

On the Rise

Europe's Competition Policy Challenges to Technology Companies

By Kati Suominen

INTRODUCTION

Digital business models such as social media platforms, ride sharing apps, and e-commerce marketplaces enable billions of individuals and firms to interact and transact with each other every day. Their rapid growth has given rise to criticism that they are “winner-take-all” businesses that have created an unrivaled advantage through their network effects that entice more and more users to join, and through their acquisition of potential competitors and ancillary businesses.

Both the United States and Europe are currently debating the merits of these arguments—including whether antitrust law should be retailored to address them. In the United States, antitrust enforcement officials and courts have, in general, accepted market leadership earned through competition in the marketplace, as long as it leads to greater efficiencies and cost savings for consumers. In contrast, the European Commission antitrust officials have tended to favor protecting potential competitors, even if market leaders have managed to outperform competitors and gain consumer loyalty through their ingenuity and smart acquisitions. One of the outcomes of this approach has yielded recent investigations and multi-billion-dollar fines by the European Commission on American companies such as Google, Apple, and Amazon for supposedly violating European competition policy rules.

Today, the business climate for American technology companies is heating up in Europe. Concerned about Europe's lack of competitiveness in the global digital economy, both the European Commission and various EU member states are looking to significantly expand their antitrust powers to curb large technology companies. One way they do this is by blocking pre-eminent firms' planned mergers and acquisitions and forcing them to provide access to the data they have gathered—to the benefit of European competitors. Europe's hardening antitrust stance poses significant problems to U.S. business interests in Europe's giant digital market—Europe's business-to-consumer (B2C) e-commerce sales alone are climbing [past \\$850 billion this year](#). The Commission's approach also risks digital protectionism and politicization of antitrust

enforcement, which could have significant implications for trade relations between the United States and the European Union and for many emerging markets' thinking about competition policy issues.

This paper reviews the proposed changes to Europe's competition policy and its implications and discusses how U.S. officials and other stakeholders can respond to them.

Europe's hardening antitrust stance poses significant problems to U.S. business interests in Europe's giant digital market—Europe's business-to-consumer (B2C) e-commerce sales alone are climbing past \$850 billion this year.

EUROPE'S HARDENING ANTITRUST POLICY

Over the past few years, the European Commission has pursued numerous competition policy actions against U.S. technology companies. For example:

- The Commission has frequently claimed that digital platforms that offer their own services and products on their platforms may be anticompetitive. For example, Amazon might sell branded Amazon merchandise alongside other brands' merchandise on Amazon's marketplace, while Netflix streams its own content via Netflix. This of course is nothing new: [Walmart, for example](#), has sold its own private labels in its stores for three decades. Europe has pursued numerous cases against U.S. companies for such supposed "self-preferencing." For example, in June 2020, European officials announced they were looking to bring [antitrust charges against Amazon](#) for unfairly using data collected from third-party merchants to boost its own product offerings, and in July 2018, [Europe fined Google \\$5 Billion](#) for equipping Android smartphones with Google products as the default software—even though European app developers benefit from the one-stop system Android provides to reach 75 percent of cell phones that use the software. The [European Commission's so-called "P2B Regulation"](#) of 2019 now requires digital platforms to disclose selection and ranking processes of goods and services on their platforms.
- The Commission has claimed that offering lower prices in the form of loyalty rebates constitutes anti-competitive behavior.¹ While United States law has traditionally considered loyalty rebates a pro-competitive business practice, Europe's concern is that a market-leading company exploits its larger base to offer discounts in ways that preclude smaller but "as-efficient competitors" from competing for consumer demand. In a famous case, in 2009, the European Commission found that Intel had abused its market position by using loyalty rebates and fined it over \$1 billion, but [in 2017, Intel won relief](#) from the European Court of Justice, which ordered a new trial. The case even prompted European [authorities and scholars to argue](#) that European positions on loyalty rebates "harm competition and European consumers" and only "protect less effective rivals from the inconveniences of the competitive process."
- The European Union has over the years pursued lengthy investigations into mergers and acquisitions made by American technology companies. In 2019, [European authorities approved](#) the

¹ These are treated under the under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and are a highly disputed areas of European competition policy.

acquisition by Apple of the popular song-recognition app Shazam, after months of analyzing whether the acquisition would give Apple an unfair advantage over other streaming music services like Europe's Spotify. However, [in June 2020](#), the Commission opened an investigation into whether Apple treated rivals like Spotify unfairly in its app store, and how other competitors were treated in Apple's mobile payments service. The Commission also studied but ended up approving acquisitions between Facebook, WhatsApp, and Instagram, and between Microsoft and LinkedIn.

