

Antitrust in the United States and the European Union – A Comparative Analysis

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I. Introduction

Technological innovation has had a profound impact on the way we live, communicate, and work. The dawn of the Fourth Industrial Revolution has opened immense opportunities but also created significant challenges.² Questions about cybersecurity, disinformation, and privacy, for example, vex businesses, governments, and private citizens alike. A different set of issues are related to the sheer size, reach, and power of the companies that comprise Big Tech and how to deal with them.

Being a large corporation, and being in the vanguard of a far-reaching and ever-expanding industry, is, by itself, neither good nor bad, but it will often lead to increased scrutiny. In some instances, this might result in attempts to either block certain companies from entering a market, or, alternatively, make it more difficult for them to operate in it. In 2015, for example, President Obama alluded to this when he accused the European Union of digital protectionism in its investigations of American tech companies— “[i]n defense of Google and Facebook, sometimes the European response ... is more commercially driven than anything else.”³ But to chalk scrutiny of large tech companies and their business practices up to mere protectionism would miss the mark. The many benefits of modern technology notwithstanding, there are powerful economic factors within digital markets that limit competition and stifle innovation, and as a result can hurt consumers.⁴

Concerns about Big Tech are also not confined to Europe. In fact, there seems to be a growing consensus in both the United States and the European Union of the need to, at a minimum, explore ways to check certain actions and the broader influence of the largest tech companies.⁵

To be sure, there are differences in how Big Tech is viewed in the United States and Europe. At a basic level, many Europeans are viscerally suspicious of the market and the power of big corporations. This clearly also applies to the tech sector, as evidenced by a poll conducted in the run-up to the European Parliament elections last year. Fully 64 percent of voters thought

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² Klaus Schwab, *The Fourth Industrial Revolution: What it means, and how to respond*, WORLD ECONOMIC FORUM, Jan. 14, 2016, <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/>.

³ Kara Swisher, *White House. Red Chair. Obama Meets Swisher*, VOX, Feb. 15, 2015, <https://vox.com/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher/>.

⁴ Unlocking Digital Competition, Report of the Digital Competition Expert Panel (2019), at 17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

⁵ See Press Release, U.S. Dep’t of Justice, Justice Department Reviewing the Practices of the Market-Leading Online Platforms (Jul. 23, 2019), <https://justice.gov/opa/pr/justice-department-reviewing-practice-market-leading-online-platforms>; see also Adam Satariano & Martina Stevis-Gridneff, *Silicon Valley’s Biggest Foe Is Getting Even Tougher*, N.Y. TIMES, Nov. 19, 2019, Sec. B, Page 1; see also Jack Nicas & David McCabe, *Tech Inquiry by Congress Widens Net*, N.Y. TIMES, Sep. 21, 2019, Sec. B, Page 1.

that the European Union had been too lax in its regulation of U.S. tech giants.⁶ By contrast, most Americans believe in the power of the market to self-correct and are warier of government overreach. Whether consciously or not, it is hardly a stretch to assume that these different attitudes inform thinking about competition policy and enforcement decisions on both sides of the Atlantic.

The focus of this article is on single-firm conduct, and the transatlantic divide over how best to use antitrust and competition policy to navigate this new and exciting world. Section 2 looks at what makes Big Tech unique from an antitrust perspective. Section 3 provides an overview of U.S. and EU competition law as it relates to single-firm conduct, as well as their respective institutional structures. Section 4 assumes a more prospective posture, looking at possible future trends and what steps Big Tech can take to protect its own interests in this environment.

II. What makes Big Tech unique?

Digital markets present a number of unique features that are relevant to any type of antitrust investigation. This section will highlight a few, although by no means an exhaustive list, of those characteristics.

First, the sheer size and reach of Big Tech. Amazon, Apple, Facebook, Google, and Microsoft, have a combined market capitalization of \$5.1 trillion.⁷ In January of 2020, Apple alone had a market cap of \$1.3 trillion, which according to data from the World Bank exceeded the GDP of all but the 14 wealthiest countries in the world.⁸ Facebook has 2.5 billion active monthly users worldwide.⁹ Google operates the most popular search engine, which processes over 3.5 billion searches every day,¹⁰ and has a global market share of over 70 percent.¹¹ In addition, it licenses Android, which has the largest market share among mobile operating systems globally.¹² Apple popularized the smartphone, and it has dominated the global tablet market since the first version of the iPad was released in 2010.¹³ And while Amazon may not have an overwhelming share of any one market, its footprint is felt almost everywhere.¹⁴ By itself, size may not be a

⁶ Jean-Daniel Levy & Pierre-Hadrien Bartoli, Copyrights & Tech Giants, Harris Interactive 5 (Mar. 2019), <https://www.akm.at/wp-content/uploads/2019/03/Harris-presentation-Copyright-Tech-Giants-in-Europe.pdf>.

