NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 47
Number 4 *Online Issue*

Article 2

5-1-2022

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Parker Williams Hassard†

I. Introduction

"Copy, acquire, and kill" might sound like a top-secret military strategy.[1] In reality, Facebook's critics use this catchphrase to describe the tech conglomerate's strategy to remain a "gatekeeper" in the digital economy.[2] Facebook's co-founder and CEO Mark Zuckerberg once admitted that he aims to "neutrali[z]e the compet[ition]" when it comes to mergers and acquisitions.[3] Further, Facebook was accused of threatening Instagram's founder, Kevin Systrom, by saying Facebook would go into "destroy mode" if Instagram tried to prevent Facebook's acquisition of the social media platform in 2014.[4] The Federal Trade Commission's antitrust case against Zuckerberg brought worldwide attention to the threat

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1 Samuel Stolton, *Facebook Accused of 'Copy, Acquire, and Kill' Tactics in US Antitrust Hearing*, EURACTIV (July 30, 2020), https://www.euractiv.com/section/digital/news/facebook-accused-of-copy-acquire-and-kill-tactics-in-us-antitrust-hearing/ [https://perma.cc/7B9S-9HTA].

2 *Id.*

3 *Id.*

4 *Id.*

posed to the "digital economy" by "Big Tech," including Facebook, Apple, Amazon, Microsoft, and Google.[5]

Although the European Union (the "EU") and other government and national bodies attempted to implement more stringent regulations on technology companies, the United States is not known for following the same level of oversight.[6] The EU is currently trying to change this through a legislative "package" that will address anticompetitive behaviors that stifle competition within the technology community.[7] These new laws include the Digital Services Act ("DSA") and the Digital Markets Act ("DMA") that were formally introduced in 2020.[8]

This Note will discuss both Big Tech regulation efforts in the United States compared to the European Union and the European Union's new movement to rein in the gatekeepers of the tech industry. Part II will examine current Big Tech regulation efforts in the United States and recent attempts at penalizing major players in the digital economy. Part III will examine current Big Tech regulation efforts within the European Union, with an emphasis on the EU's history as a leader in Big Tech regulation efforts. Part IV discusses the introduction of the legislative package encompassing the Digital Services Act and the Digital Markets Act and their intended purposes. Parts V and VI examine how the United States can and should increase its tech industry regulation by incorporating certain provisions of the Digital Markets Act and Digital Services Act, as well as how the United States can improve in areas where the DMA and DSA may fall short. Finally, Part VII provides conclusion highlighting how the United States can follow the EU's legislative lead to promote user data privacy rights and competition in the digital economy.

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5 *See id*. These five companies, Meta (Facebook), Apple, Amazon, Microsoft, and Alphabet (Google) are known as the "Big Five."

6 *See* Zoe Strozewski, *U.S. Lags in Policing Big Tech Due to Companies Being Homegrown, Expert Says*, NEWSWEEK (Nov. 8, 2021), https://www.newsweek.com/us-lags-policing-big-tech-due-companies-being-homegrown-expert-says-1647080 [https://perma.cc/YK6V-SB25].

7 Ryan Browne, *Europe Tries to Set the Global Narrative on Regulating Big Tech*, CNBC (Dec. 16, 2020), https://www.cnbc.com/2020/12/16/europe-tries-to-set-the-global-narrative-on-regulating-big-tech.html [perma.cc/6B7V-526Q].

8 *See The Digital Services Act Package*, EUR. COMM'N (Mar. 3, 2021), https://ec.europa.eu/digital-single-market/en/digital-services-act-package [perma.cc/F4QL-FE26].

II. Current U.S. Regulations Targeting Big Tech

"Senator, we run ads."[9] In July of 2020, the CEOs of tech giants including Facebook, Amazon, Google, and Apple, testified before members of Congress.[10] Senator Orrin Hatch of Utah questioned Zuckerberg on Facebook's operation and at one point asked him, "So, how do you sustain a business model in which users don't pay for your service?"[11] While Facebook may not charge its users, Facebook uses its "market power" to generate revenue in three distinct ways.[12] First, advertisers that target Facebook's users constitute Facebook's primary source of income.[13] Second, users pay for access to Facebook with their own data.[14] Third, Facebook revenue is generated by its "growth strategy," which involves buying any and all competitors, effectively reduces choice and innovation for its users and advertisers regarding social media platforms.[15]

After many weeks of Congressional testimony by Big Tech CEOs, the attorneys general of 46 U.S. states and the Federal Trade Commission ("FTC") filed a lawsuit against Facebook for anti-competitive behavior on December 9, 2020.[16] In addition to the questions surrounding Facebook's handling of users' private data, the behavior at issue is Facebook's "growth strategy," which includes using its market power to buy competitors and essentially squash any competition in the marketplace.[17] Two of the most significant examples include Facebook's acquisition of Instagram

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9 Shannon Liao, *11 Weird and Awkward Moments From Two Days of Mark Zuckerberg's Congressional Hearing*, VERGE (Apr. 11, 2018), https://www.theverge.com/2018/4/11/17224184/facebook-mark-zuckerberg-congress-senators [https://perma.cc/8EEV-DQQR].

