

Forge, Simon

## Conference Paper

# We've been here before – New and old in anti-trust regulation for global web platforms and future regulatory policy

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## We've been here before – New and old in anti-trust regulation for global web platforms and future regulatory policy

Simon Forge 09 JUNE 2022

### ABSTRACT

The global scale web platforms coming to dominate key parts of the world economy seem to be a phenomenon that is less than a decade old, or perhaps slightly more, really starting from 2000-2005. In reality their origins in terms of their business models can be traced to the evolution of the software and computing industries more generally, over the three preceding decades<sup>1 2 3</sup>. But it does not stop there. Going further back to the late 1890's, useful regulatory models can be drawn today from the prior anti-trust regulation against what was “big tech” then - and was used throughout the first parts of the twentieth century. For example, the concept of reversing acquisitions in the past has been standard practice under the USA's original anti-trust law and has been proposed in the USA Senate recently, by Senator Elizabeth Warren.

The paper briefly sketches the relevant directions in anti-trust regulation today, today with the return to the earlier views of terminating abuses of significant market power (SMP) in oligopoly and monopoly. It contrasts today's perspective with the regulatory climate that the “digital tech giants” grew up in, shaped by the monetarist Chicago School (of Friedman's 1970 paper and Judge Bork's 1978 thesis) that USA anti-trust principles should consider large (dominant) enterprises as beneficial for consumer *price* protection. Essentially it is a regulatory theory which argues for preserving monopolies. Combined with corporate lobbying and its politics, it has reduced anti-trust use over 1998 – 2018 to effectively screen the USA's web platform owners from regulatory oversight, preserving global market dominance. So the new problems are to some extent old problems often with some new malpractices for an online marketplace. However, unfortunately regulators and especially governments have been slow to recognise this and so shape effective action. This raises two key research questions in this area.

The first question is practical – what do recent major tech platform anti-trust cases indicate on which legal arguments and approaches are successful and what fails today in recent judgements. Many cases have not been successful and so reasons and context for any positive results are of vital interest. If there is a failure, where does the problem lie – is it with the regulation itself, confusion over the defendant's market position or infringement of consumer or competitor rights and /or with the relevant court's interpretation of that, including a flawed presentation of arguments. Key areas in forming a successful action need to be identified, especially for the more recent cases over the last year or so, to provide guidance in the current climate in which much uncertainty reigns. Analysis here would also anticipate the possible impacts of new legislation, especially that from the EU in the DMA and DSA and the possibilities presented by six different proposals before the USA Congress.

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<sup>1</sup> Forge S. (2000) *A Measured Proposal - future actions following the Microsoft Anti-Trust decision*, info, vol.2 no.3, June

<sup>2</sup> Forge, S., (1993) Business Models for the computer industry for the next decade: when will the fastest eat the largest?, *Futures*, Vol 25, Issue 9, Nov 1993 pp 923-948

<sup>3</sup> Forge, S. (1991): *Why the computer industry is restructuring now*, *Futures*, Vol 23, No 9, 1991, p 960.

The second key question draws on how to form a reasonable solution for reducing SMP abuse through spin-offs, and/or demergers, both vertically and horizontally – ie just how to shape future regulation today. However there are some significant new factors with the march of globalisation since 2000 that were not present in previous decades. They are especially challenging for the effectiveness of the current and proposed regulation in the EU and the USA. Thus, the latest crop of dominant firms harvest and depend on success from what may be termed a ‘trialogue’ of more novel economic factors. These feed the phenomenal financial and market success for the half dozen main players across today’s major economic vertical sectors, leading to Apple’s breakthrough to the level of a US\$3 Trillion market capitalisation in early 2022. How these platforms may be treated in terms of regulatory ex ante, or ex post, legislation is of key interest. It is in this direction that solutions for SMP abuse lie, with the new generation of European antitrust Acts.

Hopefully the paper will offer practical inputs on the fundamental question of the comparative chances of long term success for a regulatory action at all and thus in increasing competition in the subject market.

The methodology used is based on drawing together evidence from the markets and judicial procedures to produce the analysis for the two research questions, with insights, including those economic factors in reconfiguration of the firm for increasing digital markets competition.

## 1 Where have we come from?

A brief introductory background to anti-trust and digital platforms is perhaps useful. Originally at the end of the Nineteenth Century, the USA was the centre of forming anti-trust regulation by government, while in Europe, laissez-faire, mixed with dirigiste regimes held sway. However, note that primarily the reason for anti-trust laws was to counter a mix of concentrated economic *and political* power.

As Senator Sherman noted during the passage of the act named for him in 1889:-

*“If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life”<sup>4</sup>.*

Today, effectively through the lack of governments’ understanding of the complexities of digital platforms<sup>5</sup>, combined with lobbying and political pressures from the sector, the same conditions of concentration of powers are of concern today with the dominant GAFAM global ‘big tech’ platforms<sup>6</sup>.

However the Chicago School of monetarism and its promotion of the supremacy of capital markets in the late 1970’s influenced regulatory thinking on anti-trust. Consequently, in the late 1970s, Judge Robert Bork rejected the founding rationale for antitrust law being the need for competition, in his book<sup>7</sup> on anti-trust and the power of markets. Bork’s viewpoint favoured markets with less competition, stating that competition in itself was inefficient and costly and so monopolists should be encouraged – in an interesting theory that protects them - because they were more efficient - because they did not have to fight competition if they controlled their market. If they overcharged consumers, they would be removed by a competitor was the basic

<sup>4</sup> USA Congressional Record., 2457 (1889):

[http://www.appliedantitrust.com/02\\_early\\_foundations/3\\_sherman\\_act/cong\\_rec/21\\_cong\\_rec\\_2455\\_2474.pdf](http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf).

<sup>5</sup> The digital platforms discussed here are global and collectively are sometimes referred to as the GAFAM group, for Google, Apple, Facebook, Amazon and Microsoft, of USA origins but Alibaba and Tencent, from China, might be included but are much smaller in market shares and capitalisation.

<sup>6</sup> Warren, Elizabeth, *Reigniting Competition in the American Economy*, USA Senate, [https://www.warren.senate.gov/files/documents/2016-629\\_Warren\\_Antitrust\\_Speech.pdf](https://www.warren.senate.gov/files/documents/2016-629_Warren_Antitrust_Speech.pdf)

<sup>7</sup> Robert H. Bork, (1978), *The antitrust paradox*, Free Press, USA

protection mechanism for the consumer. Consumer welfare was the sole criterion, never competition. This was endorsed by the largest players in many markets, with support of the Reagan administration. Moreover, government's role was to retreat from market intervention to preserve competition, thus enabling the impacts of low competition to build a superior economic efficiency based on market dominance. Thus intervention by government was redundant as the market would destroy the monopoly firm if it failed to enhance efficiency and thus consumer welfare. This approach disregards any economic damage caused by lack of innovation, employment through market entry of new competitors or pricing controls by monopoly in concentrations of political and economic power. Also, this position ignores the reality of entrenched market power coupled with financial leverage and political influences – eg over employment – and thus over the factors that drive government. That is the situation most evident in the USA, the origin of the five largest web platforms, collectively known sometimes as GAFAM (Google, Apple, Facebook, Amazon, Microsoft). It is thus the reason for their rapid growth in the USA. With some notable exceptions, this position has been largely dominant over the last four decades in the USA and has over spilled globally - including into Europe but with less impact. However in both the USA and Europe, the situation has slowly changed as regulatory powers have come to grips with the issues specifically raised by the online platforms that are globally dominant.

## 2 The Types of Abuse of Dominance in Digital Markets

For regulation of digital markets, a major portion of abuses of significant market power (SMP) can be categorised as *exclusionary*, in either:-

- a) Removing any existing competitors in the relevant market segment, and
- b) Preventing *new* entrants from gaining market share and so excluding them from the market.

A further common complaint from customers of market abuse by dominant players is excessive pricing or reduced quality of services of goods to a disproportionate extent. These types of cases are receiving increased attention in digital markets, although they face several conceptual challenges, as described below<sup>8</sup>. Social and political harms are now being added with economic harm through global operation of reduced taxation. There are also quite specific new harms that are associated with the online nature of monopoly and oligopoly and large scale use of personal data that add to traditional abuses of significant market power. The various types of abuse can be categorised as:-

- ***Exclusive dealing for both the supply side to consumers and the sell side to data buyers of a two-sided platform, with loyalty discounts*** – exclusivity tactics are a particular concern in digital markets where the largest platform providers may attempt to foreclose the digital markets for a particular product or service such that rivals are excluded from that market segment. This becomes especially important with exclusive use of tied payment systems to app stores and barring payments to the third party suppliers selling through the app store via rival payments systems. They may take novel forms, such as discounts provided as free add-on services, either digital or physical (such as free home delivery due to the ubiquitous geographic coverage of the dominant platforms). They may impose limits on the ease with which consumers can use multiple services from different platforms at once, or 'multi-homing', such as payments systems, email or videochat, or on the portability of data across platforms – eg email addresses. The aims of exclusivity agreements are largely to prevent rival platforms from obtaining a sufficient user base to generate the necessary network effects, so raising rivals' costs and thus reducing levels of competition<sup>9</sup>. This is a continuation of the compatibility plays employed by the prior generation of software and hardware providers. These practices drove the

<sup>8</sup> OECD (2020), Abuse of dominance in digital markets  
[www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf](http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf)

<sup>9</sup> OECD (2018), Rethinking Antitrust Tools for Multi-Sided Platforms,  
<https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

earlier generation of anti-trust regulation applied to high technology from the 1950's to the 1970s, notably for IBM and AT&T in the USA and eventually the global markets. In a throwback to those days, today's mobile web markets, platforms may use ties to the mobile handset operating system (OS), with just two OS (Android and iOS) dominating the whole mobile world of 7 billion users. So the two largest app stores may work with one of the two mobile devices exclusively. In consequence, the thousands of small app suppliers that sell through that exclusively tied app store must pay heavy fees for that access to the handset (30% of sales in the highest case) arbitrarily set by the controlling platform operator. The result is the traditional computer industry lock-in of consumers – who are either unable and/or unwilling to move off the dominant platform's services as they have signed exclusive contracts with a dominant firm and must obey the contract conditions. Note that with many platforms, consumers may be unaware of the conditions or of the rights they have signed away by using the platform.

- **Tax avoidance using global operations** – the dominant platform providers with their worldwide trading base have been adept at exploiting a series of outmoded tax agreements to minimise taxation in individual countries where sales are made to generate their revenue and profits. In the absence of international agreements so far<sup>10</sup>, they have been astute in exploiting a taxation situation where physical presence for business can be avoided by digital online presence, highlighting the outdated structure of the international tax scheme. Moreover they have also employed transfer pricing on assets to minimise taxation, especially for intellectual property rights (IPR) including patents and software, intangible assets that courts may find it hard to value<sup>11</sup>. Note that this well established financing stream gives a major advantage over local competitors who may be paying the national business tax rates, typically in the EU, for instance, between 15% and 25%. That feeds free cash flow for a range of capital intensive plays – for financing acquisitions, competitive loss-making free offers, share buy-backs, etc. However, in the EU, certain Member State governments may also offer tax advantages to encourage the platform providers to implant genuine or just the strictly compliant resources and so perhaps bring employment. A series of court challenges by the European Commission against national EU governments on these tax exemptions, notably Ireland and Luxembourg, as well against the dominant platform providers has had a very uneven success record. USA Congress and Senate investigations of software companies and mobile smartphone suppliers (Apple<sup>12</sup> and Microsoft<sup>13</sup>) have discovered several such tax minimisation stratagems, for instance, “*the double Irish*”<sup>14</sup> all of which may be legal in the USA.. This exposes the unsubstantiated assumption that within a complex corporate structure,

<sup>10</sup> The OECD has been addressing this via its Inclusive Framework, with over 125 country members but no significant change has resulted apart from attempts to establish a minimum 15% standard rate, OECD (2021), OECD releases Pillar Two model rules, 20 Dec 2021, Report – *Tax challenges arising from the digitalisation of the economy Global anti-base erosion model rules*

<https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm>

<sup>11</sup> Vinje, T., (2021) *The Intellectual Property and Antitrust Review: European Union*, Clifford Chance, 15 July 2021 <https://thelawreviews.co.uk/title/the-intellectual-property-and-antitrust-review/european-union>

<sup>12</sup> USA Senate (2013), *Offshore profit shifting and the US Tax code –part 2 (Apple Inc)* 21May 2013, [https://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code\\_-part\\_2](https://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code_-part_2)

<sup>13</sup> Cook, J., (2012) *Senate report say Microsoft sidesteps billions in taxes*, 20 Sep 2012 <https://www.geekwire.com/2012/uncle-sam-microsoft-pay-billions-missed-tax-payments/>

<sup>14</sup> An Intellectual property based base erosion and profit shifting (BEPS) global corporate tax avoidance instrument often used by USA multinationals and based on Ireland's tax laws. see Discussion Paper No. 13-078 Profit Shifting and “Aggressive” Tax Planning by Multinational Firms: Issues and Options for Reform, Fuest, C., (2013) et al, Discussion Paper No. 13-078, ZEW, 13 Oct 2013 <http://ftp.zew.de/pub/zew-docs/dp/dp13078.pdf>



transactions can be fairly valued using market benchmarks objectively<sup>15</sup>. In 2019, the International Monetary Fund (IMF) analysis showed that the developing, non-OECD countries lost about US\$ 200Bn per annum in total due companies shifting profits into low-tax locations<sup>16</sup> some 1.3% of their GDP, so it is not just EU countries and the USA which are losing out

Reform of taxation in this area may require withholding taxes on cross border payments, especially for low income countries, as well as moving the focus of international taxation to the consumption of the goods and services, not the original source country for the product. In addition, taxation of cashflow to the destination of corporate transactions, rather than the production country would be part of the solution. This is the current situation:-

**Table 1 Major online platforms and their tax payments, 2020-2019**

<i>Global platform</i>	<i>Tax paid as a percentage of profit 2010-2019, %</i>	<i>Tax paid 2010-2019 US\$Bn</i>
Facebook	10.2	7.7
Amazon	12.7	3.4
Google	15.8	27.9
Microsoft	16.8	46.9
Apple	17.1	93.8

Source: Fair Tax Mark, *The Silicon Six*, 2019, based on USA SEC tax filings 10-K and 10-Q as information from European and UK subsidiaries is unavailable or incomplete.

