CONVERGING PROPOSALS FOR PLATFORM REGULATION IN CHINA, THE EU, AND U.S.: **COMPARISON AND COMMENTARY**

BY
LIYANG HOU

&
SHUAI HAN

Professor, KoGuan School of Law, Shanghai Jiao Tong University.Doctoral Candidate, KoGuan School of Law, Shanghai Jiao Tong University.

TechREG CHRONICLE AUGUST 2022

Visit **www.competitionpolicyinternational.com** for access to these articles and more!

CONVERGING PROPOSALS FOR PLATFORM REGULATION IN CHINA, THE EU, AND U.S.: COMPARISON AND COMMENTARY

By Liyang Hou & Shuai Han

The fast expansion of the digital sector has raised regulatory attention across the world. In order to maintain a competitive market and to promote healthy and fair competition, major economies have come up with proposed legislative drafts to regulate digital platforms. This article offers a comparative view on those legislative drafts in China, European Union, and the United States, and submits suggestions for future revision for the Chinese drafts.

01
INTRODUCTION

As the greatest engine for economic growth in the recent history, digital platforms have transformed people's ways of lives, and brought convenience as a standard. With innovated ways of doing businesses, platforms with the help of technology advances are now able to substantially bring down, if not to eliminate, transaction costs, by bypassing middleman and expanding business reach nation-wide or even world-wide. Consumers are now able to enjoy a wider range of products with reduced prices. More jobs are created as platforms increase opportunities and ways of doing businesses. Competitors in the traditional non-digital world certainly have different thoughts, however, as innovations and the fast expansion of their digital counterparts are threatening the very existence of their livelihood. Users, in particular business ones, are highly dependent upon those platforms, and hence have concerns over the influence exerted by platforms on their businesses.

Governments as well have showed their worries about platforms' extensive influences and controls on users and the economy. Furthermore, with the digital economy being the trend come new types of anti-competitive practices that are complex in nature and are not easily judged or regulated. Should we encourage maximizing total welfare as Bork suggested and thus tolerate the existence of market power, or should we adopt some more strict ways of regulation as what the Neo-Brandeisians have suggested to protect small businesses and to reduce platforms' influences? It seems that digital way of life is a bittersweet experience, but one thing to be sure, digital platforms are now on the radar of major nations worldwide. China, the United States (hereinafter U.S.), and the European Union (hereinafter EU) all have drafted proposals with the intention of keeping platforms in check.

The State Administration for Market Regulation in China ("SAMR") announced two guidelines in October 2021. The drafted Guidelines for Classification and Grading of Internet Platforms (互联网平台分类分级指南) ("Classification Guidelines") categorize digital platforms into super, large and medium-to-small platforms by size, and the drafted Guidelines for Implementing Subject Responsibilities on Internet Platforms (互联网平台落实主体责任指南) ("Responsibilities Guidelines") impose extra responsibilities and obligations when a platform falls into the category of "super" or "large", with the purpose of securing fair competition, equal internal governance, and an open ecosystem.[2] China is certainly not alone in doing so. The EU adopted the Digital Markets Act ("DMA") on July 18 2022,.[3] At the other side of the Atlantic, the U.S. House of Representatives, based on a similar idea, formed a set of five bills, trying to implement regulations on Big Tech companies to hold them accountable for a number of anti-competitive conduct.[4] All these guidelines and proposed acts have one common goal that is to seek government regulation against big platform operators outside the box of competition law[5].

02
DRAFT REGULATIONS IN THE EU AND THE U.S.

With the competition law analysis into mind, the logic behind those proposals in both the U.S. and the EU can be easily observed to follow the same three-step analysis.

The first step is to define relevant markets. The EU confines platform services to be governed by the DMA to 11 types under the term of "Core Platform Services". These are comprised of online intermediation services, online search engines services, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services,

2 See the State Administration for Market Regulation, "The Announcement for Public Comments on the 'Guidelines for Classification and Grading of Internet Platforms (Draft for Comment)'and the 'Guidelines for Implementing Subject Responsibilities on Internet Platforms (Draft for Comment)' [关于对《互联网平台分类分级指南（征求意见稿）》《互联网平台落实主体责任指南（征求意见稿）》公开征求意见的公告]," October 29, 2021, available at https://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html.

3 Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), adopted on July 18 2022.

