NLIU-IKIGAI POLICY CASE COMPETITION

Team Code : P11

POLICY TITTLE –

BALANCING COMPETITION AND INNOVATION: A NEUTRAL MODEL FOR ANTI-TRUST REGULATION OF INTERNET PLATFORMS

STATEMENT OF PROBLEM:

The problem faced by policy makers in the field of technology market anti-trust law is how to effectively regulate the growing power of technology companies without stifling innovation or unfairly targeting specific firms.

The purpose of this policy recommendation is to address the growing concerns about the concentration of power and influence in the technology market and the potential for abuse of that power through the implementation of anti-trust laws. In particular, this recommendation proposes the adoption of a ***Neutral Model Approach*** *to regulating the technology market in order to promote competition and protect consumers.*

The neutral model approach is based on the idea that the government should not favour or regulate any particular business model or technology, but rather should focus on ensuring that competition is fair and open to all. This approach would involve the enforcement of anti-trust laws in a way that is neutral to the specific business practices or technologies of the firms involved.

By adopting a neutral model approach, we believe that we can effectively ***address the concerns about concentration of power*** *in the technology market while also* ***promoting innovation and competition.*** *This approach would allow companies to pursue their own business strategies and innovate, while also ensuring that consumers are protected from anticompetitive behaviour.*

Overall, the adoption of a neutral model approach to technology market anti-trust law is a balanced and effective way to promote competition and protect consumers in the rapidly evolving technology industry.

EXISTING JURISPRUDENCE:

The existing jurisprudence around the regulations of internet platforms revolve around two main factors, firstly being consumer protection; second being industrial policy and this has been the major focus of anti-trust policies around the world.

To analyze the existing jurisprudence around the regulations of these internet platforms we have reviewed the policies adopted by UK, E.U, US, Germany and China; as these jurisdictions have been at the forefront when it comes to controlling the anti-competitive practices of internet platforms. The regulatory framework adopted by these countries have been quite unique and divergent in its own ways mainly due to the difference in how the respective countries sees and approaches the question of industrial policy and competitive policy.

The current jurisprudence on anti-trust law all over the world focuses mainly on the aspect of consumer welfare as that is one of the reasons why anti-trust policies are formed in the first place, different countries may have different enforcement systems in place but the crux of the anti-trust law has remained the same.

The existing anti-trust laws can be divided into two parts-:

1. Prevention of monopoly practices.
2. Prevention of abuse of dominance by dominant firms.

It is important to note that the present state of anti-trust laws have been largely unfit to deal with the rise of the big-tech companies and internet platforms and this is because historically the main focus of anti-trust laws have been on protection of consumers from exploitation and with these internet platforms and their new business model existing anti-trust laws are inadequate.

These inadequacies are mainly because the courts and the regulators have failed to firstly, define the relevant markets in which the internet platforms enjoy dominant status and secondly, most of the times regulators confuse popularity of the social media apps with dominance.[1]

To further address these issues the authors have discussed relevant models from different countries which includes sectoral regulations, existing anti-trust laws as well as modern laws.

Country	**Way Of Regulation**	**Definition Given To Internet Platforms**	**Nature Of Rules**	**Industrial Policy Stance.**	**Burden Of Proof**
E.U	Separate guidelines.	Gatekeeper	Ex-Ante	Favors a strong industrial policy	Presumption as to anti-competitive practice.
US	3 Separate legislations	Covered Platforms	Ex-Post	Favors free functioning of the market.	Presumption as to anti-competitive practice.

1 Reynolds A, "Big Tech's Monopoly of What?" (Cato.org) <https://www.cato.org/commentary/big-techs-monopoly-what> accessed December 20, 2022

UK	Separate Legislation and guidelines based on the principles	SMS status i.e., Substantial Market Status	Ex-Ante	Favors a strong industrial policy.	Collection of evidence and Consultation with the stakeholders before formation of the rules.
Germany	Separate Legislation.	PICAM status i.e., Paramount importance of competition in the market.	Ex-Ante	Favors a strong industrial policy.	Presumption as to anti-competitive practice.
China	Part of the same anti-trust law	Definition of dominance defined under platform rules and other sector specific regulations.	Ex-Post	Neutral approach	No presumption against the platform.

