ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
SCHUMPETER PROJECT ON COMPETITION POLICY

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# COMMENTS OF ITIF

Before the

Electronic Transactions Development Agency (EDTA)

Bangkok, Thailand

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| In the Matter of:<br><br>Draft Digital Platform Economy Act | ) | Public Comment |

December 20, 2024

# RESPONSE TO THE ELECTRONIC TRANSACTIONS DEVELOPMENT AGENCY'S CONSULTATION IN RELATION TO DIGITAL MARKETS AND COMPETITION

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## INTRODUCTION

The Information Technology and Innovation Foundation (ITIF), the world's top-ranked science and technology policy think tank, appreciates the opportunity to respond to the Electronic Transactions Development Agency's (EDTA) public consultation on the Draft Digital Platform Economy Act (PEA) and specifically to discuss questions related to promoting innovation and competition in Thailand's digital markets.[1]

The PEA represents a unique attempt to blend elements of the European Union's (EU) Digital Markets Act (DMA) and Digital Services Act (DSA), as well as Thailand's Royal Decree on Digital Platform Services of 2022 (Royal Decree), into a single bill.[2] This mixed bag approach is problematic since it attempts to regulate disparate issues such as content moderation, consumer protection, and competition in one piece of legislation, creating uncertainty for regulators, platforms, and users.

[1] The Electronic Transaction Development Office called for a public consultation to evaluate the Draft Digital Platform Economy Bill based on the Consultation Paper co-authored by the Electronic Transactions Development Agency (EDTA) and the Thailand Development Research Institute Foundation (TDRI). The consultation is available: https://law.go.th/listeningDetail?survey_id=NDYyNURHQV9MQVdfRlJPTlRFTkQ=.

[2] The European Parliament and the Council of the European Union adopted the Digital Markets Act on 14 September 2022, a Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

Regulation (EU) 2022/2065 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act).

Royal Decree On The Operation Of Digital Platform Service Businesses That Are Subject To Prior Notification, B.E. 2565 (2022).

Before we answer the specific consultation questions, as a general matter, three problems should be highlighted:

First, replacing the Royal Decree with the PEA seems premature since the law is in its infancy. The Royal Decree was enacted in 2022 and has only been enforced since 2023, which is not enough time to evaluate its impact or effectiveness. For this reason, there is insufficient empirical evidence or research assessing whether this law achieves its regulatory objectives, such as protecting users, preventing potential harm to the public, enhancing the credibility of platforms, or promoting best practices for platform self-regulation. Adopting a law to promote self-regulation is also inherently paradoxical; actual self-regulation emerges from industry initiative and adaptability, not from prescriptive legal mandates that undermine the very flexibility and innovation self-regulation is meant to foster. For these reasons, replacing the Royal Decree with the PEA appears to be premature.

Second, while the PEA is designed to follow international trends—the consultation paper explicitly mentions the DMA and DSA—it overlooks the fact that the EU's model is not the only approach to digital markets. On the contrary, just in the regional context, Taiwan, Singapore, and South Korea offer alternative paradigms for Thailand. While Taiwan and Singapore are also acutely aware of international developments, these countries have refrained from following the EU's regulatory agenda—and, not surprisingly, their digital markets are uniquely flourishing.[3] Moreover, South Korea is strongly considering reforming its existing ex post competition regime by the Partial Amendment Bill in a way that allows companies to offer pro-competitive justifications for their behavior.[4] Thus, before Thailand moves forward to adopt the PEA, it should consider other approaches as well.

Third, the EU's model is designed for the European digital economy and may not align with the needs or priorities of a more emerging market. Indeed, evidence shows that the DMA—contrary to its objectives—has stifled innovation. In fact, for decades, European competition policy has contributed to a decline in innovation.[5] For example, the total value of large European firms is half that of their U.S. counterparts, while the EU also lags significantly behind in the production of unicorns, patent applications, and private AI

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[3] See for example: The U.S. Department of Commerce's evaluation about Taiwan's and Singapore's digital economy: https://www.trade.gov/country-commercial-guides/taiwan-digital-economy?utm_source=chatgpt.com and https://www.trade.gov/country-commercial-guides/singapore-digital-economy?navcard=36016.

Taiwan Fair Trade Commission: White Paper on Competition Policy in the Digital Economy, 2022, https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?docid=17352&uid=179.