⁷ As of market close on April 20, 2020.

⁸ GDP (current US\$), THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (last visited Apr. 20, 2020.)

⁹ Number of Monthly Active Facebook Users Worldwide as of 1st Quarter 2020, Statista, <https://statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide> (last visited Apr. 22, 2020).

¹⁰ Google Search Statistics, Internet Live Stats, <https://internetlivestats.com/google-search-statistics> (last visited Apr. 22, 2020).

¹¹ Top 10 Search Engines In The World, Reliablesoft.net, <https://reliablesoft.net/top-10-search-engines-in-the-world> (last visited Apr. 22, 2020).

¹² As of December 2019, Android had a market share of 74 pct. in the market for mobile operating systems. See *Mobile operating systems' market share worldwide from January 2012 to December 2019*, STATISTA, <https://statista.com/statistics/272698/global-market-share-held-by-mobile-operating--systems-since-2009/> (last visited Apr. 22, 2020).

¹³ *Apple's iPad market share of global tablet shipments from 1st quarter 2012 to 4th quarter 2019*, STATISTA, <https://statista.com/statistics/268711/global-market-share-of-the-apple-ipad-since-2010> (last visited Apr. 22, 2020).

¹⁴ Matt Day & Jackie Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG, Mar. 27, 2019 <https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/>.

concern, although it is an area where U.S. and EU competition law differ, but it does raise the specter of potentially anticompetitive conduct.

Second, a proper definition of the relevant market is usually the *sine qua non* to prevail on any antitrust claim. It is, after all, difficult to prove abuse of dominance without showing that the company in question does, in fact, have a dominant position in whichever market it operates. As traditionally understood, the definitions of the relevant *product* market in the United States and the European Union are essentially the same. The U.S. Supreme Court has applied a “reasonable interchangeability of use” test,¹⁵ whereas the European Court of Justice has held that there must be “a sufficient degree of interchangeability between all the products forming part of the same market...”¹⁶ The U.S. Department of Justice and the Federal Trade Commission have elaborated on the *Brown Shoe* test in their Horizontal Merger Guidelines, where they use a “hypothetical monopolist” test to define the relevant market.¹⁷ Specifically, the test requires that the “hypothetical monopolist” likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market.¹⁸

The challenge with applying the “SSNIP” test to digital markets is fairly obvious, though. If a customer is paying \$0 for a service, as is the case with Google’s search engine, for instance, a price increase of 3 percent or 5 percent is still zero. This does not necessarily mean that the service is “free,” however. While it might be possible to opt-out of certain data collection practices when using a search engine or watching something on YouTube, the customer will still often have to “pay” by watching ads, for example.¹⁹ And it is also quite normal for customers to have no choice but to furnish the service provider with extensive data to use a platform. When shopping online, it is rarely, if ever, possible to decline to provide a name, contact, and payment information. And one of the consequences of joining a social network is that the user will need to divulge a substantial amount of personal information to connect with other users, who do the same.

The above notwithstanding, some commentators argue that the current framework is more than capable of dealing with these challenges on a case-by-case basis.²⁰ Others contend that the digital world has unique attributes, which render traditional market definition tools more or less obsolete.²¹ Because of this, less focus should be devoted to the market definition part of the analysis. Instead, more weight ought to be given to theories of harm and the identification of anti-competitive strategies.²²

¹⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

¹⁶ Case 85/76, *Hoffman-La Roche & Co. v. Comm’n*, 1979 E.C.R. 461 ¶ 28.

¹⁷ U.S. Dep’t of Justice & Federal Trade Comm’n, Horizontal Merger Guidelines, § 4 (2010), <http://ftc.gov/os/2010/08/100819hmg.pdf>.

¹⁸ *Id.*

¹⁹ *Big Data: Bringing Competition Policy to the Digital Era*, OECD, at 25, Oct. 27, 2016, [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf).

