remedies, and even mandates their consideration, in a wider set of situations than does the EU. Indeed, the DMA sets a very high hurdle for imposing structural remedies, which is potentially gameable and unlikely to be met in practice.

An additional point of difference is that the US provisions make structural remedies available almost immediately, whereas similar remedies in the EU likely would not be available for many years, if ever. In the US, the Ending Platform Monopolies Act makes it *immediately unlawful*, the moment a platform is deemed ‘covered,’ for the platform operator to own or control a line of business that poses a conflict of interest with that covered platform. The FTC can file a lawsuit to enforce the line-of-business restriction the very next day. And the American Choice and Innovation Online Act mandates that courts consider divestiture *the very first time* a covered platform violates that act through conduct enabled by a conflict of interest. By contrast, structural remedies in the EU *may not be invoked until after the issuance of three non-compliance or fining decisions* against the same firm within five years. We cannot predict whether any such eventuality ever will come to pass, let alone whether that might be in five, or ten, or even fifty years. We do know that it is unlikely to occur quickly. Because conflicts of interest can generate

substantial ongoing harm and could even lead to harmful and potentially irreversible market concentration, any such delay in the EU may prove very costly. The timing difference also reduces the potential for joint action between the US and EU authorities, which may be necessary to justify and achieve trans-national divestments.

The recent Draft Report of the Committee on the Internal Market and Consumer Protection has proposed a number of changes to the DMA proposals which would somewhat strengthen it in this area, by weakening or removing some of the conditions set out above, such as the requirement to demonstrate that a behavioral remedy would not be effective. These changes would be useful, but only go so far. The US proposals will remain stronger. In particular, the Ending Platform Monopolies Act of 2021 allows for structural divestment in situations in which there is an intrinsic conflict of interest, even if there is no explicit finding of non-compliance with the rule book.

This contrast between the EU and US approaches is interesting in the context of the UK CMA's finding, in its Digital Advertising market study (2020), that Google's strong position at each level of the ad tech value chain – including on the sell-side, the demand-side, and the intermediation exchange – “creates clear conflicts of interest.” This is a situation in which it is difficult, if not impossible, to think of behavioural remedies that might be effective, and where structural divestment may well be merited. However, it is not immediately obvious that Google's conduct in this area would breach any DMA rules, and thus unlikely that structural divestment would be achievable under the EU regulation as it stands.

It could be argued that the US approach to divestment is overly interventionist and risks undermining important economies of scope between lines of business within digital ecosystems. It may well be possible, however, to preserve economies of scope through interoperability requirements. Moreover, the US legislation does not authorise the FTC or DOJ to order divestiture. Instead, it is for the courts to consider divestiture, in specific situations, and any litigation that seeks divestment is likely to be extremely hard fought. As such, although the US powers may seem interventionist in principle, this may not be the case in practice.

**Overall, we support a strengthening of the DMA in this area, by weakening or removing some of the required conditions. The broader US approach to divestment is also worthy of further consideration in the EU, in particular to deal with situations of irreconcilable conflict of interest, albeit recognising that the different legal frameworks in the EU and US may make a full congruent approach both unrealistic and potentially undesirable.**

## **5. Conclusion**

There is, from an economic perspective, substantial similarity of intent and approach between the US and EU proposals for regulating digital markets and the firms that dominate them, but there are also some interesting divergences.

As described throughout this paper, the divergencies shine a spotlight on a number of useful areas for further consideration by the EU and the US. In some cases, there have indeed already been proposals to change the DMA in the direction of the US proposals. There are also, however,

some areas in which the US might consider following the EU approach. To the extent that the two sets of proposals can learn from each other, the final regulations are likely to be both better and more coherent internationally.

Finally, in focusing on conduct regulation, this article does not discuss the other key substantive US Bill, the Platform Competition and Opportunity Act of 2021, which relates to mergers.

Over the past decade or so, the biggest digital platform operators have engaged in a high level of M&A activity, which has helped to enhance and entrench their market positions. This partly reflects the highly dynamic nature of these markets, as well as the importance of potential competition in markets characterised by such strong tendencies towards concentration, both of which makes the standard merger assessment toolkit difficult to apply effectively.<sup>15</sup> In the US, particular concerns have been raised around the courts' reluctance to find that plaintiffs have met the very high standards for merger intervention, or that, even if plaintiffs make their case, the courts nonetheless give too much credence and weight to claimed 'efficiencies' and therefore approve the mergers nonetheless. Many commentators have suggested that the merger regime therefore needs strengthening, certainly for the largest tech firms and potentially more widely.

The Platform Competition and Opportunity Act of 2021 proposes a change to the burden and the standard for approving acquisitions by regulated big tech firms. In order to make a relevant acquisition, a 'covered platform operator' has the burden to demonstrate, by clear and convincing evidence, that there is no impact on competition or on the market position of its covered platform(s). Additionally, proponents of such mergers no longer would be permitted to assert that any harm to competition will be offset by likely efficiency benefits or quality enhancements. Although these changes would appear to establish a substantial barrier to acquisitions by the large platforms, such a barrier arguably is necessary, given the perception and perhaps the reality that agencies and courts in the US have greenlit significant mergers that turn out, in retrospect, to have been anticompetitive or, at the least, to have buttressed the large platform's market power.

There is no analogous proposal in the EU. It is true that the European Commission intends to ameliorate jurisdictional barriers to use of its merger powers in this area through more expansive use of its 'Article 22' powers. **This is useful, as far as it goes, although we believe it could be valuably enhanced by incorporating within the DMA a stronger role for the regulator in supporting DGComp's merger review process, or even giving the regulator powers to itself refer mergers to DGComp for review.**

Critically, however, there currently are no plans in the EU to alter the substantive standard of the merger test. This is apparently because a change in the Merger Regulation would require unanimity in the Council of Ministers and this is thought to be politically unrealistic. (The DMA requires only a qualified majority.) By contrast, the UK is currently considering a change in the merger test for digital platform firms that are designated as having 'strategic market status' under the UK regime. This does not perhaps go quite as far as the US proposals do, in that the threshold for intervention would simply be lowered, but it is not obvious how different the overall outcomes would be in practice, given the different legal frameworks in the UK and US.

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<sup>15</sup> See Furman et al. (2019) and CERRE (2020) for a further discussion of these issues.

What is clear, though, is that – if the US merger proposals are enacted – there will be a substantial divergence in the merger tests used in the US and the EU. This may not be an issue for many mergers, given that an adverse merger decision in one jurisdiction will frequently lead the parties to abandon the merger completely. But it could create complications.<sup>16</sup> Greater US/EU coherence would reduce this risk. **Merger review is therefore also an area where there would be substantial merit for the EU to follow the US lead in considering changes to the substantive test.**

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<sup>16</sup> For example, if the competition concerns arising from a merger are suitable for remediation, as opposed to full prohibition, close coordination between the EU and US may be required to ensure that any remedy is appropriate for both jurisdictions, but such coordination could be hampered or complicated if the jurisdictions apply different standards in doing so.

## **Appendix 1 – Author Conflict of Interest Disclosures**

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