Singapore and Taiwan have demonstrated significant growth in their digital economies. In 2022, Singapore's digital economy contributed S$106 billion, accounting for 17.3% of its GDP, up from 13% in 2017. This growth is attributed to the rapid adoption of digital technologies across various sectors. Similarly, Taiwan's digital economy has expanded, with, for example, its photonics industry achieving a revenue of US$6.5 billion in 2023, marking a 44.4% increase from the previous year.

See data about Singapore's digital markets: https://www.imda.gov.sg/resources/press-releases-factsheets-and-speeches/press-releases/2023/singapore-digital-economy-report?utm_source=chatgpt.com

See data about Taiwan's digital markets: https://www.trade.gov/country-commercial-guides/taiwan-digital-economy?utm_source=chatgpt.com

[4] Lilla Nora Kiss, Why South Korea Should Resist New Digital Platform Laws, Dec 9, 2024, https://itif.org/publications/2024/12/09/south-korea-should-resist-new-digital-platform-laws/.

[5] Joseph V. Coniglio and Lilla Nora Kiss, The Draghi Report: Right Problem, Half-Right Solutions for Competition Policy, Oct 2, 2024, https://itif.org/publications/2024/10/02/draghi-report-right-problem-half-right-solutions-competition-policy/.

investments compared to the U.S.[6] On top of that, the EU accounts for only 11 percent of global ICT revenue, a sharp decline from its earlier 22 percent in 2023.[7] These trends suggest the EU model for competition policy, which the DMA doubles down on, has not demonstrated success in fostering innovation within Europe.

ITIF's comments follow the consultation structure and address the following questions: Part 1, Question 1 and Part 3, Questions 1, 2, 3, 4, 5, and 7. ITIF's analysis explains, in sum, that regulation in the digital sector should only be necessary to remedy market failure and only if the failure cannot be addressed by the current legal framework or changes to ex post competition law enforcement. In the case of Thailand, these conditions are not met. Moreover, even if regulation was justified to address market failure, regulation should put forward clear policy-oriented goals that complement the broader legal and regulatory ecosystem. Finally, introducing heavy-handed regulation may only lead to regulatory capture and chilling innovation, thus failing to improve the *status quo*. A brief conclusion follows.

## RESPONSE TO PART 1, QUESTION 1

### What is your opinion on the objectives and scope of the draft PEA which covers both aspects of the protection of users and fair competition?

The PEA represents a unique attempt to blend elements of the EU's DMA and DSA and Thailand's Royal Decree into a single bill. This mixed bag approach is problematic because it seeks to regulate disparate issues, such as content moderation, consumer protection, and fair competition, in one piece of legislation. Further, its scope is overly broad, and its definitions and provisions are not narrowly tailored. This will create uncertainty for regulators, platforms, and users.

The PEA's broad and open-ended nature raises serious concerns about its suitability for Thailand's market conditions. Ex ante regulation requires clearly defined goals and precise applications, but the PEA lacks specificity and sets conflicting priorities. For example, while the draft aims to "maintain economic and social stability," "promote fair competition," and "support platform self-regulation," these objectives are inherently contradictory. Self-regulation thrives on flexibility, yet imposing a law to mandate it is paradoxical. Similarly, using broad regulatory mechanisms to ensure "economic and social stability" conflates societal goals with competition policy, creating further confusion. These conflicting objectives, combined with the PEA's mixed bag approach, risk stifling innovation and deterring investment.

Additionally, the PEA blends domestic regulatory solutions with imported, EU-inspired ones, which are ill-suited for Thailand's unique economic and digital ecosystem. The DMA is still in its experimental phase and untested even in the EU. Its early implementation has drawn criticism for unintended consequences, including stifling innovation and changing consumer experience. The PEA's replication of such measures without tailoring them to Thailand's context further exacerbates the risks of inefficiency and regulatory overreach.

[6] European Commission: Digital Economy and Society Index (DESI), Full European Analysis, 2022, pp. 57-58., https://ec.europa.eu/newsroom/dae/redirection/document/88764.

[7] European Commission: 2023 Report on the state of the Digital Decade, https://ec.europa.eu/newsroom/dae/redirection/document/98641.

## RESPONSE TO PART 3, QUESTION 1

### Do you view that the designation of platforms subject to the regulatory scope of trade competition is appropriate to Thailand's circumstance or not?

No, the designation of platforms for regulatory oversight under the PEA is not appropriate for Thailand's current circumstances. Thailand seems to have an effective ex post competition system that could address potential concerns arising from the digital economy.

