PROPOSED SOLUTIONS FOR BIG TECH IN THE UNITED STATES: OUT OF STEP OR DÉJÀ VU?

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On October 6, 2020, the Subcommittee on Antitrust, Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary issued a report on the investigation of competition in digital markets.[2] The Report summarizes the main findings of a sixteen-month investigation into the business conducts of four large U.S. tech corporations — Amazon, Apple, Facebook, and Google. The Report finds that each of these four companies controls access over "key channels of distribution," typically the firm's own digital platform.[3] It also finds that the four companies "have come to function as gatekeepers," reasoning that almost "30% of the world's gross economic output may lie with these firms."[4] The Report raises concerns that the four tech corporations were able to "exploit their gatekeeper power to dictate terms and extract concessions that no one would reasonably consent to in a competitive market."[5] It also raises concerns that they use their "data advantage" to obtain "near-perfect market intelligence," as well as "create and enforce barriers to competition and discriminate against and exclude rivals while preferencing its own offerings."[6] The Report concludes that these practices have led to a highly concentrated economy, which in turned has "materially weakened innovation and entrepreneurship in the U.S. economy,"[7] degraded online privacy, undermined "the vibrancy or the free and diverse press,"[8] and risks undermining political and economic liberties.[9]

To address the various problems identified, the Report recommends the adoption of three sets of complimentary reforms.[10] First, it proposes the adoption of measures that would seek to restore competition in digital markets. This includes proposals of structural separations for the big tech corporations, prohibition of self-preferencing, and the imposition of duties to ensure interoperability and open access with products or services offered by third parties. Second, the Report proposes strengthening the laws on mergers and monopolizations. Specifically, it suggests invigorating merger enforcement by introducing several assumptions that would make it easier for antitrust authorities to challenge mergers and acquisitions. It also recommends lowering the evidentiary burden for condemning a firm's unilateral conduct under antitrust law. Third, the Report recommends strengthening antitrust enforcement by providing more funding to antitrust agencies, but also by facilitating private enforcement and promoting Congressional oversight.

2 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations (2020) [hereinafter House Majority Report or Report].

3 *Id.* at 11.

4 *Id.*

5 *Id.*

6 *Id.* at 14, 17, 378.

7 *Id.* at 18.

8 *Id.* at 7.

9 *Id.* at 19.

10 *Id.* at 376.

We focus our analysis on the second set of proposals — that is, strengthening the existing antitrust laws — that have so far attracted most attention among commentators. In particularly, we focus on the proposed revisions for scrutinizing the unilateral conducts of firms with market power. The Report says that "some of the anticompetitive business practices that the Subcommittee's investigation uncovered could be difficult to challenge under current law."[11] Consequently, it "identifies specific legislative reforms that would help renew and rehabilitate the antitrust laws in the context of digital markets."[12] The Report proposes reforms that, broadly, seek to lower the burden that a plaintiff must satisfy to show that a challenged practice violates antitrust laws. For example, the Report suggests overriding Supreme Court's precedents that have established the standard for condemning practices such as a refusal to deal or predatory pricing. It also suggests lowering the standards for condemning monopoly leveraging, tying, and product design. In addition, the Report proposes to introduce into U.S. antitrust law a prohibition of abuse of dominance similar to Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

In many respects, the proposed legislative reforms suggest bringing U.S. antitrust law closer to EU competition law. The latter is typically understood as posing stricter limitation on firms' business practices. In other words, conducts such as a refusal to deal, or predatory pricing, are more likely to be found unlawful under EU competition law than under U.S. antitrust law. EU competition authorities are also able to challenge dominant firms' exploitative practices. Yet, the experience from the European Union provides a dire prediction for the likely success of the reforms that are proposed in the House Report. It suggests that even if regulators were to lower the standard for condemning firms' unilateral practices under U.S. antitrust law, that would not provide an effective solution for the practices that the Report identifies as problematic. Indeed, the European Commission has largely acknowledged the limitations of competition law in dealing with digital platforms and has opted instead for a tailored, sector-specific regulation.

