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EXECUTIVE SUMMARY

As the world grapples with how to effectively regulate the modern digital ecosystem, Europe has been the first to put sweeping legislation into effect. The European Union's Digital Markets Act, signed into law in 2022, has spurred momentum across the globe for what — in many cases — are nearly identical proposals attempting to address concerns regulators have identified with the influence of global online platforms.

As the DMA is being replicated in legislative proposals around the world, non-European countries including the United States, Brazil, and Japan are now faced with the task of examining whether the EU's solutions make sense for the current state of their own markets. Despite shared concerns regarding the ability for technology companies to compete with current market leaders in the global economy,

the proposed solutions have been criticized for doing more harm than good. Critics argue that fostering an anti-innovation approach to regulation leaves serious concerns for consumer protection and the ability for any platforms to compete in the global market. It is for these reasons that the United States, when presented with the opportunity to pass similar legislation, did not bring the bills for a vote in Congress, functionally rejecting the proposals.

As such, it is important that global regulators recognize that Europe's solution is not the only path forward for the regulation of digital markets, and in fact presents serious risk to the future growth of the technology sector and users of online platforms. The United States Congress largely determined that the approach of the Digital Markets Act does not align with the desired conditions for the U.S. tech sector and is thus exploring other ways to regulate the digital sector in ways that target specific harm. Taking an approach that identifies companies to target based on size, rather than calculations of market power or tangible harm, as is done by the DMA, risks the impediment of technological progress while failing to make a compelling case that such ex-ante regulation will spur the sort of competition which is desired as a result.

Now, what Brazil must do is assess whether EU-style regulation or the U.S. approach is better aligned with their own country's goals, demographics, and current market structure. For the United States, there is a desire to sustain the job growth, productivity growth, and low inflationary market that the tech sector has proven to be over the past decade. In addition, there is a desire to participate in the global market, currently dominated by large American companies competing with large Chinese companies on an international scale. With the Brazilian information technology market valued at \$46.2 billion in 2022, with an expected growth rate of over 8%,¹ careful consideration must be given to what is needed for Brazilian companies to emerge as global competitors.

Here, we present the risks identified in the EU approach to tech regulation identified by the United States, and the differences in EU and U.S. market conditions which leave the EU-style proposals ill-fitted to the challenges of digital markets in the United States. As the Brazilian

government deliberates the merits of similar legislation, namely draft bill 2768/2022, it is critical that solutions must be similarly assessed with respect to the goals for the future of the tech sector within the country.

- 1. The emergence of proposals to apply competition regulation based on company size may be a misunderstanding of the global digital market.**

Following in the footsteps of the EU's Digital Markets Act, proposed legislation in both the United States and Brazil rely on ex-ante regulation applied to digital platforms based on the size of the company that operates them. Each having its own criteria for assessing which platforms are covered, the proposals seek to reform antitrust law to require platforms that are sufficiently large to adhere to different rules for what is considered to be anticompetitive conduct. The sized-based criteria for a platform to be covered by each unique legislative proposal are outlined below.

FIGURE 1: CRITERIA FOR COVERED PLATFORMS IN PROPOSED EU-STYLE LEGISLATION²

Governing Body	Legislation	Status	Criteria for Covered Platforms
United States	American Innovation and Choice Online Act	Congressional leadership declined to bring to the floor for vote	<ul style="list-style-type: none"> 50,000,000 United States-based monthly active users, or 100,000 monthly active business users Net annual sales or market capitalization greater than \$550,000,000,000.
Brazil	Draft Bill 2768/2022	Introduced in 2022	Annual gross revenues greater than or equal to BRL 70 million in the provision of services to Brazilians.
European Union	Digital Markets Act	Enacted in 2022, currently in the stage of implementation	<ul style="list-style-type: none"> Covered platforms are determined by the European Commission dependent on whether they meet the criteria to be considered a “gatekeeper” <p>A platform is a “gatekeeper” if:</p> <ul style="list-style-type: none"> It has a significant impact on the internal market; It provides a core platform service which is an important gateway for business users to reach end users; and It enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

Sized-based regulation is a departure from the current global standard of enforcement for antitrust actions, which is reliant on assessment of market conditions. Instead, the DMA-style proposals take a “big is bad” approach which simply declares that large companies must be large because of anticompetitive practices and

should thus be subject to different standards. This is done without respect to market power — the companies’ ability to use their “monopoly position” to harm to consumers or competition — or recognition the size of the market a company is operating within. As a result, large retailers

like Amazon are lumped in with social media platforms such as those operated by Meta, subjecting both companies to different rules than those which their services actually compete with in the markets for retail or social media.