The Trade Competition Act (TCA) appears to provide a well-functioning ex post law enforcement system to address competition concerns in Thailand's digital markets.[8] This was evident during the COVID-19 pandemic when the Trade Competition Commission of Thailand successfully intervened to curb unfair practices in online food delivery platforms, demonstrating the adequacy of existing laws without the need for additional, duplicative regulation.[9] This underscores that the TCA's ex post approach is effective and does not require supplementation by the PEA.

## RESPONSE TO PART 3, QUESTION 2

### Do you view the 10 types of core platform services (CPS) are the services that require supervision or not? Are there any core platform services that you think should be included or excluded?

No, the Thai digital markets do not require PEA-style intervention since, as a general principle, regulation is only justified if there is market failure. Market failure arises when markets repeatedly fail to allocate resources efficiently, causing persistent harm to consumers. However, short-term disruptions or temporary imbalances do not qualify as market failure if competition and innovation resolve them naturally over time. True market failure requires persistent, systemic inefficiencies that market forces cannot correct. Thailand's digital economy, however, is emerging and thriving, with platforms such as Lazada, Shopee, and Grab creating opportunities for small businesses and consumers.[10] The digital economy is rapidly expanding, with the gross merchandise value (GMV) projected to grow from $36 billion in 2023 to between $100 and $165 billion by 2030, according to the 2023 E-conomy SEA report.[11]

The push for digital competition laws often arises from policymakers' concerns that digital markets are different from traditional markets and, therefore, require special rules to tackle potential issues arising in them. These policymakers usually argue that large platforms may monopolize a market due to network effects—wherein each additional user increases a platform's value, and there is a "winner-takes-all"

[8] Chumpicha Vivitasevi and Rak-ake Siribhadra Weerawong, Thailand: Evaluation of enforcement regime sets the stage for new legislation, 2024, https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2024/article/thailand-evaluation-of-enforcement-regime-sets-the-stage-new-legislation.

[9] Jirapong Sriwat and Akraphak Phaisitporrnpol, Unfair Trade Practice Guidelines for Online Food Delivery Business, https://www.nishimura.com/en/knowledge/publications/20210701-33501?utm_source=chatgpt.com.

[10] TMO Group, (2024) Top 5 Marketplaces in Thailand for Businesses Selling Online, 2024, https://www.tmogroup.asia/insights/top-online-marketplaces-thailand/.

[11] Google, Temasek and Bain and Company, E-conomy SEA 2023, Reaching new heights: Navigating the path to profitable growth, 2023, https://services.google.com/fh/files/misc/e_conomy_sea_2023_report.pdf.

phenomenon.[12] However, these arguments are based on misunderstanding the fundamental characteristics of digital markets: Network effects should be seen as a natural part of digital competition, rather than anticompetitive dominance.[13] Scale is a feature and not a flaw of digital markets. Moreover, size and scale mean large platforms can afford to invest heavily in research and development, generating the "gales of creative destruction" described by Schumpeter.[14] This Schumpeterian competition allows firms to continuously evolve and challenge one another, creating a cycle of innovation that benefits consumers and markets alike.

Therefore, while the identification of core platform services (CPS) can help focus regulation in theory, the inclusion of 10 types of services may be inappropriate for Thailand's current market conditions, because, as said above, Thailand's digital economy is not failing.

## RESPONSE TO PART 3, QUESTION 3

### What is your opinion on the "mechanism for the announcement of the list of service providers with the power to control other person's access to services (Gatekeepers)?"

While intended to enhance regulatory oversight, the mechanism for designating gatekeepers risks creating ambiguity in Thailand's digital rules.

A "gatekeeper" under the PEA is defined as a "service provider with the power to control other person's access to services." However, the PEA lacks clear quantitative thresholds for such a designation and fails to offer a consultation process, leaving the criteria vague and overly discretionary. Instead, it draws a blurry mechanism without any concrete characteristics—like a monthly active user (MAU) base or other tangible quantitative thresholds—and requires companies to self-evaluate whether they are gatekeepers or not. Presumably, this approach will lead to massive self-reporting since service providers will not want to face the consequences of their potential ommissions. Indeed, this is already the case with the Royal Decree, which has led to approximately 1800 service providers registered in the database and practically turned registration into a de facto licensing procedure for everyone who wanted to provide digital services.

Second, the vague concept of "controlling access" lacks a clear definition, creating uncertainty and opening the door to potential misclassification. This ambiguity means many smaller companies, which are unlikely to pose competition concerns, could be swept into the PEA's scope. Such overreach risks stifling innovation in Thailand by imposing unnecessary administrative burdens on every firm (including smaller ones), diverting resources from growth and experimentation. If Thailand proceeds with the PEA, it must at least define the gatekeeper designation mechanism to ensure legal certainty and prevent overreach.

