**"Competition in the Digital World: How the EU and the US Are Addressing New Challenges"**

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**Abstract**

The paper discusses EU and US regulations of competition focusing on significant legal frameworks that have shaped behaviors in the market and challenges originating from digital markets. It investigates the EU Competition Law, especially Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which, respectively, prohibit anti-competitive agreements and abuses of dominance. The paper explains how those provisions impact large firms and their contribution to market competitiveness, while at the same time setting them out in the context of the digital economy, where new challenges are raised with regard to traditional competition rules due to the unique characteristics of tech platforms and the exercise of market power.

The paper tries to give an answer to the problem of whether the present competition law tools were suited to today's landscape, one in which digital technologies take center stage. It discussed the application of competition principles within an increasingly globalized, often borderless context and even questions if it were any longer relevant to talk about a "digital market" when it comes to issues relating to Big Tech.

The paper addresses these challenges as a way to examine the DMA and how it is complementary to existing EU competition law in a manner targeted particularly at the needs of large digital "gatekeepers." This paper will contrast that approach with the more ambivalent US competition law-the Sherman Act and then present the evolving perspectives on the shape of antitrust enforcement, along with critiques of the Consumer Welfare Standard.

The study concludes finally by reflecting on the prospects of competition law in an era of rapid digital transformation, underlining how new regulatory frameworks have increasingly been called for in response to a more complex digital economy dominated by powerful tech giants.

Keywords: Competition Law, Antitrust , Digital Economy

**Introduction:**

Competition law is the area of the law that seeks to ensure that competition in the marketplace is maintained with the prohibition of anti-competitive practices while promoting an open, efficient, and dynamic market environment. The purpose of competition law, therefore, is to protect consumers, businesses, and the economy from distortions in the market caused by the creation of a monopoly or oligopoly, cartels, or the abuse of market power.

The articles that are issued by the European Commission to give penalties to large firms accused of breaching competition rules in the European single market are Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Both the cited two regulate the functioning and enforcement of competition within the confines of the European Union. Article 101 addresses anti-competitive agreements by firms, and Article 102 deals with the abuse of dominance where a firm enjoys considerable market power. The two are aimed at ensuring that the single European market is kept competitive because no single firm can compel restrictive practices that will limit consumer choices, stifle innovation, or create artificial prices.

Some of the key questions framing this discussion are whether the existing set of tools for competition law was effective for today's landscape, where digital technologies took center stage; how to conceive of applying the principles of competition in an increasingly globalized, borderless context; and whether it is still suitable, when referring to the powers held by Big Tech, to speak of a "digital market".

**How competition law is regulated in the EU:** [[1]](#footnote-0)

Looking closer to the content of the two articles, it is visible that Article 101 advances the cause of free competition by prohibiting anti-competitive agreements. It prevents firms from reducing competition or to engage in conduct which makes it hard for new firms to enter into the market. Any agreement, decisions, and concerted practices between undertakings that have the purpose or effect of preventing, distorting, or restricting competition within the common market are prohibited.

Amongst these are highlighted a few behaviors that are not allowed. These are: price fixing, where companies set the same prices for goods or services; this decreases competition based on price and injures consumers. Another is limiting productions and developments by directly or indirectly limiting production, investment, or technological progress, with the effect of preventing competition and innovations that would create new supplies of goods and services. It also talks about market or customer partitioning, whereby firms agree to divide the geographical areas or customer segments, with the result of not competing against each other directly and reducing consumer choices. It also mentions applying discriminatory terms, such as giving different prices to similar customers or creating barriers for new competitors, as a method that maintains competitive advantages and closes the market to new entrants. These types of agreements are referred to as "cartels."

Article 102 TFEU enables an improved enforcement of competition rules through the reinforcement of consumer protection and enhancement of efficiency in markets. It should guarantee that consumers have a wide choice of products and services at fair prices, without being penalized by abusive practices or limited competition.