10 *Facebook Antitrust Battle Escalates Tension Between Government, Big Tech*, CONVERSATION (Jan. 11, 2021), https://theconversation.com/facebook-antitrust-battle-escalates-tensions-between-government-big-tech-151959 [https://perma.cc/MR54-T4MT] [hereinafter *Facebook Antitrust Battle*].

11 Liao, *supra* note 9.

12 *Facebook Antitrust Battle*, *supra* note 10.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *See id*.

in 2012 and WhatsApp in 2014.[18] As the lawsuit claims, these acquisitions significantly reduced user and advertiser choice for social media platforms.[19] At the resolution of this suit—whenever that may be—the FTC is hoping to obtain an injunction that would require Facebook to obtain permission before acquiring any other companies or potential competitors and prohibit the social media giant from inflicting restrictive conditions on software developers.[20]

While the FTC and the federal government's recent actions against Facebook are a step in the right direction for the United States' regulation of the digital market, the United States has a reputation for giving tech giants nothing more than a "slap on the wrist" for their transgressions.[21] For example, before the FTC case against Facebook, the U.S. government "merely appealed to Facebook's 'greater responsibility'" while applauding it as an "American success story."[22] However, this proceeding represents a shift toward "align[ing] the United States with a global movement" aimed at regulating Big Tech more heavily.[23] This shift is encouraging, but the United States has a long way to go to catch up with its peers in terms of its oversight of Big Tech and the digital economy. Case in point, since 2016, the social media conglomerate has been subject to over 80 hearings globally.[24]

III. The EU's Efforts Against Big Tech

Although the United States has historically given technology companies like Facebook nothing more than a stern scolding for its anticompetitive behavior,[25] the European Union has taken legitimate actions to hold these companies accountable. For example, Facebook was penalized upwards of $123 million U.S. dollars by the EU for misleading its regulators during Facebook's

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18 *FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization [https://perma.cc/RC8K-E9NH] [hereinafter FTC].

19 *Facebook Antitrust Battle*, *supra* note 10.

20 FTC, *supra* note 18.

21 *See Facebook Antitrust Battle*, *supra* note 10.

22 *Id*.

23 *Id*.

24 *Id*.

25 *See id*.

acquisition of WhatsApp.[26] The EU also initiated its own investigation into Facebook's data practices to assess whether its handling of user data violated anticompetition law.[27]

Further, in early 2020, the European Commission (the "Commission") heightened its inquiry into accusations that Facebook used users' data to suppress competition in the marketplace.[28] Specifically, these claims allege that Facebook, through its purchase of a "virtual-private-network app," Onavo, allowed developers to view consumer use of competing apps.[29] This practice gave Facebook "intelligence on competitors before they became major threats."[30] Although Facebook's lawyers were able to reduce the scope of the Commission's probe, Facebook was required to provide documents such as emails and chat logs regarding the Onavo acquisition.[31] This investigation is just one example of the EU's examination of Facebook's use and monetization of user data in terms of anticompetitive behavior. This type of investigation, however, is not limited to Facebook.

The Commission initiated antitrust inquiries into "Apple App Store and Apple Pay practices" in June of 2020.[32] Margrethe Vestager, the EU's Competition Chief, decided to take a closer look at Apple's App Store policies after Spotify and Rakuten complained that Apple uses its App Store to stamp out competition.[33] Spotify claimed that Apple's App Store promoted its own Apple Music service over other music services, thus limiting consumer choice.[34] Similarly, Rakuten's complaint accused Apple of violating EU competition laws by "promoting its own Apple Books service"

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26 Sam Schechner, Emily Glazer & Valentina Pop, *EU Deepens Antitrust Inquiry Into Facebook's Data Practices*, WALL ST. J. (Feb. 6, 2020, 8:00 AM), https://www.wsj.com/articles/eu-deepens-antitrust-inquiry-into-facebooks-data-practices-11580994001 [https://perma.cc/HX8H-GXWW].

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*.

32 *See* Tom Warren, *EU Opens Apple Antitrust Investigations Into App Store and Apple Pay Prac*tices, VERGE (June 16, 2020, 6:35 A.M.), https://www.theverge.com/2020/6/16/21292651/apple-eu-antitrust-investigation-app-store-apple-pay [perma.cc/ND8M-U6WW].

33 *Id*.

