

## THE IMPORTANCE OF ADOPTING A SECTOR SPECIFIC APPROACH TO BIG TECH REGULATION

*by*

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## Executive Summary

This policy proposal is addressed to American experts following President Biden's [executive order](#) which seeks to deal with issues of competition posed by Big Tech. Rather than supporting calls for dismantlement, we recommend an **integrated approach informed by EU instruments**, that would tackle **structural and behavioural impediments to competition**, and contribute to **protecting core values** such as privacy, democracy and freedom of expression.

This policy proposal comes at a critical juncture when current public discourse about Big Tech indicates a heightened awareness of the risks associated with the dominance of digital platforms. The United States has mostly relied on antitrust legislation and self-governance to address these issues, but there is a growing concern that these **strategies have not been sufficient to limit the potential harms**. At the same time, legislative breakthroughs in the European Union have underscored the **potential of integrated, sector specific and comprehensive regulation** to address some specific risks posed by Big Tech.

We contend with scholars, researchers, lawyers and others who have argued that the current American approach to harms posed by digital platforms is inadequate. In particular, current antitrust legislation relies on **taxonomy and standards that are not readily applicable to the digital economy**. As such, these legislations do not satisfactorily discriminate between competitive and predatory firm behaviour. These inadequacies have led to inconsistencies in judicial ruling and have done **little to prevent predatory behaviour by Big Tech firms**.

Whilst we agree that concentrated markets are enablers for predatory behaviour (and its associated potential harms), we argue that **breaking up Big Tech does not address the root causes of market concentration**, nor do they address other important harms caused by digital platforms (e.g., user privacy, service quality and data concentration). Thus, we argue first and foremost for the expansion of comprehensive sector-specific behavioural regulations; and secondly, for an upgrade of antitrust laws to better reflect the realities of the digital economy.

Recent EU legislation, such as the GDPR, as well as those in various stages of discussion and adoption such as the [Digital Services Act](#), the [Digital Markets Act](#), and the [Data](#)

[Governance Act](#), offer a valuable foundation for future US regulation. We argue that these legislations provide for **pro-competition regulation that, if implemented in the US, can be beneficial to not only smaller firms, but also consumers and innovation**. We notably advocate for regulations to ensure access to data, data sharing and interoperability, combined with non-discrimination rules on platforms referred to as “gatekeepers”. With regard to longer-term policy objectives, we suggest the setting up of a **transparency regime** that would enable academics and other interested parties to better understand firms’ roles and responsibilities when it comes to subjects like the propagation of harmful content, privacy breaches, and more.

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## I. Introduction

*“[Big Tech’s] ability to dictate terms, call the shots, upend entire sectors, and inspire fear, represent the powers of a private government. Our founders would not bow before a king, nor should we bow before the emperors of the online economy.”*

– US Representative (RI-01) David Cicilline at the antitrust hearing in 2020

In July 2020, the CEOs of Amazon, Facebook, Apple, and Google testified in Congress, as part of an antitrust investigation against the tech giants. In a hearing that lasted more than five hours, they were questioned on topics such as their market power, anti-competitive practices, app store policies, and data collection from third party sellers (Kelly, 2020). Following the investigation, House Democrats introduced a package of five bills targeting Big Tech which were advanced through the first round of voting; this package is considered to be “the most serious effort yet to rein in Silicon Valley’s power after years of complaints from Congress” (Nysten, 2021).

“Big Tech” is commonly used to refer to the tech giants Meta, Amazon, Apple, Google (Alphabet), and Microsoft. In 2020, they generated a total income of around \$197 billion on revenue of more than \$1 trillion (Beard, 2022). The term “Big Tech” seems to take after a tradition of labelling a business group “Big X” as part of criticising it and potentially breaking it up. To this extent, John Naughton, a technology columnist of the Observer, comments that governments have been peacefully asleep as these corporations “emerged and grew, without let or hindrance, at exponential speeds” (Naughton, 2021). These companies have been accused of innumerable scandals that have shed light on the potential harms that platforms amplify (Mozur, 2018): the Rohingya genocide on the amplification of harmful content, the Cambridge Analytica case on the exploitation of user data for political purposes, coupled with the volley of fake news in the context of the pandemic, to list a few. Such instances have resulted in lawsuits against the companies, calls for their dismantlement, and growing public will to regulate these giants.

This is the inflection point at which our policy brief finds itself. Whilst actors in the US have called for a dismantling of Big Tech, the EU has taken an arguably more comprehensive and integrated approach targeted at tech giants and online platforms by adopting a combination of new ex-ante regulation and specific antitrust measures. These approaches reflect two

distinct ways of tackling the problem at hand. In light of this, our policy brief answers the following:

***Is the dismantling of Big Tech really a solution to the difficulties posed by their regulation?***

In advising the US on actions to take regarding Big Tech's dominance, this policy brief first establishes the different paths that can be taken moving forward, before outlining the current limitations of the existing American approach to antitrust. It subsequently looks at actions taken in the EU, and finally details our stance and recommendations.

## II. Approaches to tackling Big Tech

This section briefly considers the various steps taken by actors in the ecosystem with regard to Big Tech. Calls to regulate or dismantle big businesses are, in fact, not a unique feature of the “digital decade”. Traditionally, Big Tech platforms have been left to self-regulate which often comes in the form of community guidelines – often not available to the public – that define the type of content they allow on their platform whilst reserving the discretion to remove anything they wish to. Below are the three ways with which governments and international organisations find themselves confronted when considering intervention (G’sell, 2022):

### Self-governance or self-regulation

- Platforms are not liable for content and moderate at their discretion.
- Government has minimal to no intervention in the functioning of the platform.

### Government intervention

- Comprehensive regulation on privacy, data protection, content moderation, and fair competition.
- Platforms are held liable to some extent.

### Co-governance

- Frameworks (instead of regulation) by specific councils that set guidelines for platforms.
- Third party adjudications and user involvement in decisionmaking instead of government.

Section 230 of the US Communications Decency Act places the country in the first box of self-governance or self-regulation. This is because it gives online service providers immunity with regards to most content on their platforms, with some specific exceptions which target content that violate federal criminal law or are generated by the service provider themselves. However, this immunity has been questioned recently and Biden has stated that “he wants to revoke Section 230’ and thus “[repeal] the laws that protect Big Tech” (Hamilton, 2020).

On the other hand, the Facebook Oversight Board, established in 2018, is an example of a third party adjudicator whereby the board assesses if the content taken down by Facebook violated community guidelines. Moreover, Facebook’s White Paper, *Charting the Way Forward: Online Content Regulation*, urged for global rather than national policies, to manage such issues (Bickert, 2020). This also falls under a co-governance strategy, although EU’s Commissioner for the Internal Market, Thierry Breton, found the company’s offering “too little in terms of responsibility and regulation” (Lomas, 2020). Going further than intervention and regulation, US Senator Elizabeth Warren set out a plan to dismantle the tech monopolies. This

would include unwinding tech mergers and prohibiting online marketplaces that generate annual global revenues above \$25 billion from “both owning the platform and doing business on it” (The Economist, 2019).

Having gleaned the different approaches to tackling Big Tech, the following section focuses on the dominant doctrines in the US regarding antitrust legislation, as well as their inadequacies with respect to the digital economy.



### III. Inadequacies of dominant doctrines in the US

The debate around the dismantling of Big Tech finds its root in doctrinal clashes around antitrust legislation and the purpose of such legislation in the United States. In this section, we situate dismantling in the broader American legislative and doctrinal history of antitrust. Most notably, we explain how advocates of structural policies, such as dismantling, have clashed with advocates for narrower and more conservative antitrust legislation. These doctrinal clashes highlight the weaknesses of both approaches and help explain the inconsistencies and potential pitfalls of current American approaches to Big Tech regulation.

#### A. Making sense of the Sherman Act: Chicago School vs New-Brandeisian

The key antitrust legislation in the US is the Sherman Act. Particularly relevant for our study is Section 2 which covers monopolisation:

*“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].”*  
(Sherman Act, 1890)

The Sherman Act is routinely described as open-ended, “sweeping and unspecific” (Drivas, 2021: 1906) and “notoriously vague” (Creser, 2021: 304). For this reason, courts have taken up an important role in refining what constitutes anti-competitive behaviour. The Supreme Court specified the definition of monopolisation in *United States v. Grinnell Corp.* in 1966 as being “the possession of monopoly power in a given market” and the “willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident” (Drivas, 2019: 1908). Therefore, for a claim to be brought before a Court, one needs to prove the existence of a monopoly, within a defined market, and that there is evidence of abusive and exclusionary conduct (Stuart, 2021: 409).

Doctrinal clashes have had a consequential influence on judicial decisions as to what constitutes competitive or anti-competitive behaviour. As explained by Drivas (2019), the

definition of exclusionary conduct is not straightforward, as “aggressive competitive behaviour that can benefit consumers is often indistinguishable from exclusionary conduct that reduces long-run competition and consumer welfare” (1908). This means that antitrust rulings are prone to false positives or false negatives that may hamper innovation and overall economic welfare: “wrongly proscribing behaviour discourages businesses from competing, whereas failing to condemn exclusionary conduct allows monopolists to crush rivals before they can viably compete” (ibid). Two schools of thought have emerged to fill in these blanks through doctrine: structural economists (also called New-Brandeisians) and the Chicago School (Creser, 2021: 302). These two approaches differ in their definitions of competitive and anti-competitive behaviour.