<https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf>

The need for greater tax transparency is slowly moving into corporate governance regulation for the dominant web platforms, all of which operate globally with major cashflow from countries outside the USA. In April 2022, the USA Securities and Exchange Commission (SEC) supported the demands of shareholders in Amazon to include a vote on its tax policy and refused the claims of Amazon that it was 'just a normal business matter' and thus exempt from a shareholder resolution<sup>17</sup>. To some extent, USA and EU tax policy is being influenced by the Global Reporting Initiative (GRI) for transparent tax standards for international tax reporting, with data release by source country of revenue generation. This would also need to cover use of tax havens with transfer pricing, common tactics of the dominant platforms and often applied to intellectual property rights (IPR) to minimise tax dues<sup>18</sup>.

- **Large scale data collection underpins market dominance** - digital platforms have business models based on a range of offers of apparently free services. However the currency for these operations is payments in personal customer data, especially on preferences in consumer markets. Thus, collection of personal information in large volume (popularly termed in some contexts 'BIG data') also offers dominant market advantages through detailed market knowledge, on sellers and pricing as well as on buyers, with customer profiling<sup>19</sup>. That level of information asymmetries (between entrant platform players and established players) can bring significant market powers (SMP) that may be abused. Such data collection practices can become anti-competitive if the level of knowledge about the market through collection of customer transaction and search data

<sup>15</sup> Christine Lagarde (2019), *An overhaul of the international tax system can wait no longer*, Financial Times, 19 March 2019, as managing director of the IMF, quoting IMF Report of 19 March 2019, showing damages to the developing world

<sup>16</sup> Christine Lagarde (2019), IMF, *ibid*

<sup>17</sup> Agyemang, Emma (2022), *SEC dismisses Amazon plea to exclude vote on tax policy*, Financial Times, 07 April 2022

<sup>18</sup> Global Reporting Initiative (GRI), GRI standards, GRI 207:Tax, 2019, <https://www.globalreporting.org/standards/media/2482/gri-207-tax-2019.pdf>

<sup>19</sup> Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security Commission File No. P065401, [https://www.ftc.gov/system/files/documents/public\\_statements/1597024/statement\\_of\\_chair\\_lina\\_m\\_kh\\_an\\_regarding\\_the\\_report\\_to\\_congress\\_on\\_privacy\\_and\\_security\\_-\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_kh_an_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf)

leads to effective market control. Note that such customer data may be collected without competition and possibly, often without the customers' agreement or even their realisation. Moreover, a dominant player will enjoy the advantages of the network effect, that is, the more users it has, the more valuable is access to its network for those users of its consumer services, be it for pure search, shopping or social networking, and possibly for pricing and tied offers such as delivery. In a two-sided market, selling that consumer data to data brokers and market data merchants of all kinds means the network effect becomes of dual importance.

It also means that the dominant player may have levels of market data volume that protect it against a potential new entrant whose own volume of market data is unlikely to enable it to expand effectively. That may well stifle market entry and subsequent growth because it cannot increase its volume of customer data, or exploit any network effect, as it cannot expand in customers or data traffic. Understanding the key significance of data privacy in platform competition is crucial to comprehending the growth of dominance in the digital platform market<sup>20</sup>. There is now a realisation that persistent commercial data collection may support anti-competitive behaviour as well as bring privacy concerns in terms of psychological as well as economic factors influencing consumers. This latter influence was demonstrated most blatantly by social networks manipulating users' emotions<sup>21</sup>. More specifically, the concentration of control over consumer data has enabled dominant firms to create barriers to entry and so to capture markets. Additionally, massive volumes of customer and sales data from market surveillance has enabled firms to identify and frustrate still-nascent<sup>22</sup> competitive threats. Until the GDPR, and certainly in the USA, private data's competitive implications have not been appreciated by the regulatory authorities. Essentially, a platform's monopoly powers can erode customer privacy without revealing the consequences. Making the link is essential for safeguarding customer privacy via regulation<sup>23</sup>.

- **Removing competition from innovators entering the market** – the platform providers that have SMP have often built their position using their major financial reserves and market valuation levels of share prices to buy up rival entrants with similar competing services or new directions that could attract consumers and challenge their market share position. All of the dominant platforms have made acquisitions over the last two decades that have defined their current offering<sup>24</sup>. Possible competition from the new innovators may have been halted in this process, before the network effect has had time to take off for them and bring in any significant market share. This has two effects – spreading the established major platforms' offerings into new directions that do not compete with current revenue streams - and possibly - ending those that do.
- **Rejection of offers or refusal to cooperate, trade or deal** – this frequently relates to 'essential facilities' controlled by one market player that rivals need, in order to access the asset to operate in the digital market. A key example is the sharing of Application Programming Interfaces (APIs) to access and operate software and hardware. Refusal to

<sup>20</sup> Federal Trade Commission (2021), Report On Privacy And Security To The Senate And House Committees On Appropriations Pursuant To The Joint Explanatory Statement Accompanying The Consolidated Appropriations Act, 2021 P.L. 116-260, at 7 (2021).

<sup>21</sup> McNeal, GS, (2014) Facebook manipulated user news feeds to create emotional response, Forbes, 28 June 2014  
<https://forbes.co/sites/gregorymneal/2014/06/28/facebook-manipulated-user-news-feeds-to-create-emotional-contagion/>

<sup>22</sup> Stucke, M., Grunes, A.,(2016), *Big Data & Competition Policy*, Oxford University Press

<sup>23</sup> Cristina Caffarra et al., *The antitrust orthodoxy is blind to real data harms*, VOXEU, 22 April 2021, <https://voxeu.org/content/antitrust-orthodoxy-blind-real-data-harms>; also

Alessandro Acquisti et al., (2020) *Secrets and Likes: The Drive for Privacy and the Difficulty of Achieving It in the Digital Age*, 30 Journal of Consumer Psychology, 736, September

<sup>24</sup> For example Google has made some 225 acquisitions, including YouTube (2005), Double Click (2007 online advertising), Motorola Mobility (2012, especially for its patents), Nest (2014, home automation),

cooperate is used to enhance or build up a monopoly position by platform operators having key interfaces, services, or data. It has been traditional in the software industry for five decades – since IBM went through its anti-trust cases. It is a most powerful tool for monopolies in extracting high revenue streams. For instance an app store which by the protection of network effects, coupled with closed interfaces to mobile handsets becomes an *essential facility* for downloading apps. A description of this position has been applied in court cases to Apple, for its app store, charging 30% of sales by the app provider, that has met with SMP claims in its various recent court rulings in the USA in August 2020 over EPIC Games' Fortnite app, and the EU in April 2022, together with Spotify's complaints over music distribution.

The practice applies equally in regulatory actions to protect other parts of the digital supply chain. For instance in the recent case of Softbank wishing to sell the chipset architecture designer ARM to the chipmaker Nvidia (one of ARM's customers) objections were raised by regulatory authorities in the USA, the EU and its home country, the UK, as well as China<sup>25</sup>. The fears were that Nvidia would discriminate - and discontinue the deals that ARM has with all the major chipset manufacturers to supply their chipset designs used in 95% of mobile phones<sup>26</sup>. A further important example is the use of standards' essential patents (SEPs) for implementing an international standard, as in mobile radio technology, where one supplier may control the essential patents which it refuses to licence under fair and reasonable conditions which are non-discriminatory (often termed 'FRAND').

Refusal by the dominant platforms to address deception on the consumer side through paid for online advertising, or fraudulent subscription sign up also comes under refusal to deal or cooperate, but this case with consumers directly<sup>27</sup>. The harm caused is proportional to the significant market power held. The EU's General Data Protection Regulation (GDPR) that also protects against fraudulent use of identities in promotional advertising (a common ploy) should be effective here, but in practice may not be specific enough<sup>28</sup>

- **Predatory pricing** – used by dominant players to foreclose a market by sacrificing their profits in favour of squeezing rivals out of the market with short term price reductions, priced often to zero in digital markets. Losses are recovered later when competition has been removed, perhaps by introducing higher prices or their data equivalents. One case in point is consumer digital mapping where many firms once competed but a dominant player now reigns and the app is now tied to an operating system and browser. Here the currency is customer data on behaviour and preferences, so pricing is not monetary but instead is in the value of access to consumer data, a major revenue stream for the leading platforms.
- **Margin squeezing** – this is particularly applicable to vertical platforms using two-sided markets where some of the rivals may only enter at one point of the vertical chain. It can be present in shopping platforms especially where the platform deals in specific consumables such as groceries or books and yet offers its digital platforms to upstream or downstream (usually smaller) merchants such as book publishers or bookstores. This is already notorious in cases in the past concerning dominant telecommunications monopolies - and goes under the label of services cross-subsidisation. As with pure telecommunications, a typical digital platform play is to squeeze margins either upstream or downstream and recoup losses through boosting margins in some other part of the vertical supply chain. One example of this is the online shopping services market, a key

<sup>25</sup> Richard Waters (2021) *Arm's Reach: regulators pore over Nvidia takeover of chip designer*, Financial Times, San Francisco, 23 November

<sup>26</sup> Waters, R., (2021), *Arm's Reach, Regulators pore over Nvidia takeover of chip designer*, Financial Times, 23 Nov 2021

<sup>27</sup> FTC (2021), *Illegal Dark Patterns*, in Statement of Chair, Lina M Kahn, regarding the report to Congress on Privacy and Security, Comm. File P065401, 01 Oct 2021

<sup>28</sup> Heine, I., (2021), *3 years later: an analysis of GDPR enforcement*, Center for strategic and international studies, 13 Sep 2021, <https://www.csis.org/blogs/strategic-technologies-blog/3-years-later-analysis-gdpr-enforcement>



segment of the general online search market sought after for its consumer data harvests. The EU Commission fined Google €2.42 billion in June 2017, for favouring search results from its own vertical comparison shopping service<sup>29</sup>. Exploitation of a dominant position in search was the accusation. That abuse of a digital platform favouring of its own service is now incorporated in the EU's DMA and DSA, explored below, but in 2017 it could be considered as an extension of regulatory theory of market impairment for the digital platform domain. Investigation can involve complex cost-based accounting, taking in the value of consumer data gathered in a two-sided market, which the digital platforms may resist performing as the effort is considerable.

- **Tying and bundling for digital platforms** – a common complaint, that has been often exploited in the software and computing hardware industry, since the 1950s when IBM then bundled its mainframe hardware with its software. The legally forced separation in the 1960's opened up the whole “plug-compatible manufacturer” (PCM) industry for mainframe processors and peripherals such as terminals, disks and printers running IBM software.

Bundling is used to extend monopoly powers for dominant platforms when one service or product is desired by the customers but they are forced to buy many more potentially standalone offerings, as a bundle. This is especially powerful in online shopping and payments interfaces, perhaps coupled with exclusive deals on delivery. It is used widely in gaming and other software apps and products. For instance, office systems software and as an online service (SAAS – software as a service) are currently sold as a bundle of four to six products which may deny rivals any sales of the component products separately and so they cannot build sufficient scale and perhaps a network effect.

