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ANTITRUST LAW IN THE AGE OF BIG TECH: REGULATING DIGITAL MARKET POWER AND SAFEGUARDING CONSUMER INTEREST

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I. ABSTRACT

In the contemporary digital economy, antitrust law feels a new set of powerful challengers in the form of Google, Amazon, Facebook, Apple, and Microsoft among others. Large enterprises which control these numerous digital platforms, data infrastructure, and international markets, have elicited fears of their monopolistic nature, thus making these companies wield unprecedented market power.

This paper seeks to analyze and discuss the challenges that traditional antitrust legislation is facing due to certain features of the digital economy and activities of the dominant players, the Big Tech companies. Using experiences from the US and EU significant antitrust cases of Big Tech firms, this paper exposes the weaknesses of the existing legal policies and identifies the changes that need to be made to strengthen the competition law approach in the digital economy.

In particular, the paper analyzes such cases as *United States v. Microsoft*, the European Commission's cases against Google, the FTC's lawsuit against Facebook, *Apple v. Epic Games*, and others. It claims that the current antitrust legislation that is in place is inadequate for handling non-price competition questions that include data privacy, platform monopolies, and subsidizing innovation. As a result, this paper offers a range of policy advice to the appropriate authorities to ensure that digital markets function in ways that guarantee the welfare of consumers while promoting innovation.

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II. KEYWORDS

Antitrust Law, Big Tech, Digital Markets, Consumer Welfare, Market Power, Regulation, Competition Law, Data Privacy

III. INTRODUCTION

The recent supremacy of Big Tech companies presents massive problems to the traditional antitrust law, which aimed at controlling monopolies in industries based on tangible products and services. Typical market power in today's economy lies not in ownership and control over physical goods, and distribution channels, but in ownership and control over data, networks, and platforms. Many large technology companies are situated in ecosystems where they possess vast volumes of data from their users, can make and change the rules of digital platforms, and can yield significant power over their rivals and customers.

For example, Google and its search and advertising services, Amazon and its e-commercial marketplace, Facebook with its social platform, and Apple with its finesse of controlling its app store. Several articles of the monograph note that the consumer welfare standard and other tools typical of traditional antitrust fail to capture the effects that harm consumers differently, for instance, through decreased innovation, fewer choices for customers, and compromised privacy.

This paper shall seek to discuss the extent to which antitrust laws have to be adapted to cope with the dynamics of the digital markets and hence serve the best interest of consumers.

IV. RESEARCH OBJECTIVES

- To critically evaluate the contemporary outlines of the antitrust law about big technology firms and its demerits.
- To assess Big Tech's competition effects on competition, innovation, and consumers.

- To evaluate selected major antitrust case laws related to Big Tech and the signals that they contain for regulation in the future.
- To put forward recommendations for changes that liberalize antitrust law to address modern digital market power issues.

V. RESEARCH QUESTIONS

- What has been done in practice when it comes to the old-fashioned antitrust laws and their relevance to the digital business models of Big Tech?
- While analyzing how monopolistic behaviors are regulated in digital platforms, what are the particular difficulties that regulators encounter?
- With *United States v. Microsoft*, *Google v. European Commission*, and *FTC v. Facebook* being landmark cases where various forms of justice were sought and given regarding the role of large tech companies, understood as a form of big tech or big data newcomers, it is possible to consider in detail how the future of anti-trust enforcement will develop.
- What more needs to be done to adjust antitrust law continuously in a manner that it continues to serve competition and consumers?

VI. RESEARCH HYPOTHESES

- The old antitrust laws are inadequate to govern the business structures of Big Tech firms, especially in concerns with data control, platform dominance, and coercion.
- Currently, Big Tech uses its incumbency in the digital market and calls control over significant volumes of data as entry barriers that decrease competition and innovation in the market and adversely affect consumers' welfare in ways that are not captured by price.
- Amendments to antitrust law and new instruments for regulating the new generation digital platforms are essential to recreate competitive market states and to safeguard consumers.

VII. RESEARCH METHODOLOGY

This paper will use a doctrinal research method also known as the library research method. Doctrinal research relies mainly on the analysis of case and statutory law, legal, and other scholarly works.