For growing economies such as the United States and Brazil, market definition – in which regulators determine the scope of the market and subsequently the power a firm has within it – is an especially critical component to understanding the competitive landscape. A firm may be large but may still be only one piece of the even larger market. This approach also ignores the changing dynamics of the digital landscape, assuming the biggest companies today have sustainable market influence while disincentivizing growth for up-and-coming platforms – which have proven to be able to penetrate the digital market over the last decade.

One compelling example of a competitive new entrant to the global digital market is the rise of TikTok outside of China. Estimates state that there are roughly 100 million active TikTok users in the United States,³ and around 74 million users in Brazil.⁴ This represents a shift in both countries away from the popularity of Meta products, though Facebook and Instagram maintain the top market share in both countries as of 2023.

Though Meta has been designated by the EU as having “gatekeeper status”, their market share has been rapidly impeded on by platforms like TikTok, with Meta even briefly falling below the market capitalization criteria to be covered under the proposed legislation in the United States in 2022. Though for social media, multihoming – where users frequent more than one platform

– makes it difficult to accurately quantify market share, one avenue to do so is to examine spending by advertisers on content creators of different platforms. In 2023, Instagram captured 38.1% share of U.S. creator marketing spending, compared to 19.3% by TikTok. These figures represent a 16% increase for Instagram between 2022 and 2023, compared to a 94% increase for TikTok, making clear that TikTok, a company of Chinese origin, is establishing itself as a leader in the social media market in the United States. This represents one area for which size-based regulation is not representative of the level of competition in the market, because, by failing to consider the availability of substitute products for social media platforms, the longstanding market power is assumed based on the size of the platform alone.

2. The United States has chosen to protect growth in the U.S. tech sector by rejecting proposals which hurt innovation. The innovative environment in Brazil is more similar to that of the U.S. than of European countries, and thus similar considerations should be made.

Though DMA-style proposals seek to stimulate competition, it is an oversimplification to assert that the current environment has not been conducive to new market entrants in the U.S. tech sector. Innovative companies such as OpenAI have provided massive disruption to the industry, garnering \$30 billion⁵ valuation and 100 million users⁶ by early 2023 after launching ChatGPT in November 2022. Providing a novel alternative to conventional search and other digital tools, OpenAI has spurred an incredibly competitive environment for AI tools in the

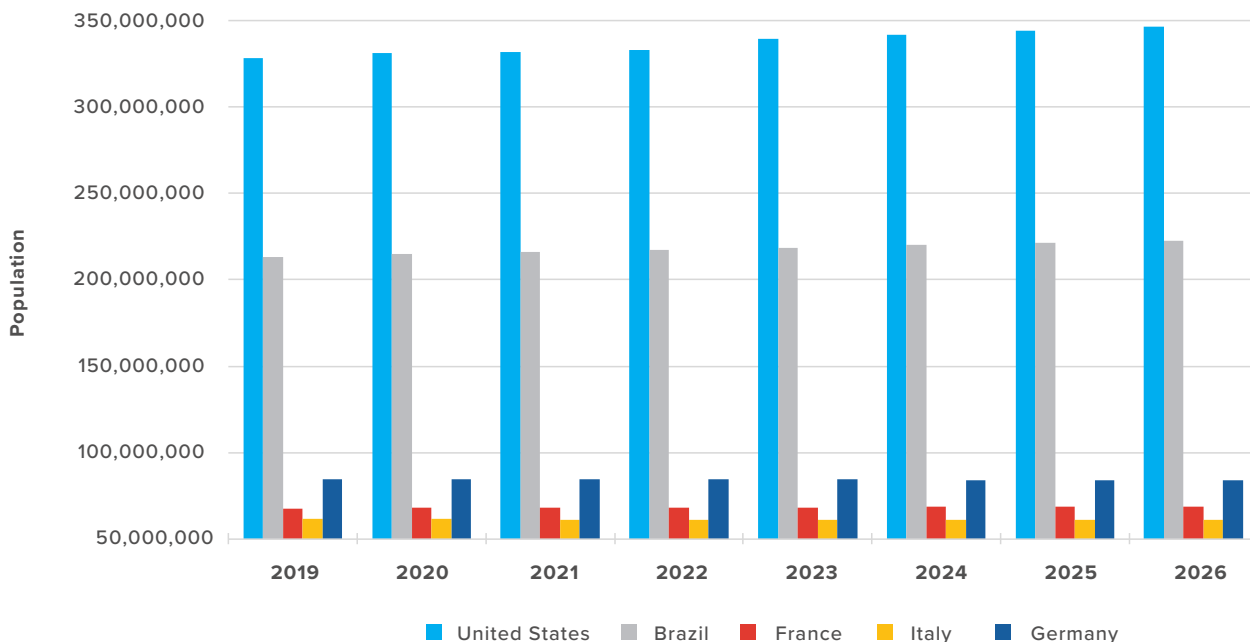
United States, positioning themselves amongst current tech giants as hosting some of the most popular digital services, both for Americans and internationally.