The Chicago School emerged in the 1970s in reaction to controversial court decisions that were seen as having a negative impact on consumers. It aimed at recentring antitrust concerns around a narrow consumer welfare standard in order to limit the risk of “false positives”, that would mistake competitive behaviour with anti-competitive behaviour. By this understanding a practice is anticompetitive “if it harms consumers by reducing the value or welfare they would have obtained from the marketplace absent the practice” (Krattemaker, Lande & Salop, 1987). According to them, using consumer welfare in a “streamlined economic approach” (Creser, 2021: 304) is the best way to objectively ground judicial decisions without hampering innovation and competition (idem: 305). This doctrine has come to dominate the antitrust debate, and shape most judicial decisions since the 1970s.

New-Brandeisians emerged in opposition to the Chicago School. They claim that the Sherman Act's intent was to focus on process and structure rather than outcome (Khan, 2017: 739). They believe that “concentrated market structures promote anticompetitive forms of conduct”. The corollary of this premise is that “a market dominated by a very small number of large companies is likely to be less competitive than a market populated with many small and medium-sized companies” (idem: 718). Concentration is seen as inherently harmful in that it “enables firms to squeeze suppliers and producers, [endangers] system stability (for instance, by allowing companies to become too big to fail), or [undermines] media diversity” (idem: 743). In order to maintain the “competitive process”, New Brandeisians argue for the protection of “structural conditions” through more interventionist policies that would limit market concentration and favour competition.

As reflected by clashes between the Chicago School and New Brandeisians, the debate around monopolisation in the United States is pervaded by ambiguities and doctrinal clashes. This debate is particularly intense on issues centred around the digital economy.

## **B. How does market concentration arise in the digital economy?**

Before tackling the application of antitrust laws to the digital economy, it is important to understand why industries within the digital economy are prone to concentration. According to Creser (2021), internet concentration can be explained by a conjunction of phenomena that enable firms to “capture market power and preserve it over time” (294). These phenomena make these firms particularly prone to tipping, meaning that “once a firm gains enough users in a given market, it establishes itself as a powerful incumbent—one that is difficult to displace”, which advantages first movers: “early advantages become self-reinforcing” (Khan, 2017: 787).

### ***Network effects***

Network effects can be described as the phenomenon whereby “individuals’ desire to be on the platform increases as more people they know join the network, linking the value of the social network to its size” (Creser, 2020: 295). In other words, “network effects arise when a user’s utility from a product increases as others use the product” (Khan, 2017: 785), which means that as a firm gets bigger, so does its popularity and the benefit that its users derive from it. As such, these effects can help a platform increase its market power through a “virtuous cycle that rewards first movers” (Drivas, 2019: 1911).

### ***Economies of scale***

According to Creser, digital platforms tend to “enjoy increasing returns to scale”, which means that “after initial investment in fixed costs to create a service, a digital platform can generate profit as customers join the platform”. Once the platform attains a critical mass, “it enjoys lower average costs per customer, giving it a significant advantage over competitors that have not yet invested in the development of a new platform” (Creser, 2020: 296).

### ***Data-driven barriers to entry***

More and more scholars are considering the rise of data-driven barriers to entry, which are amplified by the phenomena described before. Santesteban and Longpre (2020: 465) argue

that a potential new entrant is faced with a data deficit, which “limits its ability to compete”, as it cannot access the “same level of quality or variety of products and services without access to large numbers of consumers who will provide it with data”. In other words, as a platform expands, it deprives its rivals “of the key input to make their products competitive, that is, the continuous stream of user data”. This leads to the “perpetuation of a dominant platform’s market power, which hampers the “dynamic competitive process necessary for innovation” (idem: 464). Furthermore, from a cost perspective, machine learning advances require “high fixed cost and low marginal cost”, which favours ‘large firms that can spread the fixed cost over a large number of units” (Hemphill, 2019: 1977).

All these phenomena are self-reinforcing and create a virtuous loop that favours a few established incumbents and raises barriers to entry for new entrants.

## **C. Loci of competition**

Harold Feld, Senior Vice President of Public Knowledge and author of “The Case for the Digital Platform Act,” explains that within the digital economy, competition may take place either between platforms or on platforms directly (Feld, 2019b: 73). Competition between platforms opposes “platforms providing the same type of service (e.g., between Google Search and other general search providers such as Bing)” or “between the platform and some subset of services (e.g., between Google Search and specialised “vertical” search platforms such as Yelp)” (ibid).

On the platform, competition opposes “businesses using the platform (e.g., two businesses selling goods through the Facebook Marketplace)” or businesses and “a vertical affiliate of the platform itself (e.g, between retailers and Amazon’s competing retail products)” (ibid). The latter form of cooperation refers to the notion of vertical integration, whereby “two or more successive stages of production and/or distribution of a product are combined under the same control.” (Khan, 2017: 731). For example, Amazon Basics manufactures products that are then sold on Amazon, which means that “Amazon’s rivals are also its customers” because these sellers rely on Amazon’s delivery services (idem: 754).

## D. The difficulty in applying antitrust laws to the digital economy

Thus, platforms “pose unique challenges for antitrust analysis” (Khan, 2017: 784). More specifically, economists “stress that analysis applicable to firms in single-sided markets may break down when applied to two-sided markets, given the distinct pricing structures and network externalities” (ibid). Further, Francis (2021: 14) explains that because attributes such as “strong network effects”<sup>1</sup>, “platform dynamics”<sup>2</sup>, “unpredictable competitive trajectories”<sup>3</sup>, and “zero consumer prices”<sup>4</sup> “old taxonomies and standards” may be hard to apply to the digital economy. For these reasons, some have wondered whether “antitrust should be forgiving of conduct that might otherwise be characterised as anticompetitive” (ibid) or whether these specifics call for modifications of antitrust laws to better address data-driven concentration. The *Chicago School v. New-Brandeisian* clash has been transposed to judicial decisions and political proposals around the digital economy. Two specific conducts tend to be central to these debates: **predatory pricing and discrimination on vertically integrated platforms.**

**Predatory pricing** is a phenomenon whereby “large corporations slash prices below the cost of production with the intent to destroy their competitors and render them unprofitable”. “This allows them to acquire a monopoly in the particular locality where the discriminating price is made” (Clayton Act, 1914 in Khan, 2017: 723). Predatory pricing is especially prevalent in platform economics, since several platforms offer their services to users for free, or at least below production cost.

Proponents of the Chicago School, who assess antitrust on the basis of price efficiency, argue that “cutting prices in order to increase business often is the very essence of competition” (Powell, 1986 in Khan 2017: 728) and argue that it is “unlikely that internet platforms harm consumers when they offer products for free” (Drivas, 2019: 1912). On the other hand, New Brandeisians see predatory pricing as anti-competitive behaviour through which big techs such as Amazon establish dominance by “chas[ing] market share and driv[ing] out one’s rivals” (Khan, 2017: 786). Drivas (2019) notably argues that by “equating consumer harm with high

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<sup>1</sup> Phenomenon whereby a service becomes more desirable as more people use it

<sup>2</sup> Phenomenon whereby people value a service because it helps them connect and interact with other people “

<sup>3</sup> Phenomenon whereby digital services foster innovation, and add new features

<sup>4</sup> These prices tend to be supported by advertising

prices”, proponents of the Chicago School fail to see how “free products [may] harm consumers by displacing more creative or proconsumer rivals” (1911). New Brandeisians believe such strategies favour market concentration and are detrimental to competition, innovation and to the consumer in the long run (idem).

**As for vertical integration**, the Chicago School claims that “by replacing market transactions with administrative decisions within the firm [...] vertical arrangements generated efficiencies that anti-trust law should promote” (Khan, 2017: 733). On the other hand, Brandeisians argue that vertical integration constitutes a threat to competition, since a platform can use its dominant position in one sector of the economy as leverage to establish its dominance in another (idem: 731). Similarly, these firms can use “one line of business to disadvantage rivals in another line” (ibid).

These divergences yield radically different policies. On the one hand, a conservative policy framework that tolerates concentration as long as prices do not increase (Bush, 2018: 513) and relies on market dynamics to counter monopolies (The Wall Street Journal, 2020), and on the other, an interventionist policy framework that seeks to implement more radical structural changes such as the structural separation and product unbundling of different services (Feld, 2019a: 10), the requalification of certain platforms as common carriage to ensure non-discrimination (The Economist, 2019), or banning platforms from both operating and competing on a marketplace (Khan, 2017: 796).

Both approaches bring in valid points. New Brandeisian’s approach brings an important critique of Chicago School’s premises, which is more cogent of potential predatory strategies that are enabled by concentration in the digital economy. However, Chicago School proponents legitimately highlight potential shortcomings of a mere structural approach: it lacks effective regulation to address more sector specific issues that are the drivers of such a concentration (such as data privacy concern and data-driven concentration) (Creser, 2020: 311; Feld, 2019a: 11; Stuart, 2021: 432). Further, some of these provisions risk rendering these platforms useless. Most notably, the common carriage proposition that appears in Elizabeth Warren’s plan:

*“requires the service to treat all similarly situated customers the same and prohibits any unjust or unreasonable discrimination among users... But an important role of*

*many platforms, such as search, is to help users sort information. This makes common carriage largely inapplicable to digital platforms “ (Feld, 2019b: 24).*

The teachings of this evaluation of current doctrines can be summarised by Francis’ (2021) notion of an “antitrust crisis” (3), in which antitrust is ridden with ambiguities, doctrinal clashes and grey areas that prevents agencies and courts from taking actions necessary to prevent business from engaging in anti-competitive and predatory behaviour. These clashes have led to inconsistent rulings that we will present in the following section and attempt to solve under a more adequate antitrust framework.