In the course of this study, several primary legal resources are distinguished: Codes, and statutes where the legal basis for antitrust and regulation of Big Tech companies is established, namely the Sherman Act, Clayton Act, and European competition law. These are the secondary sources comprised of academic publications, studies, essays, and policies, which focus on the application of the antitrust law considering digital markets. The evidence comprises sources that are sifted, collected, and critically produced to give reasoned recommendations regarding the plausible reforms in the digital economy as faced by the regulations.

VIII. LITERATURE REVIEW

A. Robert Bork's "The Antitrust Paradox" ²

Bork's classic book claims that the objectives of antitrust law are to protect consumer interests, the main indicator of which is price impact. He dislikes the tendency of many corporations to control the market with the help of legislation and calls for amending the rules to let efficient companies prosper provided they do not overcharge consumers. With Big Tech, directly equating consumer pricing negates the fact that many of these online services are free and do not consider other ways that users are harmed such as through privacy infringement or stifling of competition.

² Bork, RH, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1978)

B. "The Curse of Bigness: "Antitrust in the New Gilded Age" by Tim Wu ³

They described a strategy whereby Chinese scholars Wu should also support the revival of antitrust in dealing with modern tech monopolists. Piore contends that market power, when in the wrong hands distorts society in several ways including; low levels of innovation, enhanced economic inequality, and even the tendency to undermine democracy. Wu's critique relates more to Big Tech platform monopolists such as Facebook and Google, whose effects are felt in spheres other than the economy – in the flow of information and the character of political debate.

C. Jacques Crémer, 'Competition Policy in the Digital Era' coauthored with Yves-Alexandre de Montjoye & Heike Schweitzer. ⁴

As can be concluded from this policy report drafted by the European Commission, there is a clear need to adapt the competition policy to address certain phenomena observed in the digital markets. It emphasizes the sixth factor – the role of data and underlines the fact that traditional antitrust instruments may not suffice. There are also high suggestions for the corporations' rules to be tightened to deter Big Tech firms from stifling competition and innovation.

D. "Big Tech and the Digital Economy: Market Power and Its Consequences⁵: The Findings of the Paper "The Impact of Market Power" by Fiona Scott Morton and David Dinielli

The Anti-Trust constraints and Big Tech from the perspective of this article are applied to industries characterized by network effects and data dependence. Big Tech firms, state the authors, leverage their market power in one market to control neighbor markets, to

³ Wu, T, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018)

⁴ Crémer, J, de Montjoye, YA and Schweitzer, H, 'Competition Policy for the Digital Era' (European Commission 2019)

⁵ Scott Morton, F, and Dinielli, D, *Big Tech and the Digital Economy: Market Power and Its Consequences* (Omidyar Network 2020)

the detriment of competition and consumers. This article demands a better regulatory focus on actions by big technology firms in merger examination specifically.

E. Jonathan B. Baker, “Restoring Competition in the Digital Economy”⁶, American Industrial Relations Association Annual Meeting, Boston Marriott Copley Place, December 2011.

Baker condemns condemnation of the consumer welfare standard because it does not account for pertinent injuries, decreased innovativeness, and decreased consumer freedom in digital markets. He lays down new legal rules that are aimed at maintaining competitive structures in markets, instead of relying exclusively on the effects on the prices. This work is essential in the current discussion about how to reign in Big Tech companies’ market power to foster more competition and innovation.

IX. ANTITRUST REGULATION AND ITS DEVELOPMENT OF THE BIG TECH COMPANIES

Antitrust law in the United States was developed with the aid of the Sherman Antitrust Act of 1890 and the Clayton Act of 1914 aimed at controlling monopolistic actions that are detrimental to competition. Originally, these laws acted to prevent monopolies in industries involving transactions that involved physical products and services like steel, oil, and railroads. But let me state, there are myriad challenges that digital markets bring altogether which were not envisaged in drafting such statutes.

