A Turning Point in the Oversight of Digital Platforms: A Challenge for American Leadership

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Authors

Tom Wheeler
Phil Verveer

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Introduction

The last quarter of 2020 produced decisions in Brussels, London, and Washington that constitute a turning point in the relationship between the major digital platform companies and democratic societies. Recognizing all the good these companies produce, the different actions share a similar conclusion: that the social costs imposed by the digital companies have become too high.

While there may be shared concerns about the unsustainable social and economic costs imposed by the dominant digital companies, the actions by the European Union and United Kingdom have reinforced how the European approaches to the problems of digital platforms are more direct and focused than have been those of the United States. This is a function of two factors. The E.U. and U.K. regulatory culture has been less in thrall to the non-interventionist orthodoxy that has dominated U.S. policy; thus, while the U.S. has effectively turned a blind eye, the Europeans have for several years been searching for effective solutions.

United States’ Failure to Act

The failure of the U.S. to act in the interconnected world of the internet has cost it the traditional role of leader. “A common refrain among European officials,” Politico reports, “is that they’re being forced to take actions because the U.S. hasn’t.”

U.S. policymakers’ recent decisions to pursue antitrust suits against Google and Facebook trail enforcement actions by the E.U. by several years. The fact that the Department of Justice (DOJ) case against Google will not go to trial until September 2023, and expected appeals will not be over until 2027, makes it obvious that the U.S. is almost a decade behind. Regardless of timing, however, the experience on both sides of the Atlantic is similar: such actions are limited in their general applicability because they are targeted at specific circumstances, and they are reliably lengthy with an uncertain outcome. “[T]here’s only so much these existing powers can do,” explained Margrethe Vestager, the E.U.’s executive vice president in charge of digital and competition policy, “We need new ways to tackle problems that digitization causes.” The E.U.’s response has been to move beyond such after-the-fact and drawn-out efforts to propose generally applicable behavioral rules.

The U.K. has been similarly proactive. Following a fulsome investigation of the behavior of dominant digital platform companies, the Conservative government is creating a new digital watchdog agency with the intention of securing new statutory powers quickly. The new Digital Market Unit, a part of the Competition & Markets Authority, will enforce a code of conduct for these digital platforms. “[Y]ou can be pro-tech without being pro-untrammeled big tech,” the government’s digital minister explained.

The E.U. and U.K. have identified digital marketplace abuses of both content and competition/consumer protection. Recognizing the difference between oversight of misinformation and hate speech from the protection of competitive markets and consumer rights, both the U.K and E.U. have proposed dealing with these issues through separate vehicles.¹

¹ The E.U. has proposed a Digital Services Act to deal with content-related issues. The U.K. has assigned such responsibility to Ofcom, the broadcasting regulator. This paper focuses on the competition-related initiatives.
The approach to competitive markets in both the E.U. and U.K. represents a sea change from ex post review of actions taken by the digital companies to ex ante broad behavioral rules. The actions of both the E.U. and U.K. amount to the recognition that a handful of dominant digital platforms have become so powerful as to warrant behavioral rules rather than specific sanctions.

**Next Two Years Critical**

The U.K.’s Digital Market Unit begins operations in April 2021. Specific legislation is expected to follow. Such a timetable is consistent with that of the E.U. The proposed Digital Markets Act from the European Commission (the E.U.’s executive) now goes to legislators where final resolution is expected to take 18-24 months.

The question for U.S. policymakers is whether they will utilize the coming 18-24 month period, while the Google and Facebook litigation slowly unfolds and before European decisions kick in, to establish an American position on the behavioral expectations for digital platforms, or to allow such determinations to be established by others. This is, of course, an important determination for American consumers. It is also important for the tech companies themselves whose world-leading digital services can be undermined by the failure of their own nation to advance principles and set the standards.

**Update on Activities in the United States**

On October 10, the Justice Department and eleven state Attorneys General filed a maintenance of monopoly suit against Google. This was followed two months later by two different suits led by multiple state Attorneys General; one expanding the DOJ’s maintenance theory for general search, and the other alleging monopolization of various display advertising markets and an illegal agreement with Facebook to maintain those monopolies. Also in December, the FTC and forty-eight Attorneys General filed separate maintenance of monopoly suits against Facebook.

Google and Facebook have every right to defend their marketplace positions and conduct and no doubt they will. As a practical matter, the monopolization cases are unlikely to be resolved for many years, during which technology, consumer preferences, and business models will continue to evolve while the companies continue their market entrenchment.

**What are the antitrust prosecutions seeking?**

Two of the Google complaints (subsequently consolidated for purposes of discovery) deal extensively with the company’s Android mobile operating system and a series of contractual provisions alleged to maintain monopolies in the company’s search activities. The logic of the DOJ search complaint leads most naturally to injunctions reforming or rescinding contractual provisions with arguable exclusionary effect.