For U.S. companies, these actions are much more than a distraction. Not only are the fines significant; the cases are time-consuming and costly for companies to manage. They also require—even when they result in a favorable outcome—significant expenditure and time by companies' legal teams and may cause reputational damage and uncertainties that can deter new investments.²

Now the challenges for U.S. technology firms in Europe are growing. The European Commission and various member states are actively working to expand their antitrust powers:

- In June 2020, Margarethe Vestager, executive vice president for the European Commission's "A Europe Fit for the Digital Age" initiative and the commissioner who has led Europe's antitrust enforcement, signaled she is seeking broader antitrust powers to address "structural competition problems" within industries, rather than analyzing case-by-case the merits of arguments against a single company.
- [The Commission is also seeking new regulations](#) to empower it to pursue potentially anticompetitive practices by dominant digital platforms before these practices even happen, arguing that ex-post investigations where officials need to prove that a company's behavior harms consumers come too late, allowing big tech to grow bigger while investigations drag on. The Commission also wants to get ahead of the so-called killer acquisitions—where a dominant firm acquires putative competitors to preempt future competition.
- There is also discussion about lowering Europe's threshold for reviewing corporate acquisitions, currently at \$2.95 billion. [For example, in Germany and Austria](#), officials review acquisitions of companies whose purchase price is more than \$472 million or \$236 million, respectively.

These ideas have been circulating in Europe for some time and were summarized in a [2019 Commission expert group report](#), "Competition policy for the digital era," which argued that "dominant digital firms" are likely to have "strong incentives to engage in anti-competitive behavior" and "require vigorous competition policy enforcement and justify adjustments to the way competition law is applied." The report [calls for shifting the burden of proof](#) to companies to prove their actions are not anticompetitive, proposing that "in some cases" a company introducing a new product or service "that might harm competition" would need to prove that product or service makes customers better off. The report also recommended, as an alternative to breaking up big firms, requirements for these firms to ensure that their users can transfer their data to other services.

Behind these policy ideas are Germany and France, followed by their allies Italy, Austria, Poland and Spain—the leading advocates of tougher competition policy enforcement in the technology sector. In 2018, German experts drew up "[Competition Law 4.0](#)," a document that calls for "contestability of positions of power in the digital economy" and argues that Europe's competition law needs to be broad-

² Joseph A. Clougherty, professor at the University of Illinois at Urbana-Champaign, and Nan Zhang, assistant professor at California State University, conducted further empirical research in their study titled "Foreign investor reactions to risk and uncertainty in antitrust: US merger policy investigations and the deterrence of foreign acquirer presence" published in the *Journal of International Business Studies* (2020).

ened to address digital policy issues. One such issue, for example, is that European consumers need to be empowered to transfer their data from one provider to another to enable smaller rivals to “attack data-based market power.” The [proposal also contemplates](#) an EU Platform Regulation that would ban self-preferencing and argues that platforms need to set up dispute resolution procedures to manage disputes over what content ends up being displayed—and where—on their platforms.³ [German authorities](#) are also considering empowering regulators to pause some of technology companies’ business practices during an antitrust investigation.

Other nations in the European Union are also hardening their competition policy stances. For example, [Benelux competition authorities have lobbied](#) for shifting the burden of proof on technology companies to show that their activities are not anticompetitive, and for the ex ante investigations the Commission is now advocating. Even the United Kingdom, Europe’s tech power, has issued proposals to curtail big tech after Brexit. [A report by the UK House of Lords Committee on Communications](#) recommends a “public interest test” on mergers and acquisitions to prevent “data monopolies,” and [the United Kingdom’s 2019 “Furman Report”](#) led by Jason Furman, the Obama White House Chairman of the Council of Economic Advisers, recommends a code of conduct for tech firms that would force them to interoperate with smaller rivals—that is, force them to enable their users to transfer their data to other providers. The [United Kingdom has already drawn up a law](#) to force Facebook to interoperate with rival social networks.

While attacking mostly foreign technology firms, the Commission is also looking to relax its robust antitrust enforcement for European companies so that they could compete with Chinese firms on a more level playing field. One impetus for this was the [Commission’s 2019 blocking of a merger](#) between Siemens and Alstom that would have helped Europe compete more successfully against the state-owned Chinese Railway Rolling Stock Corporation (CRRC). Disappointed by the Commission’s decision, [Germany and France drew up a joint manifesto](#) outlining industrial policies and merger rules conducive to producing “European Champions.” The manifesto puts forth two paradigm shifts for European competition policy: that it needs to be deployed as a means to prod European firms’ competitiveness vis-a-vis foreign rivals—especially if subsidized by their governments, and that big is fine if big is European—especially German or French.

WHAT IS DRIVING EUROPEAN PROPOSALS?

