

# Competition policy in the age of 'Big Tech': Assessing the EU's approach

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## ABSTRACT

This perspective article analyses the EU's approach to digital competition policy, focusing on its investigations into 'Big Tech' i.e., Google, Apple, Facebook and Amazon, or GAFA. It assesses the changing nature of competition policy and looks at the legal and institutional context of the EU's investigations. Analysing the impact on stakeholders and the broader policy implications, it concludes that digital regulation should not be regional and that the inclusion of technology companies coupled with the establishment of a global framework is necessary for the process of adapting competition policies for the digital age.

## Introduction

On 17th July 2019, the European Commission (EC) formally opened an antitrust investigation into Amazon [1]. The term 'antitrust' is defined in the EU's competition policy publication as 'the action of preventing or controlling trusts or other monopolies, always done with the intention of promoting competition in business' [2]. This is the latest in a growing number of global investigations into the so-called 'Big Tech' firms: Google, Amazon, Facebook and Apple (GAFA). Other notable recent cases include the European Union's (EU) combined €8.25 billion fine levied against Google across three abuse of dominance cases (Google Shopping in June 2017 [3], Google Android in July 2018 [4], and Google AdSense in

March 2019 [5]).

While these firms are growing to dominate an increasing number of markets, the accompanying technological advancement and disruption of established business models have tested the limits of traditional competition policy, both within the EU and beyond. This perspective article examines why traditional competition policy is not entirely applicable to 'Big Tech' by analysing the legal and institutional environment around the EU's antitrust cases against GAFA firms and their impact on relevant stakeholders. It then considers the broader policy and industry implications for digital competition regulation and the need for global cooperation and standardisation to effectively ensure competitive digital markets.

## Competition Law in the EU

Antitrust law is a subset of competition law, which refers to the broader legal framework in a particular jurisdiction that aims to ensure a fair and free market to the maximum extent possible by laying out a set of rules governing anti-competitive conduct [2]. EU competition law is derived from Articles 101-109 of the Treaty on the Functioning of the European Union (TFEU) [6], in conjunction with relevant Regulations such as Regulation 139/2004 (the EC Merger Regulation) [7] and Regulation 1/2003 [8] (the Modernisation Regulation) [9]. It encompasses four main policy areas.

Of these four areas, cartels and anti-competitive agreements (covered by TFEU Article 101), and abuse of market dominance (covered by TFEU Article 102), form the basis of European antitrust law. 'Anti-competitive agreements' are agreements between companies that restrict competition. These can be vertical, such as between suppliers and retailers, or horizontal i.e., between competitors in the same market. The most extreme of these is the formation of 'cartels', which are collusive groups created between companies who are market competitors, to control prices, limit production and share markets or customers amongst themselves [2, 10]. 'Abuse of a dominant position' refers to the company exploiting the strength of its market position to restrict or eliminate competition [2, 10]. Note that a dominant position in itself is not anti-competitive unless the company in question has exploited it. This adds a layer of complexity to abuse of dominance investigations, especially when dealing with GAFA companies, as explicit misuse of market dominance has to be clearly established.

Thirdly, the law covers merger control, per the Merger Regulation, which establishes the EC's power to prevent mergers or acquisitions that threaten to restrict competition. Finally, TFEU Article 107 deals with Member State aid control, prohibiting the Member States from using public funds to influence markets by investing in or otherwise granting financial advantages to private undertakings [2, 10]. EU competition law applies to the 27 Member States and the 3 non-member countries in the European Economic Area (EEA) - Iceland, Liechtenstein and Norway - in conjunc-

tion with their national laws [10]. Regulation 1/2003 also set up the European Competition Network (ECN) as a platform for further co-operation, and obligated national competition authorities (NCAs) and courts to consistently enforce TFEU 101 and 102 across the EU and EEA [9].

## Competition Policy in a Digital World

'Competition policy' refers to the application and enforcement of the rules set out by competition law [2]. Definitions and enforcement are specific to individual jurisdictions (such as individual nations and transnational blocs like the EU), as there are no binding multilateral standards or agreements. However, organisations such as the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) facilitate international dialogue and discussion to encourage global regulatory standardisation [11].