One current example of this is whether it is necessary to use a tied browser and email for the dominant mobile handset operating system, the case for leading smartphones. Returning to some two decades ago, this was also the basis of the Microsoft anti-trust case opened in 1998 by the USA Department of Justice (DoJ) in a district court. The DoJ won the first round on the matter of bundling the Microsoft web browser (IE) with its PC operating system. The court's decision was divestiture into two different firms, one for operating systems and the other to offer its software<sup>30</sup>. However the breakup decision was reversed in 2001 on appeal. The Appeals Court rejected the prior decision, imposing a rule, which included the monopoly efficiency argument then prevalent in the USA, following the theory due to Bork and the Chicago school of economics on markets and competition. This held that possible efficiencies came from the tying, that increased consumer benefits and welfare, a benefit which balanced out anti-competitive harms. The DoJ then negotiated a settlement in November 2001<sup>31</sup> (requiring Microsoft to share its relevant APIs with other software publishers also).

Note that a more general consumer tactic of the online platforms is to bundle zero-priced complementary products which may drive up usage on the free services side – but that increases revenues in two-sided markets on the profitable side – for instance by increasing the volume of new customer data for sale.

Note that a more general consumer tactic of the online platforms is to bundle zero-priced complementary products which may drive up usage on the free services side – but that increases revenues in two-sided markets on the profitable side – for instance by increasing the volume of new customer data for sale.

<sup>29</sup> European Commission Decision in Case AT.39740. 27 June 2017, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).

<sup>30</sup> Forge, S., (2000) A measured proposal: future actions following the Microsoft anti-trust decision, Info, Vol 2, No 3, June 2000, p.297, Camford Publishing, ISSN 1463-6697

<sup>31</sup> Department of Justice, (2001), announcement, Department of Justice and Microsoft Corporation reach effective settlement on antitrust lawsuit,,02 Nov 2001, [https://www.justice.gov/archive/atr/public/press\\_releases/2001/9463.htm](https://www.justice.gov/archive/atr/public/press_releases/2001/9463.htm)

- The Phenomena of ‘Dark Patterns’ in an SMP situation**

– the phenomenon of so-called dark patterns in web user interfaces into platforms has been known for some time<sup>32 33</sup> that deceive users into spending more money or more time on a particular website. Online human interface systems and their manipulation by the platform owner are not understood by many users in their entirety, in terms of both their complexity and legal claims, leaving the user open to abuse, especially by the more dominant web platforms. The level of information asymmetry between platform operators and consumers is extreme. That consumer ignorance can be exploited for profit both financially directly as well as in data collection from users without consent. However such deliberate malpractices become especially important when used by leading online platforms, especially in a shopping context, and/or for subscription sign up, be it for direct monetary charges or for targetted advertising. The basic premise of the ploy is to deceive users, often by coercing them to make choices they are not aware of, such as ordering products such as games consoles, plus the games, or extra monthly streaming subscriptions. Consequently there are many variations on unintended consequences of actions by users online. For instance, Facebook exploited personal phone data claimed to be used for two factor authentication, but instead employed it for targeted advertisements, after requiring users to give their phone numbers<sup>34</sup>. Dark pattern practices are now the subject to an FTC investigation into its diverse forms and their user impacts in 2022 as massive collection of personal data gives strong market advantages and so can be anti-competitive – the overlap between privacy and competition<sup>35</sup>. (especially if customer data is collected without competition and perhaps without consumer consent)<sup>36</sup>.
- Exploitative abuse of contracts for use of online services, by continued holding of financial card payments data, especially when children and vulnerable people are involved.** One specific example of dark patterns stands out – exploitation of children – various ways. For instance one leading gaming company sells its games online with software downloads for its game player. It holds the initial purchasing card details for the gaming device and the first games, typically purchased as a bundle. The gaming platform then offers their players – in some games categories mostly children – the ability to buy add-ons using the stored card details. That can incur massive charges, unauthorised by the original card holder, usually a parent<sup>37</sup>. The major platforms serving the consumer markets may be conscious of the level user ignorance and may exploit it via various practices. That can be viewed as an abuse of SMP. The gaming market is just one example – all the major social networking, search and gaming platforms may practice this, for their various shopping platforms and apps stores. The only way to try to halt it is by the cardholder following a specific complex process to remove or block card access - it is not necessarily barred by default in such cases. Platforms are quite conscious of this revenue stream. For instance one platform switches off parental control when the child reaches 13. This is a complex problem as some apps such as games can be accessed via multiple

<sup>32</sup> Luguri, J., et al (2021), *Shining a light on dark patterns*, Journal of Legal Analysis, Harvard Law School, 23 Mar 2021, <https://academia.oup.com/jla/article/13/1/43/6180579?login=false>

<sup>33</sup> Narayanan, A., et al, (2020) Dark Patterns, Past, Present, Future, ACM Queue <https://queue.acm.org/detail=cfm?id=3400901>

<sup>34</sup> Venkatadri, G., et al (2019) Investigating sources of PII used in Facebook’s targetted advertising, Proceedings on privacy enhancing technologies, 2019 (1) pp227-244 [https://www.researchgate.net/publication/330121178\\_investigating\\_sources\\_of\\_PII\\_used\\_in\\_Facebook's\\_targetted\\_advertising/link/5c2eb18892851c22a35833f0/download](https://www.researchgate.net/publication/330121178_investigating_sources_of_PII_used_in_Facebook's_targetted_advertising/link/5c2eb18892851c22a35833f0/download)

<sup>35</sup> Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security Commission File No. P065401 October 1, 2021

[https://www.ftc.gov/system/files/documents/public\\_statements/1597024/statement\\_of\\_chair\\_lina\\_m\\_kh\\_an\\_regarding\\_the\\_report\\_to\\_congress\\_on\\_privacy\\_and\\_security\\_-\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_kh_an_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf)

<sup>36</sup> Statement of Chair Lina M. Khan (2021) *ibid*

<sup>37</sup> Chen, B.X.,(2019), Are Your Children Racking Up Charges From Mobile Games? Here’s How to Fight Back, New York Times, 06 Feb 2019,

<https://www.nytimes.com/2019/02/06/technology/personaltech/children-charges-mobile-games.html>

devices, all of which can use the platform's card account details and will have to be blocked - but the process may be quite different for each.

- Use of the platforms for political campaigns** - Additionally there have been suggestions that the potential for political advertising by social networking and search services should also be strengthened by new regulation, especially in view of the usurping of web platforms by outside governments for political ends<sup>38</sup>. This form of campaign occurred in the USA's elections of 2016 using false accounts on social networking platforms<sup>39</sup>, as well as phishing attacks on opposition parties for email theft, fuelling international propaganda attacks by overseas governments. Here the platforms are entering the political arena and so their role as a channel for propaganda should be acknowledged publicly. That demands regulation of targeting, specifically to protect political stability as well as privacy in use of personal data, especially as conscious consent for political targeting has not been given. It would halt paid-for publishing on social and political subjects for political ends, with currently no identification of sponsors, right of reply, or any responsibility for content veracity, or for the final social consequences. Regulation would require disclosure on who is targeted and why, who is sponsoring the targeting and also the true positions behind issues-based advertising, with their sponsors. It could require platforms to monitor such content themselves and to disclose what safety systems they were using, what languages they are in, and the effectiveness of such systems, because major human rights abuses have occurred as a result. For instance, Facebook social networking has been accused of incitement in the Rohingya massacre in 2017 in Myanmar<sup>40</sup> with a lack of moderation and use of algorithms that amplify hate speech.
- Anti-trust in employment markets – the no-poach syndrome** – principally in the USA, dominant platform operators have operated various employment agreements that consent to not soliciting for employment or hiring from among the workforces of co-signee firms. This is an infraction of competition in employment markets in the USA. The DoJ has taken action against this. President Biden endorsed this as USA policy in 2021. The DoJ used criminal proceedings in this area in 2021. Among the dominant online platforms, several operating companies have pleaded guilty to no-poach agreements between 2011 and 2014, preferring to settle out of court. Famously, the head of one company sent a 'smiley' emoticon to the head of a colluding company on hearing that the recruiter responsible had for hiring an engineer from his company been discharged.

### 3 Politics and regulation of the global digital platforms

The above are major specific points of abuse of a dominant platform's SMP position. However, there is a more general one – the willingness of politicians and policy setters to accept a form of "digital reverence" for something they have no understanding of, but attribute massive respect to, as being different to other sectors for its promised returns. So the digital platforms are revered as amazing advances when they are computerised versions of trading traditionally, nothing more and perhaps somewhat less (– especially in considering the down side, as their poor security exposes the users to crime, predominantly financial fraud with data privacy theft and biased algorithms, while also perhaps hosting child pornography). This "digital reverence" in governments who set policy on regulation often may overspill into the

<sup>38</sup> Javier Espinoza (2021) EU targets social media political ads, Financial Times, Brussels, 24 November, quoting Vera Jourova, EC Vice President for Values and Transparency

<sup>39</sup> FTC (2019), FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook, 24 July 2019, public press release <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook>

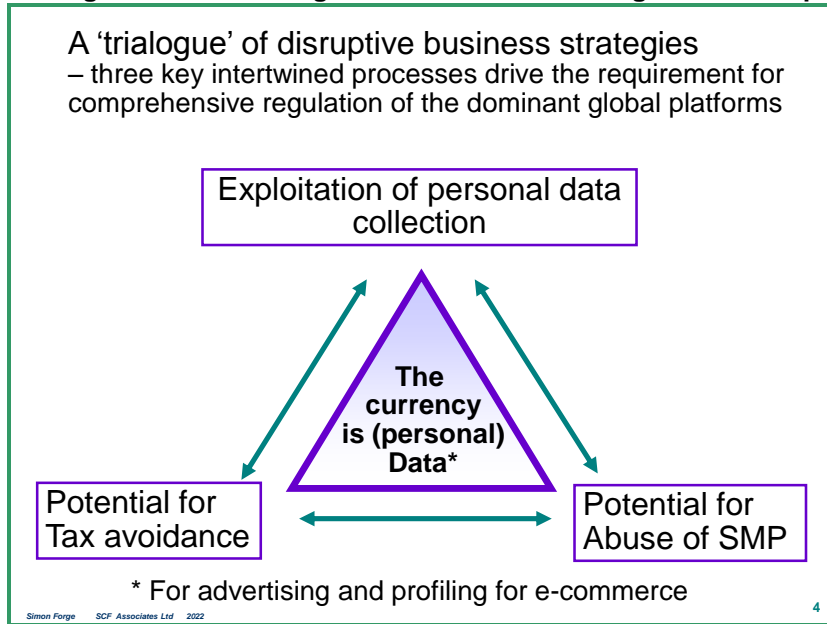
<sup>40</sup> BBC (2021), Rohingya sue Facebook for US\$150Bn over Myanmar hate speech, 07 December 2021, <https://www.bbc.co.uk/news/world-asia-59558090>

regulatory agencies to take a form of ‘regulatory capture’, as recent USA SEC policy suggests<sup>41</sup>.

**Summarising the anti-trust challenge from digital platforms at a macroeconomic level**

So far we have briefly toured specific practices of anti-competitive behaviour. A more generic perspective when operating globally is with tax optimisation, to form a ‘trialogue’ of interlocked business practices that can create and then maintain global market dominance through the global scale and dense reach of network effects. The figure below summarises these three key drivers of digital platform dominance, requiring dynamic regulatory response:-

**Figure 1 The challenge for anti-trust regulation of the dominant global online platforms**



**4 What do recent anti-trust cases for the GAFAM community indicate?**

In reply to the above practices, are various anti-trust instruments, with a somewhat chequered history and so the reality in court disputes is of interest. Analysis of these is aimed at a practical guide to what has been successful and what has failed – what do recent major tech platform anti-trust cases indicate on which legal arguments and approaches are successful and what fails today in recent judgements. Many cases have not been successful either in the EU or the USA, and so the reasons and context for any positive results are of vital interest.

**Relevant cases and their decisions for the dominant players**

Below we examine a series of case in the EU and the USA against five dominant digital platform players, with examination of the reasons for failure or winning of the case by the regulator.

**1 Apple Win** – In July 2021, Apple won the case brought by the EC in 2020, in which Margrethe Vestager, Competition Commissioner, sought a reversal of Apple’s tax exemptions allowed by the Irish administration, which would have required an Apple payment of some €14.3 Bn in taxes in 2020.

Originally, after entering Ireland in 1980, in 1991, Apple, via its subsidiary Apple Operations International (AOI), agreed an Ireland-based taxation rate of under 2%. AOI had \$30 billion of

<sup>41</sup> Anjana Ahuja (2022), Digital Enchantment Threatens Tech Regulation, Financial Times, 18 May 2022



untaxed revenue between 2009 and 2012, according to the USA Senate hearings in May 2013<sup>42</sup>, equivalent to two thirds of its global profits, via its three Irish companies, while 95% of the R&D originated in the USA, which affords USA patent protection.