²⁰ *Common Issues Relating to the Digital Economy and Competition*, Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019, at 5, Feb. 27, 2020, https://ourcuriousamalgam.com/wp-content/uploads/SAL-Report-on-Common-Issues-Relating-to-the-Digital-Economy-and-Competition_Final_4.16.2020.pdf.

²¹ See Jacques Cr mer et al., *Competition policy for the digital era*, EUROPEAN UNION, 2019, at 46 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

²² *Id.*

Third, *The Economist*, in a frequently cited article, has argued that (big) data has replaced oil as the world’s most valuable resource, and that this calls for a fundamentally new antitrust approach to Big Tech.²³ Like oil, data clearly is a source of power for those who have the means and the ability to process it. But there are also substantial differences between them, and the comparison might therefore not be as apt as it might seem at first blush. First, the value of data is dependent on context, and the type of knowledge that can be extracted from it.²⁴ Second, some data has limited scope, can go stale quickly, or see its value decline over time, whereas other types of data can be quite durable, such as a name, gender, and date of birth of a person.²⁵

III. An overview of U.S. and EU competition law

The antitrust laws of the United States and the European Union share many similarities. Their overarching goal is to maintain competitive markets, and the language employed by competition authorities and courts in both jurisdictions is similar.²⁶ But there are distinct differences, which sometimes leads to different outcomes in identical cases. The following contains an outline of these differences.

As mentioned, the basic structures of the regulatory frameworks are fairly similar. Section 1 of the U.S. Sherman Act of 1890 prohibits anti-competitive concerted action; Article 101 of the Treaty on the Functioning of the European Union (TFEU)²⁷ likewise prohibits anti-competitive concerted practices.²⁸ And Section 7 of the U.S. Clayton Act governs mergers in much the same way as the Merger Regulation²⁹ does in the European Union.³⁰

Of greater interest in this context, is Section 2 of the Sherman Act and Article 102 TFEU, and while there are some similarities between them, they are quite different. The wording of Section 2 is vague: “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire ... to monopolize any part of the trade or commerce ... shall be punished....”³¹ Section 2, in other words, prohibits attempts to *increase* market power, if it is done through anticompetitive conduct. By contrast, Article 102 is concerned with companies that *abuse* their position in the market, explicitly prohibiting “[a]ny abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it....”³² In addition, it provides a non-exhaustive list of what such abuse might look like, including “directly or indirectly imposing unfair purchase

²³ *The world’s most valuable resource is no longer oil, but data*, THE ECONOMIST, May 6th, 2017 edition <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.

²⁴ *Competition Law and Data*, Autorité de la concurrence & Bundeskartellamt, May 10, 2016, at 42 https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=24E51800C94A994A3A310F82E42CD35A.1_cid362?_blob=publicationFile&v=2.

²⁵ *Id.* at 40.

²⁶ DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY 1 (2015).

²⁷ Consolidated Version of the Treaty on the Functioning of the European Union, O.J. 2008/C115/88-89.

²⁸ GIFFORD & KUDRLE, *supra* note 25, at 2.

²⁹ Council Regulation No. 139/2004, 2004 O.J. (L24) 1.

³⁰ GIFFORD & KUDRLE, *supra* note 25, at 2.

³¹ 15 U.S.C. § 2 (1997).

³² *Supra* note 26.

or selling prices or other unfair trading conditions,” and “limiting production, markets or technical developments to the prejudice of consumers.” Unlike Section 2 of the Sherman Act, possessing or strengthening a dominant position would seem to fall outside the scope of Article 102.

At the time of its enactment, the goal of the Sherman Act was to protect small businesses from the inappropriate actions of larger companies.³³ But the way it has been interpreted by the courts has changed over time. From 1890 until around 1974, American antitrust law cycled through numerous iterations without settling on any overriding policy or enforcement goal. That all changed in the mid-1970s with the so-called “antitrust revolution,” when a consensus formed around efficiency, grounded in microeconomic analysis, as the sole goal of the antitrust laws.³⁴

Due to the devastation wrought by the Second World War, as well as the subsequent revival of the German economy, European thinking about economic issues at the time of the formation of the European Coal and Steel Community (an early precursor to today’s European Union) was markedly different. Because of the dominance of the *Freiburg School*, and its belief that concentrated economic power inevitably leads to concentrated political power and a breakdown of liberal society, the focus was on allowing the state to play a substantial role in defining the rules of competition and their enforcement.³⁵ As a result, the overriding goal of competition policy in Europe was not efficiency so much as the economic integration of its own internal market.³⁶ Like its American counterpart, EU competition policy has evolved since the 1950s. But unlike in the United States, efficiency and consumer welfare are only two of a multitude of goals pursued in the European Union. They also include, but are not limited to, promotion of economic freedom and fairness toward other market participants.