This paper is structured as follows. In Part I, we summarize the existing differences between U.S. antitrust law and EU competition law. In Part II, we explain that, in the European Union, the more expansive competition-law regime has not provided a solution for the concerns raised with respect to digital platforms. Indeed, there seems to be a general agreement in the European Union that competition law cannot provide an adequate solution. In Part III, we examine the solutions that have been recently proposed by the European Commission to deal with the so-called digital gatekeepers.

I. A COMPARISON OF THE TWO ANTITRUST REGIMES

It is generally well-recognized that EU competition law poses stricter limitations on firms than U.S. antitrust law. That assumption holds particularly in the context of unilateral conducts by firms with market power. As a result, the same business practice is more likely to be found unlawful under EU competition law than under U.S. antitrust law.

The most obvious difference between EU competition law and U.S. antitrust law concerns the so-called exploitative conducts, which are conducts that do not affect competition but instead impose a direct harm on customers or consumers. Article 102(a) TFEU explicitly prohibits a dominant firm from "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."[13] This provision has been interpreted as giving to the European Commission the authority to challenge a dominant firm's exploitative practices, such as charging "excessive" prices.[14] The Court of Justice of the European Union ("CJEU") has sustained this interpretation in its landmark judgment in *United Brands*, where it ruled that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."[15] In contrast, U.S. antitrust laws does not condemn firms from engaging in exploitative practices. In *Trinko*, the U.S. Supreme Court said that charging high, or monopolistic prices "is not only not unlawful; it is an important element of the free-market system."[16] The Court reasoned that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."[17]

11 *Id.* at 391.

12 *Id.*

13 Consolidated Version of the Treaty on the Functioning of the European Union Art. 102, May 9, 2008, 2008 O.J. (C 115) 89 [hereinafter TFEU].

14 Notably, challenges of exploitative practices are relatively rare. The European Commission's enforcement typically focuses on exclusionary rather than exploitative conduct. Nonetheless, legal actions are possible, and indeed, on several occasions, the European Commission has challenged under Article 102 TFEU a dominant firm's alleged exploitative conduct.

15 Case 27/76, *United Brands v. Commission* [1978] ECR 207, paragraph 250.

16 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

17 *Id.*

It added that "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[18] Therefore, whereas EU competition law might condemn a dominant firm for engaging in exploitative conducts, U.S. antitrust law does not.

There are important differences also in the way EU competition law and U.S. antitrust law address exclusionary practices, that is, practices that harm competition and, therefore, consumers. For example, the two systems differ in the way in which the scrutinize predatory pricing, which refers to a firm's practice of selling products or services at a loss. The concern with predatory pricing is that selling products or services below costs might permit a firm to exclude competition and subsequently increase prices above-competitive levels. Although predation might be unlawful under U.S. antitrust law, courts have expressed more skepticism than its EU counterparts[19] with the idea that such practice could have harmful effects on competition and consumers. They have emphasized that a predatory practice is unlikely to harm consumers unless there is a danger that the firm that engaged in predation is able to maintain its monopoly "for long enough both to recoup the predator's losses and to harvest some additional gain."[20] Consequently, to condemn a practice as predatory, U.S. courts have required both evidence that (1) the price is below an appropriate measure of cost and (2) there is a dangerous probability that the company will be able to "recoup[e] its investment in below-cost prices."[21] Conversely, EU competition law does not always require proof of recoupment.[22] Because of the different standard of proof, a firm's practice is more likely to be deemed as predatory, and therefore found unlawful, under EU competition law than under U.S. antitrust law.