34 *Id*.

while charging a "thirty percent commission" on other "ebooks."[35] Furthermore, the Commission is looking into Apple's obstruction of "Near Field Communication functionality," ("NFC") which allows for the communication between two electronic devices over a certain distance and inhibits users' ability to make mobile payments from applications other than Apple Pay.[36] This investigation began not long after Germany passed legislation requiring Apple to permit other companies to use its NFC functionality.[37]

Despite recent attention being focused on Facebook and Apple, Amazon and Google have not escaped the EU's watchful eye. In November of 2020, the Commission notified Amazon that it had violated antitrust laws by using "independent sellers'" data for its own benefit.[38] Third party seller data includes data related to shipping, sellers' revenues, consumer claims on products, and the number of products ordered and shipped.[39] Furthermore, the Commission is also investigating the alleged "preferential treatment" of Amazon's own sellers and sellers that use Amazon's dedicated transportation and logistical services.[40] Although the EU's investigations into Facebook, Apple, and Amazon are relatively recent, the EU's battle against Google began nearly a decade ago.[41]

This decade-long investigation into Google resulted in an approximately $10 billion fine against the search engine for using its powerful position in the market to stifle competition.[42] However, today, several years after the imposition of this substantial fine, very few competitors have joined the market alongside Google.[43]

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35 *Id*.

36 *Id*.

37 *Id*.

38 *Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation Into its e-Commerce Business Practices*, EUR. COMM'N (Nov. 10, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 [perma.cc/J6FA-BFGP].

39 *Id*.

40 *Id*.

41 Jeanne Whalen, *Europe Fined Google Nearly $10 Billion for Antitrust Violations, But Little Has Changed*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/technology/2020/11/10/eu-antitrust-probe-google/ [perma.cc/VLL5-X9AN].

42 *Id*.

43 *Id*.

Experts blame the EU for allowing Google to "fix" the problem themselves.[44] For example, one of Google's solutions was to charge "rival search engines" a fee to show as an option on Android phones.[45] U.S. officials, who filed their own antitrust case against Google in October of 2020, also criticized this outcome.[46] However, the EU felt it "didn't have the political standing to impose tougher measures, such as a breakup, on an American company."[47] This belief, if true and held by other political entities, further signals that the United States' time to step in, and step up, in the world of Big Tech regulation is long overdue. Despite its "failure" to adequately curb the anticompetitive behavior of Google, the EU is preparing to make strides in its regulation of the digital economy.

IV. The DSA and DMA

The introduction of these new rules are part of a European "digital strategy" known as "Shaping Europe's Digital Future."[48] This digital strategy highlights three overarching goals: developing technology that "makes a difference in people's daily lives," creating a "fair and competitive" market for technology companies, and creating an environment in which citizens can trust the way their data is handled.[49] An integral part of this strategy is known as the "Digital Services Act package."[50] The Digital Services Act package encompasses the Digital Services Act ("DSA") and the Digital Markets Act ("DMA").[51] These laws will apply throughout the EU and govern its digital services.[52] Two main goals of the DSA and DMA include: (1) "to create a safer digital space in which the fundamental rights of all users of digital services are protected," and (2) "to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and

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44 *Id*.

45 *Id*.

46 *Id*.

47 *See* Whalen, *supra* note 41.

48 *Shaping Europe's Digital Future, Factsheet*, EUR. COMM'N (Feb. 19, 2020), https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en.

49 *See id*.

50 *Digital Services Act Package*, *supra* note 8.

51 *Id*.

52 *Id*.

globally."[53] Thus, the DSA and DMA package specifically targets major technology companies that are considered to be the "gatekeepers" of the internet, like Facebook, Google, Amazon, and Apple.[54]

The European Commission published the first draft of the DSA and DMA package on December 15, 2020.[55] However, it was initially announced in July 2019 by Ursula von der Leyen, a German politician and physician who currently serves as the president of the European Commission.[56] As previously mentioned, the DSA forms a significant piece of the European Digital Strategy, "Shaping Europe's digital future."[57] Although the DSA and the DMA are often referred to as a "legislative package," both pieces of legislation play independent and important roles in this new strategy.[58]

The Digital Services Act ("DSA") is intended to apply widely across "the digital ecosystem" to "networking sites," "social media platforms," "online market places," "app stores," and "hosting services."[59] The rules and regulations created by the DSA apply to service providers established within the EU as well as those based outside of the EU that still offer services to EU residents.[60] Service providers based outside of the EU will also be required to elect an EU-based legal representative who is responsible for overseeing that the new regulations are complied with.[61] The elected EU-based legal representatives can be held liable for "*any* non-compliance."[62] Although the DSA targets an array of service providers, it places more stringent responsibilities on "very large platforms."[63] The

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53 *Id*.

54 *See id*.