	<b>Chicago School</b>	<b>New Brandeisian</b>
<b>Definition of anti-competitive behaviour</b>	Behaviour that results in the consumer paying higher prices because of a firm’s dominance	Behaviour that leads to the concentration of the market and increase in a firm’s market power
<b>Antitrust and predatory pricing</b>	Believe that as long as firms do not recoup their losses in the short term, then it’s a driver of competition since prices are lower	Anti-competitive behaviour through which Big Tech firms establish dominance, in the medium/long-term
<b>Vertical integration</b>	It is in and of itself a vector of efficiency that should be promoted. However, proven discrimination should be prohibited through narrow regulations	Threat to competition in that a Big Tech can use its dominant position in one sector of the economy as leverage to establish its dominance in another and disadvantage its rivals
<b>Resulting policy</b>	Tolerates concentration as long as prices do not increase. Limits governmental intervention on monopolies. It is the dominant doctrine.	Seeks to implement structural changes to prevent market concentration (dismantling, among many other policies). It is gaining political support.

## IV. Different types of monopolisation warrant different responses

In this section, we scrutinise the definition of monopolisation which is necessary to make informed decisions on whether to break up Big Tech, since each instance may differ from the other. Specifically, we attempt to resolve the ambiguity between the aforementioned two schools of thought (i.e., Chicago School vs. New Brandeisian) through the introduction of two kinds of platform competition (nascent competitors and disruptive incumbents) to better account for structural factors. This provides a more holistic view, taking into account the platform's intention and concentration effects rather than solely focussing on prices.

Hemphill's (2019) essay *Disruptive Incumbents: Platform Competition in an Age of Machine Learning* in the Columbia Law Review argues that the acquisition of a "nascent competitor" by another platform should be regarded as unlawful as it maintains monopoly, whilst the introduction of fresh competition by "disruptive incumbents" in the market should be more leniently dealt with by antitrust regulators. He defines these terms as such:

*A nascent competitor* is a threatening new entrant that, in time, might become a full-fledged platform rival. For example, Instagram posed an important threat to Facebook shortly after Instagram's launch in 2010. *A disruptive incumbent* is an established firm, often another platform, that introduces fresh competition in an adjacent platform market (idem: 1974).

He further argues that the "Sherman Act prohibits the acquisition of a nascent competitor as a form of unlawful monopolization" and is a "better fit for the evaluation of some acquisitions, due in part to judicial recognition that the target need not operate in the same antitrust market as the acquirer" (ibid).



## **A. Nascent competitors: *United States v. Microsoft*; Facebook/WhatsApp acquisition**

Hemphill (2019) argues that Section 2 of the Sherman Act – which prohibits one from monopolising or attempting to monopolise – is the “appropriate framework for evaluating acquisitions by an incumbent platform” (1984). *United States v. Microsoft* started in 1998 when the US Justice Department along with the Attorneys General of 20 states and the District of Columbia sued Microsoft for attempting to inappropriately neutralise threats to its Windows operating system monopoly. The court eventually found that Microsoft had indeed used “various tactics, including bundling, to prevent Netscape – an Internet browser company – from developing a middleware platform that could compete with Microsoft Windows and provide access for competing applications software producers” (Crandall & Jackson, 2011: 323). The Department of Justice concluded that network effects would render the “entry of competing operating systems and Internet browsers very difficult” and thus Microsoft’s series of actions were “designed to destroy Netscape, cutting off potential entry into operating systems and applications software” (ibid). Hemphill (2019: 1985-1986) surmises that the Microsoft case is significant in three ways:

1. The perceived competitive threat does not need to be full-fledged
2. The perceived competitive threat does not need to operate in the same market
3. Monopolisation may occur as collaborations instead of “pure exclusion”

These lessons from *United States v. Microsoft* did not appear to be properly considered when Facebook acquired Instagram in 2012 and WhatsApp in 2014, both on the part of American as well as European antitrust regulators. Facebook is the world’s biggest social network<sup>5</sup> platform and its move from the desktop/web interface to the mobile/app interface found itself at a disadvantage compared to Instagram’s mobile-first interface as the social media giant struggled to compete in its mobile photo sharing affordances. Kosman (2019 in Hemphill, 2019) reports that Facebook’s acquisition might have been intended to destroy Instagram entirely – to “eliminate a potential competitor” (similar to Microsoft’s anti-competitive actions towards Netscape decades ago). However, the Federal Trade Commission (FTC) had not challenged the acquisition.

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<sup>5</sup> As of 2019, Facebook had over two billion users and a market capital of over \$500 billion (Facebook, 2019 in Hemphill, 2019)

At this point, it is worth noting how regulators responded to this acquisition and why Facebook was allowed to go ahead with it. Namely, the European Commission's actions were inadequate in two ways in addressing contemporary data-driven mergers and acquisitions: (1) the Commission's price-centric analysis is fallacious and incompatible and (2) the Commission's belief that "similar products compete more fiercely than dissimilar products" (Stuart, 2021: 415). However, it should be noted that the EC used to rely on tests similar to the US and has since departed from that after a realisation that prices cannot fully capture the nuances of competition.

### **(1) *Price-centric analysis as an inappropriate metric***

Firstly, price-centric analyses such as the SSNIP (small but significant and non-transitory increase in price) test<sup>6</sup> are ill-suited to evaluate whether particular mergers and acquisitions are pro or anti-competitive. With regards to the Facebook/WhatsApp merger, the SSNIP test yielded results suggesting that there would be a price reduction after the merger which makes it pro-competition – an incorrect conclusion. Stuart (2021) points out that price-centric analysis fails to consider the "impact on quality parameters, namely privacy and data collection" which have the "potential for an exploitation of consumers through an ever-evolving degradation of the privacy and data protection rights of users" (413-414). In a sense, the act of asking users to supply more personal information as well as sharing more personal data to third parties (e.g., advertisers) can be construed as a "form of price increase or quality degradation" and therefore be in violation of competition law (idem: 418).

Stuart (2021) hence asserts that regulators should not "tak[e] the testimony of online platforms at face-value" as it can "prove problematic and increase the risk of yielding negative competitive effects" (418). Facebook's revision of WhatsApp's privacy policy post-acquisition also allowed it to "collect user data that it would not otherwise have been able to obtain – namely that of more privacy-aware users who had chosen WhatsApp for its enhanced privacy settings" (idem: 424). This demonstrates that Facebook's acquisition of WhatsApp produced a detrimental effect on consumers, especially those who were unable to switch to an alternative platform due to a variety of reasons (elaborated in the next section).

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<sup>6</sup> SSNIP is often used in competition law to evaluate if a company possesses enough market power to justify government intervention, in order to approve or block mergers and acquisitions

## **(2) *Monopolisation and antitrust conduct across different markets***

Secondly, the European Commission argued that the fact that WhatsApp and Messenger (Facebook's messaging platform) had different privacy policies suggested that they were not competitors and went further to assert that the platforms were "complementary" since they were used "simultaneously" by users who are able to "multi-home", which refers to users using different platforms at the same time without exclusivity (Stuart, 2021: 415). For example, the Commission found that 60-70% of Messenger active users also used WhatsApp which would not significantly affect the "network effects that raise barriers to entry and increase switching costs" (idem: 422-423). Revisiting the aforementioned forewarning that regulators should not readily accept online platforms' testimonies at face value, Stuart (2021) asserts that the Commission should have been suspicious about why Facebook was willing to acquire WhatsApp for \$14 billion despite this alleged insignificant effect in network effects. On the contrary, WhatsApp grew to over a billion users and Messenger grew by 100 million users in the first three months after the merger, which can be explained by how consumers have fewer choices in messaging platforms after the merger due to the pronounced role of direct network effects in communication services (i.e., one's choice of messaging platform is dependent on the app which one's family and friends use) (ibid). As such, users are often pressured against migrating to another platform.

The Commission also found that Facebook and WhatsApp were very different and therefore could not be in competition with each other (idem: 415). As such, the EC failed to recognise Facebook's intentions for acquiring WhatsApp. Instead, the regulators should be sensitive;

[...] where markets converge, [they] should consider whether the incumbent (Facebook) is seeking to eliminate a "maverick firm" (Whatsapp – which was offering greater privacy protections) in order to consolidate its position (idem: 416).

Ideally, regulators should conclude on a strategy that protects consumers – often ill-informed due to asymmetric information – from having their data exploited by companies; and also encourages innovation and "healthy competition in the market" (ibid).

Overall, both regulators from the EU and the US heavily relied on the incumbent platform's (Facebook) representations on their merger and acquisition intentions but “failed to impose any conditions or safeguards”, which is a “naivety [that] has since been relied upon and exploited” (idem: 422) by Big Tech companies. In other words, both the US and EU were ill-equipped to analyse the consequences and to deal with the Facebook/WhatsApp merger. Interestingly, the FTC sued Facebook in December 2020 for illegal monopolisation in its acquisition of WhatsApp and Instagram, and seeks the federal court to “require divestitures of assets, including Instagram and WhatsApp; prohibit Facebook from imposing anticompetitive conditions on software developers; and require Facebook to seek prior notice and approval for future mergers and acquisitions” (FTC, 2020). The suit was initially dismissed in 2021 and, after an appeal by the FTC, allowed to proceed in January 2022 (Kolhatkar, 2021; Allyn, 2022). This is an example of US regulators attempting to seek *ex post* remedies through judicial orders, which would not have been necessary should there be robust (*ex ante*) laws and regulations in the first place. This is particularly relevant considering how judicial proceedings are cumbersome, requiring considerable evidentiary burden on the part of the regulator (plaintiff) which often does not have access to such information in the first place. Moreover, Drivas (2019) points out that “courts, relying on imperfect information, often struggle to determine which view is correct” (1908), suggesting the shortcomings of *ex post* judicial proceedings which might necessitate a thorough review and strengthening of *ex ante* laws.

