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A Comparative Perspective of the Antitrust Regulation of the Digital Economy in Europe and China

Influenced by the Matthew effect[1], the digital economy tends to be a hyper-concentrated market. Large platforms with well-developed business models have far less difficulties in attracting customers and accumulating data than smaller ones. Market concentration is accentuated by certain explicitly monopolistic practices of large firms. It is not uncommon for them to deliberately design their products in such a way that they are incompatible with the devices or services offered by their competitors. The iPhone charger, for example, is not compatible with smartphones made by Samsung or Xiaomi, as this could affect the longevity of the battery. In China, consumers can only pay for their purchases on Taobao, a C2C platform of Alibaba, by using Alipay, not WeChat Pay, even though these two online payment tools work in the same way. To eliminate their competitors, established companies have embarked on aggressive mergers and acquisitions (M&A), incorporating many innovative start-ups in the process. It is estimated that Google merged 257 entities between 2006 and 2022. At the same time, Facebook acquired 94 companies between 2005 and 2021. The trajectory followed by other digital firms is similar. The boundaries of the behemoths are constantly expanding to cover a wide range of activities: social networks, entertainment, e-commerce, artificial intelligence, content sharing, etc...

Cartels, abuse of the dominant position on the market, and M&A by digital giants destabilise the market. They kill the enthusiasm of small businesses for technological innovation, reduce the number of choices available to consumers, and most importantly, turn the economic power of big businesses into political power. One simply can read *The Age of Surveillance Capitalism*[2] to understand the close links forged between the digital empires of Silicon Valley and the American government. The latter relies on high-tech companies to develop surveillance technologies. The companies recruit former politicians to improve their chances of obtaining favourable deals. One important mission of the American association *Numerama* is to oversee the relations between political and economic actors. According to the association, between 2005 and 2016, Google recruited sixty-five employees from European administrations, including senior civil servants, to make its voice heard in Brussels. At the same time, fifteen employees of Google joined European administrations at various levels[3]. The unequal capacity of companies to reach key decision-makers further strengthens the position of the large to the detriment of the small.

The European Union is currently the most active in the antitrust regulation of the digital economy. On the one hand, with the Digital Markets Act (DMA), the EU is the first political entity to have established specific legislations on antitrust issues in the digital economy. Furthermore, compared with their counterparts in other countries, European regulators are the most intransigent in the fight against anti-

[1] The Matthew effect takes its name from a passage in Matthew's Gospel, which states that "to him who has shall be given, and he shall have abundance; but to him who has not, even that which he has shall be taken away". This maxim is understood as an incentive for those who have talent to cultivate it. Sociologist Robert Merton, in "The Matthew effect in science", Science, vol. CLIX, no. 3810, 5 January 1968, uses this expression to show the extent to which the institutional reputation acquired by scientists (and the institutions they represent) determines the importance attached to their work and, more broadly, the funding available to them.

[2] Shoshana Zuboff, The Age of Surveillance Capitalism, Zulma, Paris, 2020,

[3] Jean-Marc de Jaeger «Google recrute dans l'administration européenne pour défendre ses intérêts».

competitive practices. Record-high fines imposed on major platforms come from Europe, a subject that will be discussed later in this article. Following in its footsteps, China, which has long been laxist in this area, has been taking active measures since the end of 2020 to regulate the activities of its national champions. In July 2021, Tencent was punished six times for its illegal M&A, which led to market concentration. In October 2021, Meituan Dianping, one of the largest e-commerce platforms, was penalized for abusing its dominant position in the meal delivery market. The company was accused of forcing retailers to sign exclusive agreements with it. The Chinese regulator imposed a fine of 3.442 billion yuan (€441.8 million) to Meituan Dianping. New provisions have been proclaimed and the amendment to the anti-monopoly law was approved by the Chinese legislature on 24 June 2022. Nevertheless, challenges persist in the Middle Kingdom. The delimitation of the relevant market, an essential procedure for judging whether a firm occupies a dominant position, is difficult to apply to the digital economy. The reason is simple: most digital platforms offer products to the consumers located in different parts of China, rather than in a precise geographical area.

This study examines how the European Union and China regulate anti-competitive practices in their respective digital economies. The European Union and China are chosen as the subject of study because they are currently the most active and the most advanced in institutionalizing the antitrust regulatory framework for the digital economy. They have different political systems: while the twenty-seven Member States of the EU are democracies, China is an authoritarian state. This raises many questions. For example, do China and the EU face the same challenges in legislating the antitrust-related issues? Do they fight unfair competition in the same way? This is where the originality of this article lies: by analysing the antitrust regulations of countries where the state-market power relations differs, this article can clarify on the future development of the antitrust regulation in the world's major digital economies. Among other things, it asks whether countries with different political regimes are likely to fight unfair competition in the same way. If so, the similarity of regulatory objectives could provide a solid basis for building an international regulatory framework of the digital economy.