4 U.S. House Lawmakers Release, "A Stronger Online Economy: Opportunity, Innovation, Choice" (2021), https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity, last visited on January 3, 2022.

5 Competition law is as a matter of fact an EU term, which is equivalent to anti-monopoly law in China and antitrust law in the U.S.

and online advertising services.[6] In comparison, the U.S. uses three kinds of business functions as a guide, and defines the relevant market as "Online Platforms" that can: (1) enable a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform; (2) facilitate the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform; or (3) enable user searches or queries that access or display a large volume of information.[7]

Different as they may seem, the EU and the U.S. are similar in nature. In fact, all those "Core Platform Services" can also be more or less covered by the "Online Platforms" of the U.S. Thus, it is clear that both jurisdictions, instead of establishing something new and deviating from the existing competition law completely, still rely heavily upon the traditional analysis framework of the competition law by defining the relevant market as the initial step for regulatory action.

With relevant markets successfully defined, the next step of the competition law analysis is the analysis of the market power. This is exactly what the EU and the U.S. legislators do in their proposed acts. Just as the principle of the competition law states, not all conduct is condemnable unless there is dominant market power associated with. The wording for platforms with market power in the regulatory zone may be different, as in the EU prefers "Gatekeepers"[8] whereas the U.S. uses "Covered Platforms,"[9] but both refer to an identical method comprising four factors, namely active end user numbers, active business user numbers, revenue, and market capitalization. The only difference is the thresholds applied for each factor, as illustrated in Table 1.

Table 1: Thresholds for Market Power in the EU and the U.S.

	Active End Users (mil.)	Active Business Users (thous.)	Revenue (bil.)	Market Value (bil.)
EU	45	10	€7.5	€75
U.S.	50	100	$600	$600

It is not hard to find out that all of those four factors are also ones to evaluate dominance under the competition law. Market shares and the market structure reflect the weight of a firm on its relevant market, and hence indicate its market power. The idea of market structure has been integrated into the competition law analysis since the emergence of the Harvard School, under the "SCP" paradigm that certain types of market structures (S) give rise to abusive conduct (C) that results into anti-competitive performance (P). Thus, in order to prevent anti-competitive behavior, it is best to go after the root cause. After taking care of the market structure anti-competitive behavior will disappear itself.[10]

With relevant markets successfully defined, the next step of the competition law analysis is the analysis of the market power

This idea is so embedded in modern antitrust policy that often the market shares of a firm are viewed as a strong proxy for its market power. Assumptions concerning dominance based on the scale of market shares have been officially or unofficially established across jurisdictions. In terms of weighing platforms' market power, it can be observed that both the U.S. and the EU are heavily influenced by the Neo-Brandeisian school, which advocates the restoration of the structuralist paradigm of the Harvard School and the idea that with great power, comes greater responsibilities and obligations.[11]

In order to maintain a fair and healthy competitive market for the digital sector, those powerful and dominant platforms must be kept in check. The last step of competition law analysis is to specify obligations and to take actions. Just as the traditional anti-monopoly law analysis framework would do, the EU's and the U.S.'s proposals both come up with detailed obligations. The EU's act sets mainly five groups of obligations, (1) obligations on transparency to business users; (2) obligations on interoperability to third party applications; (3) prohibitions on the practice of self-preferencing; (4) prohibitions on exclusive

6 European Commission, "Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)," COM(2020) 842 final, December 15, 2020, Article 2.

7 See Ending Platform Monopolies Act, H. R. 3825, June 11, 2021, Section 5(10).

8 See DMA, *supra* note 2, Article 3.

9 See Ending Platform Monopolies Act, *supra* note 6, Section 5(5).

10 See Herbert Hovenkamp, "The Harvard and Chicago Schools and the Dominant Firm" (2007), *Faculty Scholarship at Penn Law. 1771*, https://scholarship.law.upenn.edu/faculty_scholarship/1771.