THE MANDATE :

The mandate of the policy problem answers to two major questions:

First, the issues with a DMA-style/ "Gatekeeper" approach and why it would not work as a benchmark for other jurisdiction. *Second*, alternative to Gatekeeper approach.

1. Issues With DMA Style/"Gatekeeper" Approach.

1.1. Background: Stakeholders involved

The DMA style regulation of internet platform by the European Union has taken an overtly aggressive stance against the internet platforms. It imposes a set of ex-ante rules which has several repercussions with regards to satisfying the major stakeholders involved in such a decision.

However before we discuss it further, it is very important that we look into important stakeholders involved in the process of policy making for internet platform regulations.

Interests of all the above-mentioned stakeholders:

a) Giant Internet Platforms like Facebook, Google, also commonly known as the big-tech companies, are the main subject matter of this regulation. These Platforms' interests and expectation out of the regulations is that they are given a fair hearing and a fair chance of expressing what their economic interests are. They also demand that economic interests are protected and not violated in the legislation.

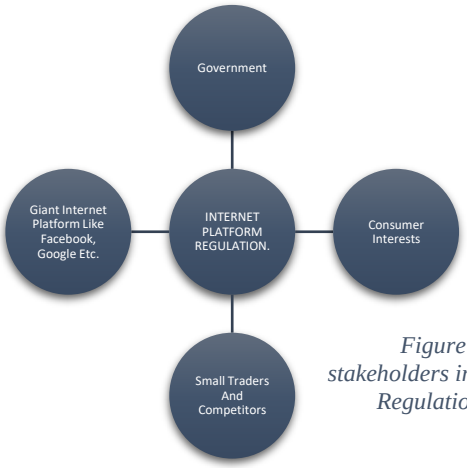


Figure depicting stakeholders involved in Regulation process

b) Small traders and competitors' main expectation is that their economic interests are not violated by the big-tech companies and their anti-competitive behavior, as well as that there are no barriers to entry for these small traders and competitors to enter into the market.[2]

c) Consumer Interests – The consumer interests in any anti-trust law must be kept at the forefront and it must be made sure that the consumers are not exploited by big-tech companies' uncompetitive practices. Further that the consumers are not compelled to take any decision in these internet platforms and any abuse of dominance which violates the interests of the consumers must be regulated.

d) Government – The government's interests here 2-fold :

- *Ease of doing business of companies within the country* – Economic interests and industrial policy of the country is at the forefront of any policy decision of the government. As the central regulatory authority, it has the responsibility to ensure smooth functioning of the economy so that all the stakeholders are taken care of and businesses do not face trouble while operating in the country.
- *Foreign policy* – with regards to the operation of foreign entities in India like Amazon and Flipkart, it could well be a policy decision impacting the economies of both the foreign country and India. This, if any decision is to be taken on regulating these big-tech companies, for instance an overtly harsh policy, it could impact the host country's business relations with the foreign country and may even lead to economic downturn or reduction in ease of doing business index points.

1.2. *What is the DMA "Gatekeeper" approach?*

The DMA's approach to internet platform regulation focuses more on the regulation of internet platform by defining "Gatekeepers" as platforms which fulfill certain criteria like turnover, large consumer base, that act as an important gateway.

Once a platform fulfills these conditions it has to abide by all the Do's and Don'ts that are mentioned in the legislation through a set of ex-ante rules. Certain guidelines are mentioned hereunder;

1.2.1. Dos for the Gatekeepers:

a) Allow third parties to **inter-operate** with the Gatekeeper's services in certain specific situations.
b) Allow their business users to access the data that they generate while using Gatekeeper's platform
c) Provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out
d) Allow their business users to promote their offer and conclude contracts with their customers outside the Gatekeeper's platform.