## B. Disruptive incumbents

The case of disruptive incumbents, as previously mentioned, refers to a phenomenon where an established player “launches an attack on the core business of another” (Hemphill, 2019: 1993). Hemphill (ibid) illustrates this “special case of innovation and competition” using Google’s foray into areas “outside [its] home market”:

Market	Disruptive incumbent	Monopolist
Shopping	Google Shopping	Amazon
Social networking	Google+	Facebook
Productivity	Google Docs Gmail	Microsoft Word Microsoft Outlook
Internet browsers	Google Chrome	Microsoft Internet Explorer

This kind of fresh competition can be healthy and beneficial. For example, Google’s acquisition of Android Inc. in 2005 and development of the Android smartphone operating system (Manjoo, 2019 in Hemphill, 2019) saw rapid innovation due to the intense competition between Android and Apple, such as Android’s focus on touchscreen interfaces after the launch of the iPhone in 2007 which provided consumers with a viable alternative to the Apple smartphone (Gao, 2016 in Hemphill, 2019). Apple was also originally obstinate in restricting iPhone to a petite size but was eventually pressured to abandon this stance after Android’s larger phones were met with success (Edwards, 2014 in Hemphill, 2019). This suggests that robust competition can exert pressure on companies to rethink their existing business models and value propositions, which can bring about positive effects on consumers (e.g., consumers now have the option to purchase larger phones from Apple and Android). Android remains the world’s biggest operating system as of March 2022 at 71.7% whilst Apple’s iOS is its primary competitor at 27.6% (Statcounter, 2022). The Android case exemplifies the advantages of cross-market disruption in that it:

1. Provides consumers with competitive alternative products
2. Applies a downward pressure on the monopolist’s prices
3. Applies pressure on firms in the market to innovate

### C. Breaking up Big Tech: inadequate and unsustainable?

Insofar as the size and dominance of Big Tech firms might afford them with unfettered power to subsume smaller competitors and engage in improper practices, breaking these firms up may neither be adequate nor sustainable. Looking back at US history, the break-up of telecommunications giant AT&T in 1984 into seven Regional Bell Operating Companies (RBOCs) or “Baby Bells”, over a decade by the Department of Justice and the Federal Communications Commission (FCC), provides valuable insights into whether breaking up large monopolies truly yields meaningful results. Feld (2019a) found that the FCC “continued to regulate AT&T long-distance as a dominant carrier until 1995” (11) – 11 years after the break-up. Kimmelman & Cooper (2017) describe the communications market as an “oligopoly on steroids” since the 1996 Telecommunications Act lifted restrictions as the market had concentrated itself (e.g., acquisition of Sprint by T-Mobile), much akin to how AT&T consolidated itself as a monopoly 35 years prior.

Feld (2019a) refers to this as the “starfish problem”, alluding to a starfish’s ability to regenerate its limbs when torn apart. He thus advocates for “vigorous antitrust investigation and enforcement against dominant platforms” and for regulators to “carefully consider what regulatory framework will prevent the market from simply returning to its highly concentrated state” (12).

A more contemporary example would be Facebook’s acquisition of WhatsApp in 2014 and Instagram in 2012. Feld (2019b) argues that regulators will not be able to cultivate robust competition even if they were to divorce Instagram and WhatsApp from Facebook (now Meta), since Facebook maintains its dominance in the social networking market whilst the descendants of WhatsApp and Instagram would “instantly create two new dominant platforms – one in messaging and one in photo-sharing”, hence creating “three starfish, each dominant in its specific market” (100), once again necessitating regulatory intervention.

Similarly, divorcing Google from YouTube might “[limit] the available data to each company, somewhat reducing their combined power in the targeted advertising market”, but similar to the former situation (breaking up Facebook), Google and YouTube would “remain the dominant search and dominant video sharing sites respectively” (ibid). In this regard, breaking up Big Tech firms clearly has its limitations and inadequacies, which necessitates a tighter and more nuanced approach which evades the “starfish problem”.

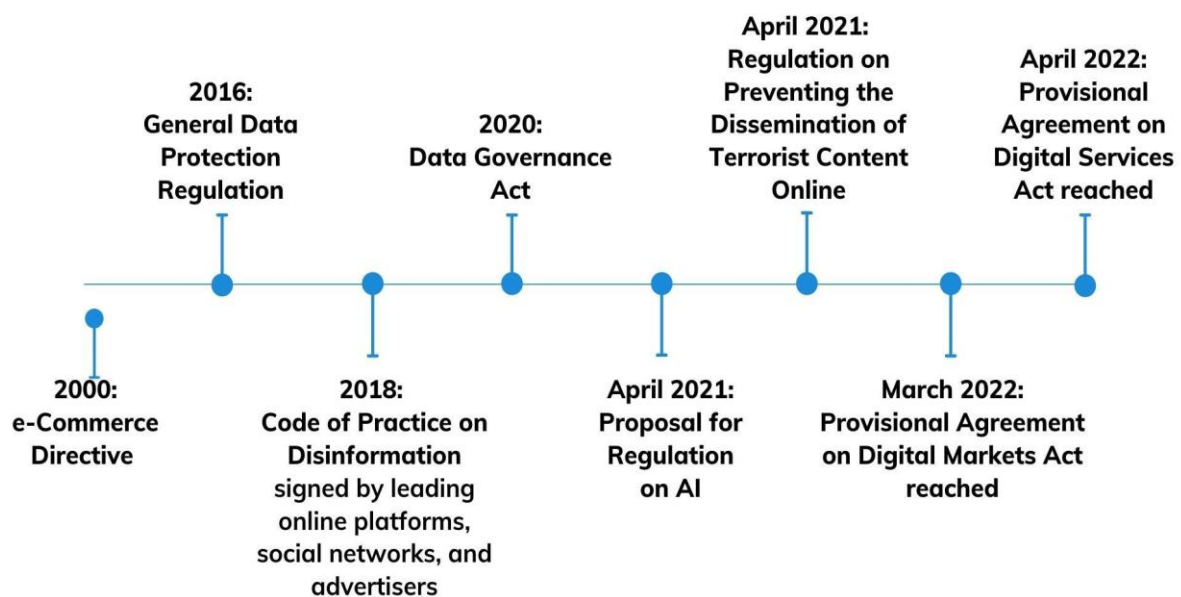
Even if authorities find a way around the “starfish problem”, there are specific practical drawbacks and issues that plague the dismantling of Big Tech. For example, *The Economist* (2019) highlights the potential challenges in Elizabeth Warren’s initial plan to break up Big Tech, since estimating the value of a break-up can be difficult since break-ups can destroy value as “synergies would evaporate” when companies can “no longer be able to offer a tightly integrated package of hardware, software and services, which is its main competitive advantage”. Apart from the challenges in establishing the value of break-ups, pragmatic concerns regarding the information collected by Big Tech further problematise its break-up. For instance, it is unclear which parts of the company should retain consumer data, amongst other data privacy concerns. Furthermore, it is difficult to make a case for why some Big Tech companies should break up whilst others should not, as *The Economist* (2019) raises the comparison between Facebook/WhatsApp and Apple/iMessage.

Finally, breaking up Big Tech companies can engender unintended ramifications such as negative reactions from the market “if divestitures were to weaken network effects” (ibid). It could also “introduce friction” which leads to price increases as well as platforms “cut[ting] investment, thus slowing innovation” (Khan, 2017 in *The Economist*, 2019).

## V. Notes from the EU

EU competition rules aim to “enable the proper functioning of the EU’s internal market as a key driver for the well-being of EU citizens, businesses, and society as a whole” (Parenti, 2021). The Treaty of the Functioning of the European Union (TFEU) contains articles 101 and 102 which have defined EU competition law since 2009 – the articles address antitrust and cartels, merger control, state aid control, and legislation regarding compensation for damages (Erbach, 2014). The European approach follows the logic of ensuring effective competition across member states so that businesses are “pressured to offer the best possible products at the best possible prices for consumers” (Parenti, 2021).

In dealing with monopolisation, both the US and EU approaches require there be “existence of a monopoly power within a market [and] some form of abusive conduct” (Stuart, 2021: 409). The European courts defined monopoly power as “a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition [...] on the relevant market by giving it the power to an appreciable extent independently of its competitors, customers...and consumers” (ibid). However, these definitions and practices do not target the platform economy and Big Tech dominance effectively. In this context, the EU has taken various new measures to protect competition, businesses and consumers:





## A. New EU Regulations

Between 2016 and 2020, the European Commission strove to address issues created by Big Tech through competition law, citing legislation contained in article 101 and 102 of the TFEU. The former prohibits anti-competitive agreements between two or more independent market operators, whilst the latter “prohibits abusive behaviour by companies holding a dominant position on any given market”. Another relevant piece of legislation is the Merger Regulation which seeks to regulate mergers and prevent concentration that may prevent competition and/or harm consumer welfare ([Regulation No 139/2004](#)). Most notably, [Facebook was fined in 2017](#) for “providing misleading statements during the company’s 2014 acquisition of the messaging service WhatsApp”, especially related to its use of Whatsapp data (Condliffe 2018). Google was fined for abusing its dominant position in [2017](#) for its preferential search tool that “favored its own shopping service over its rivals in online search results” (ibid), and again in [2018](#) for “striking deals with smartphone manufacturers that favored Google services, like its Chrome browser, over those offered by rivals” (ibid). What became apparent following this succession of fines, was that these sanctions did not succeed in mitigating the economic concentration that enabled such anti-competitive behaviour to occur in the first place (ibid).