*Failure mode of the regulator:*– the problem was that the EC cited *EU-wide* controls on state aid rules, noting that the exemption amounted to state aid. However the Irish administration's position was that *national taxation* laws that take into account local agreements are not involved – as Margrethe Vestager pointed out in reviewing the decision, that state aid rules had not been implicated in giving generous tax exemptions to Apple (or in a similar case in 2019 to Starbucks, in Luxembourg). This case shows that in the EU, to some extent anti-trust evidence must take into account the subsidiarity factor – that is: EU regulation may be overruled by national tax agreements and decrees, which can take precedence. In the EU General Court (now the Court of First Instance) the right of the EC to scrutinise national tax arrangements was upheld but it was noted that the EC failed to demonstrate that the multinational company benefited from what is classed as state aid. For a favourable judgement, the EC would have to demonstrate preferential treatment and so illegal state aid.

**2 Apple Partial Win** - In a case brought not by the USA regulators (the FTC or the DoJ) but by a software developer of games, Epic Games in August 2020 held in a USA federal court in California, with hearings in May 2021, Apple prevailed largely. It gave a partial win in the USA to Apple, which was challenged by Epic Games, over sales of its gaming software product Fortnite, distributed through Apple's App Store. Apple demands 30% fees on the purchase price of the apps sold via the store's website. Epic Games had found a way to avoid using the Apple App Store for subsequent payments during game playing, eluding the 30% App Store charge. So Apple refused to host the Fortnite app on its App Store and removed it. Epic Games then sued Apple in a district federal court on the grounds of antitrust violation (decision by District Court Judge Yvonne Gonzalez Rogers) on charges that Apple acts as a monopoly because it ties App Store distribution to its own payment system – as well as charging 30% of Epic's sales, for the App Store fee. But the court did require Apple to change its policies on stopping consumers buying additions elsewhere through operations within the app (allowing 'in-app steering') and on stopping pointing to other means of payment than Apple's own Apple Pay in a final ruling, 10 September 2021, with a 90 day notice to comply.

*Failure mode of the complaining plaintiff:* - the verdict was that Epic Games did not demonstrate irreparable harm (decision of Oakland District Court Judge Yvonne Gonzalez Rogers) in the accusation that Apple ties App Store distribution to its payment system – and charges 30% for the App Store fee<sup>43</sup>. The key point made in the trial was that the definition of the relevant market, its extent and limits are the crucial factor in a judgement on monopoly practices, as that defines whether a company has monopoly power or not. Is the market then the digital games market, where Apple has a minor share, or the market for games that run on the Apple smartphone, the iPhone, defined by its Apple operating system, iOS? Here Apple via the Apple Store dominates games sales. Moreover in the case of a 2-sided market, with games consumers on one side and games developers on the other, Apple controls sales for both sides via the Apple Store's conditions of operations and app developer fees, which are considerable at 30% of revenues taken for downloaded games plus any consumer purchases following the original game sale. In the USA, monopoly harm to both sides of a 2-sided market can be important for anti-trust verdicts. Note that Apple at that time did not permit an alternative app store on the iPhone or allow purchase from within the app (termed 'sideloading'). Moreover Apple stated, through its CEO Tim Cook, that it did not know what the profits on the App Store were, in the Congress hearings in 2020. Judge Rogers did note that the 30% fee charged by Apple had not changed since the inception of the App Store indicating

<sup>42</sup> Siv Cherevu (2013), *Tim Cook senate hearing: How did Apple avoid \$44 Billion in taxes?* 21 May 2013, Mic. Com,

<https://www.mic.com/articles/43381/tim-cook-senate-hearing-how-did-apple-avoid-44-billion-in-taxes>

<sup>43</sup> JR (2021) *Apple v. Epic antitrust trial closing comments*, 24 May 2021

<https://jackofalltechs.com/2021/05/24/apple-v-epic-antitrust-trial-closing-arguments-judge-grills-both-sides-on-competition/>



a lack of competition. In response, Apple remarked that competing app stores at the time of launching the Apple App Store also charged 30% fees, or more. Also some of its later App Store fees were lower, perhaps down to 15%. In some ways, the judgement seems to imply that Apple has created a unique market (of one supplier, or 'monopsony') with its technology. In the USA, it can set terms as a unique market, joining users to suppliers, that is judged currently as not being monopolist. However under Section 1 of the Sherman Act, conduct which extends beyond defining of a policy and refusing to deal with non-compliant partners could be taken as an act of coercing an agreement.

In a subsequent motion, Apple appealed against the federal court ruling in November 2021 on instigating changes, requesting more time for the modifications demanded, but was overruled by the court, leaving Epic to pursue the anti-trust monopolist charges. The case continues at time of writing, following court hearings on 28 September 2021, and December 2021, with prolongation into 2022, at time of writing.

**3 Google Loss** – On 12 NOV 2021 the European Court of Justice (ECJ) upheld the judgement against Google and the €2.4 billion fine for favouring its own shopping price-comparison service over others, as an abuse of market power in search services.

*Why won by regulator* - the reasons for success for the EC include:-

- Clear evidence was available through depositions by rival comparison shopping services using the Google platform for their services.
- The subject area itself is fairly clear and can be explained simply to a court
- The value of damages caused may be fairly simply assessed in lost business (but the losses of extra business opportunity may be more difficult to estimate)

**4 Google Loss** – on 18 July 2018 - EC fined Google €4.43Bn for illegal practice concerning tying its proprietary Android operating system (OS) to strengthen dominance of Google's search engine. The action was based on forced tying of Google apps with use of Android – specifically the search engine but also its browser (Chrome) and its mapping service, with Google specified versions of Android (the proprietary Google 'forks') and other Google apps for consumers and business users.

*Why won by regulator*:- it was shown that the theory of harm used in this case, an abuse of dominance, worked effectively. The focus on tying of Google's own browser, with Google Pay, its apps store Google Play with its search engine, plus its stipulation of only Google-developed 'forks' of the Android OS was a case where Google attempted to *reinforce its position* as the leading search engine via the tied apps. The result was a strong case with opposing arguments not considered sufficiently convincing. The argument that competing search engines are just as easy to select (just a click away) was not accepted as Google has such a dominant market position and has perfected its offering, making it the *default* option which gives significant market power, enabling substantial extra capture of consumer data. The latter point is important as Google (and any competitor) need large volumes of user data to train the search engine on, by using a 'machine learning' mode. The use of embedding defaults via the apps tied to Android and pre-loaded with it, 'lock in' the user, exactly as has been traditional in software and computer hardware markets for the previous three decades (notable cases being IBM and Microsoft).

Customer lock-in was further increased via contractual pressure on smartphone manufacturers, who are dependent on the Android OS, by requiring them to bundle the Google apps and utilities, as pre-loaded software, reinforcing Google's market dominance. That bundling strengthens market shares of the Google Pay payments service and the Google Play app store, just as the Chrome browser does. These practices tend to exclude rival search engines, so they could not perfect the product, as customer data for training the search engine, unless they paid smartphone manufacturers for the loss of Google's apps in order to then become the *default* search engine.

**5 Amazon Loss** – In November 2021, Italy’s Antitrust Commission fined Amazon and Apple €69Mn and Apple €134Mn, respectively, on finding Amazon resold Apple and Apple-owned Beats kits under a 2018 contractual agreement at advantageous pricing, due to lower discounts<sup>44</sup>. Other retailers were excluded from Amazon and thus from selling at lower prices than Amazon. In its action, Italy’s regulator cited the 2018 arrangement between the two companies which limited the discounts for customers on Amazon’s Italian website who were buying Apple and Beats products. This effectively excluded other Apple resellers of Apple and Beats products from utilising Amazon as an online platform to sell through which given its market power acted as a restraint on trade online. Similar investigations of Amazon were initiated in 2021 by regulators in Spain and Germany, by its Federal cartel Office.

*Why won by regulator:-* It was possible for the regulator to clearly show that other sellers and particularly resellers on Amazon were at a disadvantage as there was the 2018 restrictive agreement between the supplier and retailer effectively broke competition law in the EU. Note that in the USA, the position could have been different.

Also notice that Amazon is quite different to the other platforms in its business model and guiding strategy. In some ways it has been built to avoid or defeat anti-trust actions<sup>45</sup>, often by successfully showing a court that its major preoccupation is the customer’s benefit and satisfaction (‘consumer welfare’) not its own profits and market advantage. That argument has had major success in the conventional USA federal court views of anti-trust following Judge Bork’s book and testimony as Solicitor General before the Supreme Court that has largely held sway from around the mid 1970’s until 2018, with some key exceptions. Moreover Amazon has been painstaking to try to work with the USA government and its agencies, as well as lobbying actively<sup>46</sup> but this has not always worked – in 2021 Senator Elizabeth Warren called for Amazon’s break up<sup>47</sup>.

**6 Amazon Loss** – On 16 July 2021 Amazon Europe Core, Amazon European headquarters located in Luxembourg was fined a record €746 million (\$886.6 million) for a serious GDPR (General Data Protection Regulation) violation by the Luxembourg National Commission for Data Protection (CNPD) representing the EU. The fine exceeded all previous GDPR penalties. It was revealed in the 2021 Amazon regulatory filing for the SEC. Amazon noted its intention to appeal the verdict.

*Why won by regulator - inspection by EC - and by national authority CNIL in France - revealed Amazon was depositing cookies without authorisation on consumers' mobile handsets and PCs. This followed an original complaint from a group of French users in 2018. It is an example of GDPR transgression and therefore is a case of a more general legal principle, of ex ante regulation being successful, as rules are specified and then market surveillance actions detect contraventions. This is a much simpler anti-trust action to prove and succeed, as the character of an infraction is already defined. There is no need to prove far more vague principles of anti-competitive practice or of abuse of market power as in an ex post revue and then analysis of behaviour of a firm. This is recognised by the EC as a policy for anti-trust regulation with far more chance of being upheld against legal challenges in the EU court of first instance or the European Court of Justice and is examined by a specific court. To avoid the penalties of GDPR, while collecting as much personal data as possible, a platform operator might try to effectively force users to accept the insertion of their cookies,*

<sup>44</sup> Seeraro, G., Pollina, E., (2021), Amazon and Apple fined \$225 million in Italian Antitrust fines, Reuters, 23 November, <https://techstory.in/italy-fines-apple-amazon-225m-in-antitrust-action/>

<sup>45</sup> Gillett, C., (2019) *How Amazon is beating antitrust before it happens*, Palladium Magazine, 8 June 2019, <https://palladiummag.com/2019/06/08/how-amazon-is-beating-antitrust-before-it-happens>

<sup>46</sup> Gillet.,C (2019) *ibid*

<sup>47</sup> Kalra, A., Stecklow, S (2021) US Senator Warren urges Amazon breakup, Reuters, 15 October <https://www.reuters.com/business/us-senator-warren-urges-amazon-breakup-insia-retailers-want-probe-after-reuters-2021-10-14/>

against their will, perhaps by threatening withdrawal of services. This cookie placing may extend to those of the third parties' major platforms represent in advertising and promotional working through data collection and profiling. An alternative ploy is to make opting out of cookies difficult— by various tactics in manipulation of the user interfaces.

Significantly, since the GDPR was passed into EU law, enforcing the GDPR in the case of data gathering by cookies has been met with some energy and preparedness by both EC and national regulators. This development may possibly be because a cookie infringement of the GDPR is more easily discovered and then proven in court proceedings, especially if end user complaints reveal the initial misconduct. Only by the platform operator proving that the data was given without coercion or subterfuge can a defence in court be made against a GDPR judgement. This is significant as the burden of proof moves to the platform operator and away from the regulator<sup>48</sup>.

#### **6 Amazon Win - EU, Tax repayment 13 MAY 2021 €230 Mn to Luxembourg**

*Failure mode* – the problem is one of EU law as then related Member State law in the same area, as seen by the court. State aid rules and national taxation rules are not aligned – as Margrethe Vestager pointed out. This is the same as the Apple case in Ireland and the Starbucks case in Luxembourg in 2019. In contrast, the General court ruled in favour of the EC in 2019 on the Engie (formerly GDF Suez) case of state aid. It found that preferential treatment had been given and that €120Mn of tax exemptions should be repaid.

*Failure mode for the regulator:-* This is not just an anti-trust case but a difference on ruling of what constitutes state aid and what is permitted under EU law for a Member State. Moreover the burden of proof in such cases is clearly on the EC Competition Authority.

**7 Facebook Win (so far)** – The USA's FTC filed a complaint against Facebook in December 2020 that it enjoyed monopoly power through a “years-long course of anti-competitive behaviour” and conserved that power via a “buy or bury” strategy<sup>49</sup>. The FTC filing attempted to reverse two key Facebook acquisitions – Instagram (for US\$1Bn in 2012) and WhatsApp (in 2014 for US\$19Bn). However, the Federal Court in June 2021 rejected the complaint. The Federal District Judge, James Boasburg ruled that the FTC and states attorneys' evidence was legally insufficient but only dismissed the complaint, not the case. In January 2022 the judge denied Facebook's motion to dismiss the case as the FTC had now alleged enough information to support the premise that Facebook exercised monopoly power and maintained it via barriers to market entry.