Article 102 applies in a case of when the undertaking with the dominant market position abuses such in its power in order to acquire some privileges, that is unlawful not a mere positions prohibition against a firm is considered it can be restrictive competition without appropriate reason.

Other practices viewed as an abuse of dominance under Article 102 include predatory pricing, in which the firm sells below cost with the intent of driving other competitors out of the market and ultimately making entry too hard for other firms; discriminatory conditions also exist where the offer of different sales conditions to comparable customers without objective reasons gives rise to unequal treatment, creating a disadvantageous competitive position vis-à-vis their comparators. Refusal of access to essential infrastructure: when an enterprise is in possession of a resource or infrastructure important for the exercise of an activity and refuses to allow competitors access to it without sufficient justification, thus impeding competition. It is also abusive for a company in a dominant position to impose excessive prices or unfair trade terms, where the prices or terms are out of proportion to the economic value of the good or service and are intended to secure an unjust profit. In order for a company to be found to have a dominant position, the relevant market has to be defined, both in terms of the type of service and the geographical area.

**Application of ART. 102 in Digital Economy[[2]](#footnote-1)**

In the recent past, discussions by scholars and antitrust authorities have focused on the digital economy, with particular interest in the unilateral behavior of "tech giants". On the one hand, some discuss propositions for stricter or more innovative enforcement of existing competition regulations. At the same time, on the other hand, there is increasing interest in updating the regulatory framework to embrace challenges that fall beyond the limits of existing regulations.

The characteristics of big tech come with several special factors that make a straight application of Article 102 TFEU quite impossible. Innovation-from incremental improvements to radical inventions-along with network effects, is crucial for competition in digital markets and has increased value with a rise in the user base. Additionally, digital platforms often work in markets with multiple sides, where large scale and free services for consumers give market leaders a big advantage that can affect different connected areas. The Big Data further creates innovations in their use, providing scope for personalizing services, and there are intellectual property rights, including patent and copyright, to protect and incentivize technological developments. These factors make it challenging to apply conventional competition rules.

Abusive practices by large technology companies have been categorized and analyzed, with particular attention to examples of tying and bundling. Tying refers to situations when customers buying one product are required to purchase another product from the same dominant company, usually through technical or contractual means. Bundling is the way a company packages its commodities and sells them. For example, in the case of pure bundling, no commodities are available separately, whereas in mixed bundling, goods may be available singly but with higher discounts if ordered in one bundle. Through this, large tech companies expand their market territories to use their position of strength in one market as competitive leverage into others.

The Microsoft v. Commission case (T-201/04) is a pivotal example that underscores the challenges of applying competition law tools to large technology companies and highlights both their effectiveness and limitations. In this case, Microsoft, which dominated the operating system market, was found to have engaged in abusive practices by pre installing its Windows Media Player (WMP) with its operating systems, thus leveraging its dominance to extend its reach into the media player market. The European Commission, by a four-step legal test among which were the presence of two separate products and the possibility of removing competition, concluded that such practice was an infringement of Article 102 TFEU under tying. The importance of the case is to show how antitrust law can handle those practices which result in the restriction of competition in the market. The decision showed that the use of regulatory tools was one surefire way to rein in the dominance of technology giants, thereby protecting consumer choices and bringing about a competitive balance. The echoes of the Microsoft case still reverberate in other investigations, such as Microsoft's agreement to allow access to third-party browsers after the Commission raised concerns over Internet Explorer, and the present scrutiny of the potential bundling of Teams together with Office.

This case ties into the broader question of whether competition law tools, as currently devised, including under Article 102 TFEU, work effectively in digital markets. It illustrates how competition law can tackle specific practices but requires, often, long investigations and complex legal analysis, which is indicative of limits with respect to speed and agility. This also puts a stamp on the growing need for more ex ante measures such as regulatory frameworks-the DMA-that will keep such anti-competitive practices from taking root in the first instance.