The past few years have seen a volley of regulations implemented, such as the GDPR as well as proposed regulations that have reached agreement, such as the [Digital Services Act \(DSA\)](#) and [Digital Markets Act \(DMA\)](#). The [Data Governance Act \(DGA\)](#) is also interesting to note as a proposal in the pipeline of the triilogue. These regulations emerged as a way to adapt the European legal framework to the intricacies of platform economics and thus, all of the above address online service providers and online marketplaces in varying capacities.

Whilst the GDPR addresses user data privacy and security law, the DGA lays the ground for broader data-sharing. The act allows for better use of “data collected in some public sector areas” such as “health, environment, energy, agriculture, mobility, finance, manufacturing, public administration and skills” that would appear on data marketplaces accessible to firms and researchers. It also provides for a certification tool that regulates the data marketplaces by defining “intermediaries recognised as trustworthy data organizers”.

The Digital Markets Act emerged as a **sector-specific ex ante regulation** that would complement existing European anti-competition framework by specifically targeting big corporations considered to be “gatekeepers”. In addition to categorising different players in

the digital economy by size, it also details thorough implementation and enforcement measures, along with a sanctions plan that is more exhaustive than the TFEU. Most notably, DMA obligations (detailed in the table on page 27) seek to mediate potential lock-in effects, or self-preferencing practices by demanding that gatekeepers ensure the interoperability of instant messaging services, inform the Commission of their acquisitions and mergers, and refrain from ranking their own products higher than those of others, among many other provisions. On the other hand, the DSA seeks to regulate different types of online intermediary services, especially regarding harmful content online, data collection, and enforce transparency measures (David, 2022). Both of these regulations complement each other to create “a safer digital space [and] establish a level playing field to foster innovation, growth, and competitiveness” (European Commission, 2022a). Most importantly, they include definitions of terms specific to the digital economy and Big Tech:

***Digital Services:***

These include online intermediary services, hosting services, online platforms, and very large platforms. The **DSA** sets out different obligations for the services proportional to their “role, size, and impact in the online ecosystem” (European Commission, 2022b).

***Very Large Online Platforms (VLOPs):***

These are defined in the **DSA** as platforms with a reach of “more than 10% of 450 million consumers in Europe” (European Commission, 2022b) and pose specific risks such as dissemination of fake news or illegal content online.

***Gatekeepers:***

The **DMA** designates gatekeepers as large online platforms that have had an annual turnover of at least €7.5 billion within the EU in the past 3 years or have a market valuation of at least €75 billion and have at least 45 million monthly end users and at least 10,000 business users established in the EU. The platform must also control one or more core platform services (marketplaces, app stores, search engines, etc) in at least 3 member states (Council of the EU, 2022). This designation can be challenged by the platform through a specific procedure if they disagree with it.

Following years of the EU's efforts in imposing fines and bringing antitrust cases against tech companies for harmful business practices, the DSA and DMA enter the environment as *ex ante* regulations that will “directly ban these practices and create a fairer and more competitive economic space” (Council of the EU, 2022). The DMA is particularly relevant to anti-competitive practices as it focuses on the behaviour of platforms considered to be gatekeepers. Notably, its enforcement plan includes provisions for behavioural and structural remedies, such as the divestiture of a business or parts of it, in the event of systematic infringements which is reminiscent of American calls to dismantle Big Tech. Nevertheless, the core focus of the DMA is *ex ante* regulation and innovative mechanisms to disincentive monopolies such as introducing interoperability.

Key takeaways from the regulations are summarised in the following table such that they may act as reference points for the US, moving forward (see Page 27).

## B. Limitations of EU Regulations

Since the DSA and DMA are not in force yet, it is difficult to ascertain how these regulations will fare. Its broadness and flexibility would allow it to adapt to different cases and changes in the environment. However, criticism has been directed primarily to enforcement, echoing those that had been previously made about the GDPR. Furthermore, critics of the DMA have also claimed that it could reduce innovation and make services worse for consumers. Limitations of the GDPR are easier to reflect on as it has been around since 2016. One such is directed at Article 20 on data portability – whereby a user has the right to receive personal data concerning themselves from the controller and then transmit it to another controller without hindrance (Radley-Gardner et al., 2016: 45) – has received criticism over its process.

Notably, it was found to be “time-consuming and energy-consuming” for users who are then discouraged from asking for their data (Exposito-Rosso et al., 2021: 22), and a “lack of standardisation in portability processes” was also noted, which made for a more cumbersome or even impossible data transfer process. Additionally, a lack of cooperation between firms was noted. Often, they only provided data with “little added value”, or “refused to transfer their data to another controller on the ground of technological unfeasibility” (idem: 21) or did not respect the one-month delay to send users their data. Other critics flag the vague language, lack of strong enforcement, and “one-stop-shop” system as flaws that have led to tensions and delays (Bodoni, 2021).

Adapted from Council of the EU, 2022; *Digital Services Act, 2022*; *Digital Services Act Package, 2022*; *What Are the GDPR Fines?*, 2018; *What Are the GDPR Fines?*, 2018

	GDPR	DSA	DMA
<b>Aims</b>	Protect user's personal data, restrict non-consensual processing and movement of said data, and facilitate business by clarifying rules for companies and public bodies in the digital single market	By placing citizens at the centre, the main aims are to better protect consumers' fundamental rights, establish transparency and accountability frameworks for platforms, and encourage innovation, growth and competition within the European market	Make the digital sector fairer and more competitive by ensuring that gatekeepers cannot engage in unfair business practices and act as bottlenecks between business and consumers. It sets out rules that prohibit such practices and provides enforcement mechanisms
<b>Scope</b>	Any organisation that targets or collects data from residents and citizens of the EU, processes their personal data, or offers goods or services to them must be GDPR compliant	Intermediary services that offer network infrastructure, hosting services such as cloud and web hosting services, online platforms which include online marketplaces and social media, and very large online platforms (VLOPs). Obligations are proportional to role and size of the platform	Only "gatekeeper" platforms fall under the scope of the DMA. Such providers can include search engines, social networks or online intermediation services, and will have to meet the criteria defined by the DMA to be designated as a gatekeeper. SMEs are exempt and 'emerging gatekeeper' is established as a category to keep up with the dynamism of the environment.
<b>Obligations</b> (those relevant to the topic)	<ul style="list-style-type: none"> <li>Lays out data protection principles (lawfulness, fairness and transparency,</li> </ul>	<ul style="list-style-type: none"> <li>Measures to counter illegal goods, services, or content online, and trace sellers of illegal goods</li> </ul>	<ul style="list-style-type: none"> <li>Inform the Commission of their acquisitions and mergers</li> <li>Ensure interoperability of certain</li> </ul>

<p>have been stated)</p>	<p>data minimisation, purpose limitation, storage limitation, integrity and confidentiality, accountability)</p> <ul style="list-style-type: none"> <li>• Accountability measures (prove GDPR compliance)</li> <li>• Data security and data protection by design and by default</li> <li>• Lists when you are allowed to process data</li> <li>• Provide explicit and unambiguous consent</li> </ul>	<ul style="list-style-type: none"> <li>• Notice, trusted flagger, and audit trail obligations</li> <li>• Transparency measures for online platforms, including on algorithms used for recommendations</li> <li>• Complements GDPR rules on targeted digital marketing, specifically addresses sponsored ads and consent for targeting</li> <li>• Safeguards for users</li> <li>• Research access to data</li> <li>• New oversight structures at different levels</li> </ul>	<p>services' basic functionalities</p> <ul style="list-style-type: none"> <li>• Cannot practice self preferencing on their platforms for their products or services and must give other sellers on the platform access to their own marketing performance data</li> <li>• Cannot pre-install certain software and must allow users to unsubscribe from core platform services</li> <li>• Complements GDPR rules on limits of data usage and storage</li> </ul>
<p>Penalties</p>	<ul style="list-style-type: none"> <li>• Fines are calculated for individual cases and must be effective, proportionate, and dissuasive</li> <li>• Less severe infringements can result in fines up to €10 million or 2% of the firm's worldwide annual revenue</li> <li>• More serious infringements can result in fines up to €20 million or 4% of the firm's worldwide annual revenue</li> <li>• Data subjects have the right to seek compensation from organisations that caused the GDPR infringement</li> </ul>	<ul style="list-style-type: none"> <li>• Financial fines that are proportional to the nature and gravity of the infringement. They will be specified in the Member State's national law</li> <li>• VLOPs: Fines up to 6% of the global turnover of the service provider</li> <li>• As a last resort, rogue platforms that refuse to comply can be taken to court and given a temporary suspension</li> </ul>	<ul style="list-style-type: none"> <li>• If a gatekeeper violates these rules, it can be fined up to 10% of its total worldwide turnover</li> <li>• Repeat offences can be fined up to 20% of worldwide turnover</li> <li>• Systematic failure to comply (defined as at least 3 times in 8 years) can result in the Commission opening an investigation and potentially imposing behavioural/structural remedies such as structural separation only where there is no other equally effective solution</li> </ul>

## VI. Need for doctrinal changes

Having considered both the US and EU approaches towards antitrust regulation and laws governing online platforms, we recognise that moving forward, we need to expand our understanding of harm to accommodate ethical considerations and social good. Here, Feld (2019b: 5) emphasises that the purpose of regulations should be to “achieve particular social goals that express our values as a society” rather than focus solely on economic efficiency. We must strike the balance between reaching our social goals and prioritising the economy. Part of this can be achieved by recentring consumers in our approach to antitrust and competition.