A further difference between EU competition law and U.S. antitrust law becomes evident when examining the way in which the two systems address a dominant firm's refusal to deal. The U.S. system is based on a strong belief that companies, including those with market power, should be free to select the companies with which they want to do business. The U.S. Supreme Court emphasized that principle in its 1919 decision *United States v. Colgate &Co.* when it said that U.S. antitrust law "does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."[23] The Supreme Court reiterated this principle on several occasions, including in *Trinko* and *linkLine*.[24] In contrast, under EU competition law, a dominant firm's refusal to deal might violate Article 102 TFEU.[25] In *Microsoft*, for example, the CJEU said a dominant firm is in principle free to select the companies with which it wishes to do business, but also said that in "exceptional circumstances" a refusal to deal might violate Article 102 TFEU. In determining whether to challenge a dominant firm's refusal to deal under competition law, the Commission typically considers whether (1) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market, (2) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (3) the refusal is likely to lead to consumer harm.[26] Hence, whereas a refusal to deal is unlikely to violate U.S. antitrust law, it might more easily be found abusive under EU competition law.

In short, firms face stricter limitations under EU competition law than under U.S. antitrust law. EU competition law prohibits firms to engage in a wider set of practices. Furthermore, even when addressing the same type of practices, EU competition law imposes a lower burden of proof on the plaintiff, such that a challenged conduct is more likely to be found unlawful under EU competition law than under U.S. antitrust law.

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18 *Id.*

19 See e.g. Case C-202/07 P, *France Télécom SA, v. Comm'n*, [2009] ECR 2009 I-02369, para. 109; *AKZO Chemie BV v. Comm'n*, Case C-62/86, [1991] ECR 1991 I-03359, para. 71.

20 *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

21 See e.g. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*509 U.S. 209, 224 (1993).

22 See e.g. Case T-340/03, *France Télécom SA, v. Comm'n*, [2007] ECR II-00107, para. 227-28.

23 250 U.S. 300, 307 (1919).

24 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-8 (2004); Pacific Bell Telephone v. linkLine Comm., 555 U.S. 438, 448 (2009).

25 See e.g. Cases 6 and 7/73, *Commercial Solvents v. Comm'n*, [1974], ECR 223, para. 25; Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Comm'n*, [1995] EU:C:1995:98, para. 28; Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs*, [1998] ECR I-7791, para. 40; Case C-418/01, *IMS Health v. NDC Health*, [2004], ECLI:EU:C:2004:257, para. 52; Case T-201/04, *Microsoft Corp. v. Comm'n* [2017] ECR 2007 II-03601, para. 319.

26 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, ¶ 81 OJ C 45 (Feb. 24, 2009) [Commission's Guidance on Exclusionary Practices].

II. HAVE BROADER ANTITRUST PROVISIONS BEEN ABLE TO ADDRESS CONCERNS WITH BIG TECH IN THE EUROPEAN UNION?

The proposals presented in the House Report recommend the adoption of reforms that, in many respects, would bring U.S. antitrust law closer to EU competition law. For example, the Report suggests introducing into U.S. antitrust law a prohibition of abuse a dominance.[27] Although the Report does not provide a detailed explanation of such prohibition, it refers to "exploitation" by digital platforms.[28] This suggests that such new provision would prohibit firms to engage in the so-called exploitative practices, as it is currently the case under EU competition law. The Report also recommends overriding several U.S. Supreme Court's decisions that have outline the elements that must be satisfied to condemn practices such as predatory pricing and a refusal to deal.[29] Specifically, the Report "recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying.'"[30] The Report also suggests that "Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm," citing *Trinko* and *linkLine* as examples of decisions that should be overturned.[31] Therefore, many of the recommendations presented in the Report, if implemented in practice, would bring the provisions of U.S. antitrust law closer to those existing under EU competition law.

However, the experience from the European Union suggests that the proposed revisions are unlikely to provide a satisfactory solution for the problems that the Report identified with digital platforms. The European Commission, as well as national competition authorities in member states of the European Union, have brought several investigations against the four big tech corporation.[32] They have challenged both exploitative practices and exclusionary conducts. On several occasions, they have condemned the challenged practices, or they have concluded the investigation after securing commitments from the party under investigation.[33] They have also imposed hefty fines, such as the 4.3 billion fine imposed on Google.[34] Yet, the intervention has neither prevented market concentration, nor has it provided a definitive solution for the practices that the Report describes as problematic.