1.2.2. Don'ts for the Gatekeepers:

a) Treat services and products offered by the Gatekeeper itself more favorably in ranking than similar services or products offered by third parties on the Gatekeeper's platform.
b) Prevent consumers from linking up to businesses outside their platforms.
c) Prevent users from un-installing any pre-installed software or app if they wish so.
d) Track end users outside of the Gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.[3]

1.3. *Ex-ante rules:*

2 D. Daniel Sokol, 'TENSIONS between ANTITRUST and INDUSTRIAL POLICY' [2015] Asian Law eJournal 1247.
3 "The Digital Markets Act: Ensuring Fair and Open Digital Markets" (European Commission) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed December 12, 2022

Using Ex-ante rules to regulate the internet platforms assumes the fact that there are certain illegalities that maybe committed by the internet platforms, which must be prohibited by a set of ex-ante rules. This marks a drastic shift from the current anti-trust framework of the E.U by **"*deviation from an evidence based legal system to a reverse burden based legal system.*"**

1.3.1. What are the downsides to this?

a) DMA based regulation ***subjects all the big-tech companies*** to Ex-Ante rules in the act irrespective of:
- Any evidence as to its non-compliance or commission.
- Their business model – for instance: there is a little to no logical import of imposing inter-operability and sharing of third-party data requirement on a company like Amazon as it does not only not adhere to their business model, it impedes it.

b) DMA does not talk about whether the internet platform ***actually holds a dominant status*** or not. The DMA regulations are silent on several other factors that must be considered while deciding dominant status of a platform like – absence or presence of competitors in the market, what market dominance is, which market are the companies operating in.

c) DMA could also possibly slow down ***digital innovation***. Reducing digital businesses' competitiveness compared to their non-digital counterparts deters digital transformation, slowing down or even preventing disruption[4]which is essential for revolutionizing a market.

d) DMA creates ***extra regulatory costs*** in order to comply with the set of ex-ante rules that could undermine the competitiveness of businesses acting in the digital space. DMA creates extra regulatory costs that raise barriers to entry, thereby preserving the incumbents' positions.[5]

e) ***Imitation becomes more attractive than innovation-*** ex-ante rules of the DMA mandates inter-operability and sharing of data with other business users which leave no incentives for the business entities to innovate and use their own methods to collect data. This overlooks innovation resulting from the incentive to design an operating system with proprietary services attached to it.

f) DMA would encourage ***free-riding*** behaviors at the expense of innovation.

g) Companies that are close to meeting Gatekeeper status may be ***discouraged from creating new services*** to avoid the applicability of DMA. For example, the rules could dissuade a large platform provider from investing in a new channel, for fear of outgrowing its established regulatory category.

h) ***Self-preferencing is actually beneficial for the consumers***: Services like Google Maps and YouTube, when ties up and bundles services that are offered to the consumers, reduces search costs and improves efficiency and convenience for the consumers.[6]

1.4. *Why this approach would not work as a benchmark for other jurisdictions?*

Reasons why this approach wouldn't work for other jurisdictions is because -:

1. *Different jurisdictions have different legal system and enforcement system* – if we look at why the DMA based regulations are so strict in nature, we will be drawn towards the history of anti-trust law and enforcement in the E.U which is fundamentally different from the US or any other country.

4 'The EU's Digital Markets Act: What Does It Mean for Businesses and Data Privacy?' (Orrick.com2022) <https://www.orrick.com/en/Insights/2022/11/The-EUs-Digital-Markets-Act-What-Does-It-Mean-for-Businesses-and-Data-Privacy?utm_campaign=PostBeyond&utm_source=Twitter&utm_medium=Social&utm_term=195155> accessed 20 December 2022

5 Witt AC, 'Can the EU's Digital Markets Act Rein in Big Tech?' (*The Conversation*21 October 2022) <https://theconversation.com/can-the-eus-digital-markets-act-rein-in-big-tech-192373> accessed 12 December 2022

6 Stolton S, 'Google First Big Tech Firm Subject to New German Competition Rules' (*POLITICO*5 January 2022) <https://www.politico.eu/article/google-first-big-tech-firm-subject-to-new-german-competition-rules/> accessed 12 December 2022

Competition policies in E.U has always been driven by protectionist measures as one of its main aims was economic integration of the various member nations. The European Union is concerned about competitive opportunities for small and medium-size firms, raising the economic level of worse-off nations, and general notions of "fairness."[7] Moreover, Enforcement in the EU is far more regulatory and bureaucratic. Much regulation is based on a system of notification and approval by negative clearance, individual exemption, or block exemption which is very different from the regulatory framework of other nations.[8]

2. *Different jurisdictions have different socio-economic realities and foreign policies*: Countries that are still developing economies, aim to liberalize their economic. It would be on the losing side if they adopt a regulation similar to DMA as it would be an inhibition for their economic growth and prosperity. Although it is in these countries' interest to have anti-competitive laws in place, however, that in itself does not justify the need for regressive Ex-ante regulations.

