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

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# COMMENTS OF ITIF

Before the

European Commission

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| In the Matter of:<br><br>DMA.100203 – Consultation on the Proposed Measures for Interoperability Between Apple's iOS Operating System and Connected Devices | ) | Public Comment |

January 15, 2025

# ITIF COMMENT ON PROPOSED MEASURES IN DMA.100203

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## INTRODUCTION

On December 18, 2024, the European Commission (Commission) issued proposed measures for Apple to implement effective interoperability between its iOS mobile operating system and various third-party connected devices so as to be in compliance with Article 6(7) of the Digital Markets Act (DMA).[1] The proposed measures follow a specification proceeding opened by the Commission on September 19, 2024 to determine the specific actions Apple would have to take to comply with Article 6(7).[2]

The Information Technology and Innovation Foundation (ITIF), the world's top-ranked science and technology policy think tank, greatly appreciates the opportunity to respond to the Commission's public consultation and comment on the proposed measures designed for Apple from the standpoint of promoting sound and pro-innovation competition enforcement within the context of the DMA. While ITIF understands that the Commission seeks to vigorously enforce the DMA, this comment highlights issues with the proposed measures imposed on Apple to achieve effective interoperability under Article 6(7) for connected devices.

This comment proceeds in five parts. The first explains how the proposed measures will chill innovation both by Apple and third-party connected device providers as well as harm consumers who enjoy the high degree of privacy and security Apple's ecosystem provides. The second part discusses the standard that the Commission should apply for enforcing "effective interoperability" and emphasizes the importance of protecting as-efficient competitors in a way that is consistent with its recently issued draft guidelines on the application of Article 102 on the Treaty of the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings.[3] Part three analyzes how the proposed measures are overburdensome and likely to impose substantial, unnecessary, and disproportionate compliance costs that will ultimately be passed on to European consumers. Recommendations and a brief conclusion follow.

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[1] European Commission, DMA.100203 – Consultation on the proposed measures for interoperability between Apple's iOS operating system and connected devices (Dec. 18, 2024), DMA.100203 - Consultation on the proposed measures for interoperability between Apple's iOS operating system and connected devices.

[2] European Commission, Commission starts first proceedings to specify Apple's interoperability obligations under the Digital Markets Act (Sept. 18, 2024), Digital Markets Act.

[3] EUROPEAN COMMISSION, GUIDELINES ON THE APPLICATION OF ARTICLE 102 ON THE TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS (July 31, 2024) [hereinafter GUIDELINES]; *see also* Joseph V. Coniglio and Viraj Mehrotra, Comments to the European Commission Regarding Article 102 of the Treaty on the Functioning of the European Union (Nov. 1, 2024), Comments to the European Commission Regarding Article 102 of the Treaty on the Functioning of the European Union | ITIF.

## THE PROPOSED MEASURES WILL LIKELY HARM INNOVATION AND CONSUMERS

The proposed measures would require Apple to enable interoperability with third-party connected device providers in several distinct but related ways. First, the proposed measures mandate that Apple take a number of steps to enable interactivity, such as providing third-party connected devices with access to the same features and functionalities of iOS notifications that are available to Apple's products.[4] Second, the proposed measures ask that Apple facilitate a series of data transfers, such as allowing services on third-party connected devices to enjoy file sharing on AirDrop.[5] Third, the proposed measures outline a number of obligations related to device set-up and configuration, such as requiring Apple to support third-party connected devices "pairing" with iOS in a way that "is as user-friendly and seamless as the one for Apple's devices."[6]

While the Commission believes its proposed measures may benefit competition in European connected device markets in the short run, the proposed measures appear to omit any serious consideration of how they may imminently harm European consumers in the form of reduced privacy and security—the hallmarks of Apple's ecosystem. For example, forcing Apple to grant third-party access to sensitive features on users' devices with companies whose practices may not meet Apple's exceptionally high standards could expose European consumers to increased privacy and security risks that far outweigh any benefits in terms of giving competitors increased access. Indeed, Apple intentionally processes data at the device level where possible, rather than sending it to Apple servers, to protect user privacy. Moreover, the proposed measures would allow third parties to utilize data that Apple has itself decided not to access due to its focus on protecting user privacy and security, resulting in not just a potential loss to privacy for European consumers but also changes that could create confusion for many users.