The most prominent case of antitrust disputes in the age of the internet and new technologies is the *United States v. Microsoft Corp.* (2001)⁷, which established the criteria to control monopolies in the technology markets. In this case, Microsoft was charged with having leveraged its position in the market of selling operating systems to monoculture internet explorers. In this particular case, Microsoft was charged with anti-competitive

⁶ Baker, JB, ‘Restoring Competition in the Digital Economy’ (American Industrial Relations Association Annual Meeting, Boston Marriott Copley Place, December 2011)

⁷ *United States v Microsoft Corp.* 253 F.3d 34 (D.C. Cir. 2001)

conduct, hence forcing a change in the number of its operations. This case showed how conventional antitrust statutes could be deployed to regulate digital monopolies though it also revealed the shortcomings of such laws in handling other modern problems such as platform dominance and data monopolization.

Since then, however, Big Tech firms have become not only two-, three-, and four-sided platforms but full-fledged monopolistic managers of entire ecosystems – Google in search and advertising, Amazon in e-commerce, and Apple in the market of applications. These firms are usually associated with market power in one area using the same to acquire dominance in another; it therefore raises competition issues in multiple markets.

For instance, in *Google v. European Commission (2017)*⁸, Google was penalized €2. 42 billion for violating the competition law concerning search as it gave precedence to its comparison-shopping service instead of actual competitors. Google’s advertising litigation was based on the premise that the search engine lessened competition and innovation from access to adequate integrated information and products. This case can be seen as a prime exemplar of platform power wielded by Big Tech enterprises at the expense of competition not just in related markets.

X. MARKET POWER AND CONSUMER WELFARE: SOME INSIGHTS ON DIGITAL MARKETS

Many cost structures of these Big Tech businesses rely on digital platforms that generate system externalities, known as network economies of scale – whereby the value of the business product or service rises with repeated use. This history has enabled some firms such as Facebook, Amazon, and Google to have monopolistic control in their industries. Contrary to ‘conventional’ monopolies in which market power manifests itself in significantly higher prices, Big Tech often operates on a zero-price strategy with examples being Google’s search engine or Facebook’s social platform. However, these service

⁸ *Google Inc. v European Commission (Case T-612/17) [2017] ECLI :EU : T :2021 :763*

providers depend significantly on their consumers in terms of data sovereignty privacy, and competitiveness.

Perhaps one of the most transparent cases of this is the Federal Trade Commission (FTC) v. Facebook, Inc. (2020)⁹, where the FTC has accused Facebook of continuing to dominate its market by buying rivals such as Instagram and WhatsApp, as well as undermining competition by guaranteeing that no other competitor poses a threat to it. As a result of the company's extensive data collection and targeted advertising business model, it can provide most of its services for free while making vast amounts of money. Still, this model also grants Facebook access to massive amounts of information about users, for which the company is now infamous regarding privacy and possible neglect of competition risks.

In the same way, Amazon has faced complaints about anti-competition practices in how it deals with sellers that appear on its marketplace. Large third-party sellers have also accused Amazon of using data about third-party sellers to create similar products which are then sold on Amazon. Such behavior is counterproductive in fostering competition and may in the long run be detrimental to consumers through the reduction of their options and invention.

XI. CASE LAW: SOME OF THE LANDMARK BIG TECH ANTITRUST CASES ARE THE FOLLOWING

The following cases illustrate the growing legal and regulatory pressure on Big Tech firms: The following cases illustrate the growing legal and regulatory pressure on Big Tech firms:

- **United States v. Microsoft Corp. (2001)**¹⁰: This case was very important in the enforcement of antitrust laws especially concerning technology firms. Microsoft was held to have engaged in tying, whereby it shielded competition in operating

⁹ Federal Trade Commission v Facebook, Inc. No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020)

¹⁰ United States v Microsoft Corp. 253 F.3d 34 (D.C. Cir. 2001)

systems to dear in the browsers market, especially through offering the operating system with Internet Explorer embedded in it. In the case of Microsoft, the court's ruling forced the company to alter its business models and spoke volumes on how antitrust law could be used to rein in anti-competitive behavior in digital markets.

