

Digital reckoning? The Biden administration and prospects for greater transatlantic alignment on digital competition

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Summary

Policymakers' concerns about Big Tech's market power are nothing new. The European Commission has been launching antitrust investigations against the likes of Google, Facebook and Apple for over a decade. However, efforts to rein in big tech reached a new plateau in 2020, with the EU and the UK publishing detailed proposals for "ex-ante" regulation of large technology companies, and US federal and state authorities announcing a raft of antitrust investigations into Google and Facebook. While not the only explanation for this acceleration, the covid-19 pandemic and the shift towards living and working online - with tech firms seen as some of the biggest beneficiaries of this - have increased the sense of urgency. Looking ahead, a key question is whether we might expect a greater degree of collaboration - or at least alignment - on digital competition policy between Europe and the US under the Biden administration. Will a shared interest in promoting competitive markets prevail, or will considerations of "technological sovereignty" and protecting American companies ultimately scupper cooperation?

While technology has been a crucial lifeline for governments, businesses and individuals during the covid-19 pandemic, the crisis has also deepened concerns about the sheer market power of large tech companies. Big Tech firms including Alphabet (Google), Amazon, Apple and Facebook operate on a global scale, but to date there has been little international coordination on how governments should enforce digital competition, despite the fact that monopolistic behaviours rarely coincide with national borders. So far it has been the European Union, and to a lesser extent the UK, that has led the charge in challenging Big Tech's market power.

Ahead of the transition to the Biden presidency, there were calls on both sides of the Atlantic from the European Commission and in Democratic circles to enhance multilateral cooperation on technology policy. The Biden-Harris administration could usher in a US government that is far more aligned with European thinking on antitrust issues - at least more so than the Trump administration's approach. But given that the Big Tech firms are US companies - to what extent will domestic pressures and the current Congressional landscape inhibit or incentivise US collaboration on competition with the EU?

US developments

Under the Trump administration, the US Federal Trade Commission (FTC) and the US Department of Justice (DOJ) filed two major antitrust cases against Facebook and Google respectively, representing the most high-profile government action in this space since the FTC's case against Microsoft in the 1990s and early 2000s. The Biden administration will now pick up the reins and oversee the prosecution of these cases. Although, the new administration is under a lot of pressure to expand these lawsuits. Sarah Miller, a member of Biden's transition team, has called for the DOJ to consider broadening the investigation to include Google's position in travel, maps, and the App Store. Currently, the DOJ's lawsuit only covers anticompetitive and exclusionary practices in Google's search and search advertising markets.

Although there is momentum behind greater antitrust scrutiny, a deluge on antitrust lawsuits is unlikely to materialise. Despite minor increases to its budget over the past two years, the FTC is chronically underfunded and under-resourced, which is in part why the agency worked with the attorney generals of 46 states, the District of Columbia, and

Guam to pursue its suit against Facebook. Similarly, the DOJ teamed up with eleven states for the civil antitrust lawsuit against Google. Although there is growing bipartisan support for concerted federal action on antitrust, the aforementioned agencies that would lead this push face tough competition for federal funding and are unlikely to see a major boost in resources.

This means that under Democratic leadership, agencies like the FTC are likely to be more strategic about the cases they pursue, with a particular emphasis on effective deterrence (through larger fines, forced sell-offs etc.) and allocating greater attention to market practices that disproportionately harm people of colour. In the short-term, the Biden administration must also make two FTC Commissioner appointments as the Republican Chair, Joe Simons, has announced his resignation and another commissioner, Rohit Chopra, has been selected to run the Consumer Financial Protection Bureau. These appointments will be a key indication of how serious Biden is in taking antitrust action against Big Tech.

One Democratic priority that is likely to be more bark than bite is a revamp of US antitrust law. Last year, Democrats on the House Antitrust subcommittee authored a blistering report calling out Big Tech for its anticompetitive behaviour and urging antitrust action more in line with the approach taken by the European Union. Specifically, the report called for the structural separation of platforms from operating in lines of business that depend on or interoperate with the platform; banning self-preferencing; requirements for data portability; elimination of forced arbitration clauses; increased resources for the FTC and DOJ; and strengthening US antitrust laws by shifting the burden of proof in merger investigations onto the merging parties to demonstrate that the merger would not reduce competition. Although, legislative efforts were stymied last year due to the lengthy negotiations over a covid-19 package.