1.5. *Inference:*

From the above points it can only be concluded that with formulating the DMA regulations, the E.U focused more on protecting and preserving the industrial policy of the government. Such a regulation ***puts the goal of consumer protection on compromise*** by disincentivizing innovation which normally forms the core of any anti-trust policy.

AN ALTERNATIVE TO THE GATEKEEPER APPROACH : FEATURES FROM EXISTING JURISPRUDENCE

2.1. *Background*:

While formulating any policy there are somethings which must be kept in mind and they are as follows:

- Every country has its own historical development of anti-trust law.
- Every country has a different legal system.
- Every country has a different industrial policy.

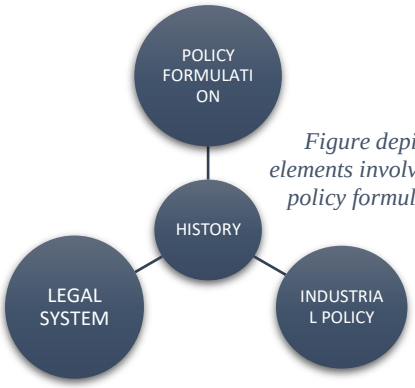


Figure depicting elements involved in policy formulation

2.2. *Review of approach by different countries*

To understand the differences in the policy approaches of major countries that have come up with regulations we have divided the classification on two basis:

First, we will compare the contrasting approaches of UK and EU with regards to their regulations and enforcement of internet platforms, this is because both of these countries have applied ex-ante rules but have a stark contrast in their approach.

Second, we will compare the contrasting approaches of US and China as both these countries have applied ex-post rules but differ fundamentally in its enforcement.

2.3. *Contrasting approaches of U.K and E.U model*

7 Fox E, 'US and EU Competition Law: A Comparison' <https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf>
8 *Ibid.*

Country	Definition	Ex-ante rules	Enforcement
U.K	Firms to pass the SMS status test – • Substantial market power • Entrenched market power • Use of that substantial market power to acquire a strategic position.	Rules are based on principles laid down in the legislation based on-: 1. Fair Trading 2. Open Options 3. Trust and Transparency	Rules and guidelines will be laid down for specific firms based on the principles listed down in the legislation. These guidelines are enforced by the CMA.

Country	Definition	Ex-ante rules	Enforcement
E.U	Firms to pass the "Gatekeeper" test – • Acts as an **important gateway** between business users and consumers. • Caters to a **large consumer base** – (there is a number given) • **Turnover** over a certain amount. • This should be entrenched since the last **3 years.**	If the firm passes the "Gatekeeper" test then it has to strictly abide by all the ex-ante rules listed under the legislation DMA.	Firms failing to adhere to these provisions face strict monetary penalty and repeated offenders might be forced to cease operations in E.U.

2.4. *Why the U.K model*[9] *is better than the E.U model-:*

The "SMS" firm status approach undertaken by the UK is principally similar to the approach taken by the German authorities and one of the key differences of lies in the formation of these rules and regulations as well as its enforcement. The UK model suggests that there be a legislation which lays down a set of principles based on the general principles of anti-trust law i.e., 1. Fair Trading, 2. Open Options, 3. Trust and Transparency and the CMA be given the responsibility to lay down a set of guidelines for specific firms based on the general principles laid down in the legislation and such rules and guidelines would be based on hard evidence collected by the CMA based on its investigations which would also include consultation with the stakeholders especially the concerned regulated firm itself.