- **Google v. European Commission (2017)**¹¹: Google was fined €2. 42 billion on another complaint that accused it of using its dominance in search to advance its comparison-shopping service at the expense of competitors. This case is important since it showed how the dominant platform operators can leverage asset controls in one area to foreclose related markets and limit competition and innovation.
- **FTC v. Facebook, Inc. (2020)**¹²: The FTC accused Facebook of maintaining its monopoly through acquiring compelling rivals such as Instagram, and WhatsApp, and exclusion. This case relates to the increasing scrutiny of the Big Tech companies and the way they are using acquisitions to lock out competition and using control of the user data which probably belongs in the user's circle privately to further lock themselves into their market domination.
- **Apple Inc. v. Epic Games, Inc. (2021)**¹³: Exclusivity of Apple was questioned in this case for instance, charging 30% of the revenue on in-app purchases from the App Store. Apple was said to be using its leadership authority to limit options and creativity by denying access to a platform of users by Epic Games. Effectively, the court joined partially Epic Games as Apple violated some sections of the law while refusing to consider Apple a monopolist. It makes it challenging to regulate social media entities that provide a marketplace to consumers and developers.
- **Amazon's Antitrust Scrutiny**: The legal issues involve multiple investigations and lawsuits against Amazon concerning its conduct towards third-party sellers, leverage use of the marketplace data to design new products, and ability to control the basic workings of e-commerce logistics. The use of algorithms at Amazon is

¹¹ Google Inc. v European Commission (Case T-612/17) [2017] ECLI :EU : T :2021 :763

¹² Federal Trade Commission v Facebook, Inc. No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020)

¹³ Epic Games, Inc. v Apple Inc. No. 4:20-cv-05640-YGR (N.D. Cal. filed Aug. 13, 2020)

also under the scrutiny of the regulators for violations of the competition law; self-preferencing coupled with predatory pricing.

XII. CHALLENGES IN REGULATING BIG TECH: INFORMATION, USER FLOWS, AND PLATFORM CONTROL

The regulation of Big Tech is a particular difficulty because of the nature of digital markets. The first of them relates to dealing with the presence of network effects, according to which usage of a platform enhances with more people hooked to it. These effects are good for companies like Facebook and Google, as the social effects generate a cycle of users and market control. Severing these platforms or applying antitrust measures is challenging because the benefits these applications offer the consumers belong to the economies of scale.

A final issue is information dominance. The Big Tech companies have access to large amounts of consumer data which they also leverage to perfect their algorithms, better position advertisements, and innovative services. This puts them in a strategic position that a host of their small competitors cannot always counter, hence being locked in a bullpen. Restriction of hiring, utilizing, and collecting data is thus vital as it seeks to balance the market power that is seen by acquiring and dominating the data asset.

In addition, there is the issue of platform gatekeeping. Market gatekeepers include individuals or businesses that have the power to either permit or restrict access to crucial markets; Bezos, the Amazon boss, and Tim Cook of Apple among others hold the keys to connecting with vital markets such as e-commerce and application distribution. It provides them with gatekeeping power and thus lock-in capacities that enable them to establish rules of the game and make developers as well as sellers pay rents. It is very crucial to open these platforms to everyone because it will help foster competition and innovation.

XIII. NECESSARY REFORMS: DEVELOPING THE FRAMEWORK OF ANTITRUST LAW FOR THE NEW ECONOMY

Given the unique challenges posed by Big Tech, several reforms to antitrust law are necessary to protect competition and consumer welfare in the digital age:

- **Updating the Consumer Welfare Standard:** In digital markets, a range of non-price harms could be quantity, growth, quality, or privacy: innovation, which are as real and worthy of action as are price effects under traditional antitrust law. Currently, antitrust law should widen its remit to take account of these more extensive social injuries, which are especially manifest in the context of data dominance and gatekeeper power.
- **Blocking Anti-Competitive Mergers and Acquisitions:** The first and foremost way through which Big Tech sustains its power is through the acquisition of rivals which can emerge as threats in the future. Policymakers should increase the activism on takeover reviews and mergers that are likely to dampen competition even if they are not likely to lead to current high prices. For instance, Facebook made some significant acquisitions in the past that initially received relatively little attention from the regulators, and these acquisitions are now known to have had the effect of removing two significant threats to Facebook's market supremacy: Instagram and WhatsApp.
- **Imposing Data Portability and Interoperability Requirements:** The way to reduce the competitive advantages of data monopolies can be the obligation to provide data portability and data sharing across platforms. This would enable the consumption of varied services and would be lessening on the lock-in effects which currently are a boon for Big Tech companies. The European Union's General Data Protection Regulation (GDPR) has some provisions on data portability, mainly, more comprehensive measures are called for to foster competitive forces.
- **Strengthening Privacy Protections:** A digitalized economy is at the center of big technology and so is data. Policy makers ought to increase the level of privacy