This newest probe by the European Commission into Facebook Marketplace adds to the developing ways in which tying practices are being policed in the digital economy. In December 2022, the European Commission issued a statement of objections to Meta/Facebook for allegedly overcharging the company for linking its dominant social platform to its classified ad service, Facebook Marketplace.

The case has a direct link with the wider debate about effectiveness in the area of competition law because it highlights how the existing rules cope with sophisticated strategies pursued by large technology firms.

Similar is Microsoft v. Commission, in which the tying of Windows Media Player to the underlying operating system had shown a firm how to use a dominant position in one market to gain an undue advantage in another.

This, of course, is the very argument that has always been made about whether Facebook's users are "constrained" to use Marketplace, because, unlikely in the case of traditional tying, where there is no doubt that a consumer must purchase two linked products, the nature of the digital setting obscures whether users are truly constrained. This study highlights the fact that competition law must learn more from user-platform interaction and how such platforms use their powerful positions. That means that competition rules might need updating in order to tackle these more subtle ways of influencing users, limiting competition.

In short, although existing competition laws are sufficient to tackle some of these practices, cases like this one reveal real limits when sophisticated strategies are devised by digital platforms. The case of Facebook Marketplace illustrates that updated, more flexible rules are needed to effectively prevent anti-competitive behavior in the fast-evolving digital economy.

 **What has changed with the Digital Markets Act (DMA)?**

The discussion so far illustrates the potential complexity of applying established competition law within digital markets, which often involve novel business models, innovative (anti)competitive practices, and where market dynamics may not fit well within the conventional methods of defining markets and measuring market power. In both the EU and the US, the movement towards a “more economic approach” introduced a degree of hesitancy when intervening against novel practices or in sectors marked by innovation.

Some scholars, notably Pierre Larouche and Alexandre de Streel, propose supplementing the current ex post antitrust rules of Article 102 TFEU with an ex ante regulatory framework—a true "code of conduct" binding on large digital companies. This code would set out clear rules, detailing what companies should and should not do to guide their future behavior in the marketplace, while also providing a swift and effective enforcement mechanism for any violations.

This became a reality in the EU with the introduction of the Digital Markets Act (DMA). Formally proposed by the Commission in December 2020, the DMA was signed into law in September 2022, with its obligations set to take effect in Spring 2024.

The Digital Markets Act is intended to complement, rather than override, the principles established by Articles 101 and 102 of the TFEU, which govern competition law. As stated in the Regulation on competition in a given market, the DMA aims to protect a distinct legal interest from the one safeguarded by these existing rules. Therefore, it should be applied without prejudice to the enforcement of Articles 101 and 102.

The DMA imposes numerous specific, prescriptive obligations on large “gatekeeper” digital firms, in an effort to keep the digital economy “contestable and fair”. Recital (5) “*…[M]arket processes are often incapable of ensuring fair economic outcomes with regard to core platform services”.* While Articles 101 and 102 of the Treaty on the Functioning of the European Union may apply to the conduct of so-called "gatekeepers," their field of application remains narrow, as it concerns only specific manifestations of market power, such as dominance in defined markets and anti-competitive conduct. These provisions are applied ex post and presuppose heavy and often highly complicated investigations that need to be analyzed case by case. It is underlined that the current European Union legislation does not tackle, or does not satisfactorily tackle, the problems of the functioning of the internal market caused by the conduct of gatekeepers who do not necessarily fall within the definition of dominance under competition law.[[3]](#footnote-2).

But, how to identify a “gatekeeper”? Article 3 provides criteria for designating gatekeepers, divided into qualitative and quantitative requirements. The qualitative criteria are: have a significant impact on digital marketplaces; provide one or more core platform services that act as essential intermediaries between businesses and consumers; hold a strong and stable position in the market. The quantitative criteria are: annual turnover of at least €7.5 billion in the EU; a market valuation of at least €75 billion; operate in at least three member states; have a significant number of active commercial and end users[[4]](#footnote-3).