Europe’s antitrust policy enforcement actions form part of a series of EU steps that have hampered U.S. companies over the past few years. Among them are the European Union’s 2018 copyright law forcing U.S. platforms to increasingly police content posted on their sites and adjudicate freedom of expression; the European Union’s 2018 General Data Protection Regulation (GDPR) that has cost American as well as European businesses billions of dollars to implement; Europe’s proposals to monitor data used for artificial intelligence applications; and several European nations’ [digital services taxes](#) that primarily impact U.S. technology companies by shifting corporate income taxes for digital services to where they are consumed, as opposed to where they are developed.

In part, Europe’s proposals for greater antitrust powers against technology companies represent a continuation of a history of cases where European enforcers and courts applied [an array of tests](#) positing that a certain behavior is anticompetitive—such that it hurts potential competitors, consumer choice, or innovation. Indeed, the Commission’s interventionist approach has long contrasted with U.S. antitrust enforcers and courts that have largely accepted market leadership and consumer loyalty earned through

³ According to Lucas Gasser, in practice this would force platforms to assume ever greater responsibility for ensuring both that platform users do not manage to upload content that might violate copyright (per Europe’s copyright law of 2018), and are able to uploaded content that might not.

hard competition and risky investments. For U.S. enforcers, protecting consumer welfare (or efficiency and lower cost)—rather than potential competitors—has been their North Star.

There are, however, a number of reasons why Europe is acting now to establish a stricter muscular anti-trust policy.

First, European antitrust officials, much like policymakers in the United States, report being under great political pressure to “do something” about big technology companies. [Polls suggest](#) that most Europeans support the Commission’s actions against Google and other U.S. technology companies and worry about their personal data getting in the hands of America technology companies and, in the wake of the Snowden revelations, the U.S. government. [Antitrust officials are also reported](#) to be pressured by local, less digitized businesses that struggle to compete with the digital platforms, and too often rush to act on populist pressures, despite having no clear empirical basis.

Second, Europe is using antitrust to clear space for its own companies in sectors it considers to be in Europe’s comparative advantage, such as financial services, the Internet of Things (IoT), smart factories and smart homes, and healthcare. [Europeans have failed to seize](#) on the various technology waves that brought us smartphones, cloud computing, search, and social media, and they lack the kind of market-leading platforms that the United States and China have produced such as Amazon, Facebook, Twitter, Google, Alibaba, and WeChat. Germany’s SAP, the Netherland’s Adyen, and Sweden’s Spotify have [barely 3 percent of the market capitalization](#) of major tech platforms compared to 68 percent held by U.S. companies.

European policymakers are now concerned that U.S. companies are going beyond their traditional swim lanes of social networking, ecommerce, and search and moving into “European” sectors. After all, U.S. technology companies often look to apply their technologies in new sectors: Apple started its own credit card and TV service; Google bought Fitbit to get into the wearable tech market and; Amazon has become a global freight forwarder and air cargo carrier. In a more frontal attack, Tesla is now striking at Europe’s leadership in high-end, tech-driven vehicles, [looking to build a gigafactory outside of Berlin](#). Europe needs to pre-empt mergers that would enable these giants to reap even more market share in Europe or outright force American companies to open their proprietary data to European firms, so they can accelerate the build-out of valuable algorithms in new markets.

Third, Europe’s actions are aimed at pre-empting the unbridled expansion of Chinese state-backed enterprises. [Chinese businesses](#) have often relied on mergers rather than on organic growth to scale quickly in Europe. For example, [in 2016](#), China’s Tencent bought a majority stake in Finnish mobile games maker Supercell, while Midea, a Chinese electrical appliance manufacturer, bought German robotics firm Kuka. [In 2019](#), Ant Financial, the FinTech affiliate of Chinese marketplace Alibaba, bought UK-based currency exchange WorldFirst. [Vestager has remarkably gone as far as to suggest](#) that European governments “go Chinese” by buying stakes in EU companies to stave off the threat of Chinese takeovers. Like the United States, Europe has also in recent months [tightened its position on TikTok and Huawei](#).

HOW EUROPEAN POLICIES BACKFIRE ON EUROPE

The European Commission appears to be turning to antitrust policy to make room for European companies. However, this risks politicizing antitrust and can backfire in a number of ways.

First, heavy-handed antitrust enforcement can undermine investor interest in European startups. After all, if startups can no longer be easily acquired by bigger technology companies, their investors are

left with fewer exit strategies. Going public has become increasingly unattractive and rare due to the constant public scrutiny and short-term drive for quarterly returns. In addition, some **85 percent of startups** with seed funding fail to raise capital past the C Round (the third venture capital investment event), leaving them far from ever ringing the NASDAQ opening bell. Getting acquired is a great way for a startup and its investors to exit. In a **January 2020 event** hosted by the U.S. Department of Justice and Stanford University, Silicon Valley venture capitalists were quite clear that using antitrust to hamper tech firms' acquisitions would disincentivize them to invest in promising firms.