Brazil has similarly experienced a vibrant emerging tech sector, being recognized by the International Trade Administration as being the tenth ranked country in the global information technology market,⁷ and the fifth largest fintech market in the world. In financial technology, specifically, the Brazilian market was just \$52 million in 2015, and grew to nearly \$4.5 billion by 2022.⁸ Other emerging sectors include artificial intelligence, an area in which Brazil has fostered hundreds of startups,⁹ and which has been supported by the government through the

Brazilian Strategy for Artificial Intelligence (EBIA) since 2021.

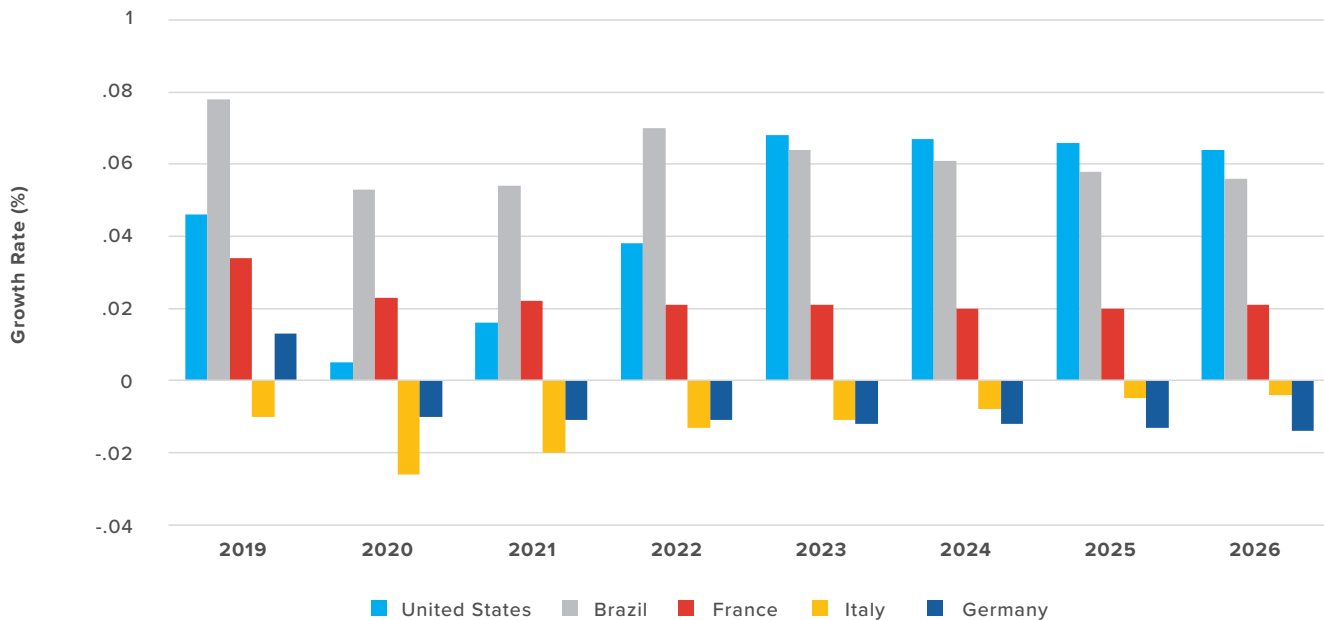
Additionally, while Europe has struggled to obtain a true single market, the conditions for growth in Brazil are more reminiscent of that of the United States than their EU counterparts. As shown in the below, not only do the United States and Brazil have a larger overall market than major European powers, but they are experiencing population growth simultaneous to Europe's declining population. Estimations for population and growth rates, as shown in Figures 2 and 3, expect these trends to continue through 2026, as shown by projections calculated by the U.S. Census Bureau.