*Why lost by the regulator:-* The FTC's December 2020 case did not have sufficient substantial and detailed evidence of Facebook's 'buy or bury' strategy against competitors. In contrast with the FTC's July 2019 case on privacy misuse, the FTC was not suitably prepared with enough detail on the behaviour of Facebook. Moreover at the time of the acquisitions of WhatsApp and Instagram, the FTC investigated the deals and approved them, apparently absolving Facebook. However there are internal Facebook communications that detail the tactic of using acquisitions as a barrier to competition, especially for the company to enter the mobile market, a major barrier for it at the time. The FTC lawsuit claims these emails show a systematic strategy to eliminate threats to its monopoly in social networking. Use of the Sherman Act in such cases is difficult as the law is broad and difficult to interpret in court.

In consequence, a response was made by the FTC to refile the complaint in August 2021. This reflected the changes in competition regulation policy in the USA's FTC and DoJ, with the change of administration in the USA. The FTC will be bringing greater evidence of the scale of the Facebook monopoly position in social networking. It also claimed the Facebook's dominance had built a high barrier to market entry for new competing entrants, by citing

<sup>48</sup> Cookie Law Info, 2021, 17 Major GDPR Fines of 2020 & 2021, 30SEP2021  
<https://www.cookie-law-info.com/major-gdpr-fines-2020-2021/>

<sup>49</sup> Hannah Murphy (2021), *Antitrust watchdog refiles suit against Facebook 'buy or bury' policy on rivals*, Financial Times, San Francisco, 21 August 2021

internal Facebook documents<sup>50</sup>. Consequently in January 2022, the judge found that the FTC had gathered enough evidence to continue<sup>51</sup> the action. This continues at time of writing.

**8 Facebook Loss** - The largest fine ever imposed on a company for violating consumers' privacy was applied in a 24 July 2019 FTC judgement against Facebook, for US\$5 Bn. At the time of the decision, this fine was some 20 times the previous maximum data security penalty or deliberate privacy breach ever imposed, globally. It was among the largest by USA government departments, for any violation<sup>52</sup>. Following a yearlong investigation by the FTC, the Department of Justice filed a complaint on behalf of the FTC, alleging deceptive disclosures and settings to undermine users' privacy preferences in violation of its 2012 FTC order, privacy breaches which were repeatedly applied by Facebook.

The FTC required a 20-year settlement order to prevent Facebook from continuing to deceive users about their actual privacy. Moreover the methods for making its privacy decisions were updated by improving the transparency of decision making. To enforce this, intersecting channels of compliance were to be applied to Facebook to hold it accountable. Facebook's CEO, Mark Zuckerberg is removed from unrestrained control over decisions affecting user privacy. At the board of directors' level, the order creates greater accountability with an independent privacy committee of Facebook's board of directors. Members of the privacy committee must be independent, appointed by an independent nominating committee. Members can only be dismissed by a supermajority of the Facebook board of directors. For enforcement of this order internally, Facebook must designate compliance officers, responsible for Facebook's privacy program. The order also improves accountability of appointees, at the individual level. The DoJ may file a complaint on behalf of the FTC alleging use of deceptive disclosures and settings in violation of the 2012 FTC order. The FTC will also have new tools to monitor Facebook. This FTC settlement had to be approved by an appropriate federal judge.

*Why won by regulator:-* the case against Facebook was strong in that it had broken prior agreements made in 2012 with the USA government on the data privacy of its users, a violation lasting over many years. The company had not informed users of the exploitation of their personal data for commercial use, nor of that of their contacts, which was also collected, for commercial use. The evidence comes from years of collection and analysis of Facebook internal documentation of the financial processes and payments chain to third party data brokers, advertising agencies and the use of consumer data as well as analysis of the processes open to users for protecting their own private data, with the actual effects. Facebook had made multiple major misrepresentations according to the FTC, such as its ability to control the use of facial recognition technology in customer accounts. However two FTC Commissioners, Rebecca Slaughter and Rohit Chopra, dissented on the grounds that the fine is far too small to have a restraining effect (being a month's revenue for Facebook at the time). It was also felt in the dissent that it is appropriate to charge officers and directors personally for infringements. As Facebook's stock price rose after the announcement, this seemed to confirm the views of a light penalty. The dissenting opinions also envisaged a court ruling against Facebook to deter it from future violations of FTC orders, as happened with the 2012 FTC order on consumer data privacy that Facebook breached<sup>53</sup> continually. Note that the break-up of Facebook was not sought, with separation of WhatsApp and Instagram. That

<sup>50</sup> Federal Trade Commission (2021), Civil Action No. 1:20-cv-03590(JEB) vs Facebook Inc, Public redacted version, 17 Nov. 2021 Plaintiff FTC's Memorandum of law in opposition to defendant Facebook's motion to dismiss amended complaint., Document 85.

<sup>51</sup> Bobby Allyn (2022), *Judge allows Federal Trade Commission's Latest suit against Facebook*, NPR, Technology, 11 Jan. 2022, <https://text.npr.org/1072169787>

<sup>52</sup> FTC (2019), FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook, 24 July 2019, public press release <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook>

<sup>53</sup> Fung, B., (2019) Facebook will pay an unprecedented \$5 billion penalty over privacy breaches, CNN business, 25 July, <https://edition.cnn.com/2019/07/24/tech/facebook-ftc-settlement/index/html>



would have required a separate court proceeding, on new charges of contravention of competition law, rather than the much simpler non-compliance with a prior order in 2012 for settlement of abuse of customer data collection, with privacy infringements.

### **9 Microsoft Win – the 1998 – 2001 USA Trial, Appeal and Judgement on complaint of the web browser bundling with the OS and of behaviour in general of abuse of SMP**

This is an older case but is highly illustrative of the sorts of practices used by major online platforms today, that include suppliers and well as consumers as the end-users and involves leveraging of operating systems and the tied software, in the same way as iOS or Android and their apps.

*The case* – Microsoft was accused by the US government of abuse of SMP over the bundling of its web browser, Internet Explorer, with its operating system, Windows and not permitting other browsers to be chosen either by end users or by PC hardware suppliers. Notably the company threatened to refuse to licence PC supplier Compaq to install Windows if it offered Netscape, a rival browser. An anti-trust suite was brought by the USA DoJ and 20 states, in 1998, with two actions, a trial and appeal, resolved through a Consent Decree in 2001 and a Final Judgment in 2002.

*The Trials* - The charge brought in the trial beginning 18 May 1998 against Microsoft was for preventing competition, illegally, to maintain its monopoly position in the desktop PC market for operating systems (OS) and for its tied software products (such as the dominant office suite) and to protect that, especially against rival browsers that could challenge its market position. In October 1998, the U.S. Department of Justice also sued Microsoft, for violating a 1994 consent decree, by forcing computer makers to include its web browser as a part of the installation of Windows software. The judge, Thomas Penfield Jackson, ordered Microsoft to offer a version of Windows which did not include its Internet Explorer browser. Microsoft responded that the company would offer manufacturers a choice: a version of Windows that was obsolete, or else one that did not work properly.

*The judgement from the first trial* – the judge's findings given November 5, 1999 noted that Microsoft's dominance of the x86-based PC operating systems market did indeed represent a monopoly. Additionally, to defeat threats to that monopoly, Microsoft had taken various measures to defend it. On 03 April 2000, the first section of the court's judgment was issued. – the *conclusions of law*, which found that Microsoft had committed monopolisation, and attempted monopolisation, with tying, in breach of the Sherman Antitrust Act, Sections 1 and 2. In response, an immediate appeal against the judgement was made by Microsoft. The second judgement section, on solutions to the legal findings was given 07 June 2000, and ordered the breakup of Microsoft as the court's response, into two separate firms. One was to supply the operating system and another was to make other software products such as applications, utilities and components.

*The Appeal* – Microsoft filed an appeal in 2000 in the Washington DC Circuit Court of Appeals. The DoJ and the states filed for a hearing instead before the Supreme Court, via a petition for certiorari, which was declined. The DC Circuit Court of Appeals then reversed the rulings against Microsoft. Two factors were taken into the appellate court's decisions.

Firstly this court had a quite different view of the liability of Microsoft. It found that although it might be possible to examine high-tech industries with traditional antitrust analysis, the court announced a new and permissive liability rule that repudiated the Supreme Court's dominant rule of automatically declaring illegality for tying, due to the dynamic effects that an automatic decision might have on innovation, which was *this court's* main concern.

Secondly, Judge Jackson had given interviews to the news media during the hearings, in contravention of a federal judge's code of conduct.

*The Final Judgement* – on 06 September 2001, the DoJ declared that a division of Microsoft into separate companies was no longer its intention and so was seeking a lighter penalty for



the antitrust behaviour. In response, a settlement proposal allowing PC manufacturers to adopt non-Microsoft software was put forward by Microsoft.

*The Settlement* - a judgment accepting much of a proposed Microsoft settlement with DoJ was given by Judge Kollar-Kotelly on November 1, 2002. This followed an agreement made by Microsoft with the DoJ, as a proposed settlement on 02 November 2001. It called for Microsoft to appoint a panel of three people to oversee compliance of technical sharing of its interfaces for five years. They would be ensured complete access to Microsoft's systems, source code, documentation and records in order to ensure compliance with the sharing of its APIs (application programming interfaces) with third-party software and hardware providers. Most notably, the DoJ, when settling, did not prevent Microsoft from tying other software with its operating system in the future, or even require Microsoft to change any of its code. Thus, Microsoft announced 05 August 2002 that in view of a possible proposed final settlement ahead of the judge's verdict, it would make some concessions towards the DoJ's position. This settlement was opposed by nine of the states' attorneys, noting the agreement would not prevent Microsoft from continuing its monopolistic practices. But the Appellate Court unanimously approved the Microsoft- DoJ settlement, rejecting the states' objections of having insufficient restrictions and penalties or that break up was a viable and suitable remedy.

#### *Critical views of the outcome -*

One view is that the Appellate Court settlement actually had little effect on Microsoft's future behaviour – as a paper by Jenkins and Bing<sup>54</sup> explores. The penalties in general, with restrictions and monitoring were seen to be insufficient to stop it from "*abusing its monopolistic power and too little to prevent it from dominating the software and operating system industry*". Their conclusion was that the process had entirely failed, with no effective correction, so the company continued its SMP position of monopoly following the court dispute.

*Failure mode of the regulator* - in the appeal, the DoJ did not pursue the claim of tying by Microsoft because the Sherman Act, Section 1, that it was charged under, requires proof that more harm than good ensued from Microsoft's conduct, a difficult task. Besides, the DoJ recognised some benefits of including a web browser with an operating system. Secondly, the judge in the original case was accused by the appeal court of bias in that he made comments during the process that were considered beyond what would be appropriate. However there have been other views of this final judgement, that the US government lost its determination to deliver justice in this case<sup>55</sup>, perhaps for reasons of changing political priorities at this time.

### **10 Microsoft partial loss, so far, 2022 - Back to 1998 for Microsoft**

Interestingly, the EC in 2022 has explored a rerun of a typical product tying case by Microsoft. But in this instance, it concerns the business user market for cloud services. Moreover the complaint is supported by other GAFAM platform owners – most notably Amazon, owner of the AWS (Amazon Web Services) cloud platform – which shows there are areas where competition between GAFAM conglomerates can operate, rather than tacit agreements to avoid competition. The complaint turns on the tying of Microsoft's Office 365 (an online office software suite sold by subscription, often to large corporates) to hosting it on its own Azure cloud service and accessed via its operating system, Microsoft Windows. The firm charges higher prices for subscriptions on rivals' cloud platforms such as Amazon's AWS<sup>56</sup>. In further bundling tactics, the highest security is only offered for Office 365 on Azure, at a premium price, for which users must buy other bundled features. Moreover the tactic of tying the firm's

<sup>54</sup> Gregory T. Jenkins & Robert W. Bing, (2007) Microsoft's Monopoly: Anti-Competitive Behavior, Predatory Tactics And The Failure Of Governmental Will, 5 J. BUS. & ECON. RESEARCH 222, January 2007 edition of the Business & Economic Research, [https://www.researchgate.net/publication/264845425\\_Microsoft%27s\\_Monopoly\\_Anti-Competitive\\_Behavior\\_Predatory\\_Tactics\\_And\\_The\\_Failure\\_Of\\_Governmental\\_Will](https://www.researchgate.net/publication/264845425_Microsoft%27s_Monopoly_Anti-Competitive_Behavior_Predatory_Tactics_And_The_Failure_Of_Governmental_Will)

<sup>55</sup> Gregory T. Jenkins & Robert W. Bing, (2007) *ibid*

<sup>56</sup> Richard Waters (2022), *Microsoft's tactics for winning cloud battle lead to fresh antitrust scrutiny*, Financial Times, San Francisco, 14 April 2022

own browser with the operating system has returned – back to 1998 - although this has now been relaxed. But real pricing impacts and choice of browsers still await the Office 365 licence expiry for renewal, over the next 3 – 5 year Enterprise Agreement that business customers will have to sign, following changes to the multi-year licence in 2019. That has increased Microsoft's Azure share from 10% of the cloud market in 2017 to 20% in 2022<sup>57</sup>. In a latest move, to attempt to deter a full EU enquiry<sup>58</sup>, Apple has offered to relax conditions on obligatory Azure cloud use for EU customers that use a European cloud hosting company. That means the tying penalty still applies to the rest of the GAFAM group, as they all have cloud offerings. Smaller EU cloud services providers then become resellers for Microsoft.

