Global Superpowers v. Tech Superpowers: A Comparative Analysis of Digital Competition Law in Notable Jurisdictions

Will Burdick*

I. INTRODUCTION

Since the creation and expansion of the internet, much has been written about the rapid ascension to power of the so-called "Tech Giants," most notably Alphabet (Google), Meta (Facebook), Amazon, Microsoft, and Apple. In fact, each of these companies is above the $1 trillion dollar mark in market capitalization as of 2024, with only one other publicly traded company achieving this level.[1] Most scholars focus on these companies' social and political power, especially their effects on the political zeitgeist, free speech, the psychology of the population, and the

* © 2025 Will Burdick. J.D. Candidate 2025, Tulane University Law School; B.B.A 2022, Mississippi State University. Senior Research Editor of Volume 33 of the *Tulane Journal of International and Comparative Law*. The author is grateful to his fellow members of the *TJICL* for all their efforts in preparing this piece for publication. The author would also like to thank his family and friends for their undying support.

1. Brian Baker, *Trillion-Dollar Companies: 5 Most Valuable Tech Giants*, YAHOO FIN. (Mar. 12, 2024), https://finance.yahoo.com/news/trillion-dollar-companies-222307746.html.

negative effects of their vast economic power.[2] There have also been growing concerns among scholars regarding the anti-competitive implications of increased concentration of market power online.[3] Sixty percent of Americans echo this sentiment, agreeing that the aforementioned Tech Giants have "too much power in the market."[4]

Competition authorities around the globe have not only listened to the concerns of scholars and citizens regarding these companies' anti-competitive effects, but have begun to investigate these companies for violations of competition laws.[5] In the United States, the House Judiciary Committee began an investigation into competition in digital markets, which was led by the Subcommittee on Antitrust, Commercial, and Administrative Law.[6] The European Commission has investigated and levied fines against Google for breaching the EU's competition laws on several separate occasions, with fines totaling several billion euros.[7] Google has been the subject of similar investigations in other jurisdictions, including South Korea, where authorities scrutinized Google's business practices after complaints by numerous South Korean businesses.[8] Since President Biden appointed Lina Khan as chair of the

2. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech,* 131 HARV. L. REV. 1598, 1612-13 (2018).

3. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Maurice E. Stucke, *Should We Be Concerned About Dataopolies?*, 2 GEO. L. TECH. REV. 275 (2018); Ariel Ezrachi & Maurice E. Stucke, *The Fight over Antitrust's Soul*, 9 J. EUR. COMP. L & PRACTICE 1 (2018); Oren Bracha & Frank Pasquale, *Federal Search Commission-Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1164-67 (2007).

4. Rebecca Klar, *Majority in Poll Says Big Tech Has 'Too Much Power in the Market'*, HILL, (Sept. 19, 2023), https://thehill.com/policy/technology/4212202-majority-in-poll-says-big-tech-has-too-much-power-in-the-market/#:~:text=More%20than%20half%20%E2%80%94%2060%20percent,to%20a%20poll%20released%20Tuesday (last accessed Mar. 4, 2024).

5. *See* Richard Waters et al., *Global Regulators' Net Tightens Around Big Tech*, FIN. TIMES (June 5, 2019), https://www.ft.com/content/973f8b36-86f0-11e 9-97ea-05ac2431f453 (last accessed Mar. 3, 2024).

6. Press Release, H. Comm. on the Judiciary, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets (June 3, 2019), https://judiciary.house.gov/news/press-releases/house-judiciary-committeelaunches-bipartisan-investigation-competition-digital [hereinafter Competition in Digital Markets].

7. European Commission Press Release, Antitrust Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2016); European Commission Press Release, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service Brussels (June 27, 2017); European Commission Press Release, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019).

8. *See KCC Begins Fact-Finding Examinations of App Market Operators Regarding Possible Violations of Prohibited Acts in Telecommunications*, KOREA COMMC'NS COMM'N (May

Federal Trade Commission in 2021, there has been a sharp increase in federal efforts to end anti-competitive conduct.[9] Though Khan's FTC has increased its enforcement efforts, those efforts have not translated to many victories in the courtroom.[10] The FTC suffered losses in its efforts to block Microsoft's acquisition of video game creator Activision Blizzard[11] and Meta's acquisition of virtual reality startup Within Unlimited.[12] However, Khan and her colleagues appear undeterred, as 2024 could see antitrust rulings against Google regarding its dominance as a search engine and Meta regarding its acquisitions of WhatsApp and Instagram.[13]

With this background in mind, this Comment embarks on a comprehensive exploration of competition law in the digital age, with a focus on the regulatory responses to the dominance of tech giants. This Comment delves into a comparative analysis of competition policy approaches from the world's most influential jurisdictions. Part II scrutinizes the United States approach, tracing the historical evolution of antitrust legislation and the ongoing debate between consumer welfare and structuralist perspectives. In Part III, attention shifts to the European Union, where the Digital Markets Act represents a bold initiative to rein in Big Tech. Finally, Part IV offers insights into China's burgeoning antitrust regime and its implications for the global digital economy. By navigating these diverse perspectives, this Comment endeavors to provide a nuanced understanding of the challenges and opportunities inherent in regulating competition in the digital sphere.