Of the six companies currently designated as gatekeepers by the European Commission, five are based in the United States and one in China. All operate and have users in Europe, but none are based in the EU. The gatekeepers are: Microsoft (owner of LinkedIn and the Windows PC operating system), Meta (owner of Facebook, Instagram, WhatsApp and others), Alphabet (owner of Google, YouTube and Android), ByteDance (owner of TikTok), Amazon (owner of Amazon Marketplace), Apple (owner of iOS and App Store)

An expansive list of “core platform services” is provided in Article 2(2) DMA[[5]](#footnote-4). The recitals to the DMA suggest two interlinked reasons for the inclusion of an activity on the list: the fact that certain services have “*the capacity to affect a large number of end users and businesses*,” which furthermore creates a “*more frequent and pronounced*” risk of weak contestability and unfair practicing arising in those sectors.

It encompasses online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the other enumerated core platform services.

Articles 5, 6 and 7 set out a fairly long list of “obligations for gatekeepers". Article 5 sets out clear and direct obligations for gatekeepers, designed to be “self-executing,” meaning that designated gatekeepers are bound by these rules without further action. Article 6 outlines additional obligations that can be “further specified” following a “possible dialogue” between the Commission and the gatekeeper regarding compliance, though the Commission is not required to engage in such discussions. If the Commission decides to formally specify compliance measures, these become binding for the gatekeeper in question. Article 7 focuses on interoperability requirements for gatekeepers providing “number-independent interpersonal communications services,” such as WhatsApp, Telegram, or Facebook Messenger. Although these services were already recognized as core platform services in the initial proposal, Article 7’s obligations were incorporated later in the legislative process. This article mandates that designated gatekeepers ensure the “basic functionalities” of their services are interoperable with those of other providers by offering the necessary technical interfaces or similar solutions to facilitate compatibility, upon request and without charge. These interoperability obligations, like those in Article 6, can also be further detailed at the Commission’s discretion.

But if the aim set by Articles 101 and 102 is clear, what is the actual issue when there is no evident negative impact on consumers? How confident can we really be that the effort will be worthwhile, given that the specific restrictions on business freedom and innovation will overall improve market function?

Enforcement is solely entrusted to the Commission, which can issue decisions on non-compliance and systemic non-compliance, imposing fines up to 10% (or 20% in severe cases) of annual turnover, along with structural and behavioral remedies. Gatekeepers under the DMA have proactive duties to assist in enforcement, yet questions remain about whether the Commission has sufficient resources to effectively monitor this.

The DMA's adoption aimed to streamline enforcement for swift responses to technological advances, relying heavily on market investigations to identify gatekeepers and assess compliance. However, doubts persist regarding whether this accelerated process will be fast enough to handle digital market challenges. Some have suggested that the Commission should leverage interim measures more during investigations to counter delays in traditional competition enforcement.

**The U.S. scenario and the new challenges assessed by Lina Khan.**

Today, the U.S. market is characterized by an economic structure that reflects the principles of economic structuralism, based on the idea that a concentration of market power fosters anticompetitive behavior. In a market dominated by a few large firms, competitiveness is limited compared to a market with numerous small or medium-sized firms. The main reasons are that monopolistic or oligopolistic markets facilitate coordination and practices such as price-fixing and tacit collusion; market leaders hinder new entrants; and such firms have greater bargaining power, allowing prices to rise and quality to fall, while still keeping profits high[[6]](#footnote-5).

The American regulation of the competition system is based on the Sherman Act. The Sherman Act is still today the source of legislation that is referred to in major rulings against the American giants that govern much of the economy to condemn them to pay very onerous fines. [[7]](#footnote-6)This is because the Sherman Act was conceived in 1890 as a "blank check" to protect large companies from the aggressive practices of large corporations: it was therefore, a resource to protect small entrepreneurs who risked being crushed. The Sherman Act is composed of two sections, which respectively state**[[8]](#footnote-7)**:

**Sherman Act, §1**

*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal*…

**Sherman Act, §2**

*Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony*…

In practice, the Sherman Act encompasses two distinct aspects for protecting competition: on one hand, antitrust violations are prosecuted as criminal offenses, leading to severe penalties, including imprisonment, significant fines, and other state-imposed punitive measures. On the other hand, these violations can also be addressed as civil wrongs in private lawsuits, allowing victims of anticompetitive behavior to sue for damages and receive compensation amounting to three times the actual harm suffered, serving as an additional deterrent for companies violating antitrust laws.