European startups get only **one-eighth** in venture funding compared to U.S. startups as a share of GDP, partly due to such frictions as rigid labor market regulations that deter investors.⁴ There have been growing concerns among European companies that GDPR is undermining their competitiveness and ability to innovate.⁵ Of course, European antitrust officials may not care if they are more concerned about preserving market share for Europe's established companies, but the European Directorate-General for Communications Networks, Content and Technology that champions the Startup Scaleup initiative should be concerned. **The European Union's 2020 SME strategy** itself sound alarms by noting that innovative, fast-growing European firms often move abroad to find capital, which, the report argues, is a problem for "Europe's technological sovereignty." The European Union's competition policy proposals only exacerbate this risk and will force the public sector to become more involved in startup investing.

Second, Europe's get-tough approach on acquisitions by foreign companies does not automatically benefit European companies, but the most immediate competitor. For example, curbing U.S. technology companies could end up only empowering China's companies. **China's Alibaba**, for example, is looking to cut into Amazon's cloud business in Europe. As it starts to limit technology companies' growth, Europe may end up having to shoo off multiple foreign companies to clear the swim lanes for European firms. In addition, could Europe's ideas to force open big technology companies' proprietary data vaults only bolster Chinese firms that could gain access to such data from U.S. companies?

Third, as the scope of antitrust enforcement widens, businesses may also more frequently seek to use antitrust actions against each other, making Europe's antitrust policy free for all. This is nothing new: in the United States, **Amazon lobbied for and won a case** against Apple for trying to compete in e-books, which only **cemented Amazon's market share** in the e-books space. As antitrust activism expands, so will corporate activism to shape antitrust enforcement.

Fourth, limiting technology companies' scale can only undermine European consumers' access to larger networks that would make them better off. For example, imagine if Amazon (which represents 27 percent of Germany's ecommerce sales) bought OTTO, a German retailer that has become a significant ecommerce marketplace with third-party sellers. The shoppers on OTTO would benefit since many probably already shop on both Amazon and OTTO, and now by way of the merger they would likely get easier access to more choices and services. German third party sellers would also benefit if they could more easily become Amazon sellers and get visibility with Amazon's German and European buyer bases or, if they already sell on Amazon, they would have to manage just one marketplace, rather than two separate ones. And perhaps such a merger between American and European marketplaces would only stave off Chinese Alibaba's expansion into Europe.

4 According to Gené Teare and Sophia Kunthara, year 2019 was a five year high for European startups with companies raising over \$36 billion—a five-year high—and over \$7 billion more than European startups raised the previous year. United States venture community invested \$136 billion in seed and growth stage deals during 2019.

5 In a survey by Bitkom, Germany's digital trade association, 74 percent said GDPR data protection requirements are the main obstacle to the development of new technologies – compared with 63 percent in 2018, and 45 percent in 2017.

Fifth, the European Union's proposals to force U.S. technology companies to share data can be seen as discriminatory. The European Union is essentially saying that in order to access European markets, American companies have to give up a prized asset they have earned through investments in new technologies and services that benefit consumers.⁶ This can be seen as redistributive antitrust, aimed at helping EU companies that do not have earned data to acquire it for building their algorithms, which undercuts technology companies' interest in innovating.

Sixth, Europe's proposed antitrust measures can undermine a key desirable of competition policy: innovation. [Innovation can be measured in various ways](#) but the most quantifiable one is research and development (R&D) spending and investment in highly skilled labor. Decades of academic literature show that large companies are more likely to invest in R&D because they can better cover the fixed costs of such investments. This certainly holds true in the technology sector: in a [PricewaterhouseCoopers survey](#), Amazon and Alphabet were the world's top two corporate R&D spenders in absolute terms in 2018, and Intel, Microsoft, and Apple were in the top ten. Altogether the five U.S. companies spent \$75.8 billion on R&D in 2018.

Technology companies' R&D dollar translate into broader economic and national security gains in at least four ways.

For one, large firms' R&D benefits small firms. The [spillovers of the innovation](#) done by larger firms such as Intel or Microsoft essentially subsidize small firms' innovation, helping small businesses get a head start in innovating by building on someone else's insights and early development.

Two, an innovative large company is not just a company with products it sells; its products and services typically enable entire ecosystems. For example, European app developers benefit from scalable Apple stores; European online sellers love to sell on Amazon and market their goods on Facebook, and service providers, such as FinTechs logistics firms, love to reach them through social media and WhatsApp.