55 *See The Digital Services Act and Digital Markets Act: A new era for online regulation within Europe*, HERBERT SMITH FREEHILLS DIGIT. TMT & SOURCING NOTES (Dec. 15, 2020), https://hsfnotes.com/tmt/2020/12/15/the-digital-services-act-and-digital-markets-act-a-new-era-for-online-regulation-within-europe/#page=1 [https://perma.cc/D38G-H9UP] [hereinafter DIGIT. TMT & SOURCING NOTES].

56 *See id*.

57 *Id*.

58 *Id*.

59 *Id*.

60 *See* DIGIT. TMT & SOURCING NOTES, *supra* note 55.

61 *See id*.

62 *See id*. (emphasis added).

63 *Id*.

DSA defines "large" as those service providers with over forty-five million customers, or about "ten percent of the EU's population."[64]

Some of the key provisions of the DSA specifically involve regulating advertising and platform transparency, regulating illegal content, improving the "traceability of business users and illegal goods," and greater enforcement measures and fines.[65] In regard to advertising, all platforms showing ads, regardless of size, must take measures to ensure their users "can identify in a clear and unambiguous manner" that the content shown is an advertisement, for whom the advertisement is meant, and "meaningful information" about why such an audience is being shown that particular advertisement.[66] Internet platforms will also need to verify all third party vendors that use their services for purposes of traceability.[67]

Finally, just as their non-EU counterparts are required to elect a legal representative within the EU, EU-based platforms must designate a "Digital Services Coordinator."[68] This individual will serve to see that the EU-based platform complies with the terms of the DSA.[69] The Digital Services Coordinator will also be responsible for reporting the number of platform users in the EU, and specifically keeping the list of "very large platforms" providing services in the EU, updated every six months.[70] Service providers that violate the DSA will be fined "up to six percent of its annual income."[71] Although the DSA specifically addresses the behavior of digital service providers in terms of advertising and transparency about how user data is handled, the DMA aims to address competition issues within the digital economy.[72]

The main purpose of the Digital Markets Act (the "DMA") is to manage the consequences that result from allowing platforms such

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64 *See id*.

65 *See* DIGIT. TMT & SOURCING NOTES, *supra* note 55.

66 *Id*.

67 *See id*.

68 *Id*.

69 *Id*.

70 *See* DIGIT. TMT & SOURCING NOTES, *supra* note 55.

71 *See id*.

72 *See* Alexandre de Streel, *Digital Markets Act: Policy Choices and Conditions for Success*, PROMARKET (Jan. 13, 2021), https://promarket.org/2021/01/13/digital-markets-act-explainer-european-regulation-big-tech/ [https://perma.cc/2D27-9V4F].

as Facebook to act as "gatekeepers."[73] The DMA has set out a three-part test to determine which service providers will meet this criteria for the purposes of the Act.[74] A service provider will be considered a gatekeeper if for three consecutive years, they have a turnover equal to or greater than "€6.5 billion ($7.9 billion) or market capitalization of at least €65 billion ($79 billion)," "presence in at least three" European Union Member States, and "more than forty-five million monthly active end users" and "ten thousand active annual business users."[75] Practices that are "'clearly unfair,' such as blocking users from un-installing any pre-installed software or apps," are also prohibited under the DMA.[76] Fines as high as ten percent of the provider's global profits are possible if found in violation of DMA provisions.[77] For repeat offenders, "sanctions may also involve structural remedies" to their business practices.[78]

Some policymakers have questioned how the DSA and DMA will coincide with the General Data Protection Regulation ("GDPR"), the EU's data privacy and security law. Commentators have described the GDPR as "the toughest privacy and security law in the world."[79] This legislation came into effect on May 25, 2018, and "imposes obligations onto organizations anywhere [in the world], so long as they target or collect data related to people in the EU."[80] While some critics present worthy points of skepticism, there are multiple reasons why the DSA and DMA properly coexist with the GDPR. First, despite its significance in the world of data privacy legislation, legislators acknowledge that the GDPR does not address the role that data plays in promoting competition in the digital economy; the DMA, specifically, aims to remedy this.[81] Secondly, the GDPR favors the exchange of data within companies

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73 *See* DIGIT. TMT & SOURCING NOTES, *supra* note 55.

74 Streel, *supra* note 72.

75 *Id*.

76 DIGIT. TMT & SOURCING NOTES, *supra* note 55.

77 *See id*.

78 *Id*.

79 Ben Wolford, *What is GDPR, the EU's New Data Protection Law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr/ (last visited Feb. 10, 2022) [https://perma.cc/NH5V-BSYF].

80 *Id*.