This has led some U.S. practitioners and politicians to accuse the European Union of using its competition policy for protectionist ends. Historically, the criticism seems to be the result of a few high-profile merger cases, like the GE/Honeywell decision in 2001, and more recently because of a perceived bias toward large U.S. tech companies. While it would be foolhardy to suggest that concerns other than those strictly related to competition never have played a role, a recent study does not support the broader claim.³⁷ Looking at over 5,000 cases over a 25-year period, a group of scholars found no evidence that the EU Commission was more likely to intervene where a non-EU or U.S.-based company was involved; in fact, if anything, the opposite was true. To be fair, the study was merger-focused. But, as the authors surmise, it would be fairly odd for an enforcement agency to engage in blatantly protectionist practices in one area but not in others.

As far as single-firm dominance is concerned, this dichotomy in competition policy goals has led to significantly different results. In the United States, a minimum market share of between 70 percent and 75 percent is usually required for a court to find dominance. And a market share

³³ *Id.* at 4.

³⁴ *Id.* at 7.

³⁵ *Id.* at 9.

³⁶ *Id.* at 13.

³⁷ See Anu Bradford, Robert Jackson, Jr., & Robert Zytneck, *Does the European Union Use Its Antitrust Power for Protectionism?*, PROMARKET, Apr. 3, 2018 <https://promarket.org/european-union-use-antitrust-power-protectionism/>.

of 50 percent or less is almost always insufficient.³⁸ By contrast, the usual threshold in the EU is 40-50 percent.³⁹ And the European Court of Justice has held that even though there is nothing inherently suspect about holding a dominant position, “the [dominant] undertaking...has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market.”⁴⁰ No such obligation exists under U.S. law.⁴¹

When it comes to the role of economic analysis in enforcement decisions there has been some convergence between the United States and the European Union. Over the last couple of decades, the EU Commission has become more reliant on economics as an integral part of its investigations.⁴² But while the U.S. antitrust “revolution” was heavily influenced by the *Chicago School*, and its only focus on efficiency, the market for those ideas has always been limited in the European Union.⁴³

As alluded to earlier, the notion that it is possible to draw a distinction between a clearly defined “pure” competition policy governed solely by economics and an “impure” one that is tainted by politics is wrong, however. While economics is an integral part of any serious antitrust analysis, it is hardly an exact science—economic experts have been known to vociferously disagree from time to time—and competition policy, moreover, cannot be viewed in a vacuum. As any public policy, by necessity, it must reflect the political choices of decision makers.⁴⁴

Finally, the different institutional structures in the United States and European Union bear mentioning.

It is said that the American antitrust system is more insulated from political pressures than many of its counterparts around the world.⁴⁵ The weight given to economic factors in stateside antitrust analysis certainly lends some credence to this argument. As does the important role of private litigation in the enforcement of the antitrust laws.⁴⁶ That is not to say that antitrust enforcement is walled off from political influences, however. The president, after all, nominates Department of Justice leadership and the commissioners of the Federal Trade Commission, who ultimately decide whether to initiate investigations and pursue violations. Moreover, there have been instances where high-profile politicians have weighed in publicly in favor of or against proposed mergers, for example. In 2016, then-candidate Trump vowed to block the AT&T/Time Warner merger if he was elected.⁴⁷ After he took office, the DOJ went to court to do just that.

³⁸ Filippo Maria Lancieri, *Digital protectionism? Antitrust, Data Protection, and the EU/US Transatlantic Rift*, *Journal of Antitrust Enforcement*, May 10, 2018, 7, 27-53, at 34 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075204.

³⁹ GIFFORD & KUDRLE, *supra* note 25, at 10.

⁴⁰ *NV Nederlandsche Banden-Industrie-Michelin v. Comm'n*, 322/81, EU:C:1983:313 ¶ 57.

⁴¹ James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, *ANTITRUST*, Fall 2018, at 116.

⁴² *Id.* at 113.

⁴³ *Id.* at 115.

⁴⁴ See e.g., Ariel Ezrachi, *Sponge*, *Journal of Antitrust Enforcement*, 2017, 5, 49-75 <https://academic.oup.com/antitrust/article/5/1/49/2525569>.