regulation which will in turn restrict the amount of information that companies with extensive operations online can acquire. While the European Union has provided more specific protection regulations GDPR, more effective data protection legal systems are still lacking to make sure consumers have control of their personal information and Big Tech company's use of this data for anti-competitive reasons.

- **Platform Neutrality and Fair Access Requirements:** To tackle the issue of platform gatekeeping, the authorities should set a policy of neutrality on digital middlemen such as Amazon, Apple, and Google. Such conditions would help to prevent platforms from giving preference to their products or services to competitors offering the same products or services. The rules provided for by the European Union in the context of the Digital Markets Act (DMA) may relate to these matters, and the measures specified may be introduced in other jurisdictions.

XIV. CONCLUSION

Big Tech companies represent new economy giants that have emerged as significant actors in the global economy that have posed new questions to antitrust law and competition policy. Contrary to the classic monopolies that get their power from the control of physical objects, Big IT companies analyze enormous amounts of information, enjoy network effects, and possess full control over digital platforms.

Quite a few of them rely on targeting consumers with free services and then monetizing the gathered data, which makes it difficult to apply the traditional process of analyzing market power and consumer damage. The use of conventional methods of antitrust analysis, which are tailored to take into account only price consequences and not the whole spectrum of oligopolistic effects that the dominance of digital leviathans produces decline in innovation, degradation of privacy, and centralization of power – leaves a lot to be desired.

Although the present antitrust regimes have shown the ability to respond to certain anti-competitive behaviors in the digital market, there are large deficiencies. Unless

modernization takes place, the regulation will remain dysfunctional in taming Big Tech, and in turn, will not be able to safeguard the consumer interest, competitive landscape, and innovation. As such, young scientists should reconsider the approach to the regulation of the Digital Economy by policymakers and regulators in the framework of antitrust legislation and conduct a set of corresponding reforms.

XV. SUGGESTIONS & RECOMMENDATIONS

To effectively address the challenges posed by Big Tech, the following reforms and policy recommendations should be considered:

A. Expand the Consumer Welfare Standard

Today's antitrust enforcement is predicated mainly on price impact, while these digital markets offer services for free to the users. Consumer welfare seems to need to extend beyond price because there are ills such as erosion of privacy of consumers, reduction in the pace of innovation, and stifled consumer sovereignty that is not reflected in the price. This will ensure that regulators have a cue on how to tackle other facets of Big Tech that have inclined towards anti-competitive behavior.

B. Block Anti-Competitive Mergers and Acquisitions

The tech giants often buy out their peers, and thus do not allow these firms to become significant threats. There is a need to tighten the rules about merit review especially where dominant firms are interested in acquiring emerging rivals. This entails a move that envisages long-term contestation factors even when there is no actual danger to the consumers in the short run.

C. Enhance Data Portability and Interoperability

This means that the firms in Big Tech enjoy one of the main sources of competitive advantages – the ownership of large amounts of users' data, which contributes to their market power. To counterbalance this, the regulators should put in place data portability

and interoperability standards. This would enable the consumers to have their data ported quite easily, making the digital service providers compete rigorously.

D. Implement Platform Neutrality Requirements

Some Big Tech companies including Amazon, Google, and Apple own important digital platforms that serve as a filter to whole markets. Such sites and apps should be under the neutrality regulation prohibitive of providing preference to their in-house products or services against that of the rivals. Equal opportunity to use these media is crucially important for developing a competitive environment and relevant innovations.

E. Strengthen Privacy Protections

Many of the largest Big Tech firms have accumulated most of their authority from the capability to gather heaps of personal information. The buying and selling of consumer data through data brokering requires improvement of data protection laws like the consent regulation and restrictive measures of collection and use of data. The General Data Protection Regulation of the EU is an example of such reform but much stronger and synchronized international standards are required.

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