To this end, Feld proposes a new measure of platform dominance: the cost of exclusion. This measures “the cost to a business or individual of being excluded from a specific platform” and if the cost is “sufficiently high”, the firm can be assumed to be a dominant firm and thus require targeted regulation (ibid). In this context, three points have been kept in mind when framing our proposal:

1. **Social good and ethical considerations:** Bush (2018) notes that antitrust needs to be expanded to view consumer welfare as an ethical consideration, rather than only a scientific calculation. This entails “protecting small businesses, consumers, the competitive process, and the political process” (idem: 524) instead of only protecting competition.
2. **Defining service quality:** Quality metrics tend to be limited or absent due to a lack of measurable variables. This allows “quality reductions through decreased privacy protections” (Stuart, 2021: 412) to be ignored, ultimately harming consumers.
3. **Privacy concerns:** Antitrust does not account for “unregulated collection of consumer data for commercial purposes” (Creser, 2021: 292). This exploitation, manipulation, and violation of consumers’ privacy must be prioritised moving forward.

## VII. Recommendations

### An integrated and multi-level sector-specific approach

Our recommendations are divided into two main categories:

**(1) structural recommendations to expand and strengthen the antitrust framework;**  
and **(2) behavioural measures that pertain to regulation.**

#### A. Expanding and strengthening the antitrust framework

Feld (2019a) laments that there has been an erosion of many aspects of “pro-competition policies” and that “antitrust laws have been increasingly narrowed by judicial precedents based on economics that is now called into question” (16), as discussed in Chapter IV of the policy brief. He advocates for “targeted improvements” to antitrust policies (ibid). This is especially because antitrust enforcement is an *ex-post* remedy, necessitating the committing of anti-competitive behaviour and that the remedies are often insufficient and inefficient. As such, a “comprehensive regulatory plan is required to fully address the problems of competition in digital platforms” (idem: 17).

Through a comprehensive study of the EU’s policies – particularly the DSA and DMA – we recommend that the US take immediate measures to close up the gaps in its existing antitrust framework. For example, the EU’s policy on gatekeepers can be similarly adopted. This is similar to Senator Warren’s proposal to declare online marketplaces with turnovers exceeding \$25 billion as “platform utilities” (and therefore disallowed from operating the platform and doing business on it, like Amazon does) (The Economist, 2019). However, gatekeepers would go further than just online marketplaces to include a wider variety of digital platforms thereby addressing the limitations that Warren’s plan had. Moreover, legislators should consider further empowering regulators by mandating companies to notify regulators before any merger and acquisition. Feld (2019a) goes further to suggest that enforcement agencies should have the power to “force divestitures where appropriate”. Noteworthy, gatekeepers have to declare intended mergers regardless of the price following the passing of the DMA.



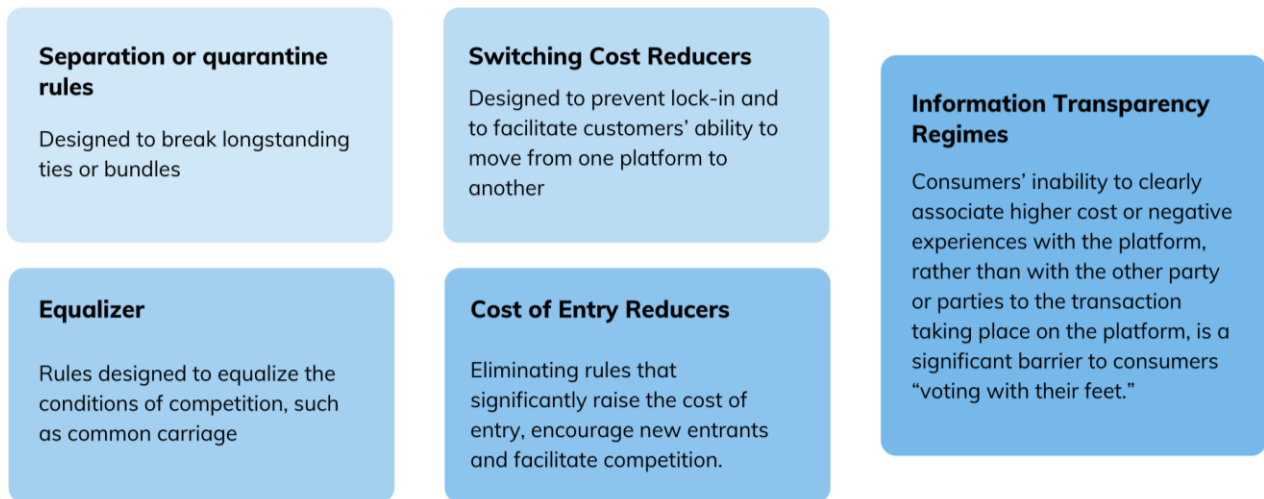
## B. The need for sector-specific regulation

As explained above, stringent antitrust legislation such as dismantling are impracticable, difficult to implement, and still require “additional regulations to address the economic factors that drive the industry to consolidation” (Feld, 2019b: 6). Echoing Harold Feld and European lawmakers, we believe that the American lawmakers should begin “with easier-to-implement behavioural regulation that is designed to encourage competition” (ibid).

Whilst the American antitrust legislation that we have evoked above is necessary to update existing antitrust regulations and attune it to the dynamism of the 2022 market, it remains laws “of general applicability” solely concerned with “size and the damage such a concentration of economic power can cause” (Feld, 2019b: 48). More sector-specific regulations are also needed in order to target “specific concerns that arise from the unique nature” of the digital economy.

Tim Wu devised a taxonomy of pro-competitive regulation which we adopted in our proposal:

### Tim Wu's Taxonomy for pro-competitive regulation (Feld, 2019b: 74)



### (1) *Enabling access to data to facilitate entry and enhance competition*

Antitrust regulations are not sufficient to “[remedy] consumer exploitation, manipulation, and privacy violations associated with the concentration of Big Tech”, and it “does not address the root cause of concentration” which would require “[changing] the underlying dynamic of data-driven innovation” (Chen, 2019). Indeed, as Creser argues “dismantling Google’s conglomerate will not

change the potential for consumer manipulation and exploitation online because the components of a hypothetically broken-up Google would still collect the same data on their own” (Creser, 2020: 310).

Our proposed regulation on data seeks to act as a switching cost reducer, an equaliser, and cost of entry reducer. This will be achieved through an integrated data framework that would borrow from existing EU legislation by **enforcing data-portability measures, relying on open APIs for interoperability, data-sharing mandates, and privacy by design provisions and transparency measures.**

### **Enforcing data portability measures**

The FTC defines data portability as “the ability of consumers to move data – such as, emails, contacts, calendars, financial information, health information, favourites, friends or content posted on social media – from one service to another or to themselves” (FTC, 2020). Enforcing data-portability “[requires] platforms to honour requests from customers to move data to other platforms in usable formats” (Feld, 2019a: 7) which ultimately “[enhances customer’s] choice and ... social graph knowledge of rival” (idem: 75).

In the US, data-portability measures have been put in place in California, under the California Customer Protection Act (CCPA). Comparable to the European GDPR, its key differences are that it targets all personal information, and it does not protect the user’s ability to transfer their personal data from one controller to another (Data Guidance & Future of Privacy Forum, 2018: 34). In order to ensure effective data-portability, the US should establish a federal right to data portability that would target all personal information and enable transfers from one platform to another. This approach should also be informed by the aforementioned pitfalls that have been identified in Europe.

We argue that to circumvent these pitfalls, federal regulation should first require firms to disclose the type of personal information that they collect on their consumers, which is a requirement of the CCPA. Second, firms should engage in a standardisation effort, based on categories of personal information, to facilitate the transfer from one business to another. A solution commonly tabled to solve this problem is to mandate APIs as the tool to enable portability (Alias, 2021: 43).

## **Data-sharing mandates and funding research in machine learning**

Moreover, intervention is needed for rivals to access “data streams similar to those available to platform incumbents” in the elaboration and refining of their platforms (Santesteban & Longpre 2020: 460). Because digital platforms rely so heavily on machine learning to improve the delivery of services and the degree of personalisation, “entrants without access to the vast continuous stream of rich consumer data possessed by the dominant online platforms are at a competitive disadvantage” (idem: 462).

Building on the Data Governance Act in the EU, this regulation would seek to go further, and require Big Tech to contribute to this data sharing process. As they have collected more expansive datasets on these topics but also on general trends, patterns and user interaction based on location for example, Big Tech have been able to personalise and improve their interface drastically, even for new users for whom they only have “their location and limited activity history” (idem: 474), which gives them a head-start on consumer interaction.

The US would benefit from a framework similar to that of the European Data Governance act, which would create an American data marketplace, and determine “intermediaries recognised as trustworthy data organizers”. This measure should go further than public sector areas and incorporate private data. Indeed, what gives Big Tech a headstart on their platforms is that they have collected more expansive datasets on these topics but also on general trends and patterns, which enables them to personalise their interface even with a new user solely based on “their location and limited activity history” (idem: 474).

