

Apple initial comments on the proposed Digital Markets Acts

January 2020

Apple welcomes the opportunity to provide its views on the Digital Markets Act (DMA) proposed by the European Commission (EC). While we believe that the DMA's purposes are laudable, and while there are provisions we support, we are very concerned that the DMA's rigid, one-size-fits all approach to a diverse set of products, markets and companies will undermine important protections for consumers and lead to less opportunity and less choice across Europe.

Apple creates technology that provides a seamless customer experience that sets the highest standards for quality and security. Apple offers consumers a clear choice in a very competitive marketplace where 'free' platforms and digital services often come at the cost of user privacy. We share the goal of supporting European customers and businesses, and helping to grow a vibrant and innovative European digital economy. Apple is not dominant in any market in which it operates and faces fierce competition from other firms in every category of products it sells.¹

The digital economy has undeniably led to new opportunities, new experiences and new choices for consumers and businesses alike across Europe and around the world. At the same time, we agree that it has also created new challenges. The collection, aggregation and control of consumer data for commercial gain and advantage is one such challenge. Disinformation and manipulation is another.

The GDPR has been instrumental in strengthening consumer privacy protections in Europe, and has already inspired many countries to develop similar regulations. The Digital Markets Act has an opportunity to contribute to that progress by taking consumer privacy and security into account in its objectives. Unfortunately, by creating sweeping standards across a broad range of products and services, the proposed regulation would penalize companies that reject a business model that treats consumers as the product.

The DMA should empower regulators with the discretion and flexibility to ensure the best possible outcome on a case-by-case basis. Given the expansiveness of the proposed new regulatory power to override market-based decisions, it should ensure stronger procedural safeguards and provide a meaningful opportunity for regulatory dialogue.

The digital economy has been a driving force for economic growth and empowerment across the EU, spawning different products, services, and business models. Applying blanket regulatory obligations and prohibitions without taking into account these differences creates significant risks. The business models and practices of each platform impact the choices and opportunities that they provide for European businesses and consumers.

Apple offers consumers products that tightly integrate hardware and software to provide a uniquely secure and seamless user experience. It does not depend on the collection and monetization of personal data — its business is to sell products and related services, not its customers's personal information.

To deliver on its promise to customers, Apple has consistently set the industry standard for safeguarding user safety and privacy. These practices also ensure that Apple can continue to create and offer innovative developer tools like APIs, and invest in the next generations of apps and developers.

With the App Store, Apple's focus is on maintaining a safe and trusted marketplace for consumers, while creating a lucrative and accessible business opportunity for developers. The result has been an unparalleled engine of innovation that benefits developers of all sizes and the customers they rely on.

¹ See for example the following market share data: Europe:
Smartphone: <https://www.idc.com/getdoc.jsp?containerId=prEUR147033120>
Tablet: <https://www.idc.com/getdoc.jsp?containerId=prEUR146992020>
W. Europe:
Smartphone: <https://www.idc.com/getdoc.jsp?containerId=prEUR147037220>
Tablet: <https://www.idc.com/getdoc.jsp?containerId=prEUR147037320>

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For example, to help small and independent developers overcome economic challenges during the pandemic, Apple recently launched the App Store Small Business Program. The program halves the commission paid by developers earning less than \$1 million annual revenues from the App Store, which includes the vast majority of all developers that pay a commission to Apple. (Of note, 85% of all developers pay no commission to Apple regardless of their total earnings, because they do not sell digital goods or services on the platform).

Regulators should review the contrasting choices made by large digital platforms that impact European user privacy, security and choice. But the DMA, as proposed, is too blunt a tool. It equates size with harm, and then imposes a one-list-fits-all set of regulatory obligations without providing an opportunity for the platform to explain, and the regulator to assess, whether — on balance — there are broader benefits to consumers or businesses.

The DMA should provide a mechanism for individual platforms to explain and objectively justify different business models and certain practices. It should also provide that regulators should explicitly take into account a set of holistic and consistent policy considerations — ones that assess the evidence of actual harm and the countervailing benefits of the practices a platform seeks to maintain.

Finally, given the significant new market-intervention authority that the DMA creates, it should have stronger procedural safeguards and more formal pathways for regulatory dialogue, including:

Objective Justification. Given the significant variation among platforms and market dynamics, the DMA should require regulators to conduct a proper case-by-case analysis, and the opportunity for covered entities to provide an objective justification for maintaining a listed practice. The regulator should have to consider both the evidence of actual competitive harm (or lack thereof) and evidence of countervailing policy benefits.

Holistic, evidence-based policy analysis. The DMA must balance a complete set of policy considerations to guide the regulator's analysis of a given practice adopted by a platform. Relevant policy considerations should include:

- *Security, privacy and choice.* The DMA should reflect the importance that European policymakers and consumers place on user security and privacy. Apple offers European consumers a trusted marketplace that reviews apps prior to distribution to ensure that they provide vital security and privacy protections, and recoups its investment by charging a transparent commission on certain on-platform sales, rather than through tracking, accumulating and monetizing user data. Article 6.1(c) would undermine Apple's technical ability to review apps for privacy and security by requiring Apple to allow apps to be downloaded via side-loading or alternate app stores. Moreover, Article 5(c) would require Apple to allow business users to promote offers to users off-platform,² thus undermining its ability to be compensated for its platform investment via commission. Consumers currently have a choice of app distribution platforms — including those that lack rigorous review and curation processes — that allow access to apps via side-loading or a third party app store. If, however, Apple is required to allow circumvention of the platform and its protections, it would not be able to maintain the safe, central marketplace it currently offers to consumers. Requiring Apple to adopt these features would simply reduce consumer choice, privacy and security.
- *Contestability of app markets for small business/new entrants.* The DMA should more clearly reflect the importance of ensuring equal opportunity for all developers, and avoid harming competition among them. With the recently launched App Store Small Business Program, SME-

² As EU Commissioners have said, “*what is illegal offline should be illegal online, and what is legal offline should be legal online*”. The practice that is prohibited per se in article 5(c) would be legal in the offline world. The App Store is a digital retailer of software applications. In the offline world, it would be perfectly legal for a brick and mortar retail store to not allow its business supplier to encourage customers in the retail store to purchase its products elsewhere, outside of the store.

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led innovation will continue booming in the Apple ecosystem. Regulations that undermine the platform rules that build user trust will tend to benefit large and widely popular apps that already have their own brand recognition — at the expense of smaller, up-and-coming developers who rely on the platform's brand to attract customers.

Institutional and procedural safeguards. The DMA would significantly expand the powers of the European Commission to intervene in digital markets, and to increase the scope of that intervention over time. To ensure balanced regulatory outcomes, the DMA should clearly base this authority on fundamental principles of proportionality, accountability, rights of defence, due process, checks and balances, and judicial review.

Enhanced Regulatory Dialogue. The DMA recognizes the importance of regulatory dialogue in Recitals 33, 58 and 60, yet the regulatory framework itself only allows for “dialogue” in the context of enforcement, under the threat of important sanctions. The DMA should establish an architecture for regulatory dialogue outside of an adversarial context, to ensure that there is an opportunity to develop a complete and robust factual understanding of the digital markets in which covered and non-covered entities are operating.

We thank the Irish government for the opportunity to provide our views. We look forward to continued engagement with the EU institutions to achieve a regulatory framework that is future proof and delivers proportionate intervention that satisfies the full range of EU digital economy objectives.