THE EUROPEAN UNION: A PIONEERING LEGAL FRAMEWORK

The antitrust legal framework of the EU has been the strictest to date. Compared with their Chinese and American counterparts, European regulators are the most intransigent. Activities that hinder competition are governed by a number of important legislative provisions. The oldest rules date back to the Treaties of Rome, articles 85 and 86 of which explain the criteria for judging whether practices by commercial entities are harmful to competition. The Treaties of Rome marked the beginning of the antitrust regulation in Europe. In that epoch, France and Germany initially agreed to establish a common agricultural policy, while Germany preferred to define very specific competition rules in line with German tradition. Secondly, antitrust policy was seen as "*the counterpart of the free movement of goods resulting from the completion of the common market. Since goods must circulate without hindrance within the common market, it seemed logical that the Member States should adopt common rules on competition, so that the latter would not be distorted in the interests of businesses and consumers alike*"[4].

The Treaty on the Functioning of the European Union (TFEU), adopted on 13 December 2007, prohibits anti-competitive practices in two ways: agreements and commercial practices that restrict competition (Article 101) and abuse of dominant positions (Article 102). Article 101 prohibits cartels whereby two or more undertakings attempt to restrict competition. Cartels may be horizontal (between competitors at the same level of the supply chain fixing prices or limiting output) or vertical (for example between a manufacturer and a distributor). However, Article 101-3 authorises the agreements with restrictive effects if they generate more positive than negative effects. Article 102 prohibits companies with a large

[4] Marion Gaillard «La politique de la concurrence de l'Union européenne», Antitrust and Cartels (europa.eu)

market share from abusing their dominant position by charging excessively low prices to prevent other competitors from entering the market, or by discriminating between trading partners.

These rules have long guided the antitrust regulation in the EU, at a time when the major US platforms had not yet acquired their dominant position on the European single market. However, with the expansion of the digital economy, these rules were quickly outdated in view of the reality on the ground. From the 2010s onwards, the EU updated its own framework, and instituted one framework which is specifically adapted to the antitrust regulation of the digital economy.

On 6 May 2015, the European Commission adopted the Strategy for a digital single market based on three pillars: improving the access of consumers and businesses to digital goods and services in the Union; creating a favourable environment and fair competition conditions, such that digital networks and innovative services can flourish; maximising the growth potential of the digital economy. In early 2020, the European Commission announced three strategic documents on the organisation of the market competition: Shaping Europe's Digital Future, White Paper on Artificial Intelligence, and European Data Strategy. In these documents, the European Union set the objective to create a fluid market where all players can compete fairly.

The most radical antitrust regulations in the European Union are the Digital Markets Act (DMA) and the Digital Services Act (DSA). The DMA crucially complements the provisions of the TFEU, which adopted an *ex post* approach to regulating cartels and the abuses of dominant positions.

The DMA improves the TFEU in three respects. First, it introduces different treatments for large and small platforms, making it possible to influence the behaviour of large platforms in advance. The latter are subject to different obligations and prohibitions from those applicable to small platforms. Second, to regulate large and small platforms differently, the European Commission advances the concept of gatekeepers. Gatekeepers enjoy (or will enjoy) a solid and lasting position, and have significant influence over the internal market. They provide services that constitute a major access point enabling companies to reach their end users. European regulators adopt both quantitative and qualitative criteria to decide whether a platform is a gatekeeper. Besides the quantitative criteria, the European Commission stipulates that "*any undertaking which meets the various criteria apart from those relating to thresholds and which appears to be too dominant may also be designated as a gatekeeper following an investigation by the Commission, which will take account in particular of network effects, benefits derived from data, economies of scale and the undertaking's vertical integration or conglomerate strategy*". Third, the European Commission is given significant regulatory and sanctioning powers. Assisted by an advisory committee and a high-level group, it designates gatekeepers, modifies the list based on market surveys, and, above all, can sanction wrongdoing companies with draconian measures. It can impose fines of up to 10% of total worldwide turnover that the concerned firm realizes in the preceding financial year, or even 20% in case of recurrence of similar infringements. These measures may be accompanied by periodic penalty payments of not exceeding 5% of average daily worldwide turnover in the preceding financial year per day. In the event of a systematic breach of the obligations and prohibitions at least 3 times in 8 years, the European Commission can open a market survey and impose behavioral or structural corrective measures on the concerned company.

For the first time, on 6 September 2023, the European Commission, appointed six businesses as gatekeepers under the DMA : Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft. It reserves the right to designate new gatekeepers and to review their compliance every three years. The six designated companies control access to 22 services. They are prohibited from giving preference to their own products or services. They cannot prevent users from unsubscribing from their services, uninstalling their applications or pre-installed software. They

cannot re-use the personal data of users for advertising purposes without obtaining users' explicit consent. The differentiated responsibilities for large platforms and small ones, laid down in the European framework, constitute an important institutional innovation, as they require digital platforms of different categories to behave differently from the outset. *Ex ante* regulation of the market competition is thus instituted.