16, 2022), https://www.kcc.go.kr/user.do?mode=view&page=E04010000&dc=E04010000&boardId=1058&cp=3&boardSeq=53114; Sangyun Lee, *Main Developments in Competition Law and Policy 2022—Korea* (Dec. 9, 2022), KLUWER COMPETITION L. BLOG, http://dx.doi.org/10.2139/ssrn.4 300778.

9. Callum Jones, *'She's Going to Prevail': FTC Head Lina Khan Is Fighting for an Anti-Monopoly America*, GUARDIAN, (Mar. 9, 2024), https://www.theguardian.com/us-news/2024/mar/09/lina-khan-federal-trade-commission-antitrust-monopolies (accessed March 16, 2024).

10. *Id.*

11. *See* Fed. Trade Comm'n v. Microsoft Corp., No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

12. *See* Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892 (N.D. Cal. 2023).

13. Jan Wolfe, *Big Tech Braces for Wave of Antitrust Rulings in 2024*, WSJ, (Jan. 1, 2024), https://www.wsj.com/tech/big-tech-braces-for-wave-of-antitrust-rulings-in-2024-860f0149 (accessed Mar. 4, 2024).

II. THE AMERICAN WAY

A. How Did We Get Here?

United States competition laws are known as "antitrust" because they were promulgated in response to the pervasiveness of trusts in the late nineteenth century.[14] The seminal piece of antitrust legislation is the Sherman Act which prohibits agreements in "restraint of trade" in Section 1 and outlaws monopolization in Section 2.[15] Congress later added the Clayton Act, which bolsters the Sherman Act and outlaws practices such as price discrimination against competing companies, conditioning sales on exclusive dealing, mergers and acquisitions that substantially reduce competition, and serving on the boards of directors for two competing companies.[16] These statutes are brief and imprecise, giving the courts significant leeway to flesh out their meaning.[17] As the Supreme Court noted in the *National Society of Professional Engineers*, "[t]he legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common law tradition."[18] Since the enactment of these main statutes, antitrust enforcement has gone through several distinct eras, and some scholars use the metaphor of a pendulum when describing the enforcement (or lack thereof) the antitrust laws.[19]

In the early days after the enactment of these antitrust statutes, the administrations of presidents T. Roosevelt, Taft, and Wilson challenged the conduct of several companies in monopoly suits.[20] The government won several key victories in this arena, with the Supreme Court ordering the breakups of conglomerates in the oil refinery industry[21] and the tobacco industry[22] into smaller entities.[23] After the election of Republican

14. *See generally*, Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

15. Sherman Antitrust Act of 1890, 15 U.S.C § 1-2 (2004).

16. *See id.* at §§ 12-27.

17. Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2063 (2020).

18. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

19. *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 378 (2003).

20. William S. Comanor & Frederic M. Scherer, *Rewriting History: The Early Sherman Act Monopolization Cases*, 2 INT'L J. ECON. BUS. 263, 264 (1995).

21. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

22. *See* United States v. American Tobacco, 221 U.S. 106 (1911).

23. Peter C. Carstensen, *Remedies for Monopolization from Standard Oil to Microsoft and Intel: The Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815, 824 (2011).

President Warren Harding, the government retreated from its strict anti-monopoly enforcement for some time.[24] However, in the New Deal era, the government again recognized that powerful corporations can exercise quasi-governmental power and imposed antitrust duties and restrictions on corporate regulatory authority.[25] During this era, the Court was particularly concerned with mergers[26] and monopolistic conduct,[27] imposing significant restraints on the goals of big businesses. Then, in the 1970s, the courts and enforcement agencies shifted their thinking on the goals of antitrust law, now believing that the true goal should be to promote economic efficiency and consumer welfare.[28] The agencies' have echoed this sentiment in their own published guidelines.[29] Due to this change in policy, there is significant evidence that the U.S. economy has changed dramatically, with many large corporations now earning returns that exceed competitive levels.[30] This has been the predominant approach to antitrust law in the United States well into the twenty-first century, but there is a growing number of critics who disagree with the consumer welfare approach and would like a to see a more structural approach.[31] At its most basic level, economic structuralism rests on the idea that concentrated market structures promote anticompetitive forms of conduct. This view holds that a market dominated by a very small number of large companies is likely to be less competitive than a market populated with many small- and medium-sized companies.

B. Looking Backward to Move Forward?

The main dissidents of the consumer welfare approach are members of the "neo-Brandeis" movement who champion a return to the

24. *See* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1122 (1989).

25. *See, e.g.*, Silver v. N.Y. Stock Exch., 373 U.S. 341, 366 (1963); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941).

26. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).

27. *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

28. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Robert Bork, THE ANTITRUST PARADOX 66 (1978))).

29. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010) ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

30. Marc Jarsulic, *Antitrust Enforcement for the 21st Century*, 64 ANTITRUST BULL. 514, 515 (2019).

31. *See* Robert W. Crandall & Thomas W. Hazlett, *Antitrust Reform in the Digital Era: A Skeptical Perspective*, 2 UNIV. CHI. BUS. L. REV. 293, 307 (2023).

structuralist approach to antitrust law, as was the dominant approach for much of twentieth century, especially considering the nature of the Tech Giants.[32] The movement gained support when FTC chair Lina Khan, a law student at the time, argued "that gauging real competition in the twenty-first century marketplace—especially in the case of online platforms—requires analyzing the underlying structure and dynamics of markets."[33] It appears that members of this camp are more concerned with defending democracy and liberty, as opposed to consumer welfare, by attacking "the enhanced political power of concentrated industries."[34] However, they do believe there are certain economic effects that stem from the exercise of market power, namely "transferring wealth from the many among the working and middle classes to the few . . . at the top of the income and wealth distribution."[35] According to the neo-Brandeisians, there is a common ideological underpinning to the political and economic evils that have plagued our society: "the philosophy of competition policy and antitrust" that gained traction in the late 1970s.[36]

In response to the perceived monopolization by the big tech companies, this philosophy has gained traction with influential political figures as well, with Elizabeth Warren arguing for "break[ing] up Big Tech" by reinvigorating "Progressive Era" regulations that "required a structural separation between the network and other businesses, and also demanded that the network offer fair and non-discriminatory service."[37] They compare companies like Amazon and Google to the railroad companies of the past, claiming that "the internet is the railroad of our times."[38] The Big Tech "platforms" have come under fire from the neo-Brandeisians for preferencing their own content on their platforms–such as when Google shows results from Google Maps in its local search queries or when Amazon places its in-house products at the top of its

32. *See id.*

33. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717 (2017).

34. Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 23 (2018).

35. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235-36 (2017).

36. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

37. Elizabeth Warren, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c, (accessed Mar 11, 2024).

38. Rana Foroohar, *Big Tech Is America's New "Railroad Problem"*, FIN. TIMES (June 16, 2019), https://www.ft.com/content/ec3cbe78-8dc7-11e9-a1c1-51bf8f989972 (accessed Mar. 12, 2024).

search results.[39] The platforms are also being condemned for preinstalling default settings and applications on their own mobile devices (e.g. Google Play on Android devices and Safari on Apple devices).[40] The neo-Brandeisians postulate that this conduct harms consumers through anti-competitive conduct.[41] However, there are many scholars that disagree with this evaluation and argue that there is little to no evidence that these behaviors are creating inefficiencies and harming consumers.[42]

The neo-Brandeisians start with the assumption that network effects lead platforms preference one firm, which tends to create a monopoly.[43] Network effects occur when the utility a user derives from using a good increases with the number of other users using the good.[44] The traditional examples of goods with network effects are telephones and fax machines. As more individuals and companies use these products, the benefits to the entire network of users increases.[45] As a result, the network becomes more valuable and appealing to each new user, creating a positive feedback cycle.[46] The fear is that network effects will be so strong that even if a superior product enters the market, users will remain on the subpar but more widely used platform because there is no way to ensure that other users will follow.[47] For example, Facebook consumers are faced with a singular choice—use this platform or use another social network that may not be used by their friends, family, and other acquaintances.[48]

C. Have the Neo-Brandeisians Had Much Influence?

As previously noted, there does seem to be a trend towards the neo-Brandeisian school of thinking, and now some of its supporters have

39. STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT, 8 (2019), [hereinafter STIGLER REPORT] https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms—-committee-report—-stigler-center.pdf.

40. *See id.*

41. *Id.* ("Consumer harm is greatest when market power is combined with behavioral biases: Consumers tend to stick with default options.")

42. John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S. CAR. L. REV. 305, 310 (2021).

43. STIGLER REPORT, *supra* note 39, at 39.

44. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

45. *See id.*

46. *See id.*

47. *See* Yun, *supra* note 42 at 314.

48. Dina Srinivasan*, The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELY BUS. L.J. 39, 40 (2019).

assumed positions that would allow them to flex their muscles a bit.[49] Antitrust reform does not appear to be a partisan issue, with legislators on both sides of the aisle voicing their support for the movement.[50] However, the movement is not without its naysayers. Many who would prefer to see the antitrust laws remain as they have been for the last forty years regard the neo-Brandeisian movement as nothing but an attack on "bigness" without regard for the reform's effects on consumers.[51] In the opponents' view, the antitrust laws would abandon an adequate regime which is calculated to maximize output of goods and services for the benefit of consumers for one in which consumer welfare is a small part of the equation.[52] Thus, adopting this policy would allow courts to return to the more inconsistent enforcement of the law that was prevalent in the mid-twentieth century.[53]

Scholarly debate notwithstanding, American courts have been hesitant to adopt the neo-Brandeisian approach against the Tech Giants thus far, but there has been an antitrust argument that did work to put the Tech Giants on notice. In *United States v. Microsoft Corp.*,[54] the DOJ sued Microsoft, alleging that it had illegally tied the web browser Internet Explorer with its Windows Operating System in violation of Sections 1 and 2 of the Sherman Act.[55] The trial court held that the relevant market was "the worldwide market for Intel-compatible PC operating systems,"

49. *See* Daniel A. Crane, *Antitrust as an Instrument of Democracy*, 72 DUKE L. J. ONLINE 23, 23 (2022) (citing President Joe Biden's Executive Order on Promoting Competition in the American Economy § 1 (July 9, 2021) (observing that "excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers").