⁴⁵ GIFFORD & KUDRLE, *supra* note 25, at 17.

⁴⁶ *Id.* at 18.

⁴⁷ Steven Overly & John Hendel, *With AT&T-Time Warner ruling, courts again thwarts Trump*, *POLITICO*, Jun. 12, 2018 <https://politico.com/story/2018/06/12/att-time-warner-ruling-trump-623211/>.

Whether direct or indirect pressure from the White House played a role in the Department’s decision to bring that case is unclear, but it is noteworthy that the judge found that “the DOJ had failed to provide sufficient evidence to bolster any of the reasons it provided for bringing the case.”⁴⁸

The institutional setup in the EU is different and more complex. More importantly, some have argued that, because of this, the Commission may be more susceptible to political influence.⁴⁹ In one sense, this is undoubtedly correct. The Commission is not bashful about the fact that it sees itself as an institution whose job is to uphold and promote the political values and principles that undergird the European Union as a whole. But it is also adamant that political considerations play no role in individual enforcement decisions.⁵⁰ Put differently, the question of whether to pursue an investigation will be made in light of the overall political priorities of the European Union as the Commission sees them. But that is not unique to the European Union. Rather, it is similar to the type of prosecutorial discretion that all enforcement agencies employ every day, and with which U.S. lawyers are quite familiar. When it comes to specific enforcement decisions, on the other hand, the Commission is keenly aware that its decisions must be able to pass legal muster with the courts. And because of that, it is scrupulous about keeping this part of the decision-making process apolitical.

Some commentators have also raised concerns about due process issues in the European Union because of the Commission’s, from a U.S. perspective, unusual structure in competition cases.⁵¹ There is no question that the Commission’s powers differ from those of the DOJ and the FTC. But whether those differences raise due process concerns is a different matter. The U.S. Supreme Court has held that “[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss’”⁵² The imposition of a substantial fine would certainly qualify as a “grievous loss,” but what are the concerns more specifically?

The objections seem to center around issues related to 1) the combination of investigatory, prosecutorial, and adjudicatory functions in the same decision-making body; 2) the absence of a hearing before the actual decision maker; and 3) that decisions are made by the College of Commissioners, which is comprised of 27 political appointees.⁵³ It also seems to rankle that the Commission can impose hefty fines unilaterally.⁵⁴

Article 41 of the Charter of Fundamental Rights of the European Union provides that “[e]very person has a right to have [their] affairs handled impartially and within a reasonable

⁴⁸ *Id.*

⁴⁹ GIFFORD & KUDRLE, *supra* note 25, at 17.

⁵⁰ Margrethe Vestager, *The values of competition policy*, keynote at CEPS corporate breakfast – “One year in office,” (Oct. 13, 2015) https://wayback.archive-it.org/12090/20191129202939/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/values-competition-policy_en.

⁵¹ Ian S. Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, 34 EUROPEAN L. R., 817-843, Dec. 2009 https://www.biicl.org/files/5749_forrester_25-06-11_biicl_1.pdf.

⁵² *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

⁵³ Forrester, *supra* note 48, at 822-823.

⁵⁴ Keyte, *supra* note 38, at 116.

time.”⁵⁵ This includes the right to be heard before an adverse decision is taken, the right to confront the evidence and arguments that the Commission relies on to make a decision, and an obligation for the Commission “to give reasons for its decisions.”⁵⁶ In addition, the Commission has put in place a number of procedural safeguards. Among them are a Hearing Officer, an independent institution within the Commission, whose role it is to secure the impartiality and objectivity in competition proceedings.⁵⁷

There is no question that the EU’s institutional structure, where the Commission combines the roles of investigator, prosecutor, and adjudicator in competition cases, at a minimum, can give rise to the *appearance* of a conflict. After all, it is not unreasonable to think that an agency that decides to investigate something, and expends substantial resources on that effort, is more likely to reach an ultimate decision that confirms its initial suspicions.⁵⁸ Any concerns about potential confirmation bias on the part of enforcement agencies are not specific to the EU, though. The commissioners of the FTC, for example, at one point went 20 years without dismissing a single administrative complaint that they had previously authorized.⁵⁹

The counterargument is that similar-type administrative enforcement systems are fairly common in the civil law systems that predominate in the vast majority of the EU’s Member States, and in practice rarely give rise to due process concerns. It is also worth keeping in mind that an important corollary to this setup is that there is a right of appeal to the EU courts. And while, from a company perspective, it clearly is preferable not to have to deal with an investigation or adverse decision, the Commission is, as mentioned, acutely aware of the need for its decisions to withstand judicial scrutiny.