Data-sharing mandates are a solution to this issue of imbalance created by the concentration of data. It is defined as the “mandatory disclosure or sharing of anonymous user data with competitors and academia. (Stuart, 2021: 427). Instead of relying on individual consumers asking for their data, and then uploading to competitors, data-sharing mandates would force specific companies to share a portion of their “voluminous dataset” with data “strictly necessary to ensure effective competition among suppliers”, inherited from their dominant status (idem: 428). This was for example done in France when the Competition Authority mandated GDF Suez to disclose its consumer data (ibid). Data-sharing mandates however need to be complemented with research into data processing (Schrepel, 2022): the raw data extracted from Facebook has little value in and of itself and needs processing to be readable and usable by competitors. Funding new techniques, such as data distillation can provide material more accessible and usable by competitors and academics. They also require privacy regulation.

### **Open APIs as a tool for interoperability and data portability**

Open APIs “[allow] rivals to access/replicate necessary elements/functions”, “[reduce] switching cost by creating interoperability among rivals,” (Feld, 2019b: 75) and ultimately “[enhance] competition by preventing lock-in [...] by providing third parties access to those elements of the platform necessary to compete with the platform and with one another.” (Feld, 2019b: 81).

APIs “[provide] the points of interconnection needed for interoperability and other kinds of interaction with the platform” (Feld, 2019b: 81). They are particularly important for “application developers” and “competitors and businesses using the platform as an essential input” (Feld, 2019a: 8). However, access to Big Tech APIs entails agreeing to licensing conditions, which may prevent developers from using this data for commercial purposes. Opening APIs will enable competitors and researchers to access certain features of a platform in order to make it interoperable.

Further, to overcome incompatibility challenges evoked in the above section, an API standard should be determined. The report “Portability: The Forgotten Right of GDPR” argues that this was put in place in the banking system under the PSD2 Directive, which enabled “external services such as rideshare services” to “offer payment functionality directly from their application” (Alias, 2021: 40). Transposed into the digital world, such measures could follow the example set by the

DMA and enable messaging platform interoperability. This means that under the DMA, small platforms will ;

be able to request that dominant gatekeeper services open up on request and enable their users to be able to exchange messages, send files or make video calls across messaging apps, expanding choice and countering the typical social platform network effects that create innovation-chilling service lock-in (Lomas, 2022).

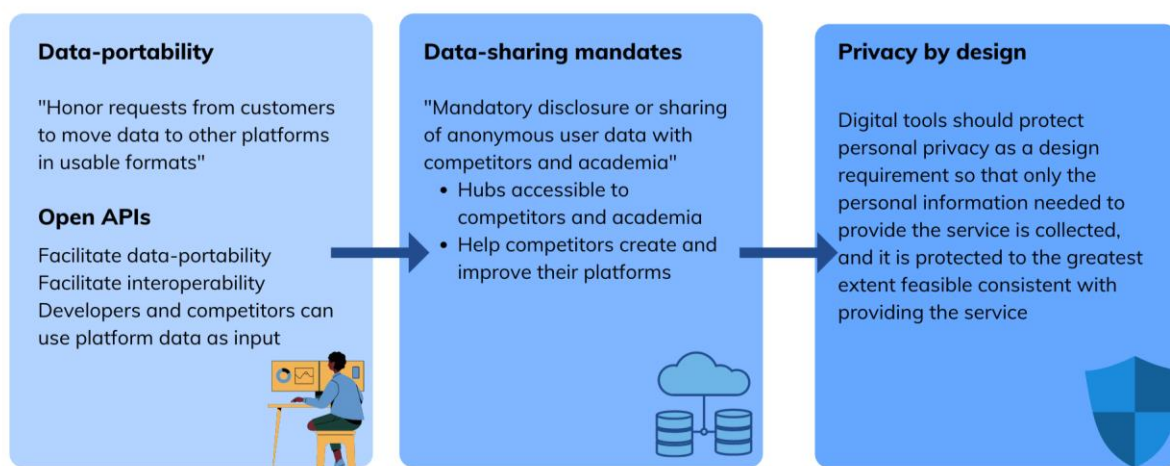
### Liability for data scraping prohibitions (Drivas, 2019)

Additionally, the US should support initiatives that have developed technologies that support data portability and interoperability, by preventing companies from prohibiting data scraping of public data on which these initiatives rely. Data Scraping enables developers and companies who do not have access to an API to collect data from online platforms. Drivas (2019) argues that courts should incrementally seek to prosecute firms that prohibit or hamper data scraping. We agree with his proposal and believe that whilst regulation and new legislation are needed, this specific point can be achieved through courts and existing anti-competition doctrine.

### Regulating the collection and use of consumer data: privacy by design

Enforcing privacy by design rules will put limitations on the type of data and information that firms can collect, first out of privacy concerns, second to limit abusive exploitation of this data (Creser, 2020: 310), and third to enhance competition (Feld, 2019b: 116).

#### Data de-concentration



## **(2) *Mitigating the effects of vertical integration: non-discriminatory rules***

Associated with these data-focused regulation, an integrated framework should also address risks of discrimination posed by vertically integrated Big Tech, as has been tackled by the DMA. Enforcing non-discrimination rules is important to first to promote innovation: if firms were to favour their own products, they could “undermine innovation at the edge of those platforms” (Singer, 2019). Moreover, it is necessary to limit vertically integrated Big Tech companies (referred to as gatekeepers in the EU) from leveraging their power to extend into multiple lines of business and disadvantage their rivals (Khan, 2017: 731) and “extort rents [from independents] in exchange for access” (Singer, 2019). To a larger extent, this would also prevent Big Tech companies from contributing to the manipulation of news and suppression of speech (ibid).

Forbidding all-out discrimination would make little sense, and risk rendering these services useless and wasteful. Europe’s approach to non-discrimination is founded in the notion of “self-preferencing” that is defined as an anti-competitive behaviour whereby “a platform’s preferential treatment of its own integrated product or service over competing products or services offered over the platform” (Francis, 2021: 53). The DMA restricts dominant platforms (VLOPs) from practicing self-preferencing, thus limiting gatekeepers’ discriminatory practices.

Under US law, it is unclear whether self-preferencing can also be considered as anti-competitive behaviour. Francis (2021) explains the ambiguity of anti-discriminatory rules under the Sherman Act by explaining that “section 2 has never been a tool for trading partners to get equal treatment with an in-house division: to call denial of such treatment “exclusion” seems to stretch the term past breaking” (54). Further, the only way to enforce non-discriminatory rules through antitrust legislation would entail considering these firms as common carriage. Feld and others explain why this would not be sustainable on these platforms;

Common carriage requires the service to treat all similarly situated customers the same and prohibits any unjust or unreasonable discrimination among users... But an important role of many platforms, such as search, is to help users sort information. This makes common carriage largely inapplicable to digital platforms. But other forms of non-

discrimination, such as a prohibition on favoring affiliated services, are both feasible and in many cases appropriate. (Feld, 2019b: 24)

An antitrust bill introduced in March seeks to add self-preferencing into the American antitrust framework. Its adoption would make it easier for Big Tech “to be held accountable for anti-competitive practices” (Wille, 2022). Were this bill to be rejected, an alternative is a more consensual approach to work towards non-discriminatory regulation, that would translate this European idea of “self-preferencing” into US regulation rather than antitrust law. An approach that could achieve this is offered by Harold Feld, who suggests “a rule that would ‘[l]imit non-discrimination to harmful economic discrimination.’” (Feld, 2019 in Singer, 2019) Under this rule, “a harmed party” would not “need to prove discriminatory intent or other improper motive;” evidence of competitive effects should suffice.’(ibid). This rule would shift the evidenciary burden away from the plaintiff, and to the platform that “possesses the data needed to prove discrimination” (ibid). Feld also argues for testing certain types of bias, and evokes the EU action against Google in 2017. He argues for “black box” testing that would be put in the hands of an enforcing agency, who would rely on “suitable standards” developed by “academic experts, standard-setting bodies, and other stakeholders”, in order to assess anti-competitive discrimination (Feld, 2019b: 113).

### **(3) *Transparency measures to inform longer term policy making***

As far as other harms identified above are concerned, we believe that the best course of action for the US would be to enforce information transparency regimes. As argued by Persily (2021), before enforcing stringent regulations on platforms content moderation, and potential amplification of harmful content, it is necessary for outside actors to objectively assess platform responsibility in these issues, and to better make sense of these mechanisms (9). His transparency agenda convincingly argues for research access to platform data, independent audits to assess biases and potential vulnerabilities (idem: 10). Through such a data access regime, researchers would be enabled to better understand the inner workings of platforms, and of their potentially harmful conduct, which would then contribute to informing further policies and regulations. This process goes hand in hand with the data-sharing mandate and data-portability measures that we have argued for in the section above.

## VIII. Conclusion

This policy brief recommends that the US government adopt an integrated and multi-level, sector-specific approach in addressing the potential harms of Big Tech dominance. We believe that simply dismantling Big Tech companies is an **unsustainable solution** due to practical concerns such as the “starfish problem” and difficulties in valuation, data management, and unintended consequences on the market and innovation. Furthermore, much of the difficulty governments currently face in regulating Big Tech arises from applying **antitrust frameworks that have not completely adapted to the radically changed digital economy**.

Our recommendations capture the **social values** we believe are important to the US and make protecting the consumer and competitors the top priority, as part of the process of fostering competition and growth. Recognising that such steps may be met with opposition, we support the current bill targeting Big Tech being debated in the US and hope to see similar steps taken in the right direction.



## Bibliography

Allyn, B. (2022, January 11). Judge allows Federal Trade Commission's latest suit against Facebook to move forward. *NPR*. <https://www.npr.org/2022/01/11/1072169787/judge-allows-federal-trade-commissions-latest-suit-against-facebook-to-move-forw>

Beard, A. (2022, January 1). Can Big Tech Be Disrupted? *Harvard Business Review*. <https://hbr.org/2022/01/can-big-tech-be-disrupted>

Bickert, M. (2020). *Online Content Regulation*. 22.