[12] Giuseppe Colangelo, "Evaluating the Case for Regulation of Digital Platforms," Global Antitrust Institute: Report on the Digital Economy, Section III: Evidence-Based Antitrust, 2020, https://gaidigitalreport.com/2020/10/04/evaluating-the-case-for-ex-ante-regulation-of-digital-platforms/.

[13] John M. Yun, "Overview of Network Effects & Platforms in Digital Markets," Global Antitrust Institute, Report on the Digital Economy, Section I: Foundations, 2020, https://gaidigitalreport.com/2020/08/25/economics-of-digital-platforms/.

[14] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (Harper & Brothers, 1942), 81.

## RESPONSE TO PART 3, QUESTION 4

### What is your opinion on the imposition of obligations on the service providers with the power to control other person's access to services in accordance with the ex-ante approach by specifying the duty to act or prohibit an action?

Imposing ex ante obligations on digital platforms in Thailand risks stifling innovation, creating unnecessary compliance burdens, and undermining the flexibility needed for the country's emerging digital economy to thrive.

First, ex ante regulation relies on forward-looking rules that can involve what the economist Friedrich von Hayek called the "knowledge problem," when regulators cannot fully grasp the dispersed and localized knowledge within an economy, making centralized interventions prone to unintended consequences.[15] In fast-evolving digital markets, this problem is particularly acute. Platforms continuously adapt their strategies to respond to consumer demands, emerging technologies, and competitive pressures. Accordingly, ex ante obligations also create a chilling effect on innovation, not only by imposing excessive administrative costs on businesses, but also deterring platforms from experimenting with new business models or developing features that could ultimately benefit consumers. All in all, ex ante regulation, such as the PEA, risks imposing a rigid framework that fails to account for this dynamism, potentially stifling adaptive responses and innovation.

Second, ex ante regulation carries a significant risk of regulatory capture, whereby large firms—often the primary targets of such regulation—use the regulation to entrench their market dominance. As a result, the PEA's seemingly broad and burdensome requirements may disproportionately impact smaller platforms and start-ups, which policymakers might want to protect. Larger, more established platforms are also typically better equipped to absorb the costs of regulation relative to their smaller competitors. Thus, the PEA could inadvertently create a barrier to entry for new competitors, allowing incumbent platforms to maintain or even expand their market power. Such dynamics undermine the goals of "fair" competition by protecting incumbents rather than fostering a healthy competitive environment.

## RESPONSE TO PART 3, QUESTION 5

### Do you view that the obligations of the service providers with the power to control other persons' access to services have the tendency to be sufficiently comprehensive or not? If not, what other aspect do you view as requiring supervision?

The obligations imposed on gatekeepers under the PEA (e.g., tying, anti-steering provisions) are designed as apparent per se bans without offering platforms the opportunity to provide pro-competitive justifications for their practices. This approach is problematic for multiple reasons.

First, imposing rigid bans on practices such as tying, bundling, or self-preferencing disregards the significant consumer benefits these practices often deliver. For instance, tying (linking the purchase of one product to another) and bundling (offering multiple products as a discounted package) enhance consumer welfare by streamlining user experiences, reducing transaction costs, and providing integrated service options.[16] Apple's integration of its hardware (e.g., iPhones) with iOS and built-in applications demonstrates how such practices

[15] Friedrich A. Hayek, "The Use of Knowledge in Society," The American Economic Review, Vol. 35, No. 4. (Sep., 1945), 519–530., https://german.yale.edu/sites/default/files/hayek_-_the_use_of_knowledge_in_society.pdf.

[16] Michael A. Salinger and David S. Evans, "Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law," *Yale Journal on Regulation*, https://ssrn.com/abstract=550884.

improve functionality, security, and overall user experience. Prohibiting these strategies outright risks creating "false positives," discouraging platforms from adopting efficient, consumer-focused approaches. Moreover, banning these practices without considering their pro-competitive benefits could result in higher costs, reduced service quality, and stifled innovation, ultimately harming consumers while prioritizing competitor protection over practical efficiencies.[17]

Another prohibited practice under the PEA is the application of anti-steering provisions, which aims to prevent platforms from limiting users' or sellers' ability to direct business to alternative platforms. While this is intended to promote consumer choice, such rules can inadvertently harm consumers. Platforms often use steering to enhance privacy, security, and user experience by guiding users within their ecosystems. For instance, Apple's App Store policies requiring in-app purchases to be processed through its payment system are justified by the need to prevent fraud and maintain a seamless user experience.[18] Restricting such steering practices could reduce platforms' ability to tailor services effectively, discourage investment in ecosystem improvements, and ultimately stifle innovation.