50. *See* A TRUST-BUSTING AGENDA FOR THE 21ST CENTURY (available at https://www.hawley.senate.gov/senator-hawleys-trust-busting-agenda) (highlighting statement by Sen. Josh Hawley (R-MO) that "[i]f you allow corporations to amass significant economic power through market concentration, they are going to have political power, and they're going to use it"); Sen. Elizabeth Warren (D-MA), Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event (June 29, 2016) (arguing that "[c]oncentration . . . threatens our democracy" and that "[t]he larger and more economically powerful these companies get, the more resources they can bring to bear on lobbying government to change the rules to benefit exactly the companies that are doing the lobbying").

51. Timothy J. Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, AM. ENTER. INST., 2, (2023).

52. Thomas A. Lambert and Tate Cooper, *Neo-Brandeisianism's Democracy Paradox*, 49 J. OF CORP. L. 16 (2023).

53. *Id.*

54. *Microsoft II* 253 F.3d 34 (D.C. Cir. 2011) (per curiam).

55. *Id.* at 45.

in which Microsoft "exceed[ed] ninety-five percent" of the market.[56] The trial court then held that Microsoft took advantage of its dominance in the market to "monopolize the browser market in violation of § 2," finding that "Microsoft's actions increased the likelihood that pre-installation of [a competitor web browser] onto Windows would cause user confusion and system degradation, and therefore lead to . . . reduced sales for the OEMs," excluding competing browsers from "competition on the merits."[57]

On appeal, the D.C. Circuit affirmed in part and reversed in part. The circuit court agreed with the lower court's conclusion that the relevant market was the market for Intel-compatible PC operating systems, rejecting Microsoft's argument that Apple's macOS should be included in the relevant market.[58] However, the circuit court reversed the district court's finding that Microsoft committed a per se tying violation with the combination of Internet Explorer and Windows and held that the more relaxed rule of reason analysis was applicable.[59] Thus, the D.C. Circuit "remand[ed] the case for evaluation of Microsoft's tying arrangements under the rule of reason." After the case was remanded, the DOJ and Microsoft ended up settling the case.[60] While this claim was ultimately unsuccessful, it did not completely foreclose this avenue for antitrust enforcement, and the DOJ filed a similar lawsuit in 2024 against Apple hoping for better results.[61]

III. THE EU TAKES AIM

A. Different or the Same?

To begin, the mechanics of the enforcement system are different in the EU than in the United States. The European Commission has the power to investigate, prosecute, and decide on competition law matters, without having to seek judicial determination to levy penalties.[62] Thus,

56. United States v. Microsoft Corp. (Microsoft I), 87 F. Supp. 2d 30, 36 (D.D.C. 2000), aff'd in part, rev'd in part and remanded, 253 F.3d at 34 (D.C. Cir. 2001).

57. *Id.* at 39-40, 54.

58. *Microsoft II*, 253 F.3d at 52.

59. *Id.* at 84.

60. Chris Butts, Comment, *The Microsoft Case 10 Years Later: Antitrust and New Leading "New Economy" Firms*, 8 NW. J. TECH. & INTELL. PROP. 275, 280 (2010).

61. David McCabe and Tripp Mickle, *U.S. Sues Apple, Accusing It of Maintaining an iPhone Monopoly*, N.Y. TIMES, (Mar. 21, 2024), https://www.nytimes.com/2024/03/21/technology/apple-doj-lawsuit-antitrust.html (accessed Mar. 27, 2024).

62. *See* James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, 33 ANTITRUST 113, 113 (2018).

the European Commission has much more leeway in determining the direction of competition policy and more discretion in the assessment of economic issues than the DOJ and the FTC.[63] While Section 2 of the Sherman Act and the Treaty on the Functioning of the European Union seem similar on their faces, they have some key differences.[64] Article 102 prohibits "[a]ny abuse by one more undertakings of a dominant position."[65] Article 102 is more concerned with protecting and opening up the borders between EU member states, while the Sherman Act has been interpreted to concern consumer welfare above all else.[66] In defining "dominance," according to *Hoffman-La Roche v. Commission*, a dominant firm under EU law is one that has the power "to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers."[67] A forty percent market share in the presence of significant barriers to entry can be considered dominance, and any firm with fifty percent market share is presumed to have dominance, which is a much lower threshold to reach than the United States uses when classifying monopolies.[68]

In the late twentieth century, there appeared to be some divergence in the enforcement of merger policy. The European Commission stalled on approving a merger between Boeing and McDonnel-Douglas until it caved to political pressures, and the Commission later blocked a merger between GE and Honeywell despite calls from U.S. enforcement agencies to approve it.[69] However, these two mergers appear to be the exception and not the rule—the agencies from Europe and the U.S. appear to

63. *See* José Carlos Laguna de Paz, *Judicial Review in European Competition Law*, U. OXFORD FAC. L., https://www.law.ox.ac.uk/sites/default/files/migrated/judicial_review_in_european_competition_law.pdf.

64. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2016 O.J. (C 202) 1 [hereinafter TFEU].

65. *Id.* (Among other things, Article 102 abuses include: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.)

66. *See* Keyte, *supra* note 62 at 114; *see also* Reiter, 442 U.S. at 343.

67. Case 85/76, 1976, ECR 461, para 38.

68. AKZO Chemie BV v. Commission, case C-62/86, 1991 ECR I-3359.

69. *See* Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES (2007).

cooperate on mergers that are investigated in both jurisdictions.[70] The two jurisdictions codified their intention to cooperate on merger enforcement in 1991.[71] Twenty years later, the two sides updated their agreement and created a more specific framework for cooperation in the field of mergers to facilitate coordinated enforcement.[72]

B. The EU Takes the Fight to Big Tech

In 2022, the European Commission promulgated the Digital Markets Act (DMA), as a breakthrough piece of legislation in reigning in Big Tech.[73] The goal of the DMA (along with its companion legislation, the Digital Services Act (DSA)) is to ensure that platforms who act as "gatekeepers" in the markets behave in a fair way online.[74] The Commission thought the DMA was a necessary addition to the competition law regime (namely TFEU Article 102) because there is an enhanced need for rapid determination of anti-competitive conduct with regards to digital platforms, which is seemingly impossible with the resource-intensive and time-consuming nature of the standard analysis.[75] The DMA defines "gatekeeper" narrowly to ensure that its regulatory objectives are carried out against only "large, systemic online platforms."[76] "Gatekeeper" is defined as an undertaking providing core platform services (CPS) that is designated as a gatekeeper according to

70. *See generally*, Giorgio Monti, *The Global Reach of E.U. Competition Law*, *in* E.U. LAW BEYOND E.U. BORDERS: THE EXTRATERRITORIAL REACH OF E.U. LAW, 174-96, (Marise Cremona & Joanne Scott eds., 2019) (showing several examples of cooperation in merger cases).

71. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws—Exchange of Interpretative Letters with the Government of the United States of America April 27, 1995 (OJ L95/47).

72. U.S.-EU Merger Working Group Best Practices on Cooperation in Merger Investigations (2011), https://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf. And more recently a multilateral framework was established to pool knowledge on mergers in a specific market, see European Commission 'Competition: The European Commission Forms a Multilateral Working Group with Leading Competition Authorities to Exchange Best Practices on Pharmaceutical Mergers' March 6, 2021 (IP/21/1203).

73. Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector (2022) OJ L265/1 [hereinafter DMA].

74. European Commission, Digital Markets Act: Ensuring fair and open digital markets, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last accessed Mar. 23, 2024).

75. *See* Jacques Crémer et al., *Competition Policy for the Digital Era*, 47 (Special Advisers' Report 2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en [hereinafter Crémer Report].

76. European Commission, Digital Markets Act: Ensuring Fair and Open Digital Markets.

certain qualitative criteria.[77] For each criterion, there are quantitative thresholds.[78] CPS tend to include what one would normally consider a platform service, including intermediation services (e.g., marketplaces and app stores), search engines, social networks, operating systems, and advertising (intermediation) services.[79] If a company meets the three criteria to obtain gatekeeper status, then it must notify the Commission on its own within two months.[80] After the commission receives this information, it takes about a month and a half to make its determination on gatekeeper status, which a company can rebut but will unlikely succeed in doing so.[81] This process has the benefit of speedy determination, but the quantitative thresholds can be rigid. However, the Commission still has the ability to conduct a more thorough market investigation by using more traditional competition law principles to make a sounder conclusion.[82] Some argue that the criteria to be classified as a gatekeeper appear to have been determined through backward induction to capture companies like Google, Apple, Facebook, Amazon, and Microsoft.[83] However, it seems one would be hard pressed to

77. The qualitative criteria are met if a company: has a strong economic position, significant impact on the internal market and is active in multiple EU countries; has a strong intermediation position, meaning that it links a large user base to a large number of businesses; and has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time if the company met the two criteria above in each of the last three financial years. DMA art. 2(1).