This is also one of the reasons why there are a number of checks built into the system. These include the active participation of the Commission’s own independent Legal Service, as well as consultations with an Advisory Committee made up of representatives from the competition authorities of each of the Member States before making decisions in an individual case.⁶⁰ And while enforcement decisions need formal sign-off from the entire Commission, it is very rare for individual commissioners, let alone the College as a whole, to weigh in on or try to influence the outcome in specific cases.

As to the Commission’s power to unilaterally impose fines, which is a huge departure from what the American enforcement agencies have the authority to do, it is worth noting that this is an area where the level of judicial review by the European courts is at its most intense. As far as the substance of a case, the Commission enjoys some discretion in how it weighs the facts and

⁵⁵ Charter of Fundamental Rights of the European Union, O.J. 2000/364/01.

⁵⁶ *Id.* Article 41(2).

⁵⁷ Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings, O.J. 2011/L275/29.

⁵⁸ Douglas H. Ginsburg & Taylor M. Owing, *Due Process in Competition Proceedings*, COMPETITION LAW INTERNATIONAL, Vol. 11, No. 1, 39-49, 46
<https://webcache.googleusercontent.com/search?q=cache:zLSmu6NZfhkJ:https://www.ibanet.org/Document/Default.aspx%3FDocumentUId%3DC45C4020-65E8-48B8-8336-7E67ADC3480B+&cd=1&hl=en&ct=clnk&gl=us>.

⁵⁹ *Id.*

⁶⁰ See Article 14(1) of Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1.

interprets the relevant law. As a result, the courts will be reluctant to overturn the Commission's assessment unless it is clearly defective.⁶¹ The role of the courts is to review the legality of the Commission's decisions, not to become a competing competition authority.⁶² When it comes to reviewing decisions where the Commission has imposed a penalty, on the other hand, the court's jurisdiction is "unlimited."⁶³ In other words, where penalties are involved, the court will provide a check not just on the legality of the decision, but on the merits of the fine, as well.

IV. Looking to the future

Some have speculated about the possibility of greater convergence between the U.S. and EU antitrust enforcement systems.⁶⁴ One of the advantages would be that it presumably would lead to more predictable outcomes in cases that are investigated in both jurisdictions. Would it, in other words, help avoid a repeat of the markedly different results in the Google cases and GE/Honeywell?

As an initial matter, it is worth noting that while this article has focused on differences between the two jurisdictions, the chasm between them often appears greater on paper than it is in practice. The DOJ, FTC and Directorate-General for Competition communicate frequently about cases of mutual interest, and the majority of these investigations usually have very similar outcomes.

Differences remain, though, and for a number of reasons a more profound convergence seems doubtful. First, it would require a fairly fundamental re-think of the current framework in either or both jurisdictions. Absent a congressionally mandated re-write of the antitrust laws in the United States, any changes would have to be made by the federal courts. Even under the most favorable circumstances that would be an arduous endeavor which would be unlikely to yield quick results. And this assumes a desire to change current law in some meaningful way, which, at present, does not seem to exist. The same is true for the European Union. Having significantly impacted competition laws in such disparate places as China, India, and a number of Latin American countries, some argue that the European Union has the most dominant competition law system in the world today.⁶⁵ Whether that is true, it definitely is a force to be reckoned with, and it is not readily apparent why they would want to change that. Second, another complicating factor is that the broader transatlantic relationship is at one of its lowest points in recent history. Over the last decade, there has been a marked shift in how many Americans view their role in the world, and European trust in the global leadership of the United States has suffered substantial, if not irreparable, harm as a result.⁶⁶ Against this backdrop, it seems unlikely that now would be the moment for increased convergence and cooperation in the antitrust space.

⁶¹ See José Carlos Laguna de Paz, *Judicial Review in European Competition Law* 10 https://law.ox.ac.uk/sites/files/oxlaw/judicial_review_in_european_competition_law.pdf.

⁶² *Id.* at 19.

⁶³ *Supra* note 59, Article 31.

⁶⁴ See Keyte, *supra* note 38, at 118; GIFFORD & KUDRLE, *supra* note 25, at 2.

⁶⁵ Anu Bradford et al., *The Global Dominance of European Competition Law Over American Antitrust Law* (2019) https://scholarship.law.columbia.edu/faculty_scholarship/2513/.