81 Aline Blankertz & Julian Jaursch, *What the European DSA and DMA Proposals Mean for Online Platforms*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/techstream/what-the-european-dsa-and-dma-proposals-mean-for-online-platforms/ [https://perma.cc/7LUE-8YL9].

over the exchange of data between companies.[82] This gives companies that provide services across a wider area an advantage over those with a more limited range.[83] The DMA will also constrain the extensiveness of "datasets" that companies like Facebook can create using only their own users' data by restricting such intra-company exchange of data.[84] Finally, Jeroen Terstegge, the International Association of Privacy Professionals Netherlands Country Leader, claims that " . . . It will be DSA first and GDPR second."[85] Thus, the DSA and DMA have been written to support and bolster the provisions of the GDPR, not to compete, even though it is yet to be seen how these laws will work in conjunction with each other in practice.

V. What can the U.S. Learn from the Digital Markets Act?

In February of 2021, United States Senator Amy Klobuchar (D-MN) announced her new legislation that will attempt to regulate Big Tech in the United States—the Competition and Antitrust Law Enforcement Reform Act (CALERA).[86] Klobuchar, who currently chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, believes this new legislation is "the first step to overhauling and modernizing our laws so we can effectively promote competition and protect American consumers."[87] CALERA will address the gaps in U.S. antitrust law by increasing funds for government agencies including the Federal Trade Commission ("FTC") and the Department of Justice's Antitrust Division, "strengthen prohibitions against anticompetitive mergers" through restoration of Section 7 of the Clayton Act, prohibit "dominant companies" from partaking in anticompetitive

82 *Id*.

83 *Id*.

84 *Id*.

85 Jennifer Bryant, *European Commission Expected to Unveil Digital Services Act in December*, INT'L ASS'N OF PRIV. PROS. (Dec. 1, 2020), https://iapp.org/news/a/european-commission-expected-to-unveil-digital-services-act-in-december/ [https://perma.cc/XEF5-9TMG].

86 Press Release, Sen. Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement [https://perma.cc/4M86-FKXW] [hereinafter Klobuchar]; S. 225, 117th Cong. (2021).

87 Klobuchar, *supra* note 86.

behaviors, and administer further measures to strengthen the American antitrust regime.[88]

While CALERA represents a long-awaited step from the U.S. to get involved in the world's efforts to regulate Big Tech, U.S. legislators should consider taking some cues from the European Union's Digital Services Act and Digital Markets Act. These two pieces of EU legislation also address anticompetitive-adjacent behaviors of tech industry "gatekeepers" in addition to their anticompetitive behaviors like buying up small potential competitors.[89] Specifically, the DMA prohibits platforms from "requiring their business customers to use their payment processors."[90] Congress could similarly address the "ancillary services" that also promote big tech's anticompetitive agenda.[91] These may include prohibiting data mixing; establishing "real penalties and structural remedies;" and prohibiting practices such as "forced single sign-on," "cross-tying," and "lock-ins."[92]

Data mixing is a practice where gatekeepers connect the data they collect on their customers with the "commercially available data" collected by their business customers and data brokers.[93] They thereby reveal otherwise private information about their customers for a competitive edge.[94] By addressing practices like data mixing, governments and legislative bodies can curb these anticompetitive behaviors while also protecting customer data.

Practices such as "forced single sign-on" force users to use their personal login information, while "cross-tying" compels customers to register for the business's own "ancillary services" like signing up for a Gmail account.[95] "Lock-ins" include another practice whereby companies prohibit independent users from "switching

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88 *Id*.

89 Cory Doctorow & Christoph Schmon, *The EU's Digital Markets Act: There is A Lot to Like, but Room for Improvement*, ELEC. FRONTIER FOUND. (Dec. 15, 2020), https://www.eff.org/deeplinks/2020/12/eus-digital-markets-act-there-lot-room-improvement [https://perma.cc/8KZ4-UFSB].

90 *See id*.

91 *Id*.

92 *Id*.

93 *See id*.

94 *See What is Data Blending?*, ALTAIR, https://www.altair.com/what-is-data-blending/ [https://perma.cc/7234-GFMC].

95 Doctorow & Schmon, *supra* note 89.

away from default apps."[96] Gatekeepers are also charged with allowing competing "third party app stores" to use their "operating systems" under the DMA.[97] By following the EU's lead in prohibiting these practices, the U.S. can encourage competition within the tech industry and provide customers with greater choice when it comes to the services they use. By preventing companies from requiring their customers to choose services that are connected with their own, customers will have the opportunity to explore third-party apps and services that are otherwise taken out of consideration the moment a customer chooses to use a gatekeeper's services.