11 See Lina Khan, "The New Brandeis Movement: America's Antimonopoly Debate," 9 *Journal of European Competition Law & Practice* 131 (2018).

dealing, and (5) obligations on data portability and interconnection.[12]

The U.S.' proposed acts mainly include (1) limitations on business scope;[13] (2) prohibitions on acquisitions;[14] (3) prohibitions on self-preferencing;[15] (4) obligations concerning interoperability with third party applications;[16] and (5) obligations concerning data portability.[17] It can be inferred from those proposed obligations that the EU is attempting to restore the competitiveness of the digital sector by confining the power of gatekeepers, whereas the U.S. takes one step further to even divest covered platforms. The limitations in business scope and the prohibitions on acquisitions may give the U.S. government the power to step into the digital market and to actively break apart those digital conglomerates. This is indeed a way of protecting those small firms, albeit with great sacrifice.[18] Legislators in the U.S. should be aware of the benefit of economic of scale and scope and the network effect, all of which can increase efficiency and consumer's welfare.[19] Blind redistribution may reduce the level of competition, efficiency and consumer's welfare, and only lets the benefit flow to smaller firms or those that are still clinging to old technologies that have been rendered outdated by new ones, namely digital platforms in particular.[20]

Furthermore, the U.S.'s acts on self-preferencing are rather general and leave plenty room for interpretation. As what the American Innovation and Choice Online Act states, it is unlawful for covered platforms to engage in conduct that "advantages the covered platform operator's own products, services, or lines of business over those of another business user". In comparison, the EU's act specifies those particular practices that are considered self-preferencing to make regulation enforcement clear and direct without too much freedom for interpretation.[21] From such a sense the EU proposal is more practical than the U.S. one.

03
DRAFT REGULATION IN CHINA

China's two guidelines for regulating the digital sector follow the proposed acts of the EU and the U.S. The Classification Guidelines use business types and sizes to categorize platforms into different category. The Responsibilities Guidelines set obligations for platforms in certain categories. These two guidelines, however, did not capture the essence of the draft legislations in the EU and in the U.S., and contain three major problems.

First, the Classification Guidelines, instead of defining relevant markets where there may exist durable monopoly power, as those proposed acts in the EU and the U.S., choose to exhaustively list out all the business services that are available in the market. Those services are divided in six main categories with in total 31 sub-categories. Those six main categories are Online sales, life services, social entertainment, information, financial services, computing applications. Such a classification suggests the underlying assumption that all types of platforms may have the ability to exert market power. However, it is not compatible with the real market situations. Consequently, the Classification Guidelines, once adopted in such a manner, would possibly lead to over-deterrence to the digital competition.

Second, the thresholds for market power are comparatively low. It may square a large number of platforms under unnecessary regulation. Although the Classification Guidelines set distinct thresholds for super and large platforms, the Responsibilities Guidelines regulate the two with no difference, as illustrated in Table 2. Thus, the real threshold for regulation is those for large platforms.

12 See DMA, *supra* note 2, Article 5-6.

13 See Ending Platform Monopolies Act, *supra* note 6, Section 2.

14 See Platform Competition and Opportunity Act of 2021, H. R. 3826, June 11, 2021, Section 2.

15 See American Choice and Innovation Online Act, H. R. 3816, June 11, 2021, Section 2.

16 See Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, H. R. 3849, June 11, 2021, Section 3.

17 *Ibid.*

18 See Herbert Hovenkamp, "Antitrust and Platform Monopoly," 130 *Yale Law Journal* 73 (2021).

19 See Daniel Sokol, "A Framework for Digital Platform Regulation," 17 *Competition Law International* 95 (2021); and Marco Cappaia & Giuseppe Colangelo, "Taming Digital Gatekeepers: the 'More Regulatory Approach' to Antitrust Law," 41 *Computer Law and Security Review* 105559 (2021).

20 See Hovenkamp, Herbert, "Is Antitrust's Consumer Welfare Principle Imperiled?," 45 *Journal of Corporation Law* 117 (2019).

21 See DMA, *supra* note 2, Article 7(2).

Table 2: Platforms Proposed to be Regulated in China

	Active End Users (mil.)	Market Value (¥ bil.)	Business Scope	Power to Monopolize
Super Platforms	500	1,000	≥ two sub-categories of services	Super strong ability to limit access to users
Large Platforms	50	100	≥ two sub-categories of services	Strong ability to limit access to users