⁶⁶ Erik Brattberg & David Whineray, *How Europe Views Transatlantic Relations Ahead of the 2020 U.S. Election*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Feb. 20, 2020 <https://carnegieendowment.org/2020/02/20/how-europe-views-transatlantic-relations-ahead-of-2020-u.s.-election-pub-81049>.

That is not to say that changes to the current antitrust frameworks in either jurisdiction will not happen. The FTC has created a task force whose job is to monitor tech markets,⁶⁷ and the European Union is in the process of reviewing its competition rules as they relate to digital markets.⁶⁸ Although not related to competition policy specifically, there also seems to be an emerging appreciation of the benefits of more regulation of the tech industry from some of the major companies themselves.⁶⁹ That said, being open to having a conversation is not the same as agreeing to what, if anything, the problem is, let alone what an appropriate solution might be.

In the United States, the DOJ antitrust chief has indicated that the current framework is flexible enough to catch any concerns that are related to the digital economy, and that policing Big Tech should be left to the DOJ and FTC.⁷⁰ On Capitol Hill, there are bipartisan voices that have not entirely bought into that conclusion. But whether the political will and bandwidth truly exists to tackle an issue this complicated and controversial in an election year, with everything else that is going on, remains to be seen. The bottom line, though, is that any major substantive changes to how U.S. antitrust is enforced against Big Tech, at least in the near term, does not seem likely.

The situation in the European Union is different. And there are at least three different reasons why. First, as discussed, there is greater distrust in Europe in the ability of markets to self-correct than in the United States, and, therefore, greater acceptance of the need for the state to regulate how markets work. Second, the overall competition policy framework is more flexible than in the United States and therefore provides more avenues for the Commission to act. Third, the European Union, under the leadership of the new Commission, is looking to bolster its own role in the digital economy.⁷¹ Because of this, the Commission has a fairly strong incentive to do something.

To this end, the Commission on June 2, 2020, announced some initial steps following an internal review. In addition to the continued vigorous enforcement of its existing antitrust arsenal in Articles 101 and 102 TFEU, the Commission launched parallel public consultations on two potentially new ways of regulating the digital economy. The first prong could lead to the introduction of some type of ex ante regulation of digital platforms. The second prong would be “a possible new competition tool” that would give the Commission the authority to address structural competition problems across markets without finding fault with any one company or group of companies.⁷²

⁶⁷ Press Release, Fed. Trade Comm’n, FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets, Feb. 26, 2019, <https://ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology/>.

⁶⁸ See e.g., Crèmer et al., *supra* note 20.

⁶⁹ See e.g., Mark Zuckerberg, *Big Tech needs more regulation*, FINANCIAL TIMES, Feb. 16, 2020, <https://www.ft.com/content/602ec7ec-4f18-11ea-95a0-43d18ec715f5>; Sundar Pichai, *Why Google thinks we need to regulate AI*, FINANCIAL TIMES, Jan. 19, 2020, <https://www.ft.com/content/3467659a-386d-11ea-ac3c-f68c10993b04>.

⁷⁰ Steve Lohr, *What, if Anything, Should Be Done to Rein in Big Tech?*, N.Y. TIMES, Nov. 11, 2019, <https://nytimes.com/2019/11/11/business/dealbook/makan-delrahim-kevin-systrom-bill-gates-regulation-technology.html/>.

⁷¹ See Commission President-elect von der Leyen’s Mission Letter to Competition Commissioner-designate Vestager https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margrethe-vestager_2019_en.pdf.

⁷² Commission press release of June 2, 2020: Antitrust: Commission consults stakeholders on a possible new competition tool https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977/.

It is not entirely clear what the exact contours of the new ex ante regulation would be, but it could take the form of a list of general dos and don'ts for gatekeeper companies in the digital sector. The scope of the new competition tool is even more uncertain. So, for both sets of possible new rules it is fair to say that at this point they raise more questions than they answer. Responses to the consultations are due in early September, and the tentative goal is to present a legislative proposal by the end of 2020.

Even assuming this timeline holds, any substantive changes are a ways off and will likely happen incrementally, if at all. Like United States, the European Union is an administrative colossus that is not geared toward revolutionary change and tends to move at a glacial pace. And one thing that will not change is the mix of factors that have guided EU competition policy so far, as well as the Commission's singular role in their enforcement.