Indeed, there seems to be a general agreement among commentators that even an expansive antitrust regime, such as the one available in the European Union, *cannot* provide an adequate solution for issues identified with digital platforms. In June 2020, the European Commission opened a public consultation for the Digital Services Act, a legislative package directed towards digital platforms.[35] Among other things, the Commission invited comments on how to "address the issue of the level playing field in European digital markets, where currently a few large online platforms act as gatekeepers."[36] On the same day, the Commission also open a public consultation for the adoption of a new competition

27 House Report, at 395.

28 *Id.*

29 *Id.* at 397, n. 2498.

30 *Id.* at 396 (citing *Matsushita v. Zenith Ratio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)).

31 *Id.* at 397 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. linkLine Commc'n, Inc.*, 555 U.S. 438 (2009)).

32 See e.g. Press Release, European Commission, Antitrust: Commission Opens Investigations into Apple's App Store Rules (June 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073; ACM Launches Investigation into Abuse of Dominance by Apple in its App Store, Authority for Consumers and Markets (Apr. 11, 2019), https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store; *Italy: Watchdog Opens Antitrust Probe into Google*, Competition Policy Int'l (May 19, 2019), https://www.competitionpolicyinternational.com/italy-watchdog-opens-antitrust-probe-into-google/.

33 See e.g. Bundeskartellamt Obtains Far-reaching Improvements in the Terms of Business for Sellers on Amazon's Online Marketplaces, Bundeskartellamt (July 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html;jsessionid=98F173CFCF40CBB4E3AA149FF088832E.1_cid362; Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources, Bundeskartellamt (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

34 See e.g. European Commission, Press Release, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; Sam Schechner, *France Fines Google for Mistreating Search Advertisers*, Wall St. J. (Dec. 20, 2019), https://www.wsj.com/articles/france-fines-google-for-mistreating-search-advertisers-11576836560.

35 Press Release, Commission Launches Consultation to Seek Views on Digital Services Act Package (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962.

36 *Id.*

tool.[37] The large majority of respondents to those public consultations have said that EU competition law does not provide an adequate solution the problems with digital platforms.[38]

The European Commission agreed. It said that "Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers."[39] It also identified several features of EU competition law that limit the Commission's ability to address, in an effective way, conducts by digital platforms. First, gatekeepers might not meet the threshold of dominance, which is necessary to trigger Article 102 TFEU. Second, their practices might not have a "demonstrable effect on competition within clearly defined relevant markets," another essential requirement to condemn a practice under Article 102 TFEU.[40] Third, the timing of intervention under the prohibition of abuse of dominance (Article 102 TFEU) might not be quick enough to address these practices in a timely and effective manner.[41] Fourth, efficiency and objective justification arguments, which are available under competition rules, may result in further entrenching of the market position of gatekeepers, and therefore contribute to limit market contestability.[42]

Therefore, the experience in the European Union that adopting a more expansive competition law regime, is unlikely to provide an adequate solution to the problems identified in the House Report. In that respect, one could question whether the legislative reforms suggested in the Report are fit for purpose. Are the proposed changes to U.S. antitrust law likely to provide an effective solution to the problems identified in the Report or are they deemed to fail even before they are implemented?

III. WHAT ARE THE SOLUTIONS CONSIDERED IN THE EUROPEAN UNION?

On December 15, 2020, the European Commission published two Proposals for Regulations of the European Parliament and of the Council: one on a single market for digital services (the so-called Digital Services Act),[43] and another – which is especially relevant for the purposes of this Article – on contestable and fair markets in the digital sector.[44] The latter proposal is referred as the Digital Markets Acts ("DMA").