The prayer for relief in the DOJ suit is not crystal clear. This is not a criticism.
A very general “give us what we prove we’re entitled to” request is not unusual, affording flexibility for eventual remedial claims. But the additional, most specific request to “[e]nter structural relief as needed to cure any anticompetitive harm” does not provide any indication about what the Justice Department and its state Attorney General co-plaintiffs believe is achievable as a practical matter.

The Facebook complaints focus on two concerns—the acquisition of Instagram and WhatsApp and other asserted nascent competitors and on the alleged manipulation of its Facebook Platform to limit or eliminate potential social network competitors. The logic in particular of the Facebook Platform allegations leads to remedies that involve interconnection or interoperability between Facebook and other social network platforms, something potentially much more direct than anything implied by the Google search complaints.

The two Facebook complaints’ prayers for relief, relative to their Google counterparts’, are more specific. They seek “divestiture or reconstruction of the businesses (including, but not limited to, Instagram and/or WhatsApp … including, to the extent reasonably necessary, the provision of ongoing support or services from Facebook to one or more viable and independent business(es)).” The latter clause unavoidably raises the issue of judicial capacity to contend with “ongoing support or services” in a dynamic environment.

**Can Courts Oversee Meaningful Solutions?**

Concern surrounding the effectiveness of the lawsuits is not with the difficult issues of liability under Section 2 of the Sherman Act, but rather with the even more difficult issues of effective remedies for the economic consequences of the apparently unassailable market positions of the companies. In other words, are there court-imposed approaches enabling competition within the search, ad tech, and social networking markets that would be workable and reliably produce more benefits than costs?

If there are promising approaches, should we expect the judiciary has the capacity not only to formulate, but also provide for their long-term oversight? These same questions were addressed in Brussels and London with the apparent conclusion that regulation was also needed.

Such an “and then what...?” concern was one of the reasons the authors previously proposed the need for a specialized regulatory agency dealing with systemically important digital platforms, not as a substitute for antitrust enforcement, but as a complement to it.

This question of relative institutional competence and the temporal realities associated with antitrust prosecution raise the question of whether Congress will undertake a meaningful and successful effort to deal with the economic consequences of allegedly dominant platforms or await the uncertain outcomes of antitrust litigation.

The governments in Brussels and London are not waiting.
Update on Activities in the European Union

The E.U.’s approach to the development of new digital policy appears to have mirrored the approach the digital companies follow in the development of new products: produce a product, see how it works, and then improve it based on that experience.

The Union’s initial effort to deal with dominant digital companies was built around lawsuits and penalties. Finding those to be less than optimally effective, the E.U. has brought out version 2.0 – the establishment of behavioral expectations. A consequence of the “Move fast and break things” digital culture is that ex post actions can be rendered ineffective by the pace of technological and marketplace change. Commissioner Vestager explained, “It is painful that in digital markets the harm that can be done in that marketplace can happen very fast but the recovery of that marketplace can be very, very difficult.”

In response to the speed with which digital markets develop, the E.U. has moved from ex post enforcement actions to ex ante behavioral requirements.

Addressing Gatekeeper Power

The E.U.’s Digital Markets Act is rooted in the concept of gatekeepers – those companies that because of their systemic importance and strong economic position possess an entrenched and durable position allowing them to control the market and the activities of other companies. A company is deemed a gatekeeper based on three criteria: (1) size – annual revenue in the European Economic Area of € 6.5 billion or market capitalization of € 65 billion; (2) user base – more than 45 million active end users located in the E.U. and more than 10,000 yearly active business users; and (3) the assumption that meeting the preceding criteria created an “entrenched and durable position” in the market. The vast majority of these gatekeeper companies are located outside the E.U.

Once the gatekeeper determination is made, the companies will have to follow defined behaviors. The first set of defined behaviors relate to the affirmative actions each gatekeeper must take. Included among these are:

- Allowing third parties to interoperate with the gatekeeper’s own services,
- Allowing business users to access the data they generate by using the gatekeeper’s platform,
- Allowing consumers to port the information the platform has about them to another service,
- Allowing real time access and use – for free – of data generated by use of the platform; protecting consumers through opt-in permission,
- Providing advertisers and publishers the tools to verify the performance of their activities on a platform, and
- Allowing business users to promote their services and conclude contracts outside the gatekeeper’s platform.

The gatekeepers also have defined activities in which they must not engage. Among these are:

- Prohibition of self-preferencing on their platform,
- Prohibition on denying consumers the ability to link to services not on the
gatekeeper’s platform, and
• Prohibition of preventing users from un-installing any pre-installed software or application.

Ongoing Oversight

To enforce these requirements, the act establishes investigatory and audit powers and procedures for the Commission. It also proposes to harmonize such requirements across the member states through preemption. The Commission is empowered to levy substantial penalties for non-compliance up to 10 percent of the offending company’s worldwide revenue. While the E.U. proposal does not require the dismembering of the dominant digital companies, it does propose such a nuclear option in the case of a company’s systematic violation of the rules. Procedurally, the Commission’s proposal now will be considered by the European Council representing each nation and the publicly elected European Parliament. Typically, such a process takes from 18 to 24 months. Another digital initiative, the General Data Protection Regulation (GDPR) dealing with digital privacy, however, required four years before it took effect.