*Why won by regulator:* Microsoft admitted the transgression: its president visited Brussels to acknowledge the practice was anticompetitive, possibly to allay a full EU investigation<sup>59</sup> and Microsoft is changing the penalties of higher costs for not using its Azure cloud so these extra charges would only apply to the GAFAM group in 2022 and would stop being applied to hosting with the EU-based cloud providers. However a full investigation by the EC is still possible, as whether the EC anti-trust regulator will accept this move by Microsoft to maintain its tying scheme for the USA cloud platforms is unclear, as yet. A fuller EU action could result.

## 11 South Korea: Google and Apple lose commissions on their mobile app stores

It is interesting to look outside the EU and the USA briefly to see whether the dominant digital platform behaviour by the GAFAM group that provokes regulatory intervention is very different. This is an example that shows this practice is considered damaging to the national economy in a country where industrial policy for innovation is highly developed. Thus government has passed new legislation against behaviour it considers damaging to innovation in apps development. On 31 August 2021, the Korean national assembly passed a new law – a bill to prevent Google and Apple from requiring its download users to pay for apps and content exclusively through their own tied payment systems. To aid the local apps developers it also bans undue delay in accepting apps for sale on the app store, removing apps once accepted, or demanding exclusivity from the app developer<sup>60</sup>. This ruling applies to all app stores accessible in South Korea, without favour. Penalties are up to 3% of the value of revenue generated in South Korea – comparatively generous compared to typical USA and EU fines. Google and Apple charge app developers 30% commission on all sales. Of total app sales in 2020 in South Korea, 67% were via Google and 23% via Apple, with the 10% remaining through local platforms, so market concentration on the two app stores is evident. This is an example of highly specific regulation, targeted on one market dominating practice, rather than being a more general law whose principles must be applied in actions brought to court by the regulator – an ex-ante prescriptive law attempting to prevent long ex-post disputes due to proof being needed of a more general principle, along the lines of attempting to achieve dominant market power, with all the questions of what is the market – and also what is dominance of that market- how is it measured?.

## Some major cases and their outcomes for the regulator

For the clearest cases of recent anti-trust actions, whether failed or successful, the table below shows the outcomes and main reasons for this, in brief:-

<sup>57</sup> Synergy Research (2022), quoted Financial Times, 20 May 2022, *Microsoft woos Brussels*

<sup>58</sup> Javier Espinoza (2022, *Microsoft relaxes cloud terms to deter full EU probe*, Financial Times, 19 May

<sup>59</sup> Richard Waters (2022), *Microsoft woos Brussels as battle over the cloud intensifies*, Financial Times 20 May

<sup>60</sup> Song-Jung A (2021) , *South Korea reigns in Google and Apple app commissions*, Financial Times 01 September 2021

**Table 2 Actions and outcomes of specific Anti-Trust trials with reasons for outcome**

Action	Outcome	Reasons for Outcome
USA, FTC vs Facebook – 2019 on charges of violation of a 2012 consumer privacy agreement with the FTC	Settlement against Facebook of US\$5Bn in 2021. Considered by dissenting FTC commissioners as a major victory for Facebook.	Quite straightforward case – failure to comply with 2012 settlement order and clear evidence of infringement of obligations.
EU vs Apple, corporate taxation exemption by Ireland, 2020 - 2022	Apple €14.3Bn tax exemption granted in the ECJ as having a national tax agreement with the Irish administration	Conflict of national taxation agreements with abuse of EU state aid rules was not upheld by ECJ as agreement not considered as state aid
EU vs Microsoft, 2022, on charges of tying behaviour	Microsoft found guilty of anti-trust behaviour. Still under investigation – final judgement to come.	Clear evidence of tying cloud services with PC operating system and office software in published contract conditions
USA government, via DoJ vs Microsoft, 1998-2002	Microsoft avoided breakup and major penalties. Despite an initial decision against Microsoft for tying its IE browser to its Windows OS, an appeal court reversed the ruling.	Firstly, the appeal court required DoJ to show that harm from Microsoft's conduct, exceeded benefits, which was difficult using the Sherman Act, Section 1 and secondly for the interviews given by the judge were considered inappropriate.

## 5 A brief summary of failure modes of anti-trust actions

As so many anti-trust cases have failed in court, analysis of the reasons for this becomes of critical. For instance, some common failures may be:-

- *Confusion reigns when explaining the defendant's market behaviour in court*, as the real impacts of the tactics used in the digital platforms market are not familiar to a court that may have little experience of either the platforms or ecommerce practices. Moreover, the potentially breaching behaviour may not be presented sufficiently clearly by the regulator when giving evidence.
- *Proving the level of market concentration is difficult in court*. Common measures such as Herfindahl Hirschman Index (HHI) may be accepted (that is, by squaring market shares and measuring the sum against a standard set of levels of competition<sup>61</sup>) but firstly with two sided markets and secondly definition of the specific online market, the arguments against SMP being present – and its abuse – are many.
- *The major challenge of estimating the 'harms' of a particular player's behaviour against the potential benefits* to the markets, competitors and consumers may be vague. Apart from estimates of lost sales and profits, 'harm' can only approximately measure what might have happened without the monopoly/oligopoly behaviour. Courts find this difficult to accept and regulators find it difficult to prove. Thus, impacts of abuses of SMP may be only measured by parameters that are difficult to gauge accurately. These include the levels of competition, especially price competition, accurate portions of market share. It also may cover the secondary effects of consumer fears of changing platforms, or of the possibilities or loss of innovation, as well as overall harm to the consumer, or to direct competitors and prevention of new entrants from daring to enter or gain customers, and so their own market share with its network effects. Theoretical bases for metrics on such

<sup>61</sup> OECD (2021) Methodologies to measure market competition, <https://www.oecd.org/daf/competition/methodologies-to-measure-market-competition.htm>  
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harms have been suggested, with various theories being put forward, such as the error cost framework<sup>62</sup>.

- *The regulation itself is too complex to obtain a clear decision in a court.* This can be particularly true in the USA, for application of the Sherman Act, designed originally around 1890 for oil and railway trusts and their anti-competitive behaviour. For the digital platforms it is less appropriate, as being *ex post*, a high burden of proof is demanded, for which it is often difficult to have a complete and convincing argument, for the court. Consequently the move in the EU's DMA and DSA is to put the burden of proof of acceptable competitive behaviour on the digital platform operator. That is more appropriate for online markets, that is to move to more of an *ex ante* strategy. Note that in the USA, the previous thinking in the first decade of this century, before the global digital platforms became so dominant, was that as the Internet had grown up with no government regulation that was the way to continue. It was even the view endorsed by the chairperson of the FTC 1997-2001, William Kennard who was against *ex ante* regulation for online businesses, as anticipating problems of Type I errors (of false positives which would find errors when the firm's market conduct was in reality advantageous for competition). However the traditional USA problem with the global web platforms in the real market over the last decade has been lack of an *ex post* regulation and Type II errors (of false negative results permitting bad conduct to continue as it escapes detection) in legal judgments<sup>63</sup>.
- *The burden of proof*, for what may be quite intangible market effects, is too hard to prove for the regulator and no clear simple cases are available. This varies by what needs to be proved – intent to commit an anti-trust action or proof that an action has already taken place and has clearly evident outcomes – for instance breaking undertakings on not sharing user data. As noted, one remedy here is *ex ante* regulation which moves the burden of proof required to the web platforms, to prove they are compliant with a set of conditions set out in legislation. One common but specific case of failure is of not providing the burden of proof due to misunderstanding what is the kernel of the infringing behaviour or *inability to measure pragmatically (rather than theoretically) the real level of 'harm'*, such as infringement of consumer or competitor rights, in a form that will stand up in court as clear evidence of damage being sustained to the market and enable a fair valuation of reparations. In association with this, is the relevant court's *interpretation of the level of harm*, particularly in the USA, to consumer welfare. That may be driven by inadequate understanding on one or both sides, plus flawed presentation of arguments, leading to protracted disputes, so the offending practices being challenged may continue, perhaps for years. There is also the issue of the court's understanding of what qualifies as anticompetitive behaviour. Note that the major platforms do engage in seminars and education of the federal judiciary in the USA, as part of lobbying, perhaps termed as practical guidance for anti-trust compliance.
- *Procrastination through appeals* by the defendant firm as well as delays due to the plaintiff regulatory authority when preparing its case or responding to appeals (and missing the court's time limits for appeals) - so that the damaging behaviour continues for years
- *Current anti-trust regulation may clash with other regulation* perhaps at a national level – specifically in the case of the EU with a Member State, eg over taxation on the principle of subsidiarity – or possibly in the USA, between federal and states' rights over legal precedence.

As a result, in setting fines, proportional to the level of harm, it is not unknown for fines to be lowered or raised as the process for calculation is open to dispute, as in the Facebook 2019 FTC case when a minority view of the commissioners opposed the fine as far too low and not penalising the two key senior managers directly. In another instance, in the case of Microsoft against the EU, in 2008, on the opening of software interfaces and formats by the dominant

<sup>62</sup> European Commission (2019), Report: Jacques Cremer et al, Competition policy for the digital era, ISBN 978-92-76-01946-6, doi: 10.2763/407537

<sup>63</sup> American Consumer Centre, (2008) Ex post and ex ante regulatory remedies must consider consumer benefits and costs, 14 May <https://www.theamericanconsumer.org/2008/05/ex-post-v-ex-ante-regulatory-remedies-must-consider-consumer-benefits-and-costs/>



market player, a fine of €899 million was set for failure to comply with a 2004 EU ruling. However on appeal by Microsoft, this was reduced by 4% by the EU General Court to €860 million due to an error in calculation by the EC<sup>64</sup>, a minor victory for Microsoft.

There are certain useful sources however, where close accounting of profits and observations from the customer base are meticulously gathered. These are typically produced internally in GAFAM players, as part of the close in-house financial controls on operations of the global platform, a key part of their business models. Often, insights into the workings to achieve market control may be both revealed and measured in such analytic documents. Email exchanges have often been instructive and deciding factor. Thus, access to internal documents tracing the digital platform's management operations become exceedingly valuable in assembling evidence of possible abuse of SMP.

However failures of enactment of court decisions may also occur in the market due to the indicted firm's reluctance to comply. This may involve appropriate actions not being taken by the firm to obey a settlement judgement. Hence the remedial action is not applied or is debuted and then relaxed or stopped, perhaps when surveillance relaxes. One example of the latter delay in applying the remedies occurred between 2011 and 2014. EU Competition Commissioner Neelie Kroes announced a final settlement with Microsoft in December 2009, a case of tying in the web browser market. It ended a decade-long anti-trust battle, after a decision in the European courts favouring the European Commission on opening of those browsers used with the Windows OS environment to consumer choice. However in March 2013, Microsoft was fined €561Mn for failing to enable a range of web browsers, rather than just its own Internet Explorer, for users in the EU. It had not enacted the choices required by the court's decision with a breach of 14 months. It claimed a technical error.

*Failure of enforcement as a general failure mode* - Here it is relevant to point out that a key question has been raised over such fines. The profits are so large from certain forms of behaviour that whether anti-trust cases in the EU are just regarded as a cost of doing business by the largest players because, compared to their turnover, is an issue because in comparison they may be relatively small.

That engenders the question of what should enforcement measures be, if current fines are not working and so the levels of fines are obviously failing. Much larger percentages of global revenues are perhaps needed. In 2022, the UK in a separate act to the EU, its Online Safety Bill<sup>65</sup>, originally suggested much higher fines – up to 5% of global turnover *per day* to encourage compliance with a specific ruling – that would give 20 days before fines are at level of possible business failure. But the government, perhaps under industry pressures, put that aside in the final version of the proposed legislation, announced 10 May 2022.