Three, [mergers can increase innovation](#) by enabling the two firms to increase the productivity of R&D and better internalize the spillovers from R&D spending.

Four, tech firms' spending and innovation is essential for national security—especially in AI, where most R&D spend comes from big technology companies. French president Macron has proposed a European equivalent of U.S. Defense Advanced Research Projects Agency (DARPA) to bolster EU's AI capabilities, but in the United States, DARPA invested only some 5 percent or \$3.43 billion of what [technology companies invested in R&D](#) in 2019. The [Pentagon's entire R&D budget](#) was \$96 billion in 2019. It is not a stretch to say that by limiting large technology companies, Europeans undercut their own small firms that use technology companies' services and risk undermining investments in key national security capabilities.

⁶ Europe may argue that this policy is akin to open banking, enshrined in the European Union's Payments Directive, that makes European banks share consumer and business customers' data at their permission with innovative FinTechs and others in the financial ecosystem, so as to enable customers' access to a wider range of financial products and services from a wider range of providers. Open banking is an excellent principle but it is not applicable to tech companies. It was to enable innovative, less regulated firms to acquire data from highly regulated and less innovative banks, to enable consumers and companies access financial services, such as fast-disbursing working capital loans to small firms. The use case is clear: enable underserved segments to access financial services, by enabling greater data share. In digital markets, the use case is not clear, and large companies are the innovative firms. Mark McCarthy, senior fellow and adjunct faculty member at Georgetown University, provides further discussion on this topic in Forbes.

JURY IS STILL OUT ON EUROPE'S ASSUMPTIONS

To take a step back, the jury is also still out on Europe's many conventional wisdoms—also shared in U.S. popular media—about the digital economy and platforms. The notions that digital businesses are monopolies-in-waiting or winners-take-all with durable networks and deep moats enabled by proprietary data are all suspect and contested in academic literature.

First, data has diminishing returns in many sectors: more and more data does not necessarily directly lead to better outcomes or deeper moats. [Recent research suggests](#) that cutting the amount of historical data companies such as Yahoo! can retain on Internet searches does not drastically affect the quality of search results. One implication is that other companies may not be as hampered as Europeans paint them to be from acquiring data and competing in spaces like AI that depend on data. In some areas such as mapping technology, more data can after a point add little incremental new value.⁷

Second, data is also not as exclusive as it may seem: users of digital services are promiscuous by shuffling from one marketplace and social media site to the next, have low attention spans, and low costs to switch to another platform. Advertisers can reach 65 percent of Snapchat users on Facebook and 54 percent on Instagram the very same day, which is seen as Snapchat's feat of garnering unique users. Here, astute observers might point out that shifting from Facebook to Instagram still keeps the user in the Facebook empire, but [Facebook itself has been agonizing about the cannibalization of Facebook](#) by Instagram: a new service does not necessarily linearly add new users and vaster data. In addition, swaths of [consumer data are also not hard to access](#)—thousands of consumer attributes are readily available on hundreds of millions of people.

In addition, many companies monetize the data larger companies like LinkedIn and Airbnb generate and have visible on their platforms and—at least in the United States—courts have held that this data is like a public library and have sided with data sharing rather than data hoarding.⁸ Europe assumes increasing returns to scale; as firms get bigger, they also grow into data barons that are more difficult to rival. Yet this is not exactly reflected in reality. In addition, by generating and pooling data, larger firms also enable smaller ones and entire ecosystems.

Third, the argument that companies produce network externalities that make them irresistible to consumers and perpetuate the growth of a massive company is also rather simplistic. After all, consumers and small businesses in many ways benefit from vast networks like global e-commerce marketplaces, global social networks, and virtual meeting platforms just as they have benefited from the standardization and network effects of Windows operating systems. Consumers voluntarily opt for one or two services precisely because of the network benefits. The fact that everyone is on Facebook is a huge social and economic benefit for small businesses, who can use one single platform to reach buyers across their country and the world.

Fourth, [Europe's premise](#) that incumbents should not be allowed to acquire promising startups due to possible future competition is suspect. For one, judging which company is “promising” is next to

⁷ Venture capitalist Ben Evans provides a neat example. If a driver “can drive in Naples for a year without ever getting confused, how much more is there to improve? At some point you're effectively finished. So, a network effect means that your product gets better if you have more users, but how many users do you need before the product stops getting significantly better? How many cars do you need to sell before your autonomy is as good as the best on the market? How many companies might be able to reach that? And meanwhile, machine learning itself is changing quickly—one cannot rule out the possibility that the amount of data you need to get autonomy working might shrink dramatically.”