The Commission's DMA Proposal was designed with the aim of ensuring fair and contestable markets in the digital sectors across the European Union. It is based on the premise that unfair practices go beyond the remit of anticompetitive practices as they stem, primarily, from a situation of imbalance in bargaining power between gatekeepers, their business users and end users.[45] In effect, the Proposal protects contestability and fairness regardless of the actual effects that the practice at issue has in the market. To achieve this goal, the DMA Proposal creates a system of *ex ante* regulation of large digital platforms, that is complementary to current EU competition law. In doing so, the DMA does not lower the thresholds for intervention under Articles 101 and 102 TFEU, but instead creates a new additional set of regulatory instruments that go beyond the remit of competition law.[46]

Three issues addressed in the Proposal deserve a particular scrutiny: (1) the definition of digital gatekeepers, that is, companies that would be subject to the DMA, (2) identification of practices that in the Commission's view "limit contestability or are unfair" and are therefore prohibited, and (3) market investigations.

37 Press Release, Antitrust: Commission Consults Stakeholders on a Possible New Competition Tool (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.

38 Press Release, Summary Report on the Open Public Consultation on the Digital Services Act Package (Dec. 15, 2020), https://ec.europa.eu/digital-single-market/en/news/summary-report-open-public-consultation-digital-services-act-package; see also Factual Summary of the Contributions Received in the Context of the Open Public Consultation on the New Competition Tool, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_stakeholder_consultation.pdf.

39 Commission Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector at 8, COM (2020) 842 final (Dec. 15, 2020) [hereinafter DMA Proposal].

40 *Id.* Explanatory Memorandum, page 7.

41 *Id.* Explanatory Memorandum, page 5.

42 *Id.* paragraph (9).

43 Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/E [hereinafter DSA Proposal].

44 DMA Proposal.

45 *Id.* paragraph (4).

46 *Id.* paragraph (10), Article 1(6).

A. The Definition of Digital Gatekeepers

The Commission's Proposal clarifies that the DMA would not apply to all digital platforms. Rather, the only platforms covered by the Proposal are the so-called "gatekeepers" that operate 'core platform services': "(i) online intermediation services, (ii) online search engines, (iii) social networking (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services mentioned above."[47]

Gatekeepers are described as those enjoying "an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers."[48] In tandem with the "low contestability" of the digital markets where they operate, gatekeepers are said to develop "unfair behaviour" in relation to business users that significantly depend upon them.[49] Although the Commission does not explicitly mention the need for impact on competition, it states that "[u]nfair practices and lack of contestability lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers."[50]

For a provider of core platform services to be designated as gatekeeper its activities must meet three criteria. First, it must be deemed to have a significant impact in the Internal Market. There is a rebuttable presumption of said impact if: (i) a core platform service is provided in at least three Member States; and (ii) the group turnover realized in the European Economic Area ("EEA") is equal to or exceeds EUR 6.5 billion in the last three financial years; or if the average market capitalization or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year.[51] Second, the core platform service must serves as an important gateway for business users to reach end users; there is a rebuttable presumption that this criterion is met if the core platform service that has more than 45 million monthly active end users established or located in the EU and more than 10 000 yearly active business users outside the EU in the last financial year.[52] Finally, for a core platform service operator to be designated as gatekeeper, it must enjoy an actual or foreseeable entrenched and durable position in its operations; this criterion is met if the users thresholds are fulfilled in the last three financial years.[53] The status of gatekeeper shall be reviewed periodically, in order to contemplate any material change that might have taken place, as well as whenever the decision was based on incomplete, incorrect or misleading information.[54]

Online platforms may rebut the gatekeeper presumption for a given core platform, in which case they will not be designated directly but be instead referred for further investigation.[55] Conversely, the Commission may also find that the existence of a gatekeeper even if the objective thresholds are not met.[56] In the latter case, a gatekeeper designation can only be made following a market investigation (as discussed more in detail below).

Therefore, differently from the prohibitions on anticompetitive agreements (Article 101 TFEU) and abuse of dominance (Article 102 TFEU), the market investigation tool is not "reactive" in nature, in the sense that it does not respond to a violation of competition rules. Instead, it is directed at fixing an underlying structural market failure instead of bringing an infringement to an end. For this purpose, the Commission would designate ex ante the companies that are considered digital gatekeepers and then subject them to a special set of rules that to not apply to other market players.

