

A THREAT TO **AMERICAN TECH** INNOVATION:

THE EUROPEAN UNION'S
DIGITAL MARKETS ACT

ABOUT THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

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Members of the ALEC Communications and Technology Task Force believe that constant, dynamic innovation in communications and technology presents numerous complexities that defy traditional public policy prescriptions. To help policymakers understand the changes underway in the 21st century economy, the Task Force brings together state legislators, private industry, and policy experts to develop public policies that will promote economic growth, freedom of technology, and innovation in the states. Areas of focus for the Task Force include: 1) Broadband deployment and adoption; 2) Protecting consumer choice in privacy; 3) Promoting new forms of e-commerce; and 4) Growing the high-tech sector of the economy.

Managing Editors:

Jonathan Williams

Chief Economist
Executive Vice President of Policy
American Legislative Exchange Council

Lee Schalk

Vice President of Policy
American Legislative Exchange Council

Author:

Jake Morabito

Director
Communications and Technology Task Force
American Legislative Exchange Council

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CONTACT INFORMATION:

American Legislative Exchange Council
2900 Crystal Drive, Suite 600
Arlington, VA 22202

Tel: 703.373.0933
Fax: 703.373.0927
www.alec.org

The European Parliament recently approved the Digital Markets Act (DMA), a new set of sweeping regulations governing technology policy within the European Union (EU) bloc. While European lawmakers may have had admirable intentions to “promote fairness,” “ensure transparency and accountability of online platforms,” and “ensure user safety,” this heavy-handed regulatory regime will have drastic consequences on Europe’s technology sector for years to come and should not be emulated in the United States. American policymakers should instead pursue free market policies that will encourage the next wave of tech innovation and new economic growth as emerging technologies come online. The free market must guide the U.S. digital economy’s next phase.



Executive Vice-President **Margrethe Vestager** and Commissioner **Thierry Breton** give a press conference on the Digital Services Act and the Digital Markets Act in Brussels, Belgium on Dec. 15, 2020.

Photo: Alexandros Michailidis

As drafted, the EU’s [Digital Markets Act](#) classifies certain digital service providers—namely U.S. technology firms such as Google, Amazon, Apple, and Meta—as so-called “Gatekeepers.” These are defined as firms with a market capitalization of at least €75 billion or EU annual revenues of €7.5 billion and that serve at least 45 million monthly end users within the EU or 10,000 yearly active business users. The regulation then categorizes a wide array of popular digital services—including search engines, online intermediation services (e.g., marketplaces, app stores), web browsers, operating systems, instant messaging services, social media platforms, video sharing platforms, cloud computing services, online advertisers, and more—as “Core Platform Services.” Even for firms that do not meet these exact criteria, the policy grants the European Commission the authority to qualify new Gatekeeper companies should the Commission determine there is a “significant impact” on the European market.

In the name of “ensuring a digital level playing field,” Articles 5, 6, and 7 of the DMA set forth [over 20 stringent obligations](#) targeting American tech companies that provide Core Platform Services, significantly restricting how they will be permitted to conduct business and configure their products within the EU. The regulation bars the “self-preferencing” of services on digital platforms, restricts companies from combining and cross-using data across their services without clear consent, and heavily impacts targeted advertising, among other mandates. By outlawing a broad swath of common digital services and business models, EU officials and regulators are unnecessarily limiting choice in the marketplace and failing to consider how these policies will impact millions of EU citizens daily when entered into force.

The DMA’s obligations go far beyond the treatment of consumer data. Messaging services like Meta’s WhatsApp will now be mandated by EU law to “provid[e] the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge” to their competitors, essentially forcing tech firms to unveil their proprietary intellectual property.

Similarly, American tech companies will be required to open up third-party access to their platforms’ operating systems and enable the sideloading of third-party apps and app stores. The process of sideloading, or the ability to directly download software outside official channels, upends existing industry verification standards and privacy practices required by platforms like the App Store and Google Play Store. This creates problematic [potential cybersecurity vulnerabilities](#) from the proliferation of unvetted apps and undermines trust in the broader app ecosystem.