⁸ HiQ, a Silicon Valley company that sells predictive analytics to employers on leaving by start employees, gets the bulk of its data by scraping it off LinkedIn. In 2017, LinkedIn lost its lawsuit against HiQ for the practice, with the court pointing out that LinkedIn's data were public for all to see—it was not hidden out of sight in a vault.

impossible—especially in the early stages of its life or in an established company’s early stages in a new market. Most startups pivot during their first few years—often multiple times— and end up with a rather different business model or market than what they started out with. And, as noted, acquirers often end a company’s product line, suggesting that the company assets could be used more productively in pursuing different products and markets. The counterfactual Europe rides on—that the acquired startup would have grown into an innovative company with its current line of products and services, let alone go public as is—is feeble.

Fifth, the question of which market structure optimizes innovation is more complicated, but even then academic literature does not favor curtailing firm size or promoting fragmented markets of small firms.⁹ Granted, [one camp argues that acquirers](#), once becoming larger, become lazy as competitors are not pushing them to invest and innovate. But mergers can just as well incentivize more innovation as the firms can economize their R&D dollars more effectively. Furthermore, technology companies are not resting on their laurels in a market they lead; they are continually looking to break into new spaces where they are the competition and rivals, not incumbents. For example, Facebook and Apple are upstarts getting into digital payments, a market long dominated by global credit card companies. [Innovation happens when leading firms can exploit their data and capabilities](#) while facing competitive pressures – but blocking them in some markets may limit the competition they can offer as upstarts in others.

Another reason not to be swayed by the idea that companies innovate less as they grow is that the concept of “killer acquisitions” is a myth not reflected in empirical studies. For example, a [recent study](#) examining the acquisition by Google, Amazon, Facebook, and Microsoft of 175 companies big and small showed that the acquired firms are often not acquired for their innovative product but rather, the acquirer is often more interested in their capabilities—talent, IP, and technology—than the product itself and typically ends the line of products the acquired company produces and integrates the staff into existing activities. If the product was such an innovative smash hit, why end it rather than taking it further to market? Acquisitions appear to substitute for in-house R&D rather than killing a supposedly rising rival with innovative products. Through acquisitions, the technology company adds capabilities to its R&D department.

Each of the premises of European proposals—that networks are exclusive, entrenched, and durable; that digital business models result in persistent winner-take-all dynamics that harm consumers; and that protecting potential smaller competitors implies promoting competition, innovation, and helping consumers—continue to be fiercely challenged across think-tanks, academics, associations, and universities on both sides of the Atlantic. The jury is still out, with empirical studies gradually trickling in. The lack of empirical basis for the various conjectures European officials make is reflected in Europe’s own policy pieces. For example, the Furman report uses “potential” or “potentially” 142 times as in “potentially anti-competitive mergers,” consumers “potentially give up more data,” and “potentially enduring market power”; the European Union’s 2019 report mentions “potential” or “potentially” 82 times, as in “potentially anti-competitive conducts” and “potentially self-preferencing.” “Potentially” is a term used by well-trained academics who have little systematic empirical evidence to go by. This lack of empirical evidence behind European antitrust proposals makes Vestager’s sweeping proposals to address “structural problems” in digital markets so worrisome.

9 The theoretical discussion on the market structure most conducive to innovation goes back decades and is divided into two camps—that of Kenneth Arrow who in the 1960s famously argued that a monopolist’s incentive to innovate is less than that of a competitive firm; and the father of “creative destruction” Joseph Schumpeter who in the 1940s stressed that innovation stem from large firms operating in oligopolistic markets. Empirical literature tends to side with Schumpeter—innovation seems to be maximized somewhere between the extremes of fierce competition among small firms and a monopoly, but much also depends on definitions such as what is “innovation.”

Each of the premises of European proposals continue to be fiercely challenged across think-tanks, academics, associations, and universities on both sides of the Atlantic.

WHAT SHOULD THE UNITED STATES DO ABOUT EUROPE'S ANTITRUST POLICY?

The intense activity in Europe to empower competition policy authorities to limit digital firms' growth create significant uncertainties about the rules of the game for American companies that provide digital goods and services to European consumers and businesses. For the United States, there are two questions: what can the country do in light of its own policies on antitrust, and what should it do?

AMERICA'S FADING AUTHORITY ON ANTITRUST

The United States has a weaker hand than some years ago to oppose the European Union's competition policy proposals. Led by the Federal Trade Commission (FTC) and the Department of Justice (DOJ), competition policy thinking is shifting and increasingly political in the United States. [In September 2020](#), in an unmistakably political move in light of November's presidential election, the Justice Department announced it would accelerate an [antitrust complaint against Alphabet's Google](#), despite objections by career staff who felt the investigation was far from complete. [The FTC](#) has meanwhile been probing Facebook and Amazon's prior acquisitions of small potential competitors to determine if they had an anticompetitive effect.¹⁰ In a [July 2020 House hearing](#), both parties attacked technology companies, with Democrats seeing them as too big and Republicans saying their algorithms are biased against conservative content. In October, a 16-month [congressional investigation compared](#) Amazon, Apple, Google, and Facebook to railroad tycoons with durable market power cemented by acquisitions.