Civil penalties under CALERA for anticompetitive behavior will include up to fifteen percent of an entity's U.S. revenues for the prior year, or thirty percent of the entity's revenues for the duration the prohibited activity occurred.[98] This is a notable change from the United States' history of antitrust enforcement, where injunctive relief was commonly the only action taken against big tech in antitrust actions.[99] However, the bill fails to provide further instruction on how civil penalties should be established in cases such as these.[100] Establishing clear guidelines as to the method of determining civil penalties is a vital step in enforcing more stringent monetary penalties on big tech companies. Penalties in the past have been accused of being a mere "slap on the wrist" in comparison to the massive revenues generated by some of these major players.[101]

In comparison to the "light" penalties often seen in the United States, the DMA establishes fines for violating its provisions at up to "ten percent of the gatekeeper's global annual revenue."[102] It also implements "periodic penalty payments" of "up to five percent of average global daily revenues" for recurrent or continuous violations of DMA provisions.[103] Additionally, the DMA calls for

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96 *Id*.

97 *Id*.

98 Jonathan Gleklen et al., *United States: Analysis of the Proposed Competition and Antitrust Law Enforcement Reform Act of 2021*, MONDAQ (Feb. 25, 2021), https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1041218/analysis-of-the-proposed-competition-and-antitrust-law-enforcement-reform-act-of-2021 [https://perma.cc/N7S3-99DW].

99 *Id*.

100 *Id*.

101 *See Facebook Antitrust Battle*, *supra* note 10.

102 Doctorow & Schmon, *supra* note 89.

103 *Id*.

the imposition of "structural remedies" on companies who fail to cease anticompetitive practices.[104] For example, a gatekeeper who refuses to stop a certain anticompetitive practice may be required to "sell off" an entire fragment of their company.[105] As previously mentioned, clear and strict guidelines regarding how penalties will be set and how penalties will increase with recurrent violations play an important role in having the deterrent effect necessary to discourage anticompetitive behavior.

Finally, the DMA was purposely written to be updated regularly to reflect changes in the tech industry and market space.[106] Regular updating of this legislation allows EU legislators to implement rules targeting smaller companies that are not currently considered gatekeepers, but likely will be at some point in the future, as well as provide legislators the flexibility to anticipate and resolve anticompetitive practices that may arise.[107] This ideal reflects an acknowledgement that the tech industry and its key players are continuously changing and evolving. These changes are reflected in how they provide their services to customers, and also in how they attempt to circumvent legislation such as the DMA to maintain a competitive edge against their competitors. Being that the United States is a significant host of tech innovation, U.S. legislators should include a similar provision in this current or future legislation to allow for the law to keep pace with this rapidly changing industry.

While these reflect several cues the U.S. can take from the EU and the Digital Markets Act in terms of designing its own legislation, there are also several stipulations in the Digital Services Act that present an opportunity for lawmakers in the U.S. to address specific issues within the tech industry that relate to advertising and other content-related practices of tech companies within the social networking sphere.

VI. What can the U.S. Learn from the Digital Services Act?

As previously discussed, the Digital Services Act ("DSA") seeks to address issues surrounding advertising and platform transparency, as well as the regulation of illegal content, and improving the traceability of business users and legal goods of

104 *Id*.

105 *See id*.

106 *See id*.

107 Doctorow & Schmon, *supra* note 89.

companies who provide "online intermediary services."[108] This is a much broader category than that targeted by the Digital Markets Act's "gatekeeper" classification.[109] These intermediary services include "hosting services such as cloud," go-between services such as "internet access providers" and "domain name registrars," online spaces such as "online marketplaces," and other large online platforms that may be likely to share prohibited or "illegal content."[110]

Under the Clayton Act, CALERA proscribes "exclusionary conduct" that "presents an appreciable risk of harming competition,"[111] but it is uncertain if advertising practices and illegal content regulation would fall within the purview of this section of the new legislation. However, while these issues may not be exclusively antitrust-related, the advertising practices of online platforms can be considered to be anticompetitive or antitrust-adjacent as well.[112] Thus, while the United States might choose to approach the issues addressed by the DSA in a separate piece of legislation rather than within CALERA itself, the DSA still contains some important elements that United States legislators should consider incorporating into American law at some point.[113] These key elements of the DSA that the United States should consider include the DSA's broader "very large platforms" definition, increased transparency regarding algorithms, "content moderation" reporting, virtual complaint system, and heftier fines.[114]

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108 *See The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, EUR. COMM'N, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en (last visited Feb. 10, 2022) [https://perma.cc/BVW5-QS3M] [hereinafter *The Digital Services Act*].

109 *See* Doctorow & Schmon, *supra* note 89.

110 *See The Digital Services Act, supra* note 108.

111 Klobuchar, *supra* note 86.

112 *See* Wilson C. Freeman & Jay B. Sykes, *Antitrust and Big Tech*, Congressional Research Service (Sept. 11, 2019) https://sgp.fas.org/crs/misc/R45910.pdf ("In May 2019, the Senate and Judiciary Committee held a hearing to investigate privacy and competition issues in the digital advertising industry.").