Moves to revive these efforts are already beginning. After officially being announced as Chair of the Senate Antitrust Subcommittee Senator Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act. This measure would strengthen the standard for antitrust enforcement by banning mergers that “create an appreciable risk of materially lessening competition” in comparison to the current law which only bars mergers that demonstrably reduce competition. It would also shift the burden of proof so that companies attempting to merge would have to prove the acquisition does not hurt competition, whereas now the burden is on regulators to prove that a transaction will hurt competition. The bill is being introduced with only Democratic support

- and while Klobuchar has stated she is reaching out to Republicans - if it were a true bipartisan effort that process is usually started before a bill’s introduction, indicating the measure could be more of a signaling effort.

Democrats may have a small majority in Congress, but the party’s 51 votes in the Senate will make it exceedingly challenging. Some Republicans - most notably Sen. Josh Hawley (R-MO) who has backed calls to preemptively ban mergers by companies like Google and Amazon - might support antitrust reform. There could be room for consensus around narrower reforms relating to data portability requirements and updating the burden of proof for acquisitions involving large tech firms. But a key lynchpin in this debate will be whether or not antitrust reform gets tied up in efforts to change tech companies’ liability protections under 230. The debate over Section 230 has tripped up previous antitrust reform efforts and is even more hotly debated now after social media platforms were used to plan the storming of the Capitol and led to former President Trump being banned from Twitter. These dynamics will likely stall any major changes to antitrust law in the near-term.

Instead, Big Tech should prepare for enhanced scrutiny and enforcement especially with Democrats in the Senate now having the power to call CEOs to testify. But even these potential policy shifts are a far-cry from the changes being proposed in Europe discussed next.

EU and UK developments

The European Union, and in particular the EU’s antitrust authority, the European Commission, has long been considered something of a trailblazer when it comes to digital competition. While in the US, antitrust action against Big Tech only really took off in 2020, the Commission has long been a thorn in the side of the tech giants. The Commission launched the first of several formal investigations into Google’s market practices all the way back in 2010; since then it has found the company guilty of multiple abuses, with the fines over the years adding up to an eye-watering €8.25 bn. And while Google has borne the brunt of the Commission’s ire, most of technology’s household names have been in the firing lines, with Apple fined for its tax arrangements in Ireland (a ruling eventually overturned by the European Court of Justice) and Facebook censured for providing misleading information to the authority during its acquisition of WhatsApp in 2014. The Commission remains highly active in this space, with ongoing investigations underway into suspected market abuses by Apple, Amazon and others.

Yet despite this record, the Commission has concluded that a new approach is needed. While

antitrust investigations into individual tech firms will continue, the EU has been criticised by numerous stakeholders - including its own watchdog, the European Court of Auditors - for moving too slowly to challenge the market power of Big Tech. To cite just one example, the Commission's aforementioned 2010 investigation into Google's search service only reached its conclusion in 2017, long after the perceived competitive abuses had taken place. Antitrust policy, with its emphasis on specific firms and markets and the use of fines and remedies to address abuses after they have taken place (ex-post), is increasingly seen as just one part of a wider policy toolbox needed to genuinely promote competition in digital markets. Key to ensuring digital competition, so the argument goes, is the addition of "ex-ante" regulation imposed on dominant tech platforms irrespective of any specific abuses identified by regulators.

In December 2020 the Commission published its long-anticipated Digital Markets Act (DMA), its attempt at creating an ex-ante legislative framework. Fundamental to the DMA's approach is the notion of "gatekeepers" - digital platforms deemed to play a gatekeeping role in governing interactions between consumers and business users. Rather than explicitly target specific companies, the DMA proposes a number of quantitative criteria - relating to size, control and entrenchment - and in-scope activities, which if met would result in a company being formally designated a gatekeeper.

Once designated a gatekeeper, a company would be subject to binding obligations regarding its business practices - such as its use of business customers' data or "self-preferencing" of its own products - and liable to fines up to 10% of annual turnover in case of non-compliance. The Commission has also floated the imposition of "structural remedies" - forced break-ups in other words - though it has been careful to frame these as a last resort. While the DMA will take several years to clear the EU's legislative process and be implemented, broad support for the proposal within the European Parliament and across the EU's member states suggests it is a matter of when rather than if. And while the precise details of the legislation still need to be haggled over, companies such as Facebook, Amazon, Google and Apple are almost certain to be captured.