According to the statistics of the China Industrial Control Systems Cyber Emergency Response Team ("CIC"), a total number of 23 Chinese platforms might be categorized as large platforms. Among those, five of them meet the threshold for super platforms, namely Tencent, Alibaba, Meituan, ByteDance, and Ant Group. If international platforms that have strong Chinese footprint are counted, including but not limited to Google, Apply, Microsoft, and Oracle, the total number can easily approach 30. In comparison, the U.S. covered platforms so far only cover the so-called GAFAM, i.e. Google, Apple, Amazon, Facebook, Amazon, and Microsoft. The EU thresholds are a bit lower, and may only include 13 platforms.[22] Even though the number of platforms that fall under the regulation coverage in the EU is far less than that in China, some scholars still criticized the threshold being a bit too low, and suggesting raising the threshold to reduce the number of platforms under regulation to be less than ten.[23]

Third, the Responsibilities Guidelines impose only four obligations nonetheless in a very general sense.[24] Those are (1) prohibition on the use of business users' data to compete with them; (2) prohibition on self-preferencing; (3) obligations on interoperability, and (4) prohibition on the use of one service on the condition of another. In comparison with proposed acts in both the U.S. and the EU, China's proposed draft has fewer obligations, and leaves too much discretion for the agency in the subsequent enforcement.

04
ROOM FOR IMPROVEMENT

The analyses above suggest that these two proposed guidelines need to be significantly revised in order to fulfill the goal of strengthening anti-monopoly in the field of platform economy in the future.

First and foremost, the 31 subcategories of platform services need to be reduced, and to focus on areas where durable market power may exist and would affect the competitiveness of the digital sector in the medium to long run. The EU's categorization of core platform services can be a good reference. The platform governance should rely on the interaction between competition law and sector-specific regulation. Once there is the lack of durable market power competition law should suffice to govern anti-competitive conduct thus arouse.[25] Consequently, the delineation of platform services, as an initial step, should serve the purpose of identifying platforms' services that might lead to medium to long term sustainable market power, rather than embracing all the types of digital services. As such a more or less clear borderline can be drawn between the competition law and the platform regulation. Otherwise, not only the proposed sector-specific regulation might be too broad so as to cover unnecessary digital services, but also the intrusive obligations imposed afterwards may distort competition in the digital sector. For such a goal, public inquiries should be carried out as to whether it is necessary to square a certain type of platform service for sector-specific regulation.

Moreover, the thresholds in the Classification Guidelines are too low in defining super and large platforms with factors such as business types and power. As analyzed before, the Chinese proposal would net much more platform operators than the EU and the U.S. The inclusion of platforms without durable market power gives the agency too much discretion, thereby possibly leading to governmental capture. Furthermore, unnecessary obligations also make platforms incur extra costs for compliance, and reduce their incentive for innovation and the desire for seeking economic efficiency.[26]

22 These 13 platforms are the GAFAM and Airbnb, Oracle, Paypal, Salesforce, SAP, Videndi, Yahoo, and Zoom. See Mario Mariniello & Catarina Martins, "Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma"(2021), https://www.bruegel.org/2021/12/which-platforms-will-be-caught-by-the-digital-markets-act-the-gatekeeper-dilemma/.

23 See Damien Geradin, "What is a Digital Gatekeeper? Which Platforms should be Captured by the EC Proposal for a Digital Market Act?" (2021), https://ssrn.com/abstract=3788152.

24 Article 16 and 17 of the Responsibilities Guideline specifically require platforms to act in accordance with the Anti-monopoly Law and the Anti-Unfair Competition Law. However, this is not really an additional obligation.

25 See OECD, "Ex ante Regulation in Digital Markets – Background Note," DAF/COMP(2021)15, December 1, 2021.

26 See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, New York: Wolters Kluwer (2020), 260-262.

Last but not least, the Responsibilities Guidelines aim at eliminating anti-competitive practices, and restoring a healthy and fair digital market. However, the ambiguous terms in the current version are unable to achieve the effect of better regulating the digital sector, and would generate too many legal uncertainties for the subsequent enforcement. Therefore, it is proposed to not only include more obligations, but also lay out more detailed conditions for the particular scenarios for those obligations.

The Responsibilities Guidelines aim at eliminating anti-competitive practices, and restoring a healthy and fair digital market

CPI SUBSCRIPTIONS

CPI reaches more than **35,000 readers** in over **150 countries** every day. Our online library houses over **23,000 papers**, articles and interviews.

Visit **competitionpolicyinternational.com** today to see our available plans and join CPI's global community of antitrust experts.

CPI COMPETITION POLICY™ INTERNATIONAL