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47 *Id.* Article 2(2).

48 *Id.* Article 3(1).

49 *Id.* Explanatory Memorandum, p. 2.

50 *Id.*

51 *Id.* paragraph (17), Articles 3(1)(a) and (2)(a).

52 *Id.* Article 3(1)(b) and (2)(b).

53 *Id.* Article 3(1)(c) and (2)(c).

54 *Id.* paragraph (30), Article 4; Legislative Financial Statement, at 2.2.2.

55 *Id.* paragraph (23).

56 *Id.* paragraph, (24), Article 3(6).

B. Prohibitions and Obligations for Digital Gatekeepers

The DMA Proposal sets forth a list of prohibitions and obligations applicable to designated gatekeepers. The first provision (Article 5) consists of: (i) prohibition of combining personal data from core platform services with personal data from other services provided by the gatekeeper or collected from third-party services; (ii) allowing business users to offer same products or services through third parties, at different prices or conditions; (iii) allowing business users to make offers and conclude contracts with end users outside the gatekeeper's platform; (iv) refraining from restricting business users from raising potential issues with the relevant authorities; (v) refraining from requiring business users to use the gatekeeper's identification service; (vi) refraining from requiring business or end users to subscribe to any other services as a pre-condition for accessing core platform services; and providing advertisers and publishers price information for each relevant advertising service.[57]

In addition, the DMA Proposal's second provision (Article 6) lists obligations that may be further specified in relation to the gatekeeper. In those situations where gatekeepers have a dual role has provider of online services to business users while being active downstream in digital markets as well, they should refrain from (i) using data from business users that is not publicly available to offer similar services to those of their business users; and from (ii) engaging in forms of self-preferencing in ranking on the core platform service. In their relations with business users, gatekeepers also ought to: (i) refrain from restricting their freedom to switch to different software applications and services. Third-party ancillary services and software applications providers must: (i) be granted access to the operating system, hardware, or software features under equal conditions to those of the gatekeeper; (ii) be provided access, on fair, reasonable and non-discriminatory (FRAND) terms, to ranking, query, click and view data in relation to search generated by consumers on online search engine services. As regards advertisers and publishers, gatekeepers must: (i) provide transparent information to whom they supply online advertising services; (ii) provide, when requested, with access to the performance measuring tools of the gatekeeper free of charge; (iii) provide access, upon request and free of charge, to data generated by business users. As per the obligations *vis-à-vis* end users, gatekeepers should not (i) prevent the un-installment of pre-installed applications on a core platform service; (ii) restrict freedom of switching between or subscription od different software applications and services. [58] Finally, they must ensure (iii) ensure that business users and end users can port that data in real time effectively (e.g. through high quality application programming interfaces).

Although gatekeepers cannot invoke efficiency defenses to escape the obligations of the Proposal, they may request the suspension of a specific obligation in exceptional circumstances, where compliance with a specific obligation is shown to endanger the economic viability of the operations of the gatekeeper in the EU, as well as on grounds of public morality, public health or public security. [59]

The Commission can update the obligations imposed upon gatekeepers following a market investigation, in accordance with Article 17 of the DMA Proposal. This enables the Commission to other practices that are considered to be unfair or that limit the contestability of core platform services because of: (i) an imbalance of an imbalance of rights and obligations between gatekeeper and business users, which disadvantages the latter in providing the same or similar services as the gatekeeper; or (ii) a weakened contestability of the markets as a result of the new practice by the gatekeeper.[60]

C. Market Investigations

In addition to the market investigation pursuant to Article 17 discussed above, the DMA Proposal provides that the Commission might initiate two additional types of market investigations.

