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A CONTINENTAL RIFT? THE UNITED STATES AND EUROPEAN UNION’S CONTRASTING APPROACHES TO REGULATING THE MONOPOLISTIC BEHAVIOR OF GATEKEEPER PLATFORMS

“We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can’t have both.”

– Supreme Court Justice Louis Brandeis.

ABSTRACT

Over the past decade, gatekeeper platforms, such as Amazon.com, Inc. (Amazon), have created highly monopolistic business models to benefit themselves while undermining third-party merchants on digital marketplaces. To illustrate, Amazon collects third-party merchant and consumer data on its marketplace to improve its private-label brands while simultaneously selling them alongside third-party merchant products, creating a significant conflict of interest business model. To address this anticompetitive behavior, the United States (U.S.) and the European Union (E.U.) have proposed contrasting approaches. The U.S., through the Ending Platform Monopolies Act, offers a structural separation remedy, giving the Department of Justice and Federal Trade Commission the statutory tools needed to sue and structurally split gatekeeper platforms that have conflict of interest business models. Contrastingly, the E.U., through the Digital Markets Act, proposes that gatekeeper platforms share their data with third-party merchants, allowing both parties to benefit while operating on a gatekeeper platform’s digital marketplace. Although strict and uncompromising, this Note proposes that the U.S. approach would be more effective in addressing the monopolistic behavior of gatekeeper platforms.

INTRODUCTION

In its 2020 fiscal year, Amazon.com, Inc. (Amazon) saw its most significant increase in value among the world’s best brands, amounting to yearly revenue of \$386 billion.¹ From this total, Amazon profited \$1.58 billion alone from its private-label brand, “AmazonBasics.”² However, while Amazon’s success is primarily attributed to its efficient integration of digital

1. Shelly E. Kohan, *Amazon’s Net Profit Soars 84% With Sales Hitting \$386 Billion*, FORBES (Feb. 2, 2021, 6:12 PM), <https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=64396cdd1334>.

2. Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

platforms and supply chain management systems,³ it has also employed anticompetitive measures to undermine its digital marketplace competition.⁴

Specifically, Amazon hosts over six million active third-party merchants worldwide on its digital marketplace, with almost 500 thousand joining in 2021.⁵ Alongside these third-party merchants, Amazon offers 158 thousand private-label brands across forty-five different categories.⁶ However, not only is Amazon selling its private-label brands alongside third-party merchant products, but it is also simultaneously collecting a vast trove of data to identify popular third-party products purchased by consumers on its digital marketplace.⁷ By collecting data on third-party merchants and consumer trends, Amazon essentially replicates products and reproduces them under its private-label brand⁸ while undercutting third-party merchants out of the equation, effectively quashing its competition.⁹ Thus, while Amazon may refer to third-party merchants on its digital marketplace as “partners,”¹⁰ its business tactics create a conflict of interest and an anticompetitive business environment.

When Amazon’s former Chief Executive Officer Jeff Bezos invented the company in 1994, no Wall Street analyst could have predicted that a “house of cards” online book retailer would become the e-commerce titan of the twenty-first century.¹¹ However, while this Note will focus on Amazon, the company is not alone in promoting monopolistic behavior in digital marketplaces.¹² Over the past decade, digital marketplaces have become

3. Kohan, *supra* note 1.

4. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710, 716 (2017). See also FTC, *Commissioners – Lina M. Khan* (last visited Feb. 4, 2022), <https://www.ftc.gov/about-ftc/biographies/lina-m-khan>. As of June 15, 2021, Lina M. Khan was sworn in as the Chair of the Federal Trade Commission. Khan’s scholarship on antitrust and competition policy has been published in the COLUMBIA LAW REVIEW, HARVARD LAW REVIEW, UNIVERSITY OF CHICAGO LAW REVIEW, and YALE LAW JOURNAL, providing critical insight to the anticompetitive nature of gatekeeper platforms.

5. MARKETPLACE PULSE, *Amazon Tops Six Million Third-Party Sellers* (Mar. 24, 2021), <https://www.marketplacepulse.com/amazon/number-of-sellers>.

6. MAJORITY STAFF OF THE SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS at 249 (Oct. 2020). See also AMAZONBASICS, https://www.amazon.com/stores/page/947C6949-CF8E-4BD3-914A-B411DD3E4433?tag=googhydr-20&hvadid=223646216827&hvpos=&hvexid=&hvnetw=g&hvrnd=15539371664362532647&hvpone=&hvptwo=&hvqmt=b&hvdev=c&hvdvcmld=&hvlocint=&hvlocphy=9004338&hvtargid=kwd-302779895982&ref=pd_sl_9018pbuwg8_b (last visited Oct. 23, 2021) (listing Amazon’s selection of private-label brands, ranging from household products to electrical accessories).

7. Tyler Sonnemaker, *Amazon is reportedly facing a new antitrust investigation into its online marketplace led by the FTC and attorneys general in New York and California*, BUS. INSIDER (Aug. 3, 2020, 3:53 PM), <https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>.

8. Mattioli, *supra* note 2.

9. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 275.

10. *Id.* at 267.

11. Khan, *supra* note 4, at 712.

12. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 10.

highly concentrated and prone to the abuse of power by giant technology companies, including Amazon, Google LLC (Google), Apple, Inc. (Apple), and Meta Platforms, Inc. (Facebook).¹³ While these companies were at one point nothing more than start-ups that began in garages,¹⁴ they are now as powerful as the monopolies last seen in the “era of oil barons and railroad tycoons.”¹⁵ Particularly, these companies have used their influence to concentrate core digital services that dominate critical channels of distribution, such as online shopping, search engines, and advertising.¹⁶

In June 2019, the United States (U.S.) House Committee on the Judiciary initiated a bipartisan investigation on these “gatekeeper platforms” in response to their growing monopolistic behavior.¹⁷ A gatekeeper platform is a company that: (1) operates a core platform service that serves as an essential gateway for business users to reach consumers; (2) has a significant impact on the internal market; and (3) enjoys an entrenched and durable position in its operations.¹⁸ Using this definition, companies such as Amazon, Google, Apple, and Facebook were prime suspects of the investigation.¹⁹ While these companies have delivered tremendous benefits to society, such as allowing consumers to purchase essentials during the coronavirus pandemic,²⁰ it has come at the price of fair competition in the digital marketplace.²¹ The House Judiciary Committee’s investigation reported that these companies are running digital marketplaces while also competing in them, creating quasi-private regulations that impede competition.²² This behavior is the explicit

13. *Id.* at 11.

14. Mary Meisenzahl, *Starting in a garage is crucial to the origin story of many Silicon Valley entrepreneurs. Here are the modest beginnings of 5 tech companies worth billions today.*, BUS. INSIDER (Apr. 1, 2020, 9:44 AM), <https://www.businessinsider.com/google-apple-hp-microsoft-amazon-started-in-garages-photos-2019-12>.

15. Ron Knox, *Congress’s big tech report shows why antitrust history is so important*, WASH. POST (Oct. 8, 2020), <https://www.washingtonpost.com/outlook/2020/10/08/congress-big-tech-anti-trust/>.

16. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 6.

17. The investigation included seven congressional hearings, the production of nearly 1.3 million internal documents and communications, submissions from thirty-eight antitrust experts, and interviews with more than 240 individuals with knowledge about Amazon, Facebook, Apple, and Google’s conduct in the digital marketplace. *Id.* at 6.

18. While the United States House of Representatives Judiciary Committee does not use the term “gatekeeper platform,” it nonetheless targeted companies who meet this definition. See Lodewick Prompers, *Digital platforms – The gatekeepers under the EU’s new Digital Markets Act*, LINKLATERS BLOG (Jan. 14, 2021), <https://www.linklaters.com/en-us/insights/blogs/linking-competition/2021/january/digital-platforms-the-gatekeepers-under-the-eus-new-digital-markets-act>.

19. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 6.

20. Shira Ovide, *Online Shopping Is Amazing. Or Is It?*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/technology/online-shopping.html>.

21. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 6-7.

22. The effects of gatekeeper platforms’ significant and durable market power are costly to American democracy. Such leverage erodes the core of American entrepreneurship, consumer privacy, and innovation in the digital marketplace, leaving fewer choices for consumers. *Id.*

conflict of interest business model that Amazon has deployed between itself and third-party merchants on its digital marketplace.²³

Until the House Judiciary Committee's investigation, the U.S. has been largely dormant in addressing the anticompetitive nature of gatekeeper platforms. However, on June 11, 2021, the House Judiciary Committee approved a bipartisan six-part package known as "A Stronger Online Economy: Opportunity, Innovation, Choice" as a direct response to addressing the unregulated power wielded by gatekeeper platforms.²⁴ Out of the proposed legislation, H.R. 3825, or the "Ending Platform Monopolies Act"²⁵ (EPMA), will give the Department of Justice (DOJ) and Federal Trade Commission (FTC) the authority to break up gatekeeper platforms, including Amazon, if the platforms promote a conflict of interest business model that hinders competition amongst third-party merchants.²⁶

While the U.S. is now addressing the anticompetitive issues that gatekeeper platforms pose, other world governments have proposed their own solutions. Notably, the European Union (E.U.) introduced the Digital Markets Act (DMA) on December 15, 2020.²⁷ Similar to the EPMA, the DMA will target gatekeeper platforms, but will take a more compromising approach. Specifically, the DMA will allow Amazon to continue selling its private-label brands alongside third-party products on its digital marketplace; however, Amazon must share the data it collects on third-party products and consumer trends, allowing third-party merchants an opportunity to compete.²⁸

With the U.S. and E.U. creating contrasting approaches to addressing the monopolistic behavior of gatekeeper platforms, this Note will examine and compare the advantages and the disadvantages of both the EPMA and DMA. In the end, this Note proposes that the U.S. approach under the EPMA is better suited to resolve such monopolistic behavior. Part I of this Note explains exactly how Amazon created a conflict of interest business model in its digital marketplace and undermined competition amongst third-party merchants. Part II will explain how the current antitrust regulatory frameworks of the U.S. and E.U. have failed to address gatekeeper platforms' monopolistic behavior. Part III describes the specifications of both the EPMA and DMA. Part IV will discuss the advantages and disadvantages of how both proposals address gatekeeper platforms' monopolistic behavior.

23. *Id.* at 16.

24. Press Release, Congressman Cicilline, House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice" (June 11, 2021).

25. H.R. 3825, 117th Cong. (2021).

26. *Id.*

27. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842.

28. *Id.*

Lastly, Part V of this Note will demonstrate why the EPMA offers a more effective approach to combating gatekeeper platforms since the E.U. approach, while appearing to be more compromising, might create more problems than it is trying to resolve. To this end, the DMA: (1) ignores the possible risks that accompany data sharing between entities;²⁹ (2) lacks specific accountability measures due to the sheer size of gatekeeper platforms and the number of transactions they oversee;³⁰ (3) does not include appropriate protections for gatekeeper platforms' trade secrets and intellectual property rights;³¹ and (4) unfairly targets U.S. technology companies.³² Therefore, the EPMA's structural separation remedy will be more effective in prohibiting Amazon from leveraging its gatekeeper platform status to outperform third-party merchants.³³

I: A GATEKEEPER PLATFORM'S CONFLICT OF INTEREST BUSINESS MODEL THROUGH THE LENS OF AMAZON

Before determining how to resolve Amazon's conflict of interest business model, it is essential to understand how Amazon undermines third-party merchants in its digital marketplace. Notably, Amazon is one of the most valuable companies globally, and its creator, Jeff Bezos, is the second wealthiest person in the world as of April 2022.³⁴ While Amazon is arguably an entrepreneurial success story due to its customer-centric business model,³⁵ including its introduction of Amazon Prime, it is now using its power to engage in anticompetitive practices against third-party merchants on its digital marketplace.³⁶

Specifically, Amazon is unfairly leveraging its access to data on third-party merchants and consumer trends to identify popular selling products while replicating them under its AmazonBasics brand.³⁷ Amazon argues that it has no incentive to abuse third-party merchants since they make up nearly

29. OECD, *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies* (Nov. 26, 2019), <https://www.oecd-ilibrary.org/sites/15c62f9c-en/index.html?itemId=/content/component/15c62f9c-en>.

30. Aurelien Portuese, *The Digital Markets Act: European Precautionary Antitrust*, INFO. TECH. & INNOVATION FOUND. (May 24, 2021), <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>.

31. *Id.*

32. *Id.*

33. Stacey Mitchell, Katy Milani, & Ron Knox, *Fact Sheet: Why the "Ending Platform Monopolies Act" is Essential Reform*, INST. FOR LOC. SELF-RELIANCE (June 21, 2021), <https://ilsr.org/fact-sheet-why-the-ending-platform-monopolies-act-is-essential/>.

34. *The World's Real-Time Billionaires*, FORBES (last visited Apr. 5, 2022), <https://www.forbes.com/real-time-billionaires/#6ff1de53d78>.

35. Brittain Ladd, *These Tools Are Why Amazon Is Successful*, FORBES (Aug. 27, 2018, 7:04 AM), <https://www.forbes.com/sites/brittainladd/2018/08/27/these-two-things-are-what-make-amazon-amazon/?sh=4ca3c6da5fd5>.

36. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 273.

37. *Id.* at 274-75.

60% of Amazon's sales.³⁸ However, when examining Amazon's percentage of sales, which is a more accurate scale of measurement, its private-label sales are growing at an exceptional rate, such as in its book category, where it dominates 74% of its digital marketplace.³⁹

While it is evident that Amazon is enriching itself with its trove of data, how does the data specifically benefit its business? For starters, former Amazon employees have confirmed that their jobs were to deliberately pull third-party merchant and consumer data from Amazon's marketplace to determine what products were bestsellers.⁴⁰ Amazon employees would then relay this information from their "data warehouse" and deliver it to their retail and marketing teams to develop and perfect their private-label brands.⁴¹ For example, in April 2020, the *Wall Street Journal* reported that Amazon outright copied a third-party merchant's car-trunk organizer design and developed its own private-label version.⁴² In other instances, a former third-party merchant, who used the Amazon marketplace for seventeen years, confirmed that Amazon replicated its bestselling products on multiple occasions.⁴³ Amazon proceeded to copy one product's design down to the color palette and sold the product at an unsustainable price.⁴⁴ Amazon's anticompetitive behavior not only forced this third-party merchant out of business but others as well.⁴⁵

The harsh reality is that Amazon is taking advantage of third-party merchants who have been coerced into using its digital marketplace. Since Amazon commands and leverages over 50% of e-commerce traffic,⁴⁶ third-party merchants feel they have no choice but to use Amazon since that is where consumers are located.⁴⁷ Jeff Bezos himself admitted that "[i]n some

38. *Id.* at 275.

39. While Jeff Bezos claims that third-party merchants "are kicking [Amazon's] first-party butt," the company is currently able to overtake third-party merchants in several categories as its private-label business continues to grow. *Id.*

40. Amazon: EC Investigation to Focus on Whether Amazon Uses Data to Develop and Favor Private Label Products; Former Employees Say Data Key to Private Label Strategy, 6 THE CAPITOL FORUM 393 (2018).

41. Krystal Hu, *Revealed: How Amazon Uses Third-Party Seller Data to Build a Private Label Juggernaut*, YAHOO FIN. (Sept. 27, 2019), <https://finance.yahoo.com/news/amazon-uses-thirdparty-sellers-data-to-build-private-labels-145813238.html>.

42. Mattioli, *supra* note 2.

43. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 279.

44. *Id.*

45. During the House Judiciary Committee's investigation, Congress heard "many heartbreaking stories" of third-party merchants who "sunk significant time and resources into building a business" just to have Amazon "poach" their products and put them out of business. For example, one third-party merchant created a unique product for construction workers and firefighters, making profits of \$60,000 per year. However, the third-party merchant "woke up and found that Amazon had started listing the exact same product, causing their sales to go to zero overnight." *Id.* at 280.

46. *Id.* at 254.

47. Amazon's conflict of interest business model "tarnish[es] the neutrality of the competitive process" in the digital marketplace. The six million third-party merchants who have no choice but

ways, we are competing” with third-party merchants.⁴⁸ Due to its market power, Amazon knows that it can take advantage of third-party merchants since they have no realistic alternative marketplace to sell their products.⁴⁹ Moreover, third-party merchants using Amazon’s marketplace recognize that using the platform puts them in a difficult situation.⁵⁰ As one seller puts it, “[y]ou can’t really be a high-volume seller online without being on Amazon.”⁵¹

II: THE UNITED STATES AND EUROPEAN UNION’S FAILURE TO ADDRESS THE MONOPOLISTIC BEHAVIOR OF AMAZON AND OTHER GATEKEEPER PLATFORMS

A. THE UNITED STATES’ SYSTEMATIC FAILURE OF ALLOWING GATEKEEPER PLATFORMS TO AMASS POWER

While the U.S. is now responding to the anticompetitive nature of Amazon with the proposed EPMA, one question still lingers: how did Congress allow gatekeeper platforms to concentrate and dominate the digital economy? Historically, Congress has been at the forefront of limiting companies from creating monopolistic conditions in the marketplace, starting with the passage of the Sherman Act in 1890 and the Clayton Act and the FTC Act in 1914.⁵² Congress further reasserted this effort with the passage of the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart-Scott-Rodino Act of 1976.⁵³

However, in the 1980s, the Reagan Administration ushered in the antitrust philosophy of the Chicago School, calling for minimal government intervention in combating monopolies since “markets would drive sluggish monopolies out of business.”⁵⁴ Further, the Supreme Court significantly weakened Congress’ efforts in *Reiter v. Sonotone Corporation*⁵⁵ by narrowly defining the goal of antitrust law to promote “consumer welfare” instead of

to “ride Amazon’s rails to reach” consumers increasingly depend on their biggest competitor. Such a system only sets small retailers and independent businesses up for failure. Khan, *supra* note 4, at 780.

48. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 268.

49. Mitchell et al, *supra* note 33.

50. Khan, *supra* note 4, at 781.

51. *Id.*

52. Knox, *supra* note 15.

53. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 391.

54. The Chicago School’s antitrust approach was the idea that, without government invention into the affairs of businesses, the free market would abolish sluggish monopolies, as it did with Western Union, the largest monopoly in the United States in the 19th century. President Ronald Reagan’s “friendly to American corporate enterprise” ideology allowed the Chicago School’s antitrust philosophy to prosper. Louis Galambos, *When Antitrust Helped, And Why It Doesn’t Now*, WASH. POST (June 13, 1999), <https://www.washingtonpost.com/archive/opinions/1999/06/13/when-antitrust-helped-and-why-it-doesnt-now/68ea1edd-bd6b-484f-82b4-88243ef818a7/>.

55. “Congress designed the Sherman Act as a ‘consumer welfare prescription.’” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343–44 (1979).

focusing on the competitive nature between companies.⁵⁶ Due to such a narrow ruling, the DOJ and FTC have taken a constricted view of their legal authorities and are “issuing guidelines that are highly permissive of market power and its abuse.”⁵⁷ Although the DOJ and FTC have opened more investigations into gatekeeper platforms, including the 2019 probe against Facebook,⁵⁸ both agencies lack the statutory tools to effectuate change.⁵⁹ Further, the recent U.S. District Court decision allowing the T-Mobile and Sprint merger⁶⁰ to proceed may provide additional antitrust defenses to gatekeeper platforms in the event federal regulators decide to pursue a case.⁶¹ Thus, the U.S. has become a suitable breeding ground for large technology companies to create monopolistic business models.

B. THE EUROPEAN UNION’S SLUGGISH EX POST FACTO APPROACH IN COMBATING GATEKEEPER PLATFORMS

While the U.S. has been largely absent in addressing gatekeeper platforms’ monopolistic behavior, the E.U. has generally taken a more aggressive approach by launching lengthy investigations into their business models. For example, in 2018, the European Commission found that Google was abusing its power as a gatekeeper platform because it diverted “traffic away from competing comparison-shopping services to Google’s own comparison-shopping service” by placing its general search services in more favorable positions for consumers to see.⁶² As a result, the European Commission fined Google and its parent company, Alphabet Inc. (Alphabet), nearly €2.5 billion for employing this anticompetitive business strategy.⁶³ To

56. “Simultaneously, courts have adopted the view that underenforcement of the antitrust laws is preferable to overenforcement, a position at odds with the clear legislative intent of the antitrust laws, as well as the view of Congress that private monopolies are a ‘menace to republican institutions.’” INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 6, at 391.

57. *Id.*

58. *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>.

59. On February 11, 2020, the United States District Court declined to block a proposed merger between T-Mobile and Sprint, “the third- and fourth-largest wireless carriers, respectively.” United States District Judge Victor Marrero, who approved the proposed merger, explained that the wireless industry was a “complex and dynamic market.” Thus, pricing strategies tend to be less transparent in such markets, with anticompetitive behavior “likely more risky, impractical, or unrealistic.” If judges are to believe that telephone companies are still “complex and dynamic,” a similar defense can be used by gatekeeper platforms. Martin C. Geagan, *DOJ and FTC Lock in on Big-Tech Firms, But T-Mobile/Sprint Merger Opinion Provides a Potential Compelling Antitrust Defense*, WINSTON & STRAWN LLP COMPETITION CORNER (Mar. 17, 2020), <https://www.winston.com/en/competition-corner/doj-and-ftc-lock-in-on-big-tech-firms-but-t-mobile-sprint-merger-opinion-provides-a-potential-compelling-antitrust-defense.html>.

60. Edmund Lee, *T-Mobile Closes Merger With Sprint, and a Wireless Giant Is Born*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/business/media/tmobile-closes-sprint-merger.html>.

61. Geagan, *supra* note 59.

62. 2018 O.J. (C 9) 8.

63. *Id.*

date, the European Commission has fined Google almost €10 billion.⁶⁴ Moreover, in 2020, the European Commission opened a formal antitrust investigation against Amazon for breaching E.U. antitrust regulations by distorting competition in its digital marketplace.⁶⁵ Specifically, the European Commission was addressing Amazon's reliance on business data from third-party merchants and consumers to benefit its own retail business, as explained above.⁶⁶

Despite the E.U.'s best efforts and issuance of pricey fines, gatekeeper platforms in Europe have done little to change their anticompetitive business models.⁶⁷ While the E.U. has initiated antitrust investigations to discover the anticompetitive nature of gatekeeper platforms, these probes are often sluggish and lack the legal enforcement to restrain the likes of Google and Amazon.⁶⁸ The European Court of Auditors confirmed that recent E.U. antitrust probes are too lengthy and are *ex post facto* remedies, only occurring after a gatekeeper platform has wiped out its competition.⁶⁹ For instance, and as noted above, the E.U. fined Google nearly €2.5 billion for its anticompetitive online shopping comparison service.⁷⁰ However, this fine has been pending with the European Court of Justice for three years,⁷¹ with Google only offering to settle it as of September 2021.⁷² To make matters worse, the E.U. essentially left it up to Google to resolve its monopolistic behavior, allowing it to barely change anything within its business model.⁷³ Thus, the E.U.'s *ex post facto* approach of investigating gatekeeper platforms after employing anticompetitive tactics has been largely unsuccessful.

64. Jeanne Whalen, *Europe fined Google nearly \$10 billion for antitrust violations, but little has changed*, BOSTON GLOBE (Nov. 10, 2020, 5:15 PM), <https://www.bostonglobe.com/2020/11/10/business/europe-fined-google-nearly-10-billion-antitrust-violations-little-has-changed/>.

65. European Commission Press Release IP/20/2077, *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* (Nov. 10, 2020).

66. *Id.*

67. Javier Espinoza, *EU has been too slow to tame Big Tech, says bloc's auditor*, FIN. TIMES (Nov. 18, 2020), <https://www.ft.com/content/abb8ebe1-99e1-4547-8c42-df265bf5125c>.

68. *Id.*

69. The European Court of Auditors also noted that the current E.U. approach of examining a company's market shares, price of goods or services, and profit margins is insufficient to "define market power and evaluate competition" when it comes to the likes of Google and Amazon. Gatekeeper platforms serve as both the marketplace and seller in digital markets, using their substantial number of users to set anticompetitive conditions. Thus, the traditional E.U. approach of investigating gatekeeper platforms has been unsuccessful. *Id.*

70. 2018 O.J. (C 9) 8.

71. Espinoza, *supra* note 67.

72. Foo Yun Chee, *EXCLUSIVE Google offers to settle EU antitrust probe into digital advertising – source*, REUTERS (Sept. 23, 2021, 11:35 AM), <https://www.reuters.com/technology/exclusive-google-seeking-settle-eu-antitrust-probe-into-adtech-source-2021-09-23/>.

73. As Megan Gray, general counsel of rival search engine DuckDuckGo, puts it, "[t]he bad actor gets to decide what their medicine is going to be. And that's just crazy, right?" Just as it did before the E.U. probes began, Google continues to dominate more than 90% of Europe's search-engine market. Whalen, *supra* note 64.

When examining both the U.S. and E.U.'s approaches to regulating gatekeeper platforms, it is apparent that both governments must overhaul their antitrust regulatory frameworks. The U.S. free market approach has allowed gatekeeper platforms to consolidate power at the expense of small business third-party merchants on digital marketplaces. Further, while the E.U. has been active in combatting gatekeeper platforms, an *ex post facto* approach is insufficient in solving the issue. Therefore, if both governments wish to curb the power of gatekeeper platforms, they must amend their current approaches.

III: THE SPECIFICATIONS OF THE ENDING PLATFORM MONOPOLIES ACT AND THE DIGITAL MARKETS ACT

With a background on Amazon's conflict of interest business model, and the U.S. and E.U.'s failure to address the monopolistic behavior of gatekeeper platforms, it is evident that both governments must rework their antitrust regulatory frameworks. Thus, the newly proposed EPMA and DMA offer the revitalization that both governments desperately need. This section will examine the specifications of the EPMA and DMA and how each offers a contrasting solution to resolving the monopolistic issues posed by gatekeeper platforms.

A. BACKGROUND AND SPECIFICATIONS OF THE ENDING PLATFORM MONOPOLIES ACT

With the introduction of the EPMA, the U.S. is leaving behind the Reagan Administration and Chicago School's antitrust philosophy of having minimal government intervention when addressing the anticompetitive business models of gatekeeper platforms.⁷⁴ Instead, Congress has designed the EPMA to promote competition and economic opportunity in digital marketplaces by eliminating conflicts of interest that arise from gatekeeper platforms that have concurrent ownership of an online platform while also having certain other lines of business on that platform.⁷⁵ In other words, the EPMA will specifically target gatekeeper platforms, such as Amazon, that collect third-party merchant and consumer data while simultaneously selling and promoting its private-label brands alongside third-party products.⁷⁶

To qualify as a "covered platform" under the EPMA, Section 5(5) requires a company to: (1) have at least 50 million U.S.-based monthly active users on the platform; (2) have at least 100 thousand U.S.-based monthly active business users on the platform; (3) have annual net sales or a market capitalization greater than \$600 billion; and (4) be a critical trading partner for the sale or provision of any product or service offered on or directly

74. Galambos, *supra* note 54.

75. H.R. 3825, 117th Cong. § 2(a) (2021).

76. Mitchell et al, *supra* note 33.

related to the platform.⁷⁷ Amazon would satisfy this definition since it: (1) has 148.6 million U.S. monthly users;⁷⁸ (2) has over 500 thousand U.S. third-party merchants;⁷⁹ (3) has a market capitalization value of \$1.674 trillion;⁸⁰ and (4) is a critical trading partner for third-party merchants on the Amazon marketplace.⁸¹

Once considered a covered platform, Section 2(a) of the EPMA will prohibit a gatekeeper platform from owning, controlling, or having a beneficial interest in a line of business, other than managing its digital marketplace, if it: (1) utilizes the covered platform for the sale or provision of products or services; (2) offers a product or service that the covered platform requires a business user to purchase or utilize as a condition for accessing its digital marketplace; or (3) gives rise to a conflict of interest.⁸² Applying these elements to Amazon, it is clear that the company's current business model would violate the EPMA on all three counts because it: (1) utilizes its digital marketplace to sell private-label brands;⁸³ (2) requires third-party merchants to pay a vendor fee to sell products on the Amazon marketplace;⁸⁴ and (3) gives rise to a conflict of interest by collecting third-party data on merchants and consumers.⁸⁵

When an agent of a gatekeeper platform violates Section 2(a) of the EPMA, the act offers two provisional remedies.⁸⁶ Beginning with Section 3(c)(1), if an officer, director, partner, or employee of a gatekeeper platform fails to abide by the EPMA, they will be fined for 15% of their total average daily U.S. revenue for the previous calendar year.⁸⁷ Moreover, under Section 3(c)(2), an officer, director, partner, or employee of a gatekeeper platform may also be fined for 30% of their total average daily U.S. revenue in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct.⁸⁸ Thus, not only will the EPMA punish the gatekeeper platform as an entity, but the act will also discipline its agents who promote and create monopolistic business tactics.

77. H.R. 3825, 117th Cong. § 5(5) (2021).

78. Brian Dean, *Amazon Prime User and Revenue Statistics (2022)*, BACKLINKO (Jan. 5, 2022), <https://backlinko.com/amazon-prime-users>.

79. Kiri Masters, *The Most Surprising Stats From Amazon's 2021 Small Business Empowerment Report*, FORBES (Oct. 20, 2021, 05:55 AM), <https://www.forbes.com/sites/kirimasters/2021/10/20/the-most-surprising-stats-from-amazons-2021-small-business-empowerment-report/?sh=48677e19545f>.

80. YAHOO FINANCE, <https://finance.yahoo.com/quote/AMZN/> (last visited Mar. 25, 2022).

81. Khan, *supra* note 4, at 781.

82. H.R. 3825, 117th Cong. § 2(a) (2021).

83. AMAZONBASICS, *supra* note 6.

84. AMAZON SELLING PLANS, <https://sell.amazon.com/pricing#selling-plans> (last visited on Mar. 25, 2022).

85. Sonnemaker, *supra* note 7.

86. H.R. 3825, 117th Cong. § 3 (2021).

87. H.R. 3825, 117th Cong. § 3(c)(1) (2021).

88. H.R. 3825, 117th Cong. § 3(c)(2) (2021).

Regarding punishment for the gatekeeper platform as an entity, Section 3(d) of the EPMA grants independent litigation authority to both the DOJ and FTC, allowing them to “seek other appropriate relief,” such as breaking up gatekeeper platforms.⁸⁹ When a company is “broken up,” it is split into two or more independent companies.⁹⁰ Thus, if a gatekeeper platform is broken up, it would resolve the company’s possible incentive and ability to promote its products at the expense of third-party merchants.⁹¹ Using this definition, Amazon will have the ultimatum of either halting its private-label sales on its digital marketplace or having the DOJ and FTC filing suit to break it up legally. Therefore, if gatekeeper platforms continue to compete unfairly against third-party merchants, they will be on a collision course with federal regulators.⁹²

B. BACKGROUND AND SPECIFICATIONS OF THE DIGITAL MARKETS ACT

Despite its best efforts, the E.U. has been unsuccessful in preventing gatekeeper platforms from employing anticompetitive business tactics.⁹³ However, with the introduction of the DMA, the E.U. is beginning to rework its strategy by adopting an *ex-ante* approach. Specifically, the DMA is a landmark proposal of *ex-ante* competition policy that will enhance the existing E.U. antitrust regulatory framework.⁹⁴ As stated above, the E.U.’s current *ex post facto* approach of investigating gatekeeper platforms after employing anticompetitive tactics has been unsuccessful. Thus, the DMA seeks to create contestable and fair conditions in digital marketplaces across the E.U. by taking an *ex-ante* approach, acting before gatekeeper platforms can wipe out their competition.⁹⁵

To qualify as a gatekeeper platform under the DMA, a company must have: (1) at least 45 million monthly active end users; (2) an annual global turnover of €6.5 billion; and (3) operations in at least three E.U. member states.⁹⁶ Amazon would quickly satisfy this definition because it has: (1)

89. H.R. 3825, 117th Cong. § 3(d) (2021).

90. FREE DICTIONARY, <https://financial-dictionary.thefreedictionary.com/breakup> (last visited Oct. 23, 2021).

91. Dana Mattioli & Ryan Tracy, *House Bills Seek to Break Up Amazon and Other Big Tech Companies*, WALL STREET J. (June 11, 2021, 6:30 PM), <https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248>.

92. Cristiano Lima & Leah Nylen, *House Panel Approves Plan to Help Breakup Tech Giants*, POLITICO (June 24, 2021, 4:43 PM), <https://www.politico.com/news/2021/06/24/house-tech-giants-breakup-bill-496091>.

93. Espinoza, *supra* note 67.

94. Meredith Broadbent, *Implications of the Digital Markets Act for Transatlantic Cooperation*, CTR. FOR STRATEGIC & INT’L STUD. (Sept. 15, 2021), <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>.

95. *Id.*

96. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 36-37.

roughly over 300 million monthly E.U. users;⁹⁷ (2) an annual turnover of €44 billion alone in the E.U.;⁹⁸ and (3) operations in all 27 E.U. member states.⁹⁹ Once a company satisfies the DMA's definition of a gatekeeper platform, it must oblige to the new standards set out in the act.¹⁰⁰

Notably, Article 5(b) of the DMA establishes transparency guidelines, which, like the EPMA, addresses gatekeeper platforms' conflict of interest business models.¹⁰¹ However, the DMA takes a different approach to resolving this issue. Rather than adopting a structural separation remedy, the DMA allows third-party merchants to "inter-operate" with gatekeeper platforms, giving third-party merchants access to collected third-party and consumer data.¹⁰² Taking such an approach will allow gatekeeper platforms to continue selling their private-label brands alongside third-party products. Moreover, Article 6(1)(i) of the DMA requires gatekeeper platforms to provide third-party merchants with "high-quality, continuous and real-time access and use of aggregated or non-aggregated data."¹⁰³ With this requirement, third-party merchants using Amazon's platform would have access to the data Amazon collects on consumers, which would help eliminate the arising conflict of interest between the parties.¹⁰⁴

To ensure that gatekeeper platforms follow the DMA, the European Commission will fine a company up to 10% of its total worldwide annual turnover for violating any section of the act.¹⁰⁵ However, while the DMA appears to create a harmonizing system between gatekeeper platforms and third-party merchants, Margrethe Vestager, European Commissioner of Competition, has embedded a backup safety measure into the act.¹⁰⁶ If a gatekeeper platform violates the DMA three times within eight years, the European Commission will consider breaking them up.¹⁰⁷ Nonetheless, E.U.

97. Joanna Perry, *Europe Ecommerce Report Shows Marketplace Growth, Key Trends*, PATTERN (Nov. 16, 2020), <https://pattern.com/blog/europe-ecommerce-report-shows-marketplace-growth-key-trends/>.

98. Daniela Coppola, *Total revenue of Amazon Europe from 2011 to 2020*, STATISTA (Oct. 8, 2021), <https://www.statista.com/statistics/934963/revenue-of-amazon-europe/>.

99. AMAZON GLOBAL EXPORT COUNTRIES AND REGIONS, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GCBBSZMUXA6U2P8R> (last visited Oct. 23, 2021).

100. *The Digital Markets Act: ensuring fair and open digital markets*, EUROPEAN COMMISSION, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited Mar. 14, 2022).

101. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 39.

102. EUROPEAN COMMISSION, *supra* note 100.

103. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 40.

104. *Id.* at 40-41.

105. *Id.* at 50.

106. Espinoza, *supra* note 67.

107. Ryan Browne, *EU targets U.S. tech giants with a new rulebook aimed at curbing their dominance*, CNBC (Mar. 25, 2022), <https://www.cnbc.com/2022/03/25/digital-markets-act-eu-targets-big-tech-with-sweeping-new-antitrust-rules.html>.

officials wish to avoid structural separation remedies since breaking up these powerful gatekeeper platforms would be daunting.¹⁰⁸ Moreover, since most gatekeeper platforms are prominent U.S. technology companies, the E.U. does not want to risk weakening its alliance with the U.S. by threatening to break them up unilaterally.¹⁰⁹

When examining the EPMA and DMA, both the U.S. and E.U. are taking fundamentally different approaches to address gatekeeper platforms' monopolistic behavior. Most likely to make up for its lack of action in the past, the U.S. is taking a strict approach to structurally separating EPMA violators. Meanwhile, the E.U.'s approach appears to give gatekeeper platforms a chance to inter-operate with third-party merchants by sharing their collected data, possibly creating an equilibrium that could resolve arising conflicts of interest in digital marketplaces.

IV: THE ADVANTAGES AND DISADVANTAGES OF THE ENDING PLATFORM MONOPOLIES ACT AND THE DIGITAL MARKETS ACT

A. ADVANTAGES OF THE ENDING PLATFORM MONOPOLIES ACT

At its core, the EPMA gives a strict ultimatum to gatekeeper platforms. Specifically, the guidelines set by the EPMA require gatekeeper platforms to either eliminate their conflict of interest business models or be sued,¹¹⁰ possibly spending billions of dollars on a lengthy lawsuit that will lead to its separation.¹¹¹ Although such an approach is uncompromising, proponents of the EPMA argue that a structural separation approach is essential to addressing the anticompetitive behavior of gatekeeper platforms.¹¹² For example, Representative Pramila Jayapal (D-WA), the U.S. House Judiciary Committee member who proposed the EPMA, stated that a structural separation approach is crucial since creating an oversight system to monitor gatekeeper platforms would be challenging due to the sheer number of daily

108. Espinoza, *supra* note 67.

109. Tensions between the United States and E.U. are already high in the digital sector due to the E.U.'s attempt to increase taxes on United States technology companies. However, E.U. Internal Market Commissioner, Thierry Breton, dismissed the idea that stricter regulations being applied to gatekeeper platforms are discriminatory towards the United States. Foo Yun Chee, *EU moves to rein in U.S. tech giants with threat of fines, break-up*, REUTERS (Dec. 15, 2020), <https://www.reuters.com/article/us-eu-tech/eu-moves-to-rein-in-u-s-tech-giants-with-threat-of-fines-break-up-idUSKBN28P0HH>.

110. H.R. 3825, 117th Cong. § 3(d) (2021).

111. Whalen, *supra* note 64.

112. Representative Jayapal spearheaded the EPMA because “[f]rom Facebook and Amazon to Google and Apple, it could not be more clear that these unregulated tech giants have become too big to care and too powerful to ever put people over profits.” Press Release, Congresswoman Pramila Jayapal, Jayapal’s Landmark Big Tech Legislation Passes House Judiciary Committee (June 24, 2021).

transactions in digital marketplaces.¹¹³ For instance, Amazon alone oversees around 66 thousand transactions per hour, averaging 18.5 per second or about 1.6 million per day.¹¹⁴

Further, gatekeeper platforms have proven that they cannot be trusted on word alone.¹¹⁵ Amazon displays a particular lack of trustworthiness, which was shown during the House Judiciary Committee's 2019 investigation when Amazon's Associate General Counsel, Nate Sutton, lied under oath, stating that Amazon does not collect third-party merchant and consumer data when creating its private-label brands.¹¹⁶ A year later, this notion was proven false when the *Wall Street Journal* found that Amazon launched replicas of bestselling products created by third-party merchants.¹¹⁷ Not even Jeff Bezos could deny these allegations, and comments from former employees confirmed that third-party data was like a "candy shop" at Amazon.¹¹⁸

Unless Congress eliminates Amazon's conflict of interest business model through structural separation, it will continue to use its overwhelming market power as a gatekeeper platform to undermine smaller third-party merchants.¹¹⁹ If Amazon is forced to sell its private-label brands on a different platform, it would not be allowed to leverage its market power and data gleaned from its digital marketplace.¹²⁰ To this end, Congress has already taken steps to ensure that gatekeeper platforms cannot transfer data from one of its owned platforms to another.¹²¹ As mentioned earlier, "A Stronger Online Economy: Opportunity, Innovation, Choice" is a six-part package and also includes H.R. 3816, or the "American Choice and Innovation Online Act."¹²² This proposal would prohibit gatekeeper platforms from mining data on third-party merchants and consumers on one platform and then transferring it to another owned platform.¹²³ Therefore, passing a structural separation bill would force the prospective companies created by a break up of Amazon to compete fairly on price and quality.¹²⁴

113. *Id.*

114. Szabolcs Szecsei, *32 Amazing Amazon Statistics Showing Off Its True Power*, CAP. COUNS. (Jul. 6, 2021), <https://capitalcounselor.com/amazon-statistics/>.

115. Press Release, Congresswoman Jayapal, *supra* note 112.

116. *Id.*

117. Mattioli, *supra* note 2.

118. Press Release, Congresswoman Jayapal, *supra* note 112.

119. Mitchell et al, *supra* note 33.

120. *Id.*

121. H.R. 3816, 117th Cong. (2021).

122. Press Release, Congressman David Cicilline, *supra* note 24.

123. H.R. 3816, 117th Cong. § 2(b)(3) (2021).

124. Mitchell et al, *supra* note 33.

B. DISADVANTAGES AND OPPOSITION TO THE ENDING PLATFORM MONOPOLIES ACT

While proponents of the EPMA argue that the act would benefit third-party merchants in the digital economy, there has also been an outcry of criticism. Without surprise, Amazon has been a prominent critic of the EPMA, arguing that such an approach will directly hurt consumers using its platform.¹²⁵ For example, consumers might lose access to the benefits that drew them to Amazon, such as Amazon Prime memberships and free two-day shipping.¹²⁶ Further, Amazon argues that such a decision would hurt third-party merchants on its digital marketplace since it would impede the merchants' ability to generate revenue.¹²⁷ However, Amazon has not offered any evidence of how the EPMA would hurt third-party merchants.¹²⁸

Although Amazon is a fierce critic of the EPMA, other groups have also raised concerns. For instance, the American Economic Liberties Project, an antimonopoly advocacy group, stated that the bill, as written, defers too much power to federal agencies, which have historically failed to break up monopolistic companies.¹²⁹ For example, in 1956, the Bell System monopoly, which consisted of the American Telephone and Telegraph Company, Inc. (AT&T) owning twenty-four telephone companies,¹³⁰ was left intact after a seven-year legal battle with the DOJ and FTC.¹³¹ Additionally, the 1998 effort to break up Microsoft, Inc. (Microsoft) ended after three years with a settlement agreement that left the company intact.¹³² To make matters more complex, the technology of AT&T and Microsoft was much more simplistic and understandable than the power that Amazon and other gatekeeper platforms hold today.¹³³ Rather than dealing with telephone companies and outdated computer systems, the U.S. government is sparring against e-commerce generating data throughout various digital marketplaces, which is a difficult concept to understand.¹³⁴ Moreover, gatekeeper platforms

125. *Stay informed and engaged on legislation that could impact your business*, AMAZON, <https://supportsmall sellers.us/> (last visited Apr. 5, 2022).

126. Annie Palmer, *Amazon launches website to go on the offensive against Congress' antitrust tech bills*, CNBC (Aug. 20, 2021, 9:46 AM), <https://www.cnbc.com/2021/08/20/amazon-launches-website-to-warn-sellers-about-antitrust-bills.html>.

127. AMAZON, *supra* note 125.

128. *Id.*

129. Lima & Nylén, *supra* note 92.

130. Charles L. Brown, *Bell System History – The Bell System*, PORTICUS CENTRE, https://www.beatriceco.com/bti/porticus/bell/bellsystem_history.html (last visited Oct. 24, 2021).

131. Bhaskar Chakravorti, *Antitrust Isn't the Solution to America's Biggest Tech Problem*, HARV. BUS. REV. (Oct. 2, 2020), <https://hbr.org/2020/10/antitrust-isnt-the-solution-to-americas-biggest-tech-problem>.

132. While Microsoft was left intact after its battle with the DOJ, the results of the case nevertheless led to competition within the digital world, allowing platforms such as Google Chrome and Firefox to gain popularity. *Id.*

133. *Id.*

134. Shira Ovide, *Congress Doesn't Get Big Tech. By Design*, N.Y. TIMES (Jul. 29, 2020), <https://www.nytimes.com/2020/07/29/technology/congress-big-tech.html>.

have argued that, for this reason, Congress is not fully equipped to make drastic decisions on breaking up their companies.¹³⁵ To illustrate, during the House Judiciary Committee's 2019 investigation, former Representative Steven King (R-IA) raised inscrutable concerns about the iPhone to Alphabet and Google's Chief Executive Officer Sundar Pichai, illustrating how little Congress members understand these issues.¹³⁶

Additional criticism comes from Minority House Leader Kevin McCarthy (R-CA), who has openly stated that he opposes giving more enforcement power to federal agencies headed by President Joseph R. Biden.¹³⁷ Representative McCarthy is not the only House Republican who takes issue with the EPMA. The House Judiciary Committee's top Republican, Representative Jim Jordan (R-OH), voted against the EPMA, stating that the proposal "represented a vast expansion of government power and a worrisome new marriage of big tech and big government."¹³⁸ If party politics begin to come into play, it could ruin the bipartisan nature and undermine the objective of the EPMA.

C. ADVANTAGES OF THE DIGITAL MARKETS ACT

Compared to the EPMA, the DMA will create a more compromising approach by allowing gatekeeper platforms to share their collected data with third-party merchants, eliminating arising conflict of interest issues.¹³⁹ Hence, third-party merchants who rely on a gatekeeper platform's digital marketplace will not be competing in an environment that will undermine them.¹⁴⁰ Further, the E.U. states that if gatekeeper platforms share data with third-party merchants, technology start-up companies could compete in the digital marketplace without complying with the quasi-private regulations that gatekeeper platforms have created to impede competition.¹⁴¹ Other than the requirement to share data with third-party merchants, the DMA will leave a gatekeeper platform's business model unchanged.¹⁴² Thus, if Amazon is

135. *Id.*

136. Nick Bastone, *Democrats erupt into laughter after Google CEO has to explain to Rep. Steve King that the "iPhone is made by a different company,"* BUS. INSIDER (Dec. 16, 2018, 9:30 AM), <https://www.businessinsider.com/steve-king-asks-google-ceo-iphone-democrats-laugh-2018-12>.

137. John D. McKinnon & Julie Bykowicz, *Google, Facebook, Amazon Among Those Set to Fight House Big Tech Antitrust Package*, WALL ST. J. (June 24, 2021, at 4:20 PM), <https://www.wsj.com/articles/house-judiciary-committee-passes-final-piece-of-big-tech-antitrust-package-11624562811>.

138. Both the remarks from Representatives McCarthy and Jordan miss the essence of the EPMA. While both Representatives have attempted to turn its passage into a political issue, the EPMA has outstanding bipartisan support due to the issues that gatekeeper platforms pose to competition in digital marketplaces. The EPMA's objective is to address these anticompetitive issues that harm small, independent businesses; not political issues. *Id.*

139. EUROPEAN COMMISSION, *supra* note 100.

140. *Id.*

141. *Id.*

142. *Id.*

willing to share its data, it can continue its private-label operations while simultaneously hosting third-party merchants on its digital marketplace.

Additionally, the DMA can help the E.U. and gatekeeper platforms avoid lengthy and expensive antitrust investigations and lawsuits that accompany structural separations.¹⁴³ To avoid this, the DMA sets a high deterrence by threatening gatekeeper platforms that violate the act with fines up to 10% of its total worldwide annual turnover.¹⁴⁴ For example, since Amazon's revenue in the 2020 fiscal year amounted to \$386 billion, it could face fines up to \$38.6 billion for violating the DMA.¹⁴⁵ Such an extensive fine towers over Amazon's \$1.58 billion from the sales of its private-label brands.¹⁴⁶ Lastly, if needed, the E.U. still reserves the power to impose structural separation remedies by mandating that a gatekeeper platform break up its business into two entities if they are found to violate the DMA continuously.¹⁴⁷

D. DISADVANTAGES AND OPPOSITION TO THE DIGITAL MARKETS ACT

While proponents champion the innovation of the DMA, it nonetheless received its fair share of criticism, particularly the protocol of sharing collected data between entities.¹⁴⁸ The Organization for Economic Cooperation and Development noted several risks associated with data sharing, including exposing gatekeeper platforms and consumers to digital security threats.¹⁴⁹ For instance, a business user under the guise of a third-party merchant can gain access to a gatekeeper platform's proprietary data, using it to hack the company's services.¹⁵⁰ Data sharing can also harm consumers, specifically since Article 6(1)(i) of the DMA calls for providing third-party merchants with "high-quality, continuous, and real-time access and use of aggregated or non-aggregated data" on consumers.¹⁵¹

Evidence further indicates that data breaches increase when data is collected, processed, and shared in large volumes between entities.¹⁵² A prime example of this is when the United Kingdom fined Facebook £500 thousand for "unfairly processing [its user's] personal data" and allowing application developers, such as Cambridge Analytica, access to information

143. William Leslie, Lodewick Prompers, & Asimina Michailidou, *The European Commission's Digital Markets Act Proposal: Regulating systemically important digital platforms*, LINKLATERS BLOG (Dec. 18, 2020), <https://www.linklaters.com/en-us/insights/publications/2020/december/european-commissions-digital-markets-act-proposal-regulating-systemically-important-digital>.

144. EUROPEAN COMMISSION, *supra* note 100.

145. Kohan, *supra* note 1.

146. Mattioli, *supra* note 2.

147. Leslie et al, *supra* note 143.

148. OECD, *supra* note 29.

149. *Id.*

150. *Id.*

151. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 40-41.

152. OECD, *supra* note 29.

without taking appropriate measures against unauthorized processing of personal data.¹⁵³ While a security algorithm could be created to protect consumer data, it would need to be high-level to comply with the DMA's data sharing requirements, proving costly and challenging to implement.¹⁵⁴

Moreover, while the E.U. intends for the DMA to be an *ex-ante* approach in preventing monopolistic behavior amongst gatekeeper platforms, it will be challenging to create an oversight system that can effectively review the high volume of transactions over various digital marketplaces.¹⁵⁵ As noted above, Amazon alone oversees around 66 thousand orders per hour, averaging 18.5 orders per second.¹⁵⁶ While the DMA sets a deterrence by fining a gatekeeper platform 10% of its total worldwide annual revenue for violating the act,¹⁵⁷ a gatekeeper platform might escape unscathed due to an oversight error based on the sheer number of transactions that occur on its digital marketplace in a matter of seconds.

Further, as drafted, the DMA does not include safeguards for trade secrets and intellectual property rights of gatekeeper platforms' proprietary software.¹⁵⁸ Having gatekeeper platforms share data with third-party merchants imposes an obligation to share proprietary information and gives competitors direct access to core technical and operational infrastructure.¹⁵⁹ Although gatekeeper platforms have employed monopolistic business models, the E.U. should not forget that they are modern-day success stories. When Jeff Bezos founded Amazon, he worked out of his garage while holding office meetings at Barnes & Noble.¹⁶⁰ The company has now earned record-breaking sales, reeling in \$386 billion in the 2020 fiscal year.¹⁶¹ While Amazon needs to create fair competition on its digital marketplace, it should not have to "turn the keys to its factory over to a competitor."¹⁶² This issue is the most prominent concern amongst gatekeeper platforms since they believe third-party merchants will be "able to free ride on the proprietary capabilities of larger platforms that have been foundational to their innovative successes."¹⁶³

153. *Id.*

154. *Id.*

155. Szecsei, *supra* note 114.

156. *Id.*

157. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 50.

158. Sean Heather, *Under the Microscope: The European Union's Digital Markets Act*, U.S. CHAMBER OF COM. (June 1, 2021), <https://www.uschamber.com/technology/under-the-microscope-the-european-union-s-digital-markets-act>.

159. *Id.*

160. Avery Hartmans, *Jeff Bezos originally wanted to name Amazon 'Cadabra,' and 14 other little-known facts about the early days of the e-commerce giant*, BUS. INSIDER (July 2, 2021, 2:42 PM), <https://www.businessinsider.com/jeff-bezos-amazon-history-facts-2017-4>.

161. Kohan, *supra* note 1.

162. Heather, *supra* note 158.

163. Broadbent, *supra* note 94.

Lastly, gatekeeper platforms are not the only critics of the DMA. Specifically, U.S. policymakers view the proposal as a direct attack on U.S. technology companies for being too successful compared to their European counterparts.¹⁶⁴ The core of this criticism accuses the E.U. of wanting to punish U.S. technology companies in order to promote and improve European firms in the digital marketplace.¹⁶⁵ However, such criticism might not be as forthcoming as it once was under the Obama and Trump Administrations.¹⁶⁶ For instance, in June 2021, the Biden Administration and E.U. launched the “Trade and Technology Council,” calling for both governments to work together in reining in the power of gatekeeper platforms.¹⁶⁷ Nevertheless, the Biden Administration has warned the E.U. about requiring a collaborative approach while dealing with U.S. gatekeeper platforms.¹⁶⁸

As both the EPMA and DMA seek to restructure the U.S. and E.U.’s antitrust regulatory frameworks, it is only natural that both proposals have received widespread praise and criticism. Both proposals offer unique and advanced methods for reducing the anticompetitive power wielded by gatekeeper platforms in ways both governments have not done before. However, upon closer examination, both proposals have one common denominator: once passed into law, they will fundamentally change the future of e-commerce in the digital economy.

V: THE STRUCTURAL SEPARATION REMEDY OF THE ENDING PLATFORM MONOPOLIES ACT IS MORE SUITABLE FOR RESOLVING A GATEKEEPER PLATFORM’S CONFLICT OF INTEREST BUSINESS MODEL

While the EPMA and DMA seek to redefine antitrust law in the U.S. and E.U., respectively, both proposals take different approaches to achieve this goal. However, the EPMA is better suited to ensure that gatekeeper platforms no longer abuse third-party merchants on their digital marketplaces. As Representative Jayapal puts it, the structural separation of gatekeeper platforms will prohibit companies from leveraging control over their digital marketplaces to the disadvantage of third-party merchants.¹⁶⁹ Moreover, structurally separating Amazon will prohibit it from collecting third-party

164. *Id.*

165. *Id.*

166. Kiran Stacey, Rochelle Toplensky, and Demetri Sevastopulo, *Donald Trump attacks EU action against US tech groups*, FIN. TIMES (June 26, 2019), <https://www.ft.com/content/3eb00398-9815-11e9-8cfb-30c211dcd229>.

167. Broadbent, *supra* note 94.

168. Javier Espinoza, *US warns EU against anti-American tech policy*, FIN. TIMES (June 15, 2021), <https://www.ft.com/content/2036d7e9-daa2-445d-8f88-6fcee745a259>.

169. Press Release, Congresswoman Jayapal, *supra* note 112.

merchant and consumer data, eliminating its conflict of interest business model.¹⁷⁰

Conversely, while compromising, the DMA is unfeasible with current technology and might create more problems than it is trying to resolve. Specifically, the DMA: (1) ignores the risk factors that accompany data sharing between entities;¹⁷¹ (2) lacks accountability protocols due to the high number of transactions that gatekeeper platforms oversee;¹⁷² (3) disregards gatekeeper platforms' trade secrets and intellectual property rights;¹⁷³ and (4) unfairly targets U.S. technology companies to promote European innovation.¹⁷⁴ Therefore, the DMA's data sharing approach is insufficient in resolving gatekeeper platforms' monopolistic behavior.

A. WHY THE STRUCTURAL SEPARATION APPROACH OF THE ENDING PLATFORM MONOPOLIES ACT IS ESSENTIAL IN RESOLVING GATEKEEPER PLATFORMS' MONOPOLISTIC BEHAVIOR

The EPMA will eliminate the conflict of interest business models currently employed by gatekeeper platforms through its structural separation solution. Specifically, through Section 3(d) of the EPMA, federal regulators will have the statutory tools needed to ensure that a gatekeeper platform cannot continue operating a conflict of interest business model due to the looming threat of being sued and broken up.¹⁷⁵ Thus, if the DOJ or FTC were to legally break up Amazon, it would no longer have the capability to outperform third-party merchants by collecting data on their products and consumer trends.

Moreover, ensuring that Amazon is not selling its private-label brands alongside third-party merchant products will eliminate Amazon from having the incentive and opportunity to use its digital marketplace to impede competition.¹⁷⁶ For instance, Amazon will not be able to incorporate its proprietary algorithms to favor its products over third-party merchants, such as placing its private-labels above better-rated third-party products.¹⁷⁷ Further, with the proposal of the American Choice and Innovation Online

170. *Id.*

171. OECD, *supra* note 29.

172. Portuese, *supra* note 30.

173. *Id.*

174. *Id.*

175. Lima & Nysten, *supra* note 92.

176. Mitchell et al, *supra* note 33.

177. Not only does Amazon place its private-label brands above those of better-rated third-party merchant products, but it also directs you to purchase a product through its distributing company, rather than through a competitor. This is especially true for Amazon's book selection. Adrianne Jeffries & Leon Yin, *Amazon Puts Its Own "Brands" First Above Better-Rated Products*, THE MARKUP (Oct. 14, 2021, 8:00 AM), <https://themarkup.org/amazons-advantage/2021/10/14/amazon-puts-its-own-brands-first-above-better-rated-products>.

Act, Amazon will be prohibited from mining data on its digital marketplace and transferring it to other owned platforms.¹⁷⁸ Thus, in the likelihood that Amazon created a separate digital marketplace for its private-label brands, it would not be able to transfer third-party data, further eliminating its conflict of interest business model.¹⁷⁹

While a structural separation is the best approach to addressing gatekeeper platforms' monopolistic behavior, it is a drastic one, as argued by critics of the EPMA.¹⁸⁰ However, the EPMA's structural separation remedy might not harm all gatekeeper platforms. In Amazon's case, the company makes roughly 60% of its revenue through third-party merchant fees,¹⁸¹ where it takes a cut of the profit from third-party sales performed on the Amazon marketplace.¹⁸² If Amazon were to cease its private-label operations, it could focus on promoting third-party merchant sales and advertisements, allowing Amazon to collect more on third-party transactions.

Lastly, structural separation remedies are nothing new, as demonstrated by the U.S. government's past actions.¹⁸³ For example, Congress implemented the National Bank Act of 1864 to prevent commercial banks from providing loans to businesses while simultaneously owning a business that could compete against loan-seeking businesses.¹⁸⁴ Further, Congress enacted the Hepburn Act of 1906 to prevent railroad companies from transporting commodities on its trains that they had "manufactured, mined, or produced," or "may have [had] any interest [in], direct or indirect."¹⁸⁵ Therefore, as Congress has done in the past, it can now similarly apply a structural separation remedy to address the anticompetitive business models created by gatekeeper platforms.

B. THE UNPREDICTABLE DANGERS ASSOCIATED WITH THE DIGITAL MARKETS ACT'S DATA SHARING PROTOCOL

While the DMA is not a bad proposal, its objective of creating a harmonized system is simply over-ambitious. Its policies can lead to unpredictable, dangerous outcomes for gatekeeper platforms and consumers. Beginning with Article 5(b) of the DMA, the data sharing between gatekeeper platforms and third-party merchants might open Pandora's box, exposing both parties to cybersecurity threats.¹⁸⁶ Gatekeeper platforms would

178. H.R. 3816, 117th Cong. § 2(b)(3) (2021).

179. Mitchell et al, *supra* note 33.

180. Palmer, *supra* note 126.

181. Annie Palmer, *Amazon says sellers are doing great on its marketplace, as regulators turn up the heat*, CNBC (Oct. 19, 2021, 11:45 AM), <https://www.cnbc.com/2021/10/19/amazon-touts-small-business-success-amid-third-party-seller-scrutiny-.html>.

182. AMAZON SELLING PLANS, *supra* note 84.

183. Mitchell et al, *supra* note 33.

184. *Id.*

185. *Id.*

186. OECD, *supra* note 29.

be at risk of potential hackers posing as third-party merchants, requesting proprietary information from gatekeeper platforms with the desire to infiltrate their systems.¹⁸⁷ While creating a security algorithm to ensure there is no breach of proprietary information could be possible, it would be costly and challenging to implement due to the sheer number of third-party merchants and transactions in digital marketplaces.¹⁸⁸ Similarly, consumers on a gatekeeper platform's digital marketplace can be harmed by data sharing, especially since Article 6(1)(i) of the DMA requires transferring consumer data to third-party merchants.¹⁸⁹ Facebook proved this notion true in 2018 when it processed and shared user data with Cambridge Analytica, leading to 87 million personal records being breached.¹⁹⁰

C. THE DIGITAL MARKETS ACT CANNOT PROVIDE EFFECTIVE OVERSIGHT OF GATEKEEPER PLATFORMS

Similar to ambitiously attempting to share data between entities, the DMA also does not account for the high volume of transactions on digital marketplaces.¹⁹¹ While Commissioner Vestager states that fining a gatekeeper platform up to 10% of its total worldwide annual turnover will serve as a deterrence from violating the DMA,¹⁹² it would be challenging for the European Commission to oversee every transaction made between gatekeeper platforms and third-party merchants.¹⁹³ Thus, the European Commission cannot possibly monitor the almost 1.6 million transactions that Amazon oversees daily.¹⁹⁴ Additionally, the DMA is supposed to serve as an *ex-ante* regulation, preventing gatekeeper platforms from employing monopolistic business tactics.¹⁹⁵ However, due to the oversight issue, the DMA's backup measure of breaking up gatekeeper platforms will most likely have to be implemented, making the end result no different than the EPMA's.¹⁹⁶

187. *Id.*

188. *Id.*

189. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 40-41.

190. OECD, *supra* note 29.

191. Szecsei, *supra* note 114.

192. Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 O.J. (COM 2020) 842 at 50.

193. Portuese, *supra* note 30.

194. Szecsei, *supra* note 114.

195. Broadbent, *supra* note 94.

196. Browne, *supra* note 107.

**D. THE DIGITAL MARKETS ACT DOES NOT PROTECT
GATEKEEPER PLATFORMS' TRADE SECRETS AND
INTELLECTUAL PROPERTY RIGHTS**

While gatekeeper platforms should not limit competition on their digital marketplaces, they should also not have to give away their proprietary information to third-party merchants. Specifically, the DMA does not include safeguards against gatekeeper platforms' trade secrets and intellectual property rights.¹⁹⁷ Forcing a gatekeeper platform to share data with third-party merchants is the equivalent to “turn[ing] the keys to its factory over to a competitor.”¹⁹⁸ Amazon and other gatekeeper platforms are successful for a reason. In Amazon's case, the company was one of the first e-commerce platforms to efficiently integrate data algorithms to oversee its digital marketplace and supply chain management systems.¹⁹⁹ By requiring Amazon to share its data with third-party merchants, the DMA imposes gatekeeper platforms to share proprietary information, granting direct access to their digital marketplaces' core technical and operational infrastructure.²⁰⁰

**E. THE DIGITAL MARKETS ACT UNFAIRLY TARGETS UNITED
STATES GATEKEEPER PLATFORMS TO PROMOTE EUROPEAN
TECHNOLOGY COMPANIES**

Lastly, the DMA unfairly targets U.S. gatekeeper platforms that have outperformed their European counterparts. As noted by Garret Workman, Senior Director of the U.S. Chamber of Commerce, the E.U. is targeting “only U.S. based companies at the same time [it is] asking to work together.”²⁰¹ The U.S. National Security Council shares this view, calling the DMA a “protectional policy.”²⁰² Moreover, the European Tech Alliance, consisting of European technology companies, such as Spotify Technology S.A. and Klarna Bank AB, have specifically pushed E.U. politicians for a “targeted approach” against U.S. gatekeeper platforms.²⁰³ While the Biden Administration has opted into the Trade and Technology Council to work together with the E.U. to create regulations in the digital economy, President Biden has nonetheless warned the E.U. about requiring a collaborative approach while dealing with U.S. gatekeeper platforms.²⁰⁴ Further, if the U.S. and E.U. begin to spar over this issue, it could disrupt their unified approach to progressing the digital economy, including the production of complex

197. Heather, *supra* note 158.

198. *Id.*

199. Mattioli, *supra* note 2.

200. Heather, *supra* note 158.

201. Pieter Haeck, *EU charge against Silicon Valley clouds transatlantic tech alliance*, POLITICO (Oct 15, 2021, 6:30 AM), <https://www.politico.eu/article/washington-brussels-big-tech-ttc-dma/>.

202. *Id.*

203. *Id.*

204. Espinoza, *supra* note 168.

artificial intelligence and computer chips, in the face of intensifying competition from China.²⁰⁵

While the DMA poses an over-ambitious objective, it is not a bad policy. Its compromising approach may even be more welcoming than the structural separation remedy of the EPMA, effectively creating a state of equilibrium between gatekeeper platforms and third-party merchants while eliminating arising conflicts of interest. However, without a sufficient oversight system to review all transactions²⁰⁶ and the unpredictable nature of gatekeeper platforms,²⁰⁷ it would be challenging to ensure that gatekeeper platforms oblige by the DMA. Therefore, the EPMA's structural separation remedy will ensure that gatekeeper platforms can no longer undermine third-party merchants.

CONCLUSION

While the EPMA appears to be a better solution for regulating the monopolistic behaviors of gatekeeper platforms, it is important that both the U.S. and E.U. are actively revitalizing their antitrust regulatory frameworks. The EPMA's structural separation remedy would ensure the eradication of conflict of interest business models that gatekeeper platforms are employing. However, in time, the DMA might become a better proposal once technology rises to meet the occasion and has advanced enough to create a sufficient oversight system. Until that day, the EPMA's strict structural separation remedy is essential to ensure that gatekeeper platforms, such as Amazon, can no longer impede competition on their digital marketplaces at the expense of small business third-party merchants.

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205. Haeck, *supra* note 201.

206. Portuese, *supra* note 30.

207. Press Release, Congresswoman Jayapal, *supra* note 112.

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