In addition, numerous state attorneys general are probing Google in particular. States like California and New York have also recently passed tough data privacy laws, [and New York has further empowered its attorney general](#) to prosecute data protection violations on behalf of New Yorkers. Additionally, print and broadcast media have over the years managed to create [exemptions from antitrust laws](#) and [have a horse in the techlash race](#)—concerned as they are about major technology companies' inroads into the news market.

The American public is increasingly concerned about data privacy but is split on enforcement actions on technology firms. In an [August 2019 Gallup poll](#), 48 percent of United States' adults favor more government regulation of big technology firms, while 40 percent said regulation of technology companies should not change, and 10 percent said it should decrease. Seasoned U.S. antitrust officials and academics are even more wary about retailing America's competition policy to address digital markets.

In light of the ongoing U.S. state and federal probes into technology companies, the starting point for the United States is to acknowledge that both the United States and Europe are grappling with hard questions about antitrust policy in the digital era and share both an interest in avoiding politicizing antitrust and meeting the challenges of state surveillance, misinformation, and digital protectionism posed by China and Russia.

¹⁰ The FTC is also contemplating using its Section 6(b) power, which allows the agency to seek business information for a wide-ranging study that is not part of a specific law enforcement investigation, according to Margaret Harding McGill and Scott Rosenberg at Axios.

WHAT SHOULD THE UNITED STATES DO?

What should the United States do in response to European antitrust policy proposals? Here are six ideas for consideration:

- Form a transatlantic “antitrust brain trust.” Competition authorities in Europe are moving along quite unchecked. The business and academic communities can form a transatlantic group of experts tasked with systematically reviewing investigations and decisions on the objective grounds of consumer welfare, innovation, and competition in the marketplace. The group would essentially put antitrust officials under the microscope—much like these officials put technology companies under the microscope—to provide an objective and empirical analysis of the grounds for each case. The group could also prepare case studies of various enforcement actions to show where mistakes and erroneous assumptions have been and are being made as enforcement policymakers assess market structures and dynamics of the digital economy. This approach would also help push competition policy enforcement to be specific to each case, rather than being guided by broad blanket pronouncements and abstract ideas. This approach is also conducive to learning: both academics and regulators need to maintain a degree of humility and take the approach of learning case by case, focusing the United States and the European Union on the facts of each case and away from the emotional and contentious—but also abstract and theoretical arguments—around competition policy enforcement.
- Use innovation as the test for antitrust. The very point of antitrust policy is to protect consumer welfare. U.S. antitrust enforcement has focused heavily on the impact on the consumer and efficiency gains such as lower prices for consumers. Europe’s antitrust enforcement has been more about competition—such as how many companies there are in a market—with the assumption being that competition produces welfare gains. The United States and the European Union share an interest in yet another desirable of antitrust: **innovation**—which unfortunately has yet to be effectively applied as a test for antitrust enforcement. Innovation in the digital economy is key for creating new value for consumers, enabling entire digital ecosystems, and for bolstering national security. It should be woven into antitrust policymaking and thinking more systematically, including through dialogue among national regulators and more fundamental interdisciplinary work among antitrust experts and innovation experts that today occupy different universes in universities and agencies.
- Look at and learn from Canada’s antitrust policy. Canada has produced a particularly sober and succinct approach to antitrust in the digital era, one that other countries should learn from. Canadian competition commissioner’s “[2018 strategy Big Data and Innovation: Key Themes for Competition Policy in Canada](#)” recognized that the rise of technology companies that control and exploit data can raise new challenges for antitrust enforcement, but it also confirmed that current antitrust policies suffice to manage this challenge. The report clarified that companies cannot be investigated or condemned simply because they have scale economies or have big data. If hard-knuckled competition and savvy investments lead to concentrated markets with a few dominant firms that do not engage in anti-competitive acts detrimental to consumers, so be it, and no particular changes to antitrust enforcement are needed. The report also gives a nod to accepting network effects, stating that “competition law enforcement ought not challenge a firm exploiting network effects absent an anti-competitive act.”
- Work with Europe’s small, tech savvy D9 economies in promoting more liberal digital regulatory models. The United States can support such partners as Denmark, Sweden, Finland, Estonia, and

Ireland to highlight their policy ideas and innovations and develop more liberal approaches to the governance of the digital economy.