First, market investigations can be used to designate as a gatekeeper a provider of core platforms services that does not meet the quantitative thresholds but nonetheless meets the qualitative criteria. Such investigation shall be carried out in accordance with "the objectives of preserving and fostering the level of innovation, the quality of digital products and services, the degree to which prices are fair and competitive, and the degree to which quality or choice for business users and for end users is or remains high."[61] In determining whether a company should

57 *Id.* Article 5.

58 *Id.* paragraph (50).

59 *Id.* paragraphs (59) (60), Articles 8 and 9.

60 *Id.* Articles 10 and 17.

61 *Id.* paragraph (25).

be designated as a gatekeeper, the Commission shall take into consideration a variety of elements including: (i) extreme scale economies; (ii) very strong network effects; (iii) the multi-sidedness of the services provided and their ability to connect business and end users; (iv) lock-in effects; (v) lack of multi-homing or vertical integration; (vi) very high market capitalization; (vii) very high ratio of equity value over profit; (viii) very high turnover from end users of a single core platform service; and (ix) high growth rates combined with productivity growth.[62]

Second, the Commission can open a market investigation to determine whether systematic non-compliance, which has further strengthened the gatekeeper's market position, demands setting additional remedies.[63] Systematic non-compliance is deemed to have occurred in situations where the Commission has issued at least three non-compliance or fining decisions against a gatekeeper in relation to any of its core platform services in the last five years prior to the adoption of the decision opening a market investigation. (a non-compliance decision refers to a Commission's decision finding that a designated gatekeeper has violated the obligations specified in the DMA.) On the other hand, a gatekeeper shall be considered to have further strengthened or extended its gatekeeper position where its impact on the internal market has further increased, its importance as a gateway for business users to reach end users has further increased or the gatekeeper enjoys a further entrenched and durable position in its operations.[64] The market investigation may culminate with the imposition of any remedy, whether behavioral or structural, having due regard to the principle of proportionality.[65]

IV. CONCLUSION

Antitrust scholars and commentators in the U.S. and the EU have long considered each other's legal system to be more suited to address particular forms of anticompetitive conduct or to capture mergers with anticompetitive effects. This tendency for finding the grass to be always greener on the other side of the fence came to fore of late in the House Majority Report.

The House Report's main findings on the business conducts of Amazon, Apple, Facebook, and Google proposed a set of far-reaching recommendations that can change the face of U.S. antitrust laws. Under the guise of enabling the investigation of conducts that currently go undeterred in the digital market arena, it proposes to lower long-established standards of intervention in unilateral conduct cases, such as predatory pricing and refusal to deal. These recommendations could bridge the gap between U.S. antitrust law and EU competition law, especially through the import of the concept of "abuse of dominance" into the U.S., and the adoption of looser standards of intervention in unilateral conduct cases.

On the other side of the Atlantic, the European Commission has also kept itself busy in proposing reforms that can effectively tackle unilateral conduct by gatekeepers. However, the Commission's DMA Proposal from December 15, 2020 followed a distinctively different path from its U.S. counterparts by pursuing the regulatory reform avenue without amending EU competition laws. The reason for the U.S. not following the regulatory approach might be one of philosophy. While in the EU, competition law and regulation are seen as complementary, in the U.S., they are typically regarded as self-excluding. However, it should be pointed-out that in *Trinko*, the Supreme Court appears to leave the door open for antitrust enforcement in those cases where "'[t]here is nothing built into the regulatory scheme which performs the antitrust function.'"[66]

Aside from putting U.S. and EU apparently out of step, the Commission's proposal also works as a warning sign about the inherent shortcomings of competition law in responding to the challenges posed by big tech and their conduct in digital markets. In effect, as the example of the EU shows, the concept of abuse of dominance appears to be manifestly inadequate to comprehensively tackle the challenges posed by big tech.

62 *Id.* paragraph (25).

63 *Id.* Article 16.

64 *Id.* Article 16 (3) and (4).

65 *Id.* paragraph (64).

66 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004) (quoting *Silver v. N.Y Stock Exch.*, 373 U.S. 341 (1963)); see Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, Michigan L. Rev., Vol. 109, Issue 5 (2011), p. 702.

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