However, measures beyond company fines might also being considered. These go back to the Sherman Act, 1890, and its two extensions in the early Twentieth Century, the Clayton Antitrust Act (1914) and Federal Trade Commission Act (1914) including the potential for divestitures and breakup of the firm. A further extension, also possible under that act is to move towards criminal sentencing of top management, as well as substantial fines for those managers convicted.

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<sup>64</sup> Kanter, J., (2012), *In European Court, a small victory for Microsoft*, New York Times, 27 June <https://www.nytimes.com/2012/06/28/business/global/in-european-court-a-small-victory-for-microsoft.html>

<sup>65</sup> <https://www.gov.uk/government/publications/draft-online-safety-bill> published 12 May 2022



## 6 The impacts of lobbyists - and their arguments

Lobbyists for 'big tech' have fairly large sums spent on their services which have increased recently – especially in the USA but also in the EU. Lobbyists tend to put forward an interpretation of market dynamics in which consumers benefit from dependency on dominant players. In the USA total lobbying by the GAFAM group members over 2015-2019 was put at US\$79 Mn for Google, Amazon US\$45Mn, Facebook US\$ 50 Mn, Microsoft US\$ 41 Mn and Apple US\$ 26 Mn<sup>66</sup>. Apple with Microsoft, later joined by Google and Amazon, were most active in lobbying to change the tax code in the USA, with the Tax Cuts and Jobs Act (TCJ) in force from 2018. Total spent on lobbying may be less in the EU, some €20 Mn for the five major platforms between January 2017 and July 2019 with Google and Microsoft leading<sup>67</sup>.

The kinds of arguments being put forward in lobbying efforts by big tech, largely in the USA, and also in the EU, are derived from the prior views of market balances that held sway in the USA from the 1970s until last year, attempting to preserve the status quo and so typically comprise:-

- Consumer welfare is enhanced by those dominant platforms holding SMP and so ignoring any potential benefits of competitive pricing, sharing economic power with many players in a segment bringing benefits of consumer choice and to employment in the industry, plus innovation from new entrants, are ignored
- Monopoly brings efficiency to online services and so also increases consumer welfare and benefits in pricing – consequently monopoly should be encouraged
- Monopoly engenders innovation - by monopolists who buy in other companies or invent their own advances. Destroying that monopoly would therefore reduce or destroy innovation. The counter argument, that innovation comes from new, smaller entrants, is not heeded.
- Significant market power of online platforms does not mean the consumers have no power and cannot protect their interests.

Such arguments seem to rely largely on rejection of the original anti-trust thesis of protection of competition for consumer choice and price contesting, to maintain quality of products and services. Ensuring innovation and new employment through a stream of new market entrants is ignored by reverting to the assumptions of the 1970's USA, of efficiencies wrought by monopoly. Note that in the USA, one part of lobbying is provision of educational courses for federal judges in competition law, largely espousing the principles given in the points just preceding by lobbyists, of protection of monopoly to create consumer welfare.

In specific cases such as the proposal for the EU's new DMA, lobbyists have become more creative in response to the greater powers in the proposed legislation and the shifts in burden of proof to the major digital platforms. Their focus moves to countering arguments for interoperability between platforms – for instance for video chat, in that major players such as Facebook's WhatsApp, offering end to end encryption, may no longer be able to deliver that. So a potentially a less secure session might result. Overall, on the DMA alone, Microsoft, Apple, Facebook and Google have been estimated to have spent €20 Mn on lobbying in Europe in 2020<sup>68</sup>. In the USA, lobbyists also tend to work at a judiciary level so the USA's incumbent judiciary may present a major problem - due to forms of lobbying via legal education seminars on anti-trust regulation<sup>69</sup>.

<sup>66</sup> Centre for Responsive Politics, [www.opensecrets.com](http://www.opensecrets.com)

<sup>67</sup> EU Transparency Register, <http://ec.europa.eu/transparencyregister/public/homePage.do>

<sup>67</sup> Schaake, M., (2022), *Privacy concerns should not block EU attempts to curb Big Tech*, Financial Times, 07 April 2022. The author is International Policy Director, Cyber Policy Centre, Stanford Univ.

<sup>63</sup> Corporate Europe Observatory (2022) Big Tech's last minute attempt to tame EU tech rules, <https://corporateeurope.org/en/2022/04/big-tech-s-last-minute-attempt-to-tame-eu-tech-rules>

<sup>69</sup> Rendleman, D. (2019) Undue influence? Special interest groups sponsor judicial education, American Bar Association, Ethics in View, April 2019,

## 7 Identifying the Key areas in forming a successful action

Looking to the more recent cases over the last year or so, it is perhaps useful to summarise the principles of potential success in anti-trust cases for guidance in the current climate, one in which much uncertainty reigns. These should favour practical remedies that support speed of decisions and implementation.

For the digital online environment, there is a need to use a quite different definition of misdemeanours, policy principles, analytic data and processes that are appropriate for the these markets. This is made difficult by the two major jurisdictions (the EU and the USA) being so different, each with its distinct legislative background and judicial processes. Generally such success factors are of two sorts:-

Firstly, immediate cases which rely on preparation of legal positions, most probably for a court:-

- This is a sector in which large amounts of business data must be amassed. For instance, analysis of background information is essential on financing, business models, transactions, customers relations and internal strategies with understanding of customer data acquisition, margins across multiple business units (some may bankroll others by cross subsidisation), acquisitions and their fates, asset distribution for transfer pricing and the total cashflow is necessary.
- To be at the level of expertise of the platform operators and their legal teams, regulatory authorities need to gain inside knowledge and understanding of both the key role of data in generating margins in the online world of two-sided markets and use of technologies that support digital markets. The relevance of customer data for competition should be understood. Hence, regulatory agencies should develop their own internal technical competences in the digital markets to follow the new legislation now appearing that will require enforcement by competition staff in the regulators

Secondly, for the longer term - improvements of regulatory policy in the main principles and in implementation:-

- The key principle is perhaps to move the burden of proof of compliance to the platform operators, by setting rules that operator must prove they are in compliance with, when inspected by the regulator. Instead of the regulator proving infractions of competition law, the liability moves to the platform operator. Importantly, emphasis for liability for digital online legal contraventions that breach anti-trust laws is placed on the responsible managers who own and operate the platform's processes and also defines automatic penalties. That may accelerate the enforcement processes, if court disputes are minimised, or even avoided.
- Avoiding need for market definition and/or simplifying it in court actions.
- Education of both the courts and judiciary as well as legislative officers including the staff in regulatory agencies who will play an increasingly important role in 'real-time market supervision' in the future.

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<https://www.americanbar.org/news/abanews/publications/youraba/2019/april-2019/special-interest-groups-sponsor-judicial-education/>

## 8 New brooms are sweeping up outdated regulation in the EU and USA – and its possible impacts on the digital markets

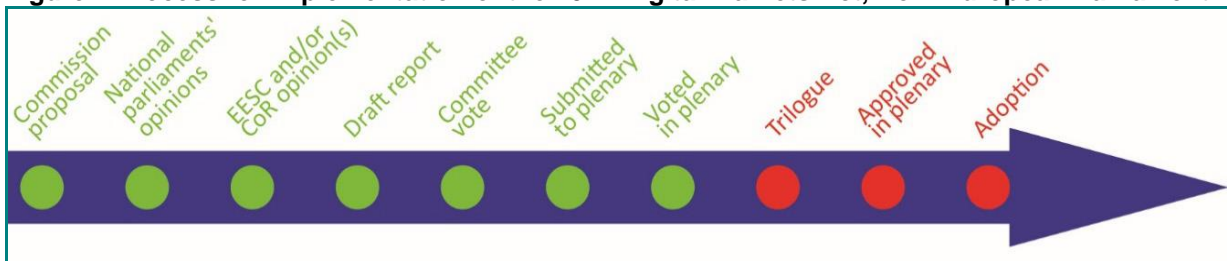
A new era in European anti-trust measures for the digital markets is coming, particularly with the DMA and DSA and also the Data Act to some extent. Their principles reverse prior thinking based on the USA’s conventional anti-trust rulings of the last two decades for online digital platforms, which dates back to the late 1970s. A strong effort from the European Commission on formulating new anti-trust law for the digital environment has been in pursued since 2019 in response to the setbacks in the European courts. So the various Acts have been shaped by the failures in past legislation.

Consequently, the new concepts reverse the weight of proof on the regulator, turning to requirements on platform operators to prove compliance with defined goals and stipulations in the regulation. Hence, increasingly they require supervision to be internal, by the platforms themselves, with reporting on their market behaviour as part of the new legal obligations and public disclosure of the algorithms, processing and systems used to detect anomalous regulated behaviour in users, advertisers and sponsors. They may also be required to reveal systems and operations to outside bodies for verification of due processes.

Importantly for the EU, the European Parliament has agreed to confer the duties of regulatory supervision of the global web platforms to European Commission and not to the EU Member States, to avoid conflicts of interest. On concepts, there is agreement on the need to identify the ‘digital gatekeepers’ that effectively control markets through their size and network effects, that have market capitalisation of at least €80bn and offer one web service. However national regulatory authorities would scrutinise local acquisitions by ‘digital gatekeepers’ that may be intent on stifling local competitors<sup>70</sup>.

The process for EU legislation requires approval after scrutiny and changes by the European Parliament and has now been agreed to entry into force in 2023/24:-

**Figure 2 Process for implementation of the 2022 Digital Markets Act, from European Parliament**



Source: EP BRIEFING - EU Legislation in Progress, PE 690.589 –Tambiana Madiega, February 2022, European Parliament Research Services, EPRS, Digital Markets Act, from EP, 2021

**The EU DSA (Digital Services Act)** opens<sup>71</sup> a different perspective on the digital world with an accountability framework for online services. It establishes that our ‘digital environment’ belongs to the citizen, not to the major online platform owners and operators (termed *VLOPs and VLOSEs – very large online platforms and very large online search engines*). Its key

<sup>70</sup> European Commission Staff Working Document, SWD (2020), 364 Final, 15 DEC 2020 accompanying document for Digital Markets Act, impact assessment

<sup>71</sup> European Commission (2020), Proposal for a Single Market for Digital Services (Digital Services Act) amending directive 2000/31/EC, 15 Dec 2020, COM(2020) 825 Final – CELEX 52020 EN <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>

principle is that whatever is illegal offline becomes illegal online in the EU, in order to protect the citizen's rights and halt the publishing of illegal content. Four categories of online operations have new obligations imposed – hosting services, intermediary services (hosting, caching and 'mere' conduit), online platforms and very large online platforms (above 45 million monthly users). To reverse much of previous accepted thinking here, it introduces new concepts and requirements for countering what has been termed 'consumer surveillance capitalism' by adding much needed transparency on the collection of consumer data, as the 'big tech' currency, in particular:-

- Revealing the algorithms being used and how data is extracted from the interactions and user transactions observed on the platform by the operator.
- Transparency via access by outside researchers to the processes for data identification, capture and processing
- Duties of care in operating online marketplaces, with two sided markets of independent sellers operating on the platform as well as the VLOP's own services and products.
- Reversing the need for proof of social harms by the regulator in the prior regulatory conditions, by setting standards for the VLOPs and VLOSEs that they shall meet, which can be verified by external independent assessors and auditing research bodies
- In the Act, illegal content is better defined to avoid ambiguities that enable VLOPs to escape from responsibility for publishing it. Thus, in the EU the DSA removes any protection for the publishing platform. In contrast, such exemptions have been enjoyed by VLOPs in the USA, since 1995, where they are held to be free from responsibility for harm caused by illegal and misleading content. In the USA, it is considered as being the end-users who are responsible for content, while the VLOP only communicates it. The responsibility of any platform company when dealing with harmful speech – not just the GAFAM group but also Twitter and any smaller platform – is made much clearer for a court through accountability and transparency rules. This also covers sales practices and sales of illegal goods.
- For enforcement, the DSA introduces *national* Digital Services Coordinators (DSCs) for every Member State (defined by Articles 43, 44 and 45). The Act requires far more stringent requirements to be placed on digital platform operators, with corporate fines and powers of breakup of firms, plus possible financial and criminal penalties for management. These powers apply to online platforms having over 45 million monthly active users. The Act comes into force generally on 01 January 2024 when approved now by the Council of Europe and the European Parliament but for VLOPs and VLOSEs it is earlier – 4 months after designation into this category of platform.
- Governance will be via the European Commission in hand with the Member States, via a structure of the DSCs with the *European Board for Digital Services*, EBDS, chaired by the EC.

Importantly, the DSA puts emphasis for liability for technology-based legal transgressions that contravene anti-trust laws on the responsible managers who own and operate the platform's processes. It rejects the 'inevitable march of technology' theme, that the 'computer must be right', in clear legal terms and also defines penalties.

Perhaps one of the most serious recent examples of this belief in the unassailable invincibility of output data from computer systems is the current UK series of court cases against the national Post Office (a government service) over its computerised accounting disaster, from 2005 and continuing today, which bankrupted many post masters and put pregnant women behind bars.