In addition, the proposed measures are not only unnecessary to help competition in the short term but will have the primary long-term effect of harming innovation in Europe. First, Apple already offers a process whereby third parties can make interoperability requests pursuant to the DMA in a way that makes the proposed measures superfluous.[7] And, if Apple fails to approve reasonable requests under the DMA, the Commission could certainly take steps to ensure that third parties have their requests satisfied. Second, as the U.S. Supreme Court has explained, "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[8] That is, due to the proposed measures, not only will Apple have less incentive to develop innovative new features integrating iOS with its connected devices that benefit consumers as a result of being forced to share them with third-party rivals, but these third parties will also have reduced incentives to engage in dynamic competition with Apple and instead be able to free ride on Apple's innovations vis-à-vis the DMA. For example, while Apple has created many advanced notification features for the Apple Watch, such as custom actions to respond to specific and image-based notifications, doing so required Apple to invest in innovations on both iOS and the Apple Watch, which it would have less incentive to do if its competitors could copy at no cost for their own connected devices.

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[4] European Commission, For Public Consultation, In Case DMA.100203 – Article 6(7) – Apple – IOS – SP – Features For Connected Physical Devices §1 (Dec. 18, 2024), 8f28e456-5bd4-4b33-af95-b9f52aeb8a03_en [hereinafter Proposed Measures].

[5] *Id.* §2.

[6] *Id.* §3.

[7] *See* Apple Support, Requesting interoperability with iOS and iPadOS in the European Union - Support - Apple Developer.

[8] Verizon Commc'ns, Inc. v. Trinko, 540 U.S. 398, 408–09 (2004).

## THE COMMISSION SHOULD NOT TURN APPLE INTO A PUBLIC UTILITY

As the Commission explains, for the features noted *supra*, the proposed measures require Apple to generally offer "interoperability solutions for third parties [which] will have to be equally effective to those available to Apple and must not require more cumbersome system settings or additional user friction."[9] Accordingly, the proposed measures effectively prevent Apple from designing its products or using data in a way that discriminates between its own products and third-party connected devices. What's more, this approach applies not only to Apple's existing suite of solutions but extends to new offerings by virtue of requiring Apple to "make available to third parties any new functionalities of the listed features once they become available to Apple."[10]

Such a broad construction of "effective interoperability" under Article 6(7) of the DMA goes well beyond what is needed to give legal effect to its purposes.[11] In essence, the proposed measures create a non-discrimination regime where Apple is required to build and maintain interoperability solutions that are "equally effective to those available to Apple" with respect to any third-party connected device provider—even if doing so is not necessarily technically feasible or practical.[12] But the Commission should not interpret "effective interoperability" under Article 6(7) in a way that turns Apple into a *de facto* public utility. Indeed, developing an iOS integration for one of Apple's own connected devices, such as Apple Watch, is inherently different from building a publicly supported ecosystem, as Apple has to consider a variety of factors and features that specific to third-party connected device products.

Moreover, Apple's ecosystem benefits from considerable synergies that, in many cases, will not be practically achievable for third-party connected device providers and which thus preclude any "equally effective" interoperability solution. For this reason, the Commission should consider construing "effective interoperability" to require Apple to offer interoperability solutions to the degree necessary for an equally efficient competitor to compete. For example, the Commission could require interoperability solutions that would allow an established device maker with comparable technical capabilities and synergies to compete, but not those necessary for a small, poorly resourced firm that would entail Apple redesign its application programming interfaces (APIs), create custom modifications to its systems, or lower its security, privacy, or user experience standards to accommodate them. Indeed, such an approach to applying Article 6(7) is consistent with the Commission's recent draft guidelines on the application of Article 102 on the Treaty of the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, which explained that exclusionary abuses not only risk harming effective competition by virtue of being capable of producing exclusionary effects, but also do not constitute competition on the merits depending on whether "a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct."[13] Put simply, like Article 102, the DMA must be enforced in a way that does not chill competition on the merits—here, by forcing Apple to protect less-efficient connected device firms.

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[9] Case Summary, Case DMA.100203 – Article 6)7 – Apple – iOS – SP, Features for Connected Physical Devices at 4 (Dec. 18, 2024), ee7ba643-6cd6-494d-8552-cbaaaf18426a_en [hereinafter Case Summary].

[10] *Id.*

[11] Article 6(7) provides that Apple as a "gatekeeper shall allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant listed in the designation decision pursuant to Article 3(9) as are available to services or hardware provided by the gatekeeper."

[12] Case Summary at 4.

[13] GUIDELINES at 55.

## THE PROPOSED MEASURES IMPOSE SUBSTANTIAL AND UNNECESSARY COSTS

In addition to the considerable obligations placed on Apple to provide interoperability solutions for third-party connected device providers, the proposed measures mandate that "[s]hould Apple make changes to a feature…including with new feature functionalities or updates" it must not just inform third parties of the change, but also make available both beta and final versions of an updated interoperability solution along with "updated documentation" at the same time such new feature functionalities or updates are available to Apple.[14] This attempt to turn Apple's innovative and customized solutions into white label offerings is highly problematic: Apple doesn't know *ex ante* exactly what interoperability functionality third-party connected devices may desire, or even whether the new integration will be successful. The proposed measures thus create a risk of third-party connected device providers unnecessarily bearing the costs of inadequate or failed product developments that would have previously been born almost exclusively by Apple.