FIGURE 2: POPULATION GROWTH RATES, 2019 TO 2026



Source: United States Census Bureau, International Database

FIGURE 3: POPULATION, 2019 TO 2026



Source: United States Census Bureau, International Database

Brazil's growing tech labor market emphasizes how these population trends are able to support the emerging tech sector. The International Labour Organization has estimated that the number of ICT professionals in Brazil increased 50% between 2019 and 2022. This is in addition to PPI estimates which show that Brazil supports roughly 428,000 app jobs as of September 2023, up 54% from estimates completed in 2019. Though the challenge for Brazil will be ensuring that workers are equipped with the correct skillsets to fill these jobs such that the information technology sector may continue to grow in Brazil, the conditions for growth show potential for the future of global enterprise to emerge from the Brazilian market.

3. As proposed, regulation of digital markets poses real risks to cybersecurity, the consumer experience, and the ability for domestic companies compete on a global scale.

Given the sensitivity of information stored on digital platforms, imposing regulatory restrictions come with significant risk when security is not considered. A significant element of the United States deliberation over the merits of digital markets regulation, security professionals have warned that there are consequences to DMA-style proposals, both for security that individual consumers enjoy on digital platforms and implications for the larger global market.

In an open letter in 2022, former Defense, Intelligence, Homeland Security, and Cyber Officials including the former Secretary of Homeland Security and former Directors of both the NSA and CIA, explained their concerns with the digital market regulation at large, cautioning Congress from making the same mistakes Europe did with the DMA.¹⁰

The letter hits on points which represent two main lines of concern when it comes to cybersecurity for online platforms. The first is the implication for global competition. As these companies operate within an international market, they face international competitors. By defining current market leaders as in need of additional regulation, the door is opened for fast-growing competitors, particularly those emerging from Chinese markets, to take center stage without meeting the privacy and security standards consumers are accustomed to. In the United States, Congressional leaders such as Oregon Senator Ron Wyden echoed the concerns, explaining that by handicapping leading tech companies that currently compete in the global market, “powerful state-owned and subsidized Chinese and Russian companies,” which could have “negative impacts on internet users’ privacy, security, and free speech.”¹¹

Once again, TikTok provides a considerable example of this dilemma. Despite presenting a new entrant to the social media market which competes with the likes of Facebook, security and transparency concerns given its Chinese parent company have prompted world governments to consider whether the app should be accessible within their borders. In the United States, this materialized in Congressional questioning and proposals at the federal and state level to ban the platform outright. In Brazil, the National Data Protection Authority has launched an investigation into the “verification of compliance with the processing of personal data of children and adolescents.”¹² With this in mind, it is critical that governments do not put rule-abiding domestic competitors at a disadvantage

from achieving scale in international markets, as it will only make it more difficult for competitors to emerge that are subject to the standards that digital platforms must be held to for cybersecurity and consumer protection.

The letter also outlines the security harm to consumers associated with certain provisions of proposed legislation, such as requiring outside downloads to mobile devices. Currently, mobile operating systems are broken into open and closed systems. With closed systems, there is a higher level of user protection built into devices, as downloads must be pre-screened, preventing accidental downloads of malware. In line with the thinking that digital platforms should be as interoperable as possible, a staple of many international proposals to regulate digital markets has been the requirement that operating systems adopt an open model, allowing outside downloads. This puts users who prefer the extra layer of security at a disadvantage, opening their devices to malware. This presents one of many concerns of the adverse impacts of such legislation on the user experience which, though varying between legislative proposals, risks the convenience of free digital services and social media platforms consumers currently enjoy.