Hence, this model seems to be a much more mature and welcoming model than the Gatekeeper approach for the following reasons-:

1. Stakeholders' concerns are addressed.
2. It does not unreasonably subject all the laid down rules on one firm.
3. It gives due regard to the business model of the firm and the kind of anti-competitive practice that they commit.

9 'A New Pro-Competition Regime for Digital Markets' (*GOV.UK* 20 July 2021)

2.5. *Contrasting model of US and China -:*

Country	Definition	Ex-post rules	Enforcement.
U.S	Firms to pass the test of "Covered platforms" -: 1. have at least 50 million U.S.-based monthly active users or 100,000 U.S.-based monthly active business users. 2. are owned or controlled by firms with net annual sales or market capitalizations greater than $600 billion. 3. are "critical trading partner[s]" for the sale or provision of any product or service offered on or directly related to the platforms.	Ex-Post rules are divided into 3 different legislations -: 1. The American Innovation and Choice Online act. 2. the Ending Platform Monopolies Act. 3. Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act.	According to the conventional anti-trust law i.e., the Sherman act and the clayton act, investigations can be carried out by the FTC and private individuals can also make complaints. In this the burden of proof shifts on the defendant i.e., the "covered platform" to prove that it has not committed the wrong.

Country	Definition	Ex-post rules	Enforcement
China	Defined under sectoral legislations like the Article 11 of the Platform Guideline (API) and the Article 17 of the conventional Anti-Monopoly act.	Added two new requirements for internet platforms: Undertakings shall not use data or algorithms, technology, capital advantages, etc, to engage in the monopolistic practices are prohibited. Undertakings "shall not exclude or restrict competition by abusing the advantages in data and algorithms, technology and capital and platform rules,"	Similar to their national anti-trust law with strict punishments, burden of proof is on the plaintiff.

2.6. *Why the Chinese model[10] is better than the US model[11]:*

Few of the major differences between both this legislation is that the Chinese law,

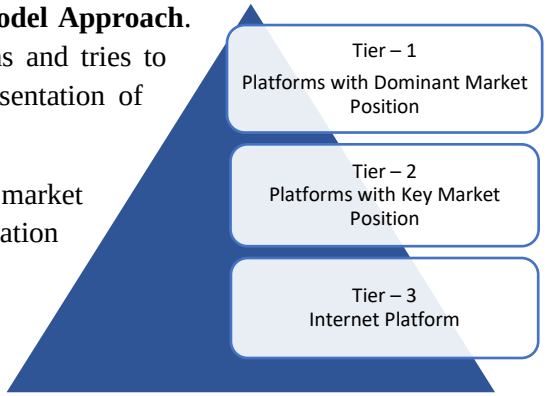
1. Does not create a separate legislation for regulation of the internet platforms.
2. Applies the conventional principles of "abuse of dominance" and "monopolistic practices by firm"
3. Amendments in the **sectoral legislations** like the platform rules to include broad guidelines of when a platform is said to be in a dominant position.

[10] 'The Dominance and Monopolies Review - the Law Reviews' (*Thelawreviews.co.uk* 2022) <https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/china#footnote-015> accessed 15 December 2022
[11] American Innovation and Choice Online Act, 2022

A NEW PROPOSAL – THE THREE TIER NEUTRAL MODEL APPROACH :

We must focus on an approach which accommodates the interests of all the stakeholders involved in this process; and while we agree in our proposal that it is not possible to regulate the internet platform with the current anti-trust laws, the essence of anti-trust law should not be done away with and a policy should be formed in such a manner that it is in harmony with all the stakeholders involved.

For this purpose, we recommend the **Three-Tier Neutral Model Approach**. This model incorporates the features of multiple jurisdictions and tries to inefficiencies of the Gatekeeper model. The graphical representation of which shown here.



Three-Tier Neutral Model Approach

The policy takes up the **three-level approach**. The Technology market companies shall be divided in three level/tiers. The categorisation would be done on **Quantitively and Qualitatively**.

Tier 3:

This is the layer of least application of new regulation shall be regulated with the existing competition act. They do not have substantial hold in the market and do no pose substantial threat to the competition condition in the digital market.

This layer would continue to be governed by the existing competition/ anti-trust laws in the country.