As it looks at updating its rulebook, the Commission would be well-advised to guard against the temptation to employ antitrust to try to solve problems that have little, if anything, to do with competition. One example is the Facebook decision by Germany's *Bundeskartellamt*, which found that a violation by a dominant firm of the EU's General Data Protection Regulation by itself constituted abuse of a dominant position under German competition law.⁷³ It is one thing to have a system that allows some degree of flexibility in the factors that an enforcement agency can consider as part of its investigation, but if it ventures too far afield, any resulting decision can easily be seen as arbitrary, and therefore will carry less weight and could lead to a loss of legitimacy.

Where does this leave Big Tech? In the short term, the coronavirus pandemic has afforded the tech giants an opportunity to, in some ways, reset the clock. They have provided valuable services to both citizens and governments, and the EU's Internal Market Commissioner has been effusive in his praise in return.⁷⁴ That said, it is unlikely to materially change the underlying concerns that led to the launch of probes in the first place. And in a post-Covid world, a number of those concerns may actually be exacerbated.⁷⁵

From the perspective of companies and their advisors, there seems to be, more than the content of any one rule, a desire for legal certainty and predictability. There is nothing wrong with that, of course, but the question is whether it is attainable.⁷⁶ No one wants to see antitrust, or any other area of law, enforced arbitrarily. But it is also impossible to fashion a rulebook with such precision that it captures everything. Some degree of flexibility in how rules are written and enforced therefore seems both necessary and appropriate, especially for an industry whose

⁷³ See *Bundeskartellamt prohibits Facebook from combining user data from different sources* https://bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html/.

⁷⁴ Laura Kayali, *EU industry chief: Coronavirus crisis could be turning point for Big Tech*, POLITICO, Mar. 25, 2020 <https://www.politico.eu/article/eu-industry-chief-coronavirus-crisis-could-be-turning-point-for-big-tech-google-netflix-facebook/>.

⁷⁵ See e.g., Steven Overly, Leah Nysten & Gabby Orr, *Why Silicon Valley's virus-era D.C. glow may not last*, POLITICO, Mar. 25, 2020 <https://www.politico.com/news/2020/03/25/silicon-valley-virus-era-dc-glow-147178>; Javier Espinoza, *EU restarts work on Regulating Big Tech*, FINANCIAL TIMES, Apr. 27, 2020 <https://www.ft.com/content/1711b919-7699-4f5c-8881-113ac107601b>.

⁷⁶ Ezrachi, *supra* note 41, at 67.

business model is to innovate and exploit—in the best sense of the word—rapid changes in the broader economy. The nature of digital markets, in other words, reinforces the need for enforcement agencies, and the rules they apply, to be at least somewhat nimble.

Business decisions are often about mitigating and managing risk with imperfect information, and this is no different. And a lack of complete legal certainty hardly means that it is impossible to develop a pretty good sense of where enforcement agencies are likely to come down in individual cases. While a dearth of case law in some areas can be a complicating factor, the EU Commission, for example, almost always relies on traditional antitrust principles. That is not to say that surprises never happen. And where an agency treads new legal ground, the interests of fairness, if nothing else, would seem to dictate a lighter touch. It is one thing to fine a corporation that knew or should have known that its actions were running afoul of well-established law. But it is another to fault a company for breaking a rule that they had no reasonable way of knowing existed or could be applied to them.

With all that in mind, what can Big Tech companies and their advisors do to avoid future issues or, failing that, ameliorate those that do arise?

First, look at company actions through the eyes of enforcement agencies, and do not be shy about seeking informal guidance. Not only can this help anticipate potential problems and ward them off before they snowball into full-fledged investigations, it can also provide a chance to educate agency personnel about misunderstandings or misconceptions about the tech industry or what a particular company is doing or planning to do. To put a finer point on it: build trust and keep the lines of communication open. Second, if a more conciliatory approach fails, companies should always be prepared to vigorously defend their decisions and business model. The agencies charged with enforcing the antitrust rules in the United States and the European Union are populated by smart and highly capable people, but from time to time they, like everybody else, get things wrong, just as there are situations where reasonable people simply disagree. Third, do not suspect some unseemly political agenda or bias against U.S. tech companies behind the European Commission's actions. It might strike a chord with some in Silicon Valley and Washington, but, as mentioned earlier, the available data does not back it up, and it is unlikely to win much favor in Brussels. Finally, while the United States and the European Union share many things in common, there are also profound differences in legal approach and culture. Being mindful and respectful of those differences is likely to help mitigate potential conflicts.