- Make competition officials listen to startup investors. Europe has an interest in cultivating startups and scaleups. However, the current proposals and antitrust risk deterring early-stage investors—angels and venture capital funds—for whom getting their investees acquired is still the most common path to exit and profits. The investment community and antitrust communities appear to have little dialogue in Europe; comparably the United States’ DOJ has helpfully propelled such dialogue. U.S. venture capital funds are interested in Europe to some extent but are more focused on the United States, Asian, and Latin American markets. Meanwhile, the European venture capital community appears silent in antitrust policy debates—though it has been more vocal about GDPR. The investment community’s views need to be brought more systematically into antitrust policy dialogues in Europe as well as in the United States in three ways: 1) carry out annual surveys with investors on their views on policy proposals; 2) organize semiannual events between competition policymakers, startup policymakers, and startup investors and; 3) open participation to investors in the antitrust brain trust that shadows antitrust enforcers.
- Convince Europe to treat China and the United States differently and collaborate with the latter on China. Europe is not yet fully seeing the advantages of working together with the United States on the common challenges posed by China. Rather, Europe tends to see itself as a third party in the U.S.-China technology rivalry. The European Commission has indicated willingness to work with the United States on the unique issues posed by China’s state-led capitalism, but in practice, cooperation has been limited on technology issues—though more encompassing on trade, where the European Union, United States, and Japan are working on a playbook on China’s unfair trading practices. What is more, as Tyson Barker, deputy executive director and fellow at the Aspen Institute Germany has pointed out, some states like California and New York have been more aligned with European positions on privacy than the U.S. government, but [Europeans do not seem to recognize this](#).

U.S. antitrust enforcement has focused heavily on the impact on the consumer and efficiency gains such as lower prices for consumers. Europe’s antitrust enforcement has been more about competition.

Could the European Union and United States work together to enable Europe to grow more competitive in the digital economy? The European Union is deeply worried about its ability to compete globally in that sector. Yet European economies have tremendous strengths: highly educated workforces, depth in engineering and advanced technologies, and leadership roles in a host of industries that are rapidly digitizing. Such industries include agriculture, infrastructure, transportation, logistics, manufacturing, and knowledge-intensive business services such as financial, business, environmental, and engineering services. The United States and Europe share an interest in piloting, investing in, and leveraging disruptive technologies like AI, blockchain, and IoT in these key industries, and liberalizing market access for services in emerging markets. The United States and Europe can also work together to ensure that firms and workers in underserved and remote regions are able access and apply technologies and increase their productivity.

CONCLUSION

The “Chicago School” of antitrust thought urges caution and preventing false positives like “killer acquisition”, as false positives can be more costly to society and more irreversible than acting on false negatives. However, regulators around the world, especially in Europe, are feeling pressure to “do something” about technology companies. The 2019 EU report embraces the acting on false positives concept by stating that “[U]nder-enforcement in the digital era is of particular concern because of the stickiness of market power” of digital firms.

Europe's policy proposals are founded on reams of assumptions that lack an empirical basis. They raise a real risk of politicization and overenforcement, which can have many serious unintended but foreseeable impacts. The "public interest" European antitrust enforcers claim to champion can quickly become a public bad if antitrust undermines economic efficiencies (that improve consumer welfare), startup investments and formation, innovation, and national security.

Dealing with its own antitrust policy issues, the United States may have fewer bargaining chips to push back on Europe's competition policy proposals that may be detrimental to U.S. companies. But the administration and Congress need to pay close attention and address concerns with European policymakers through collaborative, empirically grounded dialogue and partnership.

***Kati Suominen** is an adjunct fellow with the Europe Program at the Center for Strategic and International Studies in Washington, D.C.; founder and CEO of the data and research firm Nextrade Group, which helps multilateral development banks, governments, and Fortune 500s optimize public policies and investments in driving trade and e-commerce worldwide; founder of TradeUp Capital Fund, a platform for globalizing small to medium-sized enterprises; and founder of Business for eTrade Development, a global coalition of leading companies driving e-commerce development.*

The author would like to thank William Reinsch, Meredith Broadbent, Jack Caporal, Jasmine Lim, and Victoria Meyer for constructive comments and research support, and all participants in CSIS's September 2020 working group meeting on competition policy.

This report is made possible through the generous support of the Computer & Communications Industry Association (CCIA).

This report is produced by the Center for Strategic and International Studies (CSIS), a private, tax-exempt institution focusing on international public policy issues. Its research is nonpartisan and nonproprietary. CSIS does not take specific policy positions. Accordingly, all views, positions, and conclusions expressed in this publication should be understood to be solely those of the author(s).

© 2020 by the Center for Strategic and International Studies. All rights reserved.