**The Digital Markets Act (DMA)**<sup>72</sup>, defines rules for the largest platforms for the first time across Europe, by presenting a range of specific conditions for application of anti-trust regulation that are common and uniform across all EU Member States. These platforms are defined as having over 45 million users. It employs detailed requirements for these major platforms, which are held liable for harms to the citizen, the competitive level of markets, and to the EU economy, more generally. Following European Parliament consultations with the Commission, delivered in March 2022, the Council and Parliamentary vote will enable Member State enactment in 2023.

The DMA defines eight core platform services (CPS) for regulatory purposes which are – social networks (eg Facebook), online search engines (eg Google search), online intermediate services (eg Apple App Store or Google Play), communications services platforms (eg Gmail, WhatsApp), cloud services for hosting, storage and processing (eg Amazon AWS, Microsoft Azure), user device operating systems, usually for mobile but also for PC (eg Apple iOS, Google Android, Microsoft Windows), advertising services (eg Google Ads), with video sharing services (eg Google YouTube).

For regulatory operation, comprehensive measures and commitments to clarify liability are employed, to a degree never before employed at the level of anti-trust for a regional economy of some 450 million citizens:-

- Regulation of very large platforms which are designated as *market gatekeepers* are the main focus. They are identified and informed of their obligations when operating in the EU. That defines the major objectives of the DMA.
- The EC will pursue constant market investigation to *identify platforms as gatekeepers* and to update market obligations at a rapid rate to keep up with the changing markets
- Codes of conduct for platforms and transactions will be used together with technical standards.
- An overseeing infrastructure for online markets will be set up under the European Commission with a *European Board for Digital Services* (EBDS) acting with the Member States with their DSCs as introduced in the DSA (Section 2). The largest gatekeeper platforms will also be monitored directly by the EC.
- Enforcement will include fines of up to 20% of global turnover
- Also, breakup of the gatekeeper enterprise can be imposed in the most serious and repeated cases of non-compliance
- Various new operating conditions and obligations will be enforced by the DMA:-
  - Enable interworking of the gatekeepers systems with third parties. This means the gatekeeper platform must allow third parties to be effectively used when accessed by means other than the core platform services of that gatekeeper.
  - Enable independent verification by advertisers of impacts of their advertisements
  - Gatekeepers may not prevent consumers from linking up to businesses online that are outside the gatekeeper platform.
  - Gatekeepers may not track or address end users who are outside the gatekeeper's core platform service for targeted advertising, without consent being granted.
  - Discrimination by a gatekeeper in favour of its own goods and services in any way in competition with other merchants in a two-sided online marketplace is prohibited
  - Discrimination by a gatekeeper in collecting data from consumers and merchants and payment systems on all transactions and interactions on its platform restricted to its own use only is prohibited. Within privacy rules all such data must be shared equally among the participating sellers

<sup>72</sup> European Parliament, Briefing, EU Legislation in Progress, Digital Markets Act, PE 690.589, May 2021

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS\\_BRI\(2021\)690589\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf)  
European Commission Staff working Document, SWD (2020), 364 Final, 15 DEC 2020 accompanying document for Digital Markets Act, impact assessment

- Improved traceability online of sellers of services and goods will be enhanced with identification of all the actors (platform and merchant businesses and any intermediaries be they within the EU or outside it). Thus the DMA will apply globally not just within the EU single market.

Enforcement of these rules is critical to ensure the codes of conduct for platforms and transactions with their obligations are followed. That needs monitoring as with the DSA. So those central EU and Member State bodies introduced in the DSA are employed - the European Board for Digital Services (EBDS), with the Digital Service Coordinators (DSCs), the national authorities within each Member States. Other countries and regions should take note.

**The EU Data Act<sup>73]</sup>** in its final stages of preparation in 2022 impinges on the problems of data sharing, protection of stored data, open databases, commercial principles for general data access and in particular cloud storage and processing. In terms of nati-competitive behaviour, the Act is important as it examines the inherent risks brought by cloud service providers in a realm occupied by the largest GAFAM players – Amazon (with its cloud services offering, AWS), Google (Google Cloud Platform, GCP), Apple (iCloud) and Microsoft (Azure). It provides rules for switching between cloud services providers and so challenges monopoly or oligopoly formation of “cloud prisons” as users cannot escape via its portability obligations. The Act is a companion to the data protection rights for personal and confidential data given by the EU GDPR (General Data Protection Regulation of 2018).

- ***A wind of change may blow through anti-trust in the USA in the future***

In the USA, the situation is currently quite different, but so fluid that it may be under change. Note that the USA has a comparable history in its anti-trust law to the EU treaty clauses. Significantly, there is an equivalent to Article 81 of the Treaty of Rome, prohibiting agreements affecting trade between Member States which prevent or distort competition in the common market. That is equivalent to Section 1 of the Sherman Act (1890). But the EC enforces the economic freedoms of market players, rather than just consumer welfare, the conventional USA competition metric since the late 1970s, which also assumes any trade agreement between players is lawful unless its anticompetitive nature is proven<sup>74</sup>.

The possibilities presented by six proposals before the USA Congress in strengthening anti-trust law and especially its enforcement may offer a promising revision. But the reality is that the political balances in the USA are against significant change – although surprises are conceivable. The proposals before the USA house of Congress will be difficult to get passed and may be more difficult to enact in practical cases.

For instance, under the current administration, the FTC with its new Director, Lina Khan, the Commission’s mandate has widened, to focus on how dominant platforms may wield their power to distort competition and what are the long term effects on the overall economy. That moves away from prices for consumers and simple consumer choice (‘consumer welfare’) which is difficult to apply, especially when the online digital services are seemingly free in the user cash payment sense, but not in a consumer data sense.

The various new USA proposals are the proceeding through the several stages of Congress and Senate processing and likelihood of becoming law are unclear. At least, six potential bills for Congress plus Senate bills are under debate - having diverse aims, contents and long term

<sup>73</sup> European Commission (2022), Proposal for Data Act COM(2022) 68 Final

[https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en)

<sup>74</sup> Abbott, A.F.( 2005) *A brief comparison of European and American antitrust law*, University of Oxford Centre for Competition Law and Policy, Paper (I)02/05,  
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impacts. They may promise much but their political chances of passing into law are uncertain while their names and contents may evolve in debate. Some of these contenders are:-

- American Innovation and Choice Online Act (2021)- aims to prevent 'self-preferencing' by dominant online platforms and intentionally disadvantaging competitors for platforms with 50Mn or more monthly users. It has been introduced to both Senate and House of Representatives but not yet voted on.
- Platform Competition and Opportunities Act (2021) – objectives are to promote competition and block acquisitions used to stifle competition by the dominant online platforms
- Ending Platform Monopolies Act - anti-trust regulation of digital platform monopolies
- The Access Act of 2021 – also known as the Augmenting Compatibility and Competition by Enabling Service Switching Act – to enable consumer business to switch online services
- State Antitrust Enforcement Venue Act - to halt the movement of cases to friendlier jurisdictions in the USA by the digital platform operators
- Merger Filing Fee Modernisation Act – to update level of statutory reporting on mergers

Senate Bills which may change name and content and be re-entered as candidates for legislation, include:-

- Competition and Antitrust Law enforcement reform Act, 2021 (Calera) by Senator Amy Klobuchar to revise mergers and anticompetitive conduct – reversing the burden of proof to the platform operator to prove that a merger will not harm competition. It also would remove the need for regulators to define the market. The overall aim is to ease the burden on the regulatory authority and make it easier to bring anti-trust cases.
- Senator Mark Warner with Senator Amy Klobuchar Honest Ads Act for online political advertising, driven by the interference in the USA 2016 election by outside countries
- The Deceptive Experiences to Online Users Reduction Act or Detour Act from Senators Mark Warner and Deb Fischer - to avoid users deceptively giving away personal data or signing away data, or in encouraging compulsive usage by children. It would apply to behavioural and psychological practices employed by the digital platform operators in their online user interfaces.

Chances of all the above passing into law are a resounding maybe. The probabilities of becoming legislation are made lower as political divides may be aided by vested interests' lobbying. However the EU examples could set a benchmark for future USA regulation perhaps, both for its focus and for new positioning of the burdens of proof via ex ante regulation.

## 9 In conclusion – what is the future?

Expectations are far closer consideration of behaviour by the dominant platforms, especially as new entrants attempt to expand the digital markets and the global economy. The EU's DMA and DSA with the Data Act are the first signs that the economy's move to digital operation is finally being recognised seriously after two decades, in appropriate new government legislation. Consequently, the real question on anti-trust regulation for the future may well be ex ante or ex post.

These new EU Acts exploit a trend of changing the basic regulatory grounds, by moving to ex ante measures for the necessary revision of regulatory legislation along the lines of the DMA and DSA which seems to be a useful way forward, based on experience of court processes over the last decade. Regulators may then act in a pre-emptive role to stop SMP misbehaviour almost before it happens, rather than taking action some time after any harms have been accumulating, perhaps years later.

Here what we see is the old mixed with the new. Old restrictive practices are still present but with some major novel twists, particularly for two-sided markets but remedies can be treated in quite different ways that are more efficient and much faster. Moving to a completely revised *modus operandi* for regulation puts far less reliance on the regulator's efforts by moving the burden of proof to the digital platform operator, through prescriptive obligations on behaviour. That does require regulatory surveillance. It will still leave the need for enforcement that may require *ex post* actions in view of the wide range of situations of abuse of SMP that will be encountered.

Certain USA Senate bills may reflect this thinking behind the DMA and DSA in the American Innovation and Choice Online Act and the Open App Markets Act which examine whether platforms with SMP restrict, impede competition or delay access to competing services.

Generally the lessons learnt from past court regulatory failures may then have a limited value for the future as these new types of regulation come into force but there are perhaps several conclusions that may still be useful:-

- Intense preparation is necessary beforehand in a regulatory court process for a major platform. Investigations may take a dedicated team to explore internal documents with company operational cost/benefit analyses being especially useful, unfortunately much being in large volumes of email trails. This may take at least a year, unless self-evident abuses of market power are observed, for instance preference of own services over those of other providers using the platform, with testimony from the competing services, as in the Google comparison shopping service case.
- Use of the *ex-ante* provisions in the latest DMA/DSA types of regulation need to be strongly and efficiently enforced, to move away from the more difficult to apply traditional anti-trust rulings and tests, such as Sections 1 and 2 of the Sherman Act. They are necessary for supervising the behaviours of global digital platforms, with their two-sided markets and quite different market conduct, due to the value of consumer data. That requires market supervisory resources to be constantly examining the behaviour of the platforms, especially as regards their self-supervision and compliance obligations with DMA types of regulation. Codes of conduct for platforms and transactions with obligations that need monitoring are employed. In the EU a specific body is involved - the *European Board for Digital Services*. Other countries and regions should take note.
- Examination of taxation matters is important and requires tracing transactions across many different countries. It may reveal the level of intent to comply with the legislation *en vigueur* as well as the general stance on regulation.
- Tracing restrictive behaviour associated with tied consumer devices, such as smartphones and especially their operating systems, or with tied cloud hosting services, will always be important, as they offer such tempting opportunities for locking in consumers and locking out competitors.
- New enforcement measures will inevitably be necessary as the current penalties will need to be reinforced to reduce the reliance on monitoring with complex supervisory processes as moving the weight of evidence provision on to the major players is unlikely to be successful without suitable encouragements. Two major directions are available – firstly moving to custodial penalties for the responsible top management in serious cases, with multi-year tariffs, and post-release limits on business activities, as the USA anti-trust acts already envisage. Secondly is the path of break up by separation of the firm's assets into logical independent entities, to return the market to a competitive situation. There are several creative approaches to the latter<sup>75</sup> that can generate innovation and employment through enhanced competition. Remember that previous break-ups of high technology monopolies have required similar fragmentation – the Modified Final Judgement (MFJ) for the Bell System case eventually produced eight companies (one long-distance carrier and seven Regional Bell Operating Companies) in the 1980s.

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<sup>75</sup> Forge, S., (2000) *Ibid*



- Budgets for anti-trust regulators unfortunately need to be sufficient for the task. The current budgets for regulators are often minor compared to the GAFAM platforms' resources in financing, legal assets and defensive political organisation. For example, in the USA, The FTC in 2019 at the time it fined Facebook US\$ 5Bn, its own net budget was 2% of Facebook's, at US\$ 350Mn<sup>76</sup>.

Note that the measures above are only useful in a supportive political-economic environment. What enabled the growth of online platform abuses of SMP were over three decades of accommodating political administrations - that *even permitted reversal of the MFJ on AT&T*. The lesson is that in anti-trust, constant politico-economic vigilance is a necessary condition. That requires strong separation of vested interests from regulatory governance.

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