Firms found in violation of the DMA's policies can be charged hefty fines of up to 10% of global revenue that increase to 20% for “systematic infringements.” In the case of Meta, such astounding fines could be as high as [\\$23 billion](#). The matter of implementation and enforcement of these mammoth regulations [remains a point of concern](#) even among proponents of the regulations.

Core Platform Services Regulated by the Digital Markets Act

CATEGORY	EXAMPLES
Online intermediation services	Amazon.com, Apple App Store, Facebook Marketplace, Google Play Store, Microsoft Store
Online search engines	Google Search, Microsoft Bing
Online social networking services	Facebook, Instagram, LinkedIn, Twitter
Video-sharing platform services	YouTube
Number-independent interpersonal communications services	Apple iMessage, Facebook Messenger, Microsoft Teams, Slack, WhatsApp, Zoom
Operating systems	Apple iOS, Apple MacOS, Android, Microsoft Windows
Web browsers	Apple Safari, Google Chrome, Microsoft Edge
Cloud computing services	Amazon Web Services, Google Cloud Platform, Microsoft Azure, Oracle Cloud, Salesforce, SAP
Virtual assistants	Amazon Alexa, Apple Siri, Google Assistant
Online advertising services	Firms likely affected: Amazon, Google, Meta, Microsoft

Under the DMA's new regime, tech firms will now have to divert resources and engineering talent to regulatory compliance that could have been better invested in R&D or enhancing products for end users. Some stakeholders predict [these regulations](#) could have a [chilling effect on innovation](#) as growing small and medium-sized firms avoid investing in product lines or markets that could result in the onerous Gatekeeper classification. Thus, the DMA could effectively discourage new competitors – the opposite of European policymakers’ [stated intent](#) to create a fair and competitive digital market.

American policymakers and their constituents have reasonable and valid concerns regarding how the internet and emerging digital technologies are governed. People from all walks of life interact with a vast array of digital services daily to do their jobs, educate their children, communicate with loved ones, order essential household goods and services direct to their doorstep, and much more. Yes, technological innovations have delivered immense economic rewards, but significant public policy challenges remain on matters such as consumer data privacy, content moderation on digital platforms, expanding internet access across the nation, the ramifications of artificial intelligence and automation, and hardening our cyber vulnerabilities in a connected world.

Lawmakers would do well to reject the European approach to address these problems with even more government mandates. ALEC supports an alternative path, guided by the proven doctrine of light-touch regulation and free market competition that ushered in today's era of American-led tech innovation. In just a few short decades, the internet rapidly evolved from a methodical dial-up experience on a clunky desktop computer to a dynamic, high-speed mobile broadband experience, enhanced by the rich ecosystem of connected devices and convenient software-based services that consumers enjoy today. We are on the cusp of yet another wave of transformation as emerging technologies such as artificial intelligence, next-generation wireless communications, virtual and augmented reality systems, blockchain technologies, and cryptocurrencies become fully realized in the near future.

ALEC members adopted [Six Principles for Communications and Technology](#) that serve as a North Star for policymakers in the perpetually changing telecommunications and emerging technology sectors:

ALEC's Principles for Communications and Technology

1

The free market should drive communications and technology policy.

2

Government should strive for competitive and technological neutrality in its policies.

3

Constitutional limits and protections should guide government policy at all levels.

4

Self-governance, codes of conduct, and other voluntary initiatives are preferred methods for pursuing solutions to new challenges.

5

Any necessary regulations should be simple, certain, and accompanied by safeguards.

6

Deregulation should be continuously pursued to reduce burdens and promote growth and innovation.