Update on Activities in the United Kingdom

The week before the E.U. announced its new initiative, the U.K. announced the next steps in its own initiative. Whereas the E.U. focuses on “gatekeepers,” the U.K. targets companies with “strategic market status.” In the E.U. there is a uniform set of behavioral expectations for covered companies; in the U.K. the expectations will be assigned on a company-by-company basis.

The U.K.’s actions have moved at a lightning pace for government. In the March 2019 report Unlocking digital competition, a specially convened expert panel chaired by Jason Furman concluded, “digital markets will only work well if they are supported with strong pro-competition policies.” Following through on the recommendations of the Furman Report, in June the U.K. government announced plans to establish a Digital Markets Unit within the Competition & Markets Authority (CMA). In December, a CMA interim report sought input on the implementation of such efforts and a final report, issued in July 2020, concluded, “these markets are so wide ranging and self-reinforcing that our existing powers are not sufficient to address them.”

The Digital Market Unit will become operational in April 2021. Its first undertakings will be to define what constitutes “strategic market status” and from there to identify the behavioral expectations for such companies. Legislation based on these consultations will follow.

The Digital Markets Unit will establish a code of behavioral conduct for the companies subject to its jurisdiction. The agency will have the ability to assess penalties up to 10 percent of a companies’ global revenue. In keeping with the Furman Report recommendation, the U.K. plans to continue to rely on existing competition laws to deal with monopolies and quasi-monopolies.
Conclusion – The First Mover Advantage

There is a first mover advantage in regulation, just as there is in the marketplace. A digital example is how the E.U.’s GDPR became the *de facto* standard for online privacy around the world.\(^2\)

The challenge for American consumers, companies, and policymakers is whether the United States government will step up as forcefully as have European governments.

The filing of multiple antitrust lawsuits against Google and Facebook is significant. The probability that these American actions will reach their conclusion before the E.U.’s final adoption of its rules is questionable.

Even if the antitrust actions are resolved prior to the E.U.’s action, their solutions will be backward-looking as opposed to the E.U.’s and U.K.’s forward-looking policies. As a result, even after the antitrust actions, the United States will still lack the regulatory first mover opportunity to shape policy regarding digital platforms for an interconnected world.

The ability of an existing U.S. regulatory agency, such as the Federal Trade Commission (FTC) to establish an American regulatory standard is hobbled:

- The agency’s statute and practice for the most part constrains the FTC to targeted *ex post* enforcement actions as opposed to broad-based *ex ante* rulemaking,
- Even should Congress grant the FTC expansive new *ex ante* authority, the digital oversight would still have to compete with all the other responsibilities of the agency, extending in recent actions from funeral director practices, to robocalls, to hockey puck labeling,
- The internal complexity of having the same agency simultaneously pursuing a monopolization case against Facebook (with an outcome determined by the court) while *de jure* considering competition-oriented *ex ante* regulation of the same company.

The authors of this paper have previously proposed the creation of a Digital Platform Agency for the United States. Such an agency would not only overcome the inherent limitations of antitrust enforcement and reliance on antiquated regulatory statutes and structures, but also establish American policies for the behavior of the dominant digital companies – rules that would return the United States to its leadership role as the nations of the world struggle to develop consistent digital market policies.

The United States can return to its marketplace policy leadership position with a new Digital Platform Agency that stands on three pillars:

- Obligations and oversight based on the common law-derived principles of the duty of care and duty to deal,
- Agile risk management driven by task-oriented outcomes rather than the imposition of rigid rules, and

\(^2\) Non-European companies providing services in the E.U. have had to alter their privacy-related practices to comply with GDPR. When the state of California and the Commonwealth of Virginia adopted their own consumer privacy laws they followed the outlines established by GDPR. As the U.S. Congress continues to debate domestic privacy policy, GDPR has become table stakes.
• Government instigated, supervised, approved and enforced behavioral standards that are developed utilizing a process similar to that used in the development of the digital standards themselves.

The ideas put forward by the European Union and United Kingdom are timely and groundbreaking. They represent an attempt to think anew about a new challenge. The United States must similarly think and act anew...now.

**About the Authors**

Tom Wheeler is a businessman, author, and was the 31st Chairman of the Federal Communications Commission (FCC) from 2013 to 2017. He is presently a Senior Fellow at the Shorenstein Center at Harvard Kennedy School and a Visiting Fellow at the Brookings Institution.

Phil Verveer’s legal career included government service and private practice. He is the former Deputy Assistant Secretary of State for International Communications and Information Policy and Senior Counsellor to the Chairman of the FCC and was the Justice Department’s the first lead counsel on United States v. AT&T which resulted in the breakup of AT&T. He is presently a Senior Fellow at the Shorenstein Center at Harvard Kennedy School.