CONCLUSION

Despite the global push towards EU-style, size-based regulation for the digital sector, the United States Congress determined that the proposals were not the correct fit for the United States moving forward. However, this does not mean that there are not competitive concerns to be addressed through antitrust enforcement in regard to digital platforms. In the United States,

ongoing cases brought by the Department of Justice and Federal Trade Commission seek to address cases of market power by American digital platforms. Cases against companies such as Amazon and Google have had to prove that there is longstanding evidence of harm to consumers and competition. These cases, which are currently making their way through the courts, will consider the size of the overall market in ways that the DMA does not.

In light of these considerations, Brazilian regulators must carefully consider the tradeoffs associated with unproven, ex-ante regulation being modeled by the European Union. With a promising future for the emerging information and financial technology sector in Brazil, regulation should aim to uplift domestic competitors to disrupt the global market rather than focus on size-based regulation which has the potential to harm both consumers and the potential for growth.

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References

- 1 "Brazil Information and Communications Technologies," International Trade Administration, last updated March 2023, <https://www.trade.gov/country-commercial-guides/brazil-ict-information-and-communications-technologies-and>.
- 2 Competition Law and Policy in Brazil, Mattos Filho, 2023, <https://www.mattosfilho.com.br/wp-content/uploads/2023/03/230310-livreto-concorrencial-v6-en.pdf>; The Digital Markets Act (DMA)," The Digital Markets Act (DMA), accessed September 27, 2023, [https://www.eu-digital-markets-act.com/#:~:text=The%20Digital%20Markets%20Act%20\(DMA\)%20is%20part%20of%20the%20Digital,personal%20data%20for%20targeted%20advertising.](https://www.eu-digital-markets-act.com/#:~:text=The%20Digital%20Markets%20Act%20(DMA)%20is%20part%20of%20the%20Digital,personal%20data%20for%20targeted%20advertising.)
- 3 Ying Lin, "How Many TikTok Users Are in the US? (2019–2025)," Oberlo, accessed September 27, 2023, <https://www.oberlo.com/statistics/how-many-tiktok-users-are-in-the-us>.
- 4 Alberto Gonzalez, "Social Media in Brazil," Marketing 4 Ecommerce, March 23, 2023, <https://marketing4ecommerce.net/en/social-media-in-brazil-this-is-how-social-media-works-in-the-largest-country-in-south-america/>.
- 5 Julia Boorstin, "OpenAI Ranks as No. 1 on Disruptor 50 List," CNBC, May 9, 2023, <https://www.cnbc.com/video/2023/05/09/openai-ranks-as-no-1-on-disruptor-50-list-with-30-billion-valuation-and-200-million-users.html>.
- 6 Krystal Hu, "CHATGPT Sets Record for Fastest-Growing User Base," Reuters, February 2, 2023, <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>.
- 7 "Brazil Information and Communications Technologies."
- 8 "Brazil Finance," International Trade Administration, last updated March 2023, <https://www.trade.gov/country-commercial-guides/brazil-finance>.
- 9 "Top 625+ Startups in Artificial Intelligence in Brazil," Tracxn, last updated June 2023, <https://tracxn.com/explore/Artificial-Intelligence-Startups-in-Brazil>.
- 10 "Open Letter from Former Defense, Intelligence, Homeland Security," Punchbowl, April 18, 2022, <https://punchbowl.news/wp-content/uploads/Open-Letter-Cyber-Intel-Defense-HS-1.pdf>.
- 11 Ron Wyman and Mike Crapo on behalf of the U.S. Senate Committee on Finance to President Joseph R. Biden, Washington, DC, February 1, 2022, <https://www.finance.senate.gov/imo/media/doc/2022.02.01%20Wyden-Crapo%20Letter%20to%20POTUS%20on%20DMA%20DSA.pdf>.
- 12 "ANPD Investigating Data Processing by Meta, TikTok," International Association of Privacy Professionals, June 1, 2023, <https://iapp.org/news/a/anpd-announces-investigations-into-data-processing-by-meta-tiktok/>.



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