Recent developments in the UK mirror those in the EU in many respects, although there are important differences. While the Competition and Markets Authority (CMA), the UK's competition authority, has over the past decade been noticeably less active than the Commission when it comes to individual investigations of Big Tech, this has recently started to change. Last year, the CMA cleared Amazon's investment into Deliveroo after an extended

investigation, nearly derailing the transaction, and is currently carrying out simultaneous investigations into Facebook's planned acquisition of Giphy, Nvidia's planned acquisition of Arm, and Google's plans to phase out third-party cookies from its Chrome browser (the CMA fears this will further consolidate Google's dominance in the online advertising space).

This more activist approach demonstrates the CMA's growing focus on digital markets, which culminated in proposals published last year for an ex-ante regulatory regime similar to that proposed by the DMA. As part of broader "Digital Markets Taskforce" also involving the UK's data protection and communications regulators (the ICO and Ofcom), the CMA is calling for a "a pro-competition regime for digital markets" which would impose specific obligations and interventions - known collectively as a "code of conduct" - on dominant tech firms deemed to hold "Strategic Market Status" (SMS). The regime would be overseen by a newly-created Digital Markets Unit (DMU) staffed with experts and responsible for both the monitoring and enforcement of digital competition. While the measures closely echo those in the DMA, the UK's proposals are noticeably more flexible than the EU's, with obligations and interventions designed on a case-by-case basis as opposed to being fully mapped out in legislation. With the government having formally committed to the CMA's proposals, the UK's ex-ante regime could be in place relatively quickly assuming parliamentary support and an amenable government timetable.

Prospects for transatlantic collaboration

As previously noted, ambitions for closer transatlantic collaboration on tech policy are high following the inauguration of the internationally inclined Biden-Harris administration. The European Commission's recent proposal for a sweeping transatlantic agenda calls for a Trade and Technology Council, the aim of which would be to "strengthen our technological and industrial leadership", including by "promoting innovation and fair competition". Even within the US tech sector, leaders have [proposed](#) a "T-12" or "techno-democracies group" (encompassing the US, Japan, Germany, France, Britain, Canada, Netherlands, South Korea, Finland, Sweden, India, Israel and Australia) to coordinate action on technological standards and competition. As for the UK, the Johnson government will be keen to foster the so-called "special relationship", including on digital policy, while the CMA has called for greater cooperation between competition authorities on enforcing digital competition.

Yet look past such high-minded statements of intent and the picture looks rather different. As the

analysis above demonstrates, while there is mutual frustration with Big Tech's perceived competitive abuses, when it comes to specific solutions there is little agreement. While the EU and the UK have accepted the need for ex-ante regulation in addition to antitrust investigations, there is no such consensus in the US, where antitrust action against Big Tech has only recently taken off and congressional gridlock is likely to stymie attempts to overhaul competition law. But while a joined-up approach to regulation is unlikely anytime soon, ongoing collaboration between European and American authorities - including on information sharing and identifying anticompetitive market practices - will continue and probably intensify as antitrust investigations in the US ramp up.

More generally, collaboration on digital policy - including but not limited to competition - could also be further hamstrung by factors including digital services taxes, data localisation, and an ongoing shift on both sides of the Atlantic towards technological sovereignty and economic nationalism. Against this backdrop, accelerating efforts to tax and regulate the largely US-based tech giants could create the perception of American business under siege from abroad, and provoke retaliation from the new administration. The UK, which has already introduced a digital services tax and is likely to have its ex-ante framework in place sooner than the EU, will be a valuable test case of where the Biden administration's instincts lie. Alignment will face fewer obstacles in areas where interests are already largely similar, such as 5G security, developing shared technological standards for emerging industries such as AI or blockchain, and protecting critical technologies from foreign acquisition.

Given the global nature of Big Tech, greater transatlantic alignment on digital competition policy would appear to be a prerequisite to truly challenging its market power and influence. But at least in the near-term, such alignment does not appear to be in the cards.

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