The spirit of differentiated responsibilities is also present in the DSA, approved by the European Parliament in January 2022, six months ahead of the DMA. The larger the platform, the greater its responsibilities. The characteristics of the digital regulation in the EU is the differentiated regulation, in the areas of the antitrust as well as that of the content moderation. Replacing the E-Commerce Directive of 8 June 2000, the DSA establishes the category of "very large platforms" and "very large search engines". Companies falling into these categories face additional constraints. In April 2023, the European Commission designated seventeen "*very large platforms and search engines*" and created a binding regulatory framework for them. The obligations of the platforms designated as such are numerous. They must inform users of the reasons why certain information is recommended to them. Users have the right to opt out of the optimized recommendation systems by user profiling. It will be easier for users to signal illegal content, and platforms must deal with users' notifications with diligence. Platforms will have to label all advertisements and indicate the identity of their promoters to users. By laying down different obligations for different types of market players, the *ex ante* regulations incentivize the large platforms to behave themselves within the regulatory parameters.

The antitrust framework of the EU is characterized by the cooperation between European and national regulators. Since 2004, national competition authorities, just like the European Commission, have been able to apply the antitrust rules of the EU to regulate cartels and the abuse of the dominant position in their respective country. At present, the most important antitrust cases are dealt with primarily at the European level. This is especially the case when the anti-competitive practices produce pan-European effects. In June 2017, the European Commission imposed a fine of €2.42 billion on Google, the largest penalty ever imposed by the EU. This record-high penalty was explained by the fact that Google abused its dominant position in the search engine market. In 2018, the EU again fined Google €4.34 billion for abusing its dominant position in the Android operating system market. The radical approach of the EU to the antitrust regulation is unrivalled.

National regulators are no less uncompromising. The Federal Cartel Office (*Bundeskartellamt*) in Germany is extremely active. In 2016, it launched an investigation against Facebook, criticizing the latter of abusing its dominant position and illegally collecting users' data. In 2021, Google was targeted by the German regulator. In 2019, Gibmedia, a French website which edits information websites on weather (info-meteo.fr), company data (info-societe.com) and telephone information (pages-annuaires.net), complained to the French Competition Authority. According to Gibmedia, Google abused its dominant position in the online advertising market. Google was said to have adopted opaque and complex operating rules for its advertising platform Google Ads. These rules were applied unfairly and randomly. The French regulator supported Gibmedia, imposing a penalty of €150 million on Google. It ordered Google to clarify on the wording of the Google Ads operating rules, as well as the procedure for suspending accounts.

Competition regulators in Italy and Spain have also been uncompromising in their fight against anti-competitive practices by digital giants. In December 2021, the Italian competition regulator punished Amazon for discriminating against the sellers who did not used its logistics service. Amazon was fined €1.128 billion. In March 2023, the National Commission for Markets and Competition, Spain's antitrust regulator, launched an investigation into Google and its parent company Alphabet. The reason was that Google had allegedly imposed "*unfair commercial conditions on publishers of press*

publications and press agencies in Spain, regarding the exploitation of their content protected by intellectual property laws".

Other Member States such as Ireland have not succeeded in preserving good order in the market, and have granted multiple tax breaks to big digital platforms. In October 2017, the European Commission announced that it would take Ireland to the Court of Justice of the European Union (CJUE) for failing to recover €13 billion owed to it by Apple. In August 2016, the European Commission concluded that the tax arrangements that Ireland allowed Apple were in fact illegal state aid. It decided that the American smartphone manufacturer should return this aid to Ireland. However, the Irish government still did not receive the money. Although the EU law stipulates that it is forbidden to give a company the advantages that other companies do not have, Ireland remains lenient towards large multinational firms to ensure its attractiveness, thereby distorting the competition in the European market.

Anti-competitive fervour of the European Union is motivated by three objectives: encouraging competition, protecting the personal data of users, and controlling the expansion of American platforms in Europe. European regulators are convinced that only by encouraging competition can they stimulate innovation and create a dynamic market. This is why regulating large platforms has always been a priority for the EU. The protection of personal data is another priority. The attention of the European Union to this sector is explained by the importance of data in influencing market competition. It is also influenced by the fact that data protection is related to the privacy and dignity of citizens.

Of course, the reason why the EU has imposed this binding framework is also linked to its need to protect its digital firms from the aggressive practices by the American titans. The vast majority of the European platforms are small and medium-sized. As a result, they hardly fall into the category of gatekeepers. Nevertheless, it is clear that by increasing the cost of the monopolistic practices of large firms, the DMA will protect the enthusiasm of small and medium-sized European platforms for technological innovation. This ultimately benefits consumers by giving them a greater number of choices.

CHINA: INSTITUTIONAL IMITATION AND ADAPTATION

China's antitrust regulatory framework owes much to that of Europe. On 30 August 2007, China adopted its first Anti-Monopoly Law (AML), which came into effect on 1 August 2008. The aim of this law is to eliminate the factors likely to harm competition in three areas: cartels, abuse of dominant position, and illegal M&A. Wentong Zheng, a researcher in political economy, highlighted the legal transplants that China introduced from the EU when building its antitrust legal framework[5]. The provisions on cartels and abuses of dominant positions are largely inspired by Articles 101 and 102 of the TFEU[6]. Similarly, the rules on mergers resemble those of the European Union, adopted unanimously by the Council of Ministers in December 1989. At the same time, researchers have shown that the Chinese AML was also inspired by American and Japanese laws. For example, Article 46 of the AML stipulated that companies that