Bodoni. (2021, June 25). Europe's Data Law Is Broken, Departing Privacy Chief Warns. *Bloomberg.Com*. <https://www.bloomberg.com/news/articles/2021-06-25/eu-s-broken-gdpr-needs-fixing-departing-privacy-chief-warns>

Bush, D. (2018). Consumer Welfare Theory as an Ethical Consideration: An Essay on Hipsters, Invisible Feet, and the "Science" of Economics. *The Antitrust Bulletin*, 63, 509–528. <https://doi.org/10.1177/0003603X18815001>

Chen, A. (2019, June 6). *Making big tech companies share data could do more good than breaking them up*. MIT Technology Review. <https://www.technologyreview.com/2019/06/06/135067/making-big-tech-companies-share-data-could-do-more-good-than-breaking-them-up/>

Condliffe, J. (2018, July 18). A brief history of the impact of E.U. Antitrust fines on tech stocks (Published 2018). *The New York Times*. <https://www.nytimes.com/2018/07/18/business/dealbook/eu-antitrust-tech-stocks.html>

Council of the EU. (2022, March 25). *Digital Markets Act (DMA): Agreement between the Council and the European Parliament*. <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/>

Creser, O. T. (2021). In Antitrust We Trust?: Big Tech Is Not the Problem—It's Weak Data Privacy Protections. *Federal Communications Law Journal*, 73(2), 290–316.

David, R. (2022, April 27). « Digital Services Act » : Comment l'UE veut imposer ses règles du jeu aux géants du numérique. Public Senat. <https://www.publicsenat.fr/article/politique/digital-services-act-comment-l-ue-veut-imposer-ses-regles-du-jeu-aux-geants-du>

*Data To Go: An FTC Workshop on Data Portability*. (2020, March 10). Federal Trade Commission. <http://www.ftc.gov/news-events/events/2020/09/data-go-ftc-workshop-data-portability>

Dismembering Big Tech. (2019, October 24). *The Economist*. <https://www.economist.com/business/2019/10/24/dismembering-big-tech>

Drivas, I. (2019). Liability for Data Scraping Prohibitions under the Refusal to Deal Doctrine. *The University of Chicago Law Review*, 86(7), 1901–1940.

Erbach, G. (2014). *EU and US competition policies*. 7.

European Commission. (2022b). *The Digital Services Act: Ensuring a safe and accountable online environment* [Text]. European Commission - European Commission. [https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

European Commission. (2022a). *The Digital Services Act package | Shaping Europe's digital future*. <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

European Parliament. (2022, June 4). *Data governance: Why is the EU data sharing law important?* <https://www.europarl.europa.eu/news/en/headlines/society/20220331STO26411/data-governance-why-is-the-eu-data-sharing-law-important>

Exposito-Rosso, S., Cao, F.-X., Piquet, A., & Medjaoui, M. (2021). *GDPR Data Portability: The Forgotten Right* (pp. 1–46). ALIAS.

*A Fair Playing Field? Investigating Big Tech's Impact on Small Business*, 1 (2019a) (testimony of Harold Feld). <https://www.congress.gov/event/116th-congress/house-event/LC64772/text?s=1&r=7>

Feld, H. (2019b). Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms. *Roosevelt Institute*, 216.

Francis, D. (2021). *Making Sense of Monopolization: Antitrust and the Digital Economy* (SSRN Scholarly Paper No. 3959352). Social Science Research Network. <https://doi.org/10.2139/ssrn.3959352>

*FTC Sues Facebook for Illegal Monopolization*. (2020, December 9). Federal Trade Commission. <http://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>

G'Sell, F. (2022, March 7). *Comparative Approach to Big Tech Regulation: Regulating Social Media in the EU* [Lecture].

G'sell, F. (2022, March 14). *Comparative approach to Big Tech regulation: Regulating Digital Markets and online commerce*.

Hamilton, I. A. (2020, November 15). *The Georgia runoffs could decide the fate of Section 230 – along with the future of Big Tech*. Business Insider. <https://www.businessinsider.com/what-biden-administration-means-for-section-230-2020-11>

Hemphill, S. (2019). *Disruptive Incumbents: Platform Competition in an Age of Machine Learning*. Columbia Law Review. <https://columbialawreview.org/content/disruptive-incumbents-platform-competition-in-an-age-of-machine-learning/>

How to dismantle a monopoly: Big Tech and antitrust. (2019). *The Economist*.

How to tame the tech titans. (2018, January 18). *The Economist*. <https://www.economist.com/leaders/2018/01/18/how-to-tame-the-tech-titans>

Kelly, H. (2020, July 29). The biggest takeaways from the big-tech antitrust hearing. *Washington Post*. <https://www.washingtonpost.com/technology/2020/07/29/big-tech-antitrust-hearing-takeaways/>

Khan, L. M. (2017). Amazon's Antitrust Paradox. *The Yale Law Journal*, 96.

Kimmelman, G., & Cooper, M. (2017). A communications oligopoly on steroids: Why antitrust enforcement and regulatory oversight in digital communications matter. *Equitable Growth*, 34.

Krattenmaker, T., Lande, R., & Salop, S. (2015, June 25). *Monopoly Power And Market Power In Antitrust Law*. <https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law>

*Lina Khan's Battle to Rein in Big Tech | The New Yorker*. (n.d.). Retrieved 25 April 2022, from <https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech>

Lomas, N. (2020, February 17). Facebook pushes EU for dilute and fuzzy internet content rules. *TechCrunch*. <https://social.techcrunch.com/2020/02/17/facebook-pushes-eu-for-dilute-and-fuzzy-internet-content-rules/>

Lomas, N. (2022, March 25). Europe says yes to messaging interoperability. *TechCrunch*. <https://social.techcrunch.com/2022/03/24/dma-political-agreement/>

*Mobile Operating System Market Share Worldwide*. (2022). StatCounter Global Stats. <https://gs.statcounter.com/os-market-share/mobile/worldwide&sa=D&source=docs&ust=1650817639216201&usq=AOvVaw2BMMVhhKuAkBwk65iFca-8>

Mozur, P. (2018, October 15). *A Genocide Incited on Facebook, With Posts From Myanmar's Military—The New York Times*. <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>

Naughton, J. (2021, November 21). Can big tech ever be reined in? *The Observer*. <https://www.theguardian.com/technology/2021/nov/21/can-big-tech-ever-be-reined-in>

Nylen, L. (2021, October 6). *House Democrats about to uncork 5-pronged assault on tech*. POLITICO. <https://www.politico.com/news/2021/06/09/house-democrats-announce-tech-bills-492703>

Parenti, R. (2021, October). *Competition policy*. Fact Sheets on the European Union. <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>

*Testimony of Professor Nathaniel Persily on “Social Media Platforms and the Amplification of Domestic Extremism and Other Harmful Content”, 1 (2021) (testimony of Nathaniel Persily).* <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/10/2021-10-26-Testimony-Before-the-Senate-Homeland-Security-and-Governmental-Affairs-Committee-including-Proposed-Platform-Transparency-and-Accountability-Act.pdf>

Radley-Gardner, O., Beale, H., & Zimmermann, R. (Eds.). (2016). *Fundamental Texts On European Private Law*. Hart Publishing. <https://doi.org/10.5040/9781782258674>

Sanford, C. (2020, July 29). Big Tech Antitrust Hearing Full Transcript July 29. *Rev*. <https://www.rev.com/blog/transcripts/big-tech-antitrust-hearing-full-transcript-july-29>

Santesteban, C., & Longpre, S. (2020). *How Big Data Confers Market Power to Big Tech: Leveraging the Perspective of Data Science* (SSRN Scholarly Paper No. 3556232; pp. 1–52). Social Science Research Network. <https://doi.org/10.2139/ssrn.3556232>

Schrepel, T. (2022, February 21). *Alternatives to Data Sharing | The Regulatory Review*. <https://www.theregreview.org/2022/02/21/schrepel-alternatives-data-sharing/>

Şimşek, C. (n.d.). *Digital Services Act: Will the EU draw lessons from the GDPR?* Retrieved 25 April 2022, from <https://webserver07.reims.sciences-po.fr/public/chaire-numerique/en/2021/10/02/digital-services-act-will-the-eu-draw-lessons-from-the-gdpr/>

Singer, H. (2019, May 8). *How To Tame Big Tech*. Forbes. <https://www.forbes.com/sites/washingtonbytes/2019/05/08/how-to-tame-big-tech/>

Stuart, T. (2021). Too little too late? An exploration and analysis of the inadequacies of antitrust law when regulating GAFAM data-driven mergers and the potential legal remedies available in the age of Big Data. *European Competition Journal*, 17(2), 407–436. <https://doi.org/10.1080/17441056.2021.1909234>

The Editorial Board. (2020, July 29). *Big Tech’s Antitrust Paradox—WSJ*. WSJ | Opinion. <https://www.wsj.com/articles/big-techs-antitrust-paradox-11596064516>

*The Facebook Papers: What do they mean from a human rights perspective?* (2021, November 4). Amnesty International. <https://www.amnesty.org/en/latest/campaigns/2021/11/the-facebook-papers-what-do-they-mean-from-a-human-rights-perspective/>

*What are the GDPR Fines?* (2018, July 11). GDPR.Eu. <https://gdpr.eu/fines/>

*What is GDPR, the EU's new data protection law?* (2018, November 7). GDPR.Eu. <https://gdpr.eu/what-is-gdpr/>

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