78. A company may meet the quantitative criteria for "gatekeeper" status if: it has a significant impact on the internal market—where it achieved an annual EU turnover above 7.5 billion euros in each of the last three financial years, or where its average market cap amounted to at least seventy-five billion euros in the last financial year, and it provides the same CPS in at least three member states; the CPS it provides is an important gateway for business users to reach end-users—where in the last financial year, the CPS had at least forty-five million monthly active end-users established or located in the EU and at least 10,000 yearly active business users established in the EU; it enjoys an entrenched and durable position—where the thresholds of (b) were met in each of the last three financial years. *Id.* at art. 3(1)-(2).

79. *Id.* at art. 2(5)–(13). For example, the definitions of "online intermediation services" and "online search engine" are borrowed from the P2B Regulation. *See* Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (2019) OJ L186/57 [hereinafter P2B].

80. DMA, *supra* note 73 at art. 3(3).

81. *Id.* at art. 3(4).

82. Most of the elements accounted for in the investigation are barriers to entry, including economies of scale and scope, network effects, data-driven advantages, switching costs and user lock-in, and vertical integration, see DMA, art. 3(8). The market investigation should be concluded within twelve months, with preliminary findings within six months, see DMA, art. 17(1)-(2).

83. Mario Mariniello & Catarina Martins, *Which Platforms Will Be Caught by the Digital Markets Act? The "Gatekeeper" Dilemma*, BRUEGEL (Dec. 21, 2021), https://www.bruegel.org/

establish any quantitative criterion that would not capture these companies.

Unlike competition law, the DMA explicitly makes any efficiency defense unavailable saying, "[a]ny justification on economic grounds seeking . . . to demonstrate efficiencies deriving from a specific type of behavior by the undertaking providing core platform services should be discarded."[84] To justify the unavailability of efficiency defenses, the Commission argued that the alleged gatekeepers have a pattern of attempting to show offsetting efficiencies in a way that is self-serving, without properly showing their full effect.[85] It also seems that allowing an efficiency defense would subvert one of the main goals of the DMA, procedural efficiency, by necessitating a full-blown market analysis.[86] There are other defenses available to gatekeepers that would prompt the Commission to suspend obligations under the DMA.[87] If a gatekeeper adequately demonstrates that the obligations imposed against it would "endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union," then the Commission can suspend those obligations.[88] Allowance of such a defense seems to show that the Commission, while not considering efficiency, will consider proportionality when determining the obligations of gatekeepers.[89] The Commission can also exempt a gatekeeper from specific obligations for reasons of public health or public security.[90] There are other exemptions from certain obligations on a case by case basis. For example, there is an obligation for platforms to allow the effective installation of third-party apps and app stores.[91] However, the gatekeeper may take necessary measures to ensure that those apps and app stores "do not endanger the integrity of the hardware or operating systems provided by the gatekeeper."[92]

---

blog-post/which-platforms-will-be-caught-digital-marketsact-gatekeeper-dilemma (last accessed Mar. 22, 2024).

84. DMA, *supra* note 73 at recital 23.

85. DMA Impact Assessment, 61, referencing Case T-201/04 Microsoft v Commission EU: T:2007:289, para 1091 sq.

86. *See* DMA, *supra* note 73 at recital 10.

87. *See id.* at art. 9-10.

88. *Id.* at art. 9(1).

89. *See id.* at art. 8(7).

90. *Id.* at art. 10.

91. *Id.* at art. 6(4).

92. *Id.* The gatekeeper can also apply measures and settings other than default settings enabling end-users to effectively protect security in relation to third-party software applications or software application stores.

Gatekeepers are not only required to ensure that they comply with the obligations, but they must also intermittently report the measures they are taking to do so.[93] The Commission has broad discretion to use its investigative power to check that gatekeepers are complying, and when there is ambiguity, the Commission can open proceedings and adopt implementing acts to specify the measures.[94] If the Commission finds a gatekeeper non-compliant, it can order a cease and desist order, but can also levy fines of up to ten percent of the gatekeeper's worldwide turnover during the last financial year, similar to the penalties under EU competition law.[95] In case of a second same or similar infringement of an obligation in relation to the same gatekeeper within eight years the DMA allows for fines up to twenty percent of said turnover.[96] If the EC issues three non-compliance decisions—not necessarily concerning the same platform or obligation—within eight years ("systematic noncompliance"), it can impose "any behavioral or structural remedies which are proportionate and necessary to ensure effective compliance."[97] In principle, these remedies include breaking up the gatekeeper, although breakups will not easily qualify as proportionate and necessary. Before it comes to that "third strike," though, the gatekeeper can offer commitments, which the EC can make binding.[98]

IV. THE PEOPLE'S REPUBLIC OF CHINA

A. The (Newer) Chinese System

China did not enact its first antitrust law, the Anti-Monopoly Law (AML), until 2008, at a time when China was still transitioning away from a Soviet-style planned economy to a market economy.[99] The enactment of the AML was the first step in China's efforts to adopt a Western-style

93. *Id.* at art. 8(1) and 11. They must do so for the first time six months after designation and update at least annually after that.