Heavy-handed regulations like the EU's DMA are a poor fit for the iterative, disruptive digital economy. When firms openly compete for end users without the government picking winners and losers, companies are incentivized to design superior products, consumers are rewarded with more choice, and the cost of consumer goods falls in the process.



The European Approach to Tech Regulation

- Top-down, overly prescriptive regulations stifle innovation and discourage new competitors from entering the market.
- Consumers are not free to decide which products are best for them and must accept questionable features like sideloading against their will.
- Government bureaucrats decide which business practices are permissible and which are prohibited in the name of consumer protection.
- **The result: An industry bogged down by burdensome rules that do not support the purported goal of increasing competition.**

The Free Market Approach

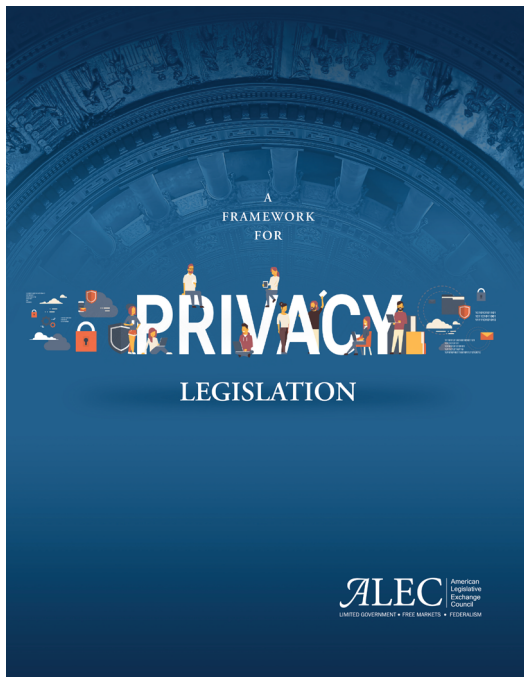
- Open competition rewards firms that deliver superior products and apply emerging technologies to solve new problems.
- New market entrants are incentivized to fulfill the needs of consumers by competing for their business.
- Government bureaucrats don't pick winners and losers.
- Existing state and federal consumer protection authorities can address consumer harms and hold bad actors accountable.
- **The result: A thriving technology sector supporting widespread economic opportunity and high-paying jobs across the states.**

RESOURCES

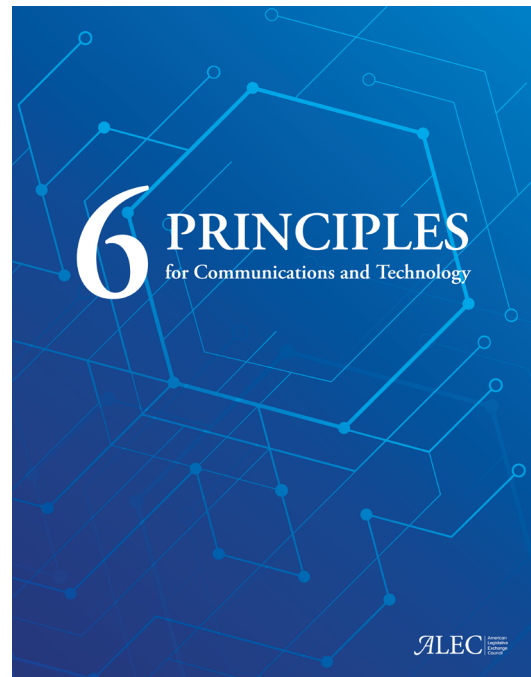
European Union Resources:

- Full Text: [Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives \(EU\) 2019/1937 and \(EU\) 2020/1828 \(Digital Markets Act\)](#)
- European Commission – [The Digital Markets Act: ensuring fair and open digital markets](#)
- Council of the EU – [“DMA: Council gives final approval to new rules for fair competition online”](#)

ALEC Communications and Technology Task Force Resources:



[A Framework for
Privacy Legislation](#)



[Six Principles for
Communications and
Technology](#)

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