Furthermore, the proposed measures confirm that Apple will provide interoperability to third-party connected device providers "free of charge, irrespective of their beneficiary, application, product and use case" and that "Apple shall also not charge any fees indirectly for any of the [proposed] measures."[15] And yet, despite the categorical inability for Apple to recover the costs imposed by the proposed measures, Apple's obligations are both open-ended and ongoing as it develops new innovations and integrations. The proposed measures would thus make Apple a free service provider for its connected device competitors with only the potential for ever increasing costs of compliance (or noncompliance)—in other words, an uncertain stream of costs without any way for Apple to recoup them by charging, for example, a fair, reasonable, and non-discriminatory fee for its services.

Finally, the Commission is clear that "Apple shall make available complete, accurate and well-documented frameworks and APIs to the extent access to such frameworks or APIs is relevant" to the proposed measures.[16] However, not only does Apple have over 250,000 APIs—which attests to the potential scale of the work Apple will have to do to ensure interoperability for third-party connected device providers—but creating and maintaining such a repository of material would place a substantial burden on the company. Indeed, making such information available is bound to risk further diminishing the innovation incentives of both Apple and third-party connected device providers by sharing what, in many cases, would otherwise be treated as highly confidential and sensitive business information if not *de facto* trade secrets.

## RECOMMENDATIONS

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

- **Reconsider the proposed measures' effects on innovation and consumers.** Apple already has a process to satisfy interoperability requests for Article 6(7). Rather than be necessary to stimulate competition in connected device markets, the proposed measures are likely to immediately risk diminishing consumer privacy and security, as well as chill innovation both on the part of Apple and third-party connected device providers over the long term.
- **The Commission should not interpret "effective interoperability" to make Apple a public utility.** Instead of using Article 6(7) of the DMA as a non-discrimination regime that forces Apple to provide and maintain interoperability solutions regardless of their technical feasibility, practicality, or

[14] Proposed Measures §131(l).

[15] *Id.* §131(h).

[16] *Id.* §131(i).

costs, the Commission should prioritize technically feasible interoperability measures that would enable as-efficient rivals to compete.

- **Reduce the compliance costs on Apple.** The proposed measures create heavy and undue compliance burdens on Apple that go well beyond what is necessary to implement Article 6(7) and which will ultimately be passed on to European consumers.

## CONCLUSION

As the Commission continues to put forward specific measures that gatekeepers must comply with under the DMA, it is imperative that it avoid unduly chilling innovation and harming European consumers, including through reduced digital privacy and security. Instead of treating Apple as a public utility, it should work to ensure that interoperability requirements align with the broader theoretical framework that orients European competition policy, such as condemning unilateral conduct that may harm rivals only when it does not constitute competition on the merits. Finally, the Commission must be careful not to enforce the DMA in a way that imposes excessive costs on American firms who seek to comply in good faith and have already made extensive changes to their business practices to do so.

This last concern is particularly important given the incoming administration in the United States, which, in addition to eschewing the neo-Brandeisian antitrust model of the prior government, is unlikely to warmly receive regulatory efforts by foreign governments that are seen as targeting American firms. Apple—which has enriched Europe's markets for over 40 years and supports over 2.5 million jobs across the continent—has already found itself on the receiving end of billions in competition law penalties that include a €1.8 billion fine for anti-steering behavior in the music streaming market as well as a whopping €13 billion judgment on the grounds that it received illegal state aid in the form tax benefits from Ireland.[17]

With the specter of even larger potential fines looming with the DMA, it is imperative that the Commission reconsider this approach of heavy-handed competition enforcement against leading American companies.[18] Indeed, such a reassessment could not be more timely given the pressing need to foster the key transatlantic cooperation between the United States and the European Union that is critical given China's quest for global techno-economic dominance. For all of these reasons, the DMA should only be enforced in a way that is light touch and narrowly tailored toward achieving its core purposes so as to avoid coming at the expense of either European innovation or strong U.S.-EU collaboration.

Thank you for your consideration.

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[17] Apple, The App Store, Spotify, and Europe's thriving digital music market (Mar. 4, 2024), The App Store, Spotify, and Europe's thriving digital music market - Apple; Judgement of 10 September 2024, *European Commission v Ireland and Apple Sales International*, Case C-465/20, ECLI:EU:C:2024:724; Press Release, Commission fines Apple over 1.8 billion over abusive App store rules for music streaming providers (Mar. 3, 2024), Commission fines Apple.

[18] *See, e.g.*, Hadi Houalla, Apple vs. Europe—the $38 Billion Batlle Over the DMA (Dec. 20, 2024), Apple vs. Europe—the $38 Billion Battle Over the DMA | ITIF.