113 Klobuchar, *supra* note 86.

114 *See* Christoph Schmon & Karen Gullo, *Eur. Comm'ns. Proposed Digit. Servs. Act Got Several Things Right, But Improvements are Necessary to Put Users in Control*, ELEC. FRONTIER. FOUND. (Dec. 15, 2020), https://www.eff.org/deeplinks/2020/12/european-commissions-proposed-regulations-require-platforms-let-users-appeal [https://perma.cc/UC8V-2KTY].

First, in comparison to the Digital Market Act, the DSA creation of the "very large platforms" category significantly broadens the number and type of companies affected by the new regulations.[115] This category encompasses newer faces in the social media world such as "TikTok, Twitter, and Snapchat" in addition to the original "social media giants" like Facebook.[116] According to proponents of this new definition, the broader category better recognizes the significant societal impact that even smaller technology and social media platforms can have in the spread of misinformation.[117] However, while the DSA significantly broadens the category of online platform subject to its legislation, the DSA is not a "blanket" approach.[118] In fact, the DSA can give the United States a lesson in "asymmetric" regulation, the movement toward imposing different regulations on different types of companies.[119] For example, in comparison to social media sites, a cloud service provider would have different obligations in regard to monitoring information online.[120] This movement from "one-size-fits-all" to "asymmetric," and more tailored regulation is also arguably a reflection of the evolution in the internet and its rapid, continuous change.

The next three elements of the DSA reflect its goal of increasing the transparency within online platforms regarding their advertising and content moderation practices.[121] These elements include "algorithm disclosure" requirements, mandatory content moderation reporting, and the "implementation of a virtual complaint system."[122] To comply with the algorithm disclosure provision of the DSA, online service providers must be able to show

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115 *See* Juan Londoño, *The EU's Digital Services Act: A Primer*, AM. ACTION FORUM (Mar. 24, 2021), https://www.americanactionforum.org/insight/the-eus-digital-services-act-a-primer/ [https://perma.cc/P9DJ-2CNH].

116 *See id*.

117 *See id*.

118 Bruna Martins dos Santos & David Morar, *Four Lessons for U.S. Legislators from the EU Digital Services Act*, BROOKINGS (Jan. 6, 2021), https://www.brookings.edu/blog/techtank/2021/01/06/four-lessons-for-u-s-legislators-from-the-eu-digital-services-act/ [https://perma.cc/R4HV-P4NU].

119 *See* Emily Birnbaum, *Five Things US Companies Need to Know About the New EU Rules*, PROTOCOL (Dec. 15, 2020), https://www.protocol.com/companies-know-new-eu-rules [https://perma.cc/H5zy-B8DU].

120 *See* Londoño, *supra* note 115.

121 *See id*.

122 *See id*.

EU regulators how they use algorithms to moderate content and target particular users with certain advertisements.[123] This provision also gives the European Commission power to conduct inspections of the company or platform's algorithms.[124] A platform could be fined as much as "ten percent of their total revenue in the fiscal year" if they fail or refuse to consent to an inspection.[125] As previously mentioned, the lack of transparency surrounding targeted advertisement via the use of algorithms is something for which large platforms like Facebook have been criticized.[126] Increasing the transparency of such practices, for the user and digital economy's benefit, are important topics for tech policy advocates and should be essential to any U.S. legislation that attempts to regulate these practices within the technology industry.

Per request by the European Commission, platforms are required to provide the Commission with reports on the transparency of their "content-moderation efforts" under the DSA."[127] Information such as the "average time of compliance on an order" for content moderation, the "number of complaints received," and any content removed must be included in the "transparency reports" provided to the Commission.[128] Coincidentally, the requirement that online platforms implement "effective internal complaint-handling systems" is the next key element of the DSA.[129] This mechanism not only allows users to file complaints if they identify illegal content, but it also allows users to file complaints if they oppose "certain content-moderation practices."[130] More specifically, an effective complaint system must provide users with the opportunity to file complaints against "decisions to remove or disable access" to certain information, "decisions to suspend or terminate the provision of service" wholly or partially, and "decisions to suspend or terminate" a user's account.[131] Complaint systems should also be "user-friendly" and

123 *See id*.

124 *Id*.

125 *See id*.

126 *See* DIGIT. TMT & SOURCING NOTES, *supra* note 55.

127 *See* Londoño, *supra* note 115.

128 *See id*.

129 *See id*.

130 *See id*.

131 *See id*.

allow the company to provide a timely response to complaints.[132] These and other practices mandated by the DSA are just a few examples of how potential U.S. legislation could promote greater transparency within the digital economy. However, there are several criticisms of these elements in the current draft of the DSA.[133]

The first of these criticisms is the ambiguous language requiring complaint systems to be "user-friendly" and for online platforms to respond in a "timely manner."[134] Without more guidance, companies are left to their own devices in constructing complaint platforms that are sufficiently easy for users to navigate.[135] Conversely, users must rely on the goodwill of the platforms to create complaint systems that are easy to figure out and use. Without further guidance, companies could purposely establish platforms with low user operability simply to make it more difficult for users to file complaints. Furthermore, the ambiguity regarding the time in which companies are required to respond to these complaints could cause problems for both platforms and users.[136] The absence of clear guidance could leave room for regulatory intervention where online platforms are given very little time to respond to such complaints.[137] Again, by contrast, it could also allow companies to give themselves overly-generous deadlines which would be less beneficial for the users.[138] Thus, while the concepts presented in the DSA to address the lack of transparency in Big Tech represent a step in the right direction, the United States should consider providing more concrete requirements and recommendations in future legislation.

The final provision from which the United States can take pointers is the monetary penalty structure established by the DSA. Platforms who fail to comply with the stipulations in the DSA can be subject to fines as high as six percent of global revenue for just their first offense.[139] Fines for repeat offenses can be as high as ten

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132 *See id*.

133 *See* Londoño, *supra* note 115.

134 *See id*.

135 *Id*.

136 *See id*.

137 *See id*.

138 *See* Londoño, *supra* note 115.

139 *See id*.

percent of global revenue.[140] As previously discussed, the United States failed to impose sufficiently deterrent monetary penalties on companies like Facebook, Google, and Amazon in the past according to critics.[141] For example, Facebook was fined a "record" five billion dollars as a result of the "Cambridge Analytica data breach."[142] While five billion dollars sounds huge to the average individual, critics equate five billion dollars to a parking ticket[143] for a company whose market capitalization value reached $1 trillion in 2021.[144] However, the potential fines posed by the DSA and DMA could pose significant disruptions to the value of gatekeepers in the digital market.[145] The United States, who has been criticized of imposing proportionally nominal fines, should emulate the DSA's more significant penalty structure. The potential fines must be impactful enough to deter companies of every size, but especially the large gatekeepers of the industry, from participating in anticompetitive behaviors. It is essential that the United States, or any country hoping to enter the world of Big Tech regulation, includes provisions to protect and promote competition in the digital market in addition to increasing the potential fines of offenders. As they say, "an ounce of prevention is worth a pound of cure."

VII. Conclusion

In conclusion, despite that Big Tech has gone virtually unregulated in the United States for too long, the EU has been a continuous leader in global efforts to address the issues surrounding

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140 *See* Blankertz, *supra* note 81.

141 *See Facebook Antitrust Battle*, *supra* note 10.

142 Rob Davies & Dominic Rushe, *Facebook to Pay $5 Billion Fine as Regulator Settles Cambridge Analytica Complaint*, GUARDIAN (July 24, 2019), https://www.theguardian.com/technology/2019/jul/24/facebook-to-pay-5bn-fine-as-regulator-files-cambridge-analytica-complaint [https://perma.cc/F3MV-2SJA].

143 Julia Carrie Wong, *Facebook to be fined $5bn for Cambridge Analytica Privacy Violations,* GUARDIAN (July 12, 2019), https://www.theguardian.com/technology/2019/jul/12/facebook-fine-ftc-privacy-violations [https://perma.cc/X4Y3-QJLN].

144 Salvador Rodriguez, *Facebook Closes Above $1 Trillion Market Cap for the First Time*, CNBC (Jun. 28, 2021), https://www.cnbc.com/2021/06/28/facebook-hits-trillion-dollar-market-cap-for-first-time.html [https://perma.cc/639G-DT47].

145 *See* Londoño, *supra* note 115 ("These sizeable fines are apparently not meant to be simply deterrents: There are reports that the EU is already incorporating their revenue into its budget, which . . . signals that the EU expects companies will not be able to comply with these regulations."); Blankertz, *supra* note 81.

the digital economy.[146] The EU is currently planning to strengthen their regulation of Big Tech by introducing a legislative package encompassing the Digital Services Act ("DSA") and the Digital Markets Act ("DMA").[147] These two pieces of legislation seek to address anticompetition behaviors within the technology community.[148] While the DSA and DMA have not yet been officially enacted into law, the United States could enact similar provisions in future legislation as it seeks to bolster Big Tech regulation in the United States.

The United States might be considered a leader in many areas of science, medicine, and technology, but its regulation of Big Tech has lagged behind other governmental bodies such as the EU. The introduction of CALERA is a positive sign that the U.S. intends to step up to the plate when it comes to reining in Big Tech. The United States prides itself on being a supporter of innovation and entrepreneurship, but legislators must remember that proper regulation of large industries and the main players within those industries will bolster competition and innovation in the technology industry, not hinder it.

146 *See The Digital Services Act Package*, *supra* note 8.

147 *Id.*

148 *See id.*