Through most of the 20th century, various schools competed to define what the right interpretation and goals of the act were. The two most prominent schools opposed each other: Harvard Law School and Chicago Law School.

Harvard Law School believes that concentrated market structures are bound to give anticompetitive effects, such as less competition and the abuse of market power. Protection of the whole concept of competition is underlined in this approach, whereas consolidation of market power is viewed as problematic, even if it does not immediately result in higher prices. Usually, Harvard scholars support more far-reaching antitrust policies to avoid conduct that may be harmful and to keep the markets open and competitive.

On the other hand, Chicago Law School believes that there should be minimum government intervention and that markets can self-correct over time. The Chicago approach is more focused on economic efficiency and considers consumer welfare, defined by lower prices and higher output, as the primary goal of antitrust laws. Monopolistic practices, unless they affect consumers adversely, are not considered detrimental. This led to the adoption of what is called the Consumer Welfare Standard. This approach has prevailed up until very recently, when Lina Khan, the current chair at the FTC and part of the New Brandeis movement, suggested that it's not good enough for regulating the challenges presented by the digital giants. Aggressively criticizing the latter, Lina Khan, in her article "Amazon's Antitrust Paradox," claims it is necessary to revert to the old standards of regulating competition.

Lina Khan severely criticizes the approach followed since the 1970s to evaluate market competition: the Consumer Welfare Standard. This standard is focused on the impacts to consumers, principally prices and the availability of products, under the supposition that in a competitive market, consumers would be benefiting from lower prices and higher quality. The assumption is that monopolistic behavior is only destructive when it results in increased price or reduced supply, which thereby limits antitrust intervention to those cases where consumer welfare is visibly compromised.

It is from this position that it becomes critical to begin since it clarifies why Big Tech companies have, until lately, been spared. Predatory pricing strategies are ways large digital platforms have managed to employ to enhance consumer market effects. Notably, in recent times, this view has been criticized due to its failure to tackle the rise of the digital platforms. The companies, in this case Amazon, can easily adopt anti-competitive practices, like predatory pricing and vertical integration, without necessarily raising prices-which would make it hard for the authorities to identify and regulate their market power. These new dynamics have raised debates on antitrust reform in the U.S. using other metrics beyond price: long-term competition, innovation, and overall welfare.

Meanwhile, several antitrust bills are making their way through the US Congress; of these, arguably the most relevant is the American Innovation and Choice Act, which would ban self-preferencing by major tech firms. The bill, proposed by Senator Amy Klobuchar, enjoyed bipartisan support but ultimately didn't have enough to see it through the legislative process. With some suggestion it could be reintroduced later in 2024, it still doesn't enjoy overt backing from either major party.

**Conclusion:**

In conclusion, as technology continues to reshape the global economic landscape, competition law faces the need for profound transformation. Traditional laws, while solid in their foundations, must be integrated and revisited to meet the challenges posed by an ever-expanding digital economy. The European Union’s response, embodied by the Digital Markets Act, underscores the growing awareness of the need for a more targeted and proactive approach. However, the real challenge will be to strike a balance between innovation and regulation, ensuring that emerging technologies do not suffocate under the weight of outdated rules but also do not thrive at the expense of competition and consumer rights. The future of competition hinges on this complex and global arena: a place where regulations must be agile, and traditional principles must evolve to address the scale and speed of the digital world. Can we safeguard the essence of competition while fostering an economy that remains fair, open, and innovative? Only time will tell if today’s initiatives will become the cornerstones of a new regulatory era.

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