94. *Id.* at art. 8(2) and 20. The EC can open such regulatory dialogue for the obligations of Articles 6-7; it can only do so with regard to the obligations of Article 5, obligations in case of circumvention. Gatekeepers may request the EC to open this dialogue, see art. 8(3).

95. *Id.* at art. 30(1) and 31. For procedural violations, the fine can amount to one percent of worldwide turnover during the last financial year, see art. 30(3).

96. *Id.* at art. 30(2).

97. *Id.* at art. 18(1) and (3).

98. *Id.* at art. 25.

99. *See* Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [The Antimonopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517 (China) [hereinafter AML].

antitrust law into its economy.[100] The AML borrows heavily from Western antitrust law, specifically European law.[101] However, these laws can be applied much differently due to China's "state capitalism" economic structure. The AML imposes antitrust liability for monopolistic agreements and abuse of dominant market position and mandates a notification and approval regime for corporate mergers.[102]

In recent years, Chinese innovation has increased significantly, and it could be considered the preeminent startup scene for internet-based industries.[103] Between 2014 and 2017 alone, China produced thirty-four "unicorns" (private companies valued at more than $1 billion USD) in technology industries, thanks to a combination of private venture capital investment, government subsidies, and government-supported incubators.[104] Similarly to the United States, there are a handful of companies at the top of these industries, and their market capitalizations rival those of the American tech giants.[105] Internet-based industries are some of the few industries where real competition can take place because they are not saturated with state-owned entities ("SOE") like many other Chinese industries. SOEs do not have any incentive to innovate because the competitive landscape has already been cleared for them by the Chinese government. Oftentimes successful startups will be in competition until they can curry investment from the state.[106] Therefore, there are a plethora of competitive abuses that occur in the technology industries in China.

---

100. China first assembled a team to draft the AML in 1987, twenty years before its eventual enactment. The initial efforts, however, were met with repeated delays. It was not until the AML drafters were alarmed by the potential monopolization of the Chinese market by multinational corporations that a consensus to enact the AML was reached. *See* Wentong Zheng, Transplanting Antitrust in China: Economic Transition, Market Structures, and State Control, 32 U. PA. J. INT'L L. 643, 715-19 (2010).

101. The AML' provisions on monopolistic agreements and abuse of dominant market position are heavily influenced by Articles 101 and 102 of the Treaty on the Functioning of the European Union, and the AML's merger review regime appears to be drawn from the European Union Merger Regulation. *See id.* at 648.

102. AML, *supra* note 99 at art. 3-4.

103. *See* John Lee, *The Rise of China's Tech Sector: The Making of an Internet Empire*, INTERPRETER (May 4, 2017), https://www.lowyinstitute.org/the-interpreter/rise-china-s-tech-sector-making-internet-empire (last accessed Apr. 2, 2024).

104. *Id.*

105. *Id.*

106. For example, China's Huawei achieved its early success by developing a digital telephone switch system with greater capacity than any other products available on the Chinese market at the time. *See* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 694 (2015).

Without any strong state-owned incumbents, startups in China's internet industries face incredibly steep competition. The internet industry gave China its first AML litigation that reached the Supreme People's Court ("SPC").[107] Qihoo 360 is China's leading anti-virus software company.[108] It filed a lawsuit against Tencent, China's largest social media and gaming company, alleging that Tencent illegally bundled its own anti-virus software with its social media software (called "QQ"), and would not allow its customers to use Qihoo 360's service.[109] The lower court ruled for Tencent, and the SPC upheld the lower court's ruling on appeal.[110] The SPC examined complex economic evidence presented by both sides in reaching its decision.[111] This was a major milestone in China's antitrust jurisprudence because it was the first time that two private litigants had a dispute under the AML.[112] This showed that there was enough competition to motivate firms to engage in anti-competitive conduct, which had not been the case before in China.[113]

B. China Singles Out Its Own Big Tech

China has recently become much more proactive in enforcing its antitrust law in the tech space. The State Administration of Market Regulation (SAMR) is empowered by the AML to review, and, if it deems necessary, block concentrations of market power that tend to eliminate or restrict competition.[114] In 2021, SAMR published new Guidelines for the Platform Economy.[115] The Guidelines, which are divided into six chapters, provide guidelines for preventing monopolies, preserving fair competition, encouraging innovation, and defending the interests of consumers and society in platform-specific contexts.[116] Chapter 2 of the

107. *See* Li Zhu, *Beijing Qihoo Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd. (Dispute over the Abuse of Market Dominant Position)—Analysis Methods and Ideas for the Definition of the Relevant Markets and the Abuse of Market Dominant Position in the Internet Environment*, in 1 SELECTED CASES FROM THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA 325 (China Inst. Applied Juris. ed., 2020).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. AML, *supra* note 99 at art. 27.

115. Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy (Platform Economy Guidelines) (Feb. 7, 2021), http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html [hereinafter Platform Economy Guidelines].

116. *Id.* at art. 1 and 3.