The obligations outlined in the PEA are not sufficiently nuanced to distinguish between genuinely harmful practices and those that enhance consumer welfare. Instead of blanket prohibitions, the PEA should focus on evidence-based analysis to address specific, demonstrable consumer harm.

## RESPONSE TO PART 3, QUESTION 7

### What is your opinion on specifying the Trade Competition Commission of Thailand (TCCT) to be the main regulator for the trade competition part under this draft PEA?

The PEA creates regulatory fragmentation issues. First, intended to be a general law (lex generalis) it introduces potential overlap with Thailand's existing legal framework, particularly with special laws (lex specialis) like the Computer Crime Act or the Personal Data Protection Act.

Second, the PEA creates regulatory fragmentation within the field of competition law, as it conflicts with the ex post competition law enshrined in the TCA—proven to be well-established for addressing competition concerns.

Third, the PEA creates tensions between agencies as it proposes that the TCCT share enforcement powers with the Electronic Transactions Development Agency (ETDA). However, the ETDA's primary expertise lies in digital transactions, not competition regulation. Allocating competition enforcement to multiple agencies creates ambiguities regarding jurisdiction, dilutes the TCCT's authority, and further increases regulatory fragmentation. As a result, businesses could face dual compliance requirements, undermining legal certainty and increasing operational (or legal) costs. Having a single, specialized authority like the TCCT overseeing competition matters is more efficient than setting up a competing jurisdiction regime for the two agencies. Thus, competition-related powers should be consolidated exclusively under the TCCT to maximize efficiency and regulatory clarity.

[17] Joseph V. Coniglio and Viraj Mehrotra, "Comments to the European Commission Regarding Article 102 of the Treaty on the Functioning of the European Union."

[18] Daniel Castro, "Ten Principles for Regulation That Does Not Harm AI Innovation" (ITIF, February 8, 2023), https://itif.org/publications/2023/02/08/ten-principles-for-regulation-that-does-not-harm-ai-innovation/.

## RECOMMENDATIONS

For these reasons, ITIF has significant concerns about the PEA and offers the following recommendations:

- **Use existing laws to solve perceived issues:** Existing laws, such as the Royal Decree and the TCA, are already able to address many issues in Thailand's digital markets. The Royal Decree, still in its early stages, should be allowed to demonstrate its effectiveness before considering additional regulations.
- **Wait and see:** Thailand should avoid hastily adopting strict regulations for digital platforms and instead take a measured "wait-and-see" approach. The digital economy is evolving rapidly, and premature intervention may lead to unintended and harmful consequences. Policymakers should monitor the market to determine whether genuine issues, such as anticompetitive behavior by "gatekeepers," arise. Regulation should be grounded in clear economic principles and evidence of market failure rather than vague concepts like fairness or emulation of international trends without proven effectiveness. Since Thailand's digital markets are emerging, not indicating market failure, regulatory intervention is unnecessary.
- **The PEA can do more harm than good:** Heavy-handed regulations could hinder the innovation driving the country's economic strength and digital transformation—including by creating barriers to entry for smaller firms that chills the very competition Thailand hopes the regulation will bring. That is, even in the case of market failure, DMA-style regulation can do more harm than good. Instead of emulating the EU's DMA, which is already creating problems for consumers and businesses, Thailand should prioritize fostering an environment that promotes innovation and economic growth without heavy-handed regulations.
- **Minimize regulatory uncertainty and inter-agency conflict:** In addition to its broad and conflicting set of goals and principles, the PEA's mixed approach involving two agencies (TCCT and EDTA) raises questions regarding the potential for a disjointed regulatory framework, conflicting enforcement actions between agencies, and regulatory fragmentation.

## CONCLUSION

Thailand's emerging digital markets are driven by innovation, growth, and the spirit of entrepreneurship. Hastily adopting the PEA as proposed risks introducing unnecessary regulatory burdens, fostering regulatory capture, and stifling innovation without clear evidence of market failure. Existing legal frameworks, such as the Royal Decree and Trade Competition Act, should be allowed more time to prove their efficacy without being replaced or complemented by the PEA. Adopting a cautious, evidence-based approach that emphasizes targeted interventions only when genuine market failures arise will better support Thailand's thriving digital economy.

Thank you for your consideration.

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