The original definitions of anti-competitive behaviour were established for traditional business models, where it was possible to demarcate markets for different industries [11]. They were also firmly set in price theory, as consumer welfare and harm were broadly considered in monetary terms [12]. For instance, consumers were being harmed if they were being forced to pay a higher price than was fair without any alternatives. Identifying a dominant player as one who held the greater market share or classifying inter-business agreements as collusive in nature was thus more straightforward. It was also easier to define anti-competitive activities, such as price-fixing (an agreement between rival sellers to raise or fix prices to restrict competition and increase profits [13]). A well-known case of collusive agreements is the famous 1961 electrical equipment price-fixing case in the United States. Multiple high-profile electrical equipment manufacturers including General Electric and Westinghouse were charged and indicted by a Philadelphia grand jury with having colluded to 'raise, fix and maintain' the prices of equipment estimated to be worth \$1.7 billion annually [14].

The digital revolution has fundamentally altered the nature of markets and industries, creating more fluid business models and leading to new obstacles for the enforcement of competition law. For example, 'zero-price' services such as social media [12] require considerations beyond monetary repercussions to customers. GAFA business models are now increasingly platform-based, acting as intermediaries that facilitate transactions between different user groups. They serve different sets of users in different ways, with different pricing models for each [15]. Additionally, they are no longer confined to a single industry. For example, Amazon's e-commerce business places it in the traditional industries of retail, logistics, manufacturing and advertising, whilst also having a completely different business model as an online marketplace of physical and virtual goods, along with its software businesses. Similarly, Google operates in the sectors of internet search, advertising, software development and analytics, to name but a few. Companies no longer operate in industries, but ecosystems.

This makes it difficult to (a) define a particular market, and (b) establish a company's position in it from a revenue perspective, especially with the 'zero-price' nature of digital services [12] (such as social media, retail product comparisons and travel booking searches), which compete for customers' attention rather than their money. In the absence of clear revenue gains, identifying a dominant market player or defining collusive behaviour is significantly more difficult. This complexity is compounded by the fact that GAFA companies, which often own the largest online platform marketplaces, also compete in them. Thus, a creative and flexible approach is required to justify the application of competition frameworks to digital markets.

The EU released a report on how competition policy should evolve for the digital era in April 2019, which concluded that while the existing legal framework of competition law was still sufficient, enforcement methods would need re-thinking to keep pace with the digital economy [16]. It is also the most active jurisdiction in bringing regulatory action against technology firms. According to a global Hogan Lovells survey on proposed digital regulation, 49% of the 452 entries recorded for the first half of 2019 were from the EU, with the US

displaying its recent surge in digital regulation in second place at 28%. Antitrust regulation was the largest category overall, with 26% of the total proposals being competition-related [17].

## Notable Cases

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Google has been the subject of three high-profile EC investigations so far: Google Shopping in June 2017 [3], Google Android in July 2018 [4], and Google AdSense in March 2019 [5]. In all three cases, it was charged with abuse of dominance and fined by the EC under TFEU 102. In the Android decision, Google was charged with restrictive practices for demanding pre-installation of proprietary apps on devices using the Android operating system [4]. The AdSense decision found the company guilty of forcing third-party websites using its advertising service to do so exclusively and prominently [5]. The Shopping case acknowledged Google's dominance in the online search market but penalised it for abusing this position in a supplementary market, i.e. the online shopping comparison market, by prioritising its own results above those of its competitors [3].

The validity of these claims has been disputed in the legal community, and critics stress the necessity of establishing a firm causal link between simply being in a dominant position and being found guilty of abusing it [18]. In this matter, the Android and AdSense cases were potentially stronger [18], as Google's restrictive practices in the first and insistence on exclusivity in the second broadly fit the criteria for anti-competitive conduct.