Guidelines focuses on joint anti-competitive conduct and states that even in cases where no formal agreement has been reached, cooperative behavior that restricts competition through data, algorithms, and other platform rules may be scrutinized under the antitrust laws.[117] Platform operators are responsible for proving there is no collusion, and in situations where direct evidence of collusion is difficult to come by, it might be possible to rely on consistent indirect evidence about synergies.[118]

Chapter 3 of the Guidelines covers abuse of a dominant position. The Guidelines offer several factors to consider when determining whether there is a dominant position in digital market, including market share and competition in the relevant market.[119] In calculating market shares the SAMR will consider transaction volume, revenue, size of user base, clicks, site usage time, and the length the market share has been held.[120] The level of competition in the relevant market is measured by comparing market share of the platform with the market share of its competitors, taking into account economies of scale and the potential of new competitors, while also considering the impact of innovation and technology changes in the market.[121] The Guidelines then outline several types of abusive conduct, but they also include several objective justifications as defenses for platforms.[122] For example, there is a ban on unfair pricing, which occurs when a platform either sells at unfairly high prices or buys at unfairly low prices, but the Guidelines note that this will only be unlawful if anticompetitive effects are shown.[123] The Guidelines outline several other types of exclusionary conduct,[124] but suggest that the platforms can justify their conduct by showing it was necessary to protect the interests of consumers, intellectual property rights, or its own business model.[125] There is also a ban on bundling and tying, including circumstances in which consumers are coerced into buying particular goods by threats of legal action, harm to their web traffic, or other technological impediments.[126] Platforms can again justify this conduct by

117. *Id.* at art. 2.
118. *Id.* at art. 9.
119. *Id.* at art. 11.
120. *Id.*
121. *Id.*
122. *Id.* at art. 12.
123. *Id.*
124. Such as predatory pricing, refusals to deal, etc. *Id.*
125. *Id.* at art. 15.
126. *Id.* at art. 17.

showing that their practices are part of trading customs, or that the conduct aims to protect consumers or merchants.[127]

Similar to the EU with the DMA,[128] China has a special classification for "Super Platforms" in its Guidelines for Classification of Platforms.[129] Under these Guidelines, "super platforms" include those that (1) have over five hundred million users; (2) are active in at least two business categories including sales platforms, social entertainment, financial services, etc., and; (3) have a market value of over 100 billion RMB for the previous year, with a strong opportunity to restrict other merchant's ability to reach consumers.[130] If classified as a super platform, certain obligations become effective. Super platforms must not use data from their operator without valid reason to prevent misuse.[131] They are also not allowed to precondition the use of one service on the use of another and may not self-preference their own services.[132] Super platforms are also obliged to promote the interoperability of their services with the services of other platforms, make certain data security guarantees, implement their own compliance mechanisms, and conduct periodic risk assessments to ensure that no illegal content or content that can harm consumers is shared on their platform.[133]

V. CONCLUSION

In the ever-evolving digital landscape, the intersection of competition law and technology has become increasingly crucial. This Comment has delved into the intricate dynamics of competition policy in key jurisdictions like the United States, European Union, and China. In the United States, the debate between the traditional consumer welfare approach and the resurgence of the structuralist perspective reflects a fundamental tension in antitrust philosophy. While recent efforts have aimed to challenge the dominance of tech giants, such as the DOJ's lawsuits against Microsoft and Apple, the outcome remains uncertain amid scholarly debate and political discord.

127. *Id.*

128. *See infra* subpart II.B.

129. SAMR, Guidelines for the Classification of Internet Platforms (Draft for Comments) ("Draft Classification Guidelines"); Guidelines on the Responsibilities of Internet Platforms (Draft for Comments) ("Draft Responsibilities Guidelines") (Oct. 29, 2021), http://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html [hereinafter Draft Classification Guidelines].

130. *Id.*

131. *Id.* at art. 1.

132. *Id.* at art. 2.

133. *Id.* at art. 3-7.

Across the Atlantic, the European Union has taken a proactive stance against Big Tech through groundbreaking legislation like the Digital Markets Act. By defining and regulating gatekeeper platforms, the EU seeks to ensure fair competition and protect consumers in the digital economy. The DMA's stringent enforcement mechanisms, including hefty fines and potential structural remedies, underscore the EU's commitment to reining in tech giants' perceived abuses of market power. Meanwhile, China's evolving antitrust regime reflects its transition to a more market-oriented economy, drawing from Western models while adapting to its unique socioeconomic context. As China continues to assert itself as a global economic powerhouse, its approach to competition law will undoubtedly shape the future landscape of digital competition. In conclusion, navigating the complexities of competition law in the digital age requires a nuanced understanding of technological innovation, market dynamics, and regulatory frameworks. While jurisdictions may differ in their approaches, the overarching goal remains the same: to foster competitive markets that benefit consumers, promote innovation, and safeguard against the concentration of economic power. As policymakers, regulators, and scholars grapple with these challenges, the quest for a fair and equitable digital economy continues, shaping the course of competition law in the years to come.