Tier 2:

This is the layer of Key Market Position. The internet platforms which have exceed the Quantitative threshold, as defined later, would be come in this layer. They would be called as **Key Internet Platforms (KIPs).**

Quantitative Threshold will be said to have passed if an Internet Platforms exceeds,

- *Turnover* or *Market Capitalization* of more than $600 Billion, and
- Monthly active *consumer base* of more than 50 million users or 1,00,000 active monthly *business users*.

The central idea behind this layer is that, a digital platform which has achieved substantial position in the market, has potential to 'tip' the market in their favor in some year.

However, unlike in the case of EU's DMA, this policy does not penalize the platforms for gaining **quantitative substantial position** in the market. The mere existence of a big tech company in the market is not a problem. Thus, the companies falling under this category would not attract the strict ex-ante rules. Nevertheless, the possibility of these companies tipping the market in their favor cannot be neglected. Hence, existing **Ex-post** rules will govern these companies. However, these companies would also come under the radar of new **Digital Platform Regulatory Authority** (DPRA) which would have the following guiding principles.

- *First*, related to self-preferencing and discrimination.
- *Second*, Third Party data usage.
- *Third*, Anti-competitive contracts and exclusionary conduct.
- *Fourth*, Anti-competitive platform rules and policies.

DPRA would be a digital market watchdog which will be tasked to have regulatory and adjudicatory powers to keep a check on the anti-competitive practices of the KIPs.

The aim of this layer is to help the government expedite the process of anti-competition proceedings, which traditionally takes long time to conduct. For this purpose, the policy intends to establish DPRA which shall work within the existing competition law framework. They would fall under the Central Competition agency in hierarchy and would specifically deal with the competition issues of the Digital Market.

DPRA would be given discretionary power to impose the emergency provisions on the KIPs when finds substantial evidence of it engaging in any anti-competitive practices. This ensures that the firms do not use such practices to tip the market in their favor.

Tier 1:

This is the layer of Dominant Market Position. They would be called **Dominant Internet Platform (DIP).** These are the players which have entrenched market position and would attract Ex-ante rules.w DPRA would be tasked to subject the firms to **DIP Test** to assign them DIP Status.

DIP test would include both Quantitative and Qualitative elements. Quantitative test would be the same indicated for Tier 2.

A firm would pass the **Qualitative Test** if at least one of the activities of the firm, for last 3 years :

- Has no substantial competitors in the market, and
- Has strong network effect, and
- Forms indispensable tech gateway, or
- Engages in any anticompetitive activities, like
    - *First*, related to self-preferencing and discrimination.
    - *Second*, Third Party data usage.
    - *Third*, Anti-competitive contracts and exclusionary conduct.
    - *Fourth*, Anti-competitive platform rules and policies.

Specific Activity: The firm would attract strict ***Ex-ante*** rules when they are given the DIP status by the DPRA. However, we understand that imposing such rules all across the company would impose unnecessary burden onto the firm. Thus, only such activities of the firm which actually engage in the anti-competitive will attract ex-ante rules. Regardless, general code of conduct would apply to whole of the firm.

Abuse of dominance -: Internet Platforms with a dominant status cannot engage in the following conduct with respect to 'Specific Activities'-:

1. Cannot engage in any unjustified exclusionary practice against any business user or consumer.
2. Cannot impose unnatural and unreasonable restraints in the form of monetary restraint or any other form so as to push the business user out of business.
3. Cannot deny anyone to link their data with their apps except when such app is a direct competitor of these platforms.
4. Cannot deny any user from accessing third party platforms other than the dominant platform.
5. Cannot use its position to force business users to favor their own services over others by means of pre-installation of apps or any other way.
6. Cannot use its position to give self-preference to its own services over other business users.

7. Undertakings holding dominant platform position shall not use data or algorithms, technology, or platform rules, etc., to engage in the practices that abuse dominant market positions provided for in the previous paragraph.

Conclusion:

The authors propose *Three-Tier Neutral Model Approach* that the authors are proposing through this proposal, these proposals rely on the 3 basic principles that -:

1. Every country has its own historical development of anti-trust law.
2. Every country has different socio-economic realities.
3. Every country has a different industrial policy.