The Shopping case is more contentious. It penalised Google for abusing its position in a different market than the one it was claimed to be dominant in, which made the causal link between the two less clear. Google has stated that not only were its own results marked as 'advertisements' [18], but online marketplaces such as Amazon and eBay are equally prominent in this regard and therefore competition was enforceable with a single click, given the 'zero-price' nature and subsequent low switching costs of the market in question [19, 20].

It is important to view the three cases discussed above in the context of the limitations of the

EU's jurisdiction as well as the scale at which companies like Google operate. The EU has an administrative enforcement system. For competition cases, this is led by the EC, whose role is to investigate cases, announce a decision (and/or a settlement) and propose remedies, which the defendant can then accept or appeal [10]. By contrast, other jurisdictions such as the United States (US) have a more adjudicative system, with both parties (the investigating agency and the defendant) presenting their case and remedies and/or penalties being decided by the courts. The former relies more on financial sanctions, while in the latter criminal sanctions are also a realistic possibility [21]. However, the EC's fines are capped at 10% of a company's global annual turnover, and within that, to 30% of revenue related to the infringement multiplied by years of participation [22]. While this still allows the EC to levy fines in billions of euros, it is important to consider whether this has significant impact, given the scale of the companies involved. For instance, Alphabet (Google's parent company) listed the €4.34 billion Android fine (a mere 3.7% of Google's annual revenue) under standard costs and expenses in its 2018 annual statement [23]. This renders the effectiveness of financial sanctions on the multi-billion dollar GAFA companies questionable.

Another notable case, albeit at the Member State level, is the German Federal Cartel Office's (FCO) abuse of dominance decision against Facebook in February 2019. The FCO found Facebook's collection and leveraging of user data beyond its own website to be an abuse of its dominance as a social network. In a landmark ruling, the Düsseldorf Higher Regional Court (the first court of appeal) suspended this decision, stating that even if Facebook was found to have violated data protection law by its actions, it did not automatically constitute anti-competitive conduct simply due to its dominant position [24]. Investigations conducted by Member State NCAs such as the FCO are important as they can supplement current or upcoming EC cases if they are investigating the same company, which gives the EU's antitrust investigations a level of coordination that is absent from other jurisdictions [9].

Currently, Amazon is being investigated [1] for its dual role as a retailer in its own marketplace, i.e.

selling goods on a platform that the company itself owns. The EC is investigating whether it has used confidential data from retailers on its platform to its advantage (to price its own products lower and position them better in searches), either by abusing its position over them (TFEU 102) or by colluding with them (TFEU 101) [25]. This case is similar to Google's cases in that both these companies are online gatekeepers as well as market players i.e., they control the very interfaces that they compete in. It also has parallels to Facebook's case where the alleged anti-competitive behaviour stems from infringement of protected data. However, in Amazon's case, the causal link to abuse of dominance would be more direct than Facebook's case, as the data was allegedly used to directly undermine competitors [26]. In many of these notable cases against different GAFA firms, conducted by different authorities across the EU and worldwide, comparisons can be drawn. This helps give weight to the argument that it is possible to develop a more standardised global framework to help different jurisdictions, even beyond the EU, to effectively regulate competition in digital markets.

## Role of institutions

The EU's competition rules are applied and enforced by the authority of the EC. Within the EC, the Directorate-General (DG) Competition is the department responsible for direct enforcement. It can open investigations on its own initiative or based on complaints registered. Based on the result of the investigations, the EC can prohibit the discovered anti-competitive conduct, impose fines, and require remedial actions. For example, in the AdSense decision, the EC stated that Google had ceased the problematic conduct by that time [5], and in the Shopping and Android decisions, Google was given 90 days to cease the stated conduct or face penalty payments of up to 5% of Alphabet's average daily global turnover [3, 4].

The EC usually investigates cases that impact three or more Member States, or where the situation necessitates an EU-level precedent. Cases involving dominant technology platform companies like GAFA usually fulfil both criteria (Google was concluded to possess over 90% market share

in most or all EEA countries). For cases within a Member State or between two of them, the respective NCAs are better suited and can independently enforce competition rules in their respective jurisdictions [2, 10]. This is reflected in recent independent NCA investigations, such as the German FCO's Facebook decision [24] and the 2018 and 2019 investigations into Amazon initiated by the FCO [27] and the Austrian Federal Competition Authority (FCA) [28] respectively. Should the EC initiate proceedings into the subject of an NCA investigation on the same charge, the respective NCA will lose its authority to investigate further to the EC (although it can pursue parallel investigations) per Regulation 1/2003 [9].

The EU's General Court and the (higher) Court of Justice of the European Union (ECJ) have the power to annul or modify EC decisions. Companies and Member State governments periodically launch appeals against EC decisions and have sometimes seen successful outcomes in the past [2]. National courts have the same power for decisions by respective NCAs, as seen in Facebook's success with an interim decision in the Düsseldorf Higher Regional Court. However, final decisions in both cases are expected to take considerable time, and challenging complex EC decisions of magnitude is a lengthy and drawn out procedure. For example, Google has appealed the EC's decision in each of its cases, with the hearings for the first case, Google Shopping, starting in February 2020 [29], almost 10 years after the investigation was first opened. The decision could take years, and in the meantime, Google has to comply with the EC's decisions proposed remedies to limit anti-competitive conduct [30].

This system is thus far from ideal for the fast-moving digital ecosystem. The lack of precedence or any formal guidance that could serve as a reference further slows down the process, since most cases are treated as novel, and arguments already established in parallel (but not identical) cases have to be reformulated. Again, this is where a standardised enforcement framework for applying competition law to digital models is essential, both to the investigating authorities and to the organisation under investigation.

## The impact of increased regulation

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Antitrust investigations invariably involve a large number of stakeholders, both in industry and in government. As discussed above, 'Big Tech' firms operate in an ecosystem of multiple adjacent industries and have a huge global presence, with most of the market-leading digital platforms operating in over 100 countries. Furthermore, the EU's recent investigations have set precedents as they are the first of their kind into GAFA firms, leading to divided public and legal opinions on the validity of some of the charges (such as the abuse of dominance charges in the Google Shopping and Facebook cases detailed above), and a series of appeals from the companies themselves. Thus, these investigations and their outcomes have a significant impact, not only on the parties directly involved (the EU governing bodies, Member State governments, firms and competitors) but also on other jurisdictions, consumer welfare groups, international competition policy organisations and the broader legal community.

The new EC of 2019 has made robust policy for digital markets a priority. President von der Leyen has stated as much in her agenda [31] and has charged Competition Commissioner Margrethe Vestager with the responsibility of shaping a 'Europe Fit for a Digital Age' [32]. The EU already leads globally in this regard, and its position as the first mover could lead to other national and international standards being framed accordingly. This is reflected in the various regional data protection regulations such as the California Consumer Privacy Act (CCPA) of 2020, that have been modelled after the EU's 2018 General Data Protection Regulation (GDPR) [17]. Thus, the cases discussed above are crucial not only in terms of their outcomes but in helping to create a blueprint to regulate digital and 'zero-price' business models.

However, the EU's agenda has been critiqued as tending towards protectionism and stretching competition law to target companies simply for being successful [33]. These critiques bear some thought given Commissioner Vestager's statements that the EC will consider more far-reaching tools such as 'interim measures' to force



companies to cease suspected anti-competitive behaviour during an investigation and not after, or shifting the burden of proof onto dominant companies to prove pro-competitive conduct [34, 35].

The heightened scrutiny on 'Big Tech' has also spurred other countries into action. Chief among them is the US, with multiple investigations against GAFA companies being launched in the last year at both the federal level by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) and the state level by many state Attorneys General's (AGs) [32]. Digital regulation has also become a hallmark of many political platforms - a turnaround from the US's relatively minimalist approach so far [32]. The UK government has also stated that they are looking to adopt recommendations by the UK's Competition and Markets Authority (CMA) to enable effective regulation [36].

For the GAFA companies, the multitude of investigations requires them to be constantly vigilant for a change in the competition policy and the enforcement in any particular jurisdiction. They then have to adapt according to the investigations at hand to minimise potential fallout. For example, in 2015, Google restructured itself to create a holding company (Alphabet Inc.) and listed itself as a subsidiary. This enabled it to separate its chief revenue-generating arms of search and advertising from its other less crucial businesses [37]. Amazon agreed to amend its terms of service with sellers on its platform to appease the two Member State authorities investigating it [38]. GAFA companies are thus attempting to minimise potential fallout in various ways. While they are often successful since they have the capacity and resources to do so, it makes them less likely to cooperate with information-gathering or knowledge-sharing attempts should any government attempt them, as these can easily turn investigative in nature.

Another unintended consequence of a piecemeal approach to regulating digital competition is that the burden of increased and rapidly evolving regulation can fall disproportionately on smaller technology companies, as they lack the resources and public affairs experience to keep up [17]. Although many of these companies, especially European ones, were among those who filed complaints to start the GAFA investigations, by most

accounts the remedial measures are proving ineffective, with the 'Big Tech' companies finding workarounds and newer areas of expansion while simultaneously appealing every decision [39]. Thus, these companies might be benefited from industry partnerships, trade coalitions and advocacy groups instead of relying solely on regulatory frameworks.

## Broader implications and conclusion

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This shift to increased enforcement and vigilance in digital competition policy has long-lasting implications, both within the EU and globally. The national scope of regulation so far is especially concerning - per the aforementioned Hogan Lovells survey, 85% of all tracked proposals were at a national level [17]. Thus, a standardised global framework to help jurisdictions enforce competition policy is still a long way off. This is highly problematic since a long-term consequence could be global regulatory fragmentation, with different rules in different national digital markets. This can prove highly detrimental to global trade, especially where the sharing or exchange of data across jurisdictions is concerned, and could result in reduced choices for consumers. The international community needs to recognise that this is not a region-specific issue, and regional policing of digital ecosystems is therefore not a sustainable or an enforceable solution. Further, the EU should consider that an overly complex and drawn-out approach to enacting competition legislation is as difficult to enforce for them as it is for the companies in question to adhere to. As discussed above, GAFA companies are becoming increasingly adept at finding workarounds to sidestep any substantial changes or restrictions to their operating models and by extension, their revenue. This increases the potential for non-compliance and could realistically lead to more companies subverting the legal system if similar cases continue to be brought in this piecemeal fashion.

Authorities also need to remember that digital business models can vary and thus cannot be regulated using a single template, as it requires a ground-up approach to enforcement which is both

time-consuming and resource-intensive. Governments should, therefore, take an adaptable and inclusive approach to digital regulation. The EU cases against GAFA companies have proven that traditional remedies such as fines are unlikely to be a sustainable solution, and extreme remedies such as 'breaking up' large companies might serve little purpose other than to create a larger set of smaller monopolies, which would be even harder to regulate [23]. The true barrier to effective regulation, then, is a lack of transparency in the operating models of these firms as well as the precise legal violations that they have committed. Much of the divide in public opinion on GAFA companies stems from the complete opacity in their operations [40]. An alternative to the current case-by-case investigatory approach employed by individual jurisdictions could be to include technology companies in the global standardisation process, and foster compliance by design in digital products and services so that potential concerns are addressed from the onset. If a benchmark for regulatory compliance in digital ecosystems is established and accepted by both the regulators and the industry, then both new and existing products can be held accountable to it.

To conclude, since the EU is regarded as a trendsetter in technological regulation, it should leverage its influence to push for an inclusive and sustainable global framework to approach it. The EU's own legal and policy framework, both at a national and trans-national level, allows for a fair degree of coordination between multiple competition authorities, and can serve as a starting point in envisioning an inter-jurisdictional framework for the enforcement of competition policy in digital ecosystems. The rapid adoption of digital ecosystems globally has made global practices for adapting existing legal frameworks a necessity. Coupled with pragmatic and flexible enforcement, industry cooperation and a mechanism for inter-jurisdictional coordination, a global framework will be instrumental in preventing the regional fragmentation of digital ecosystems and the subsequent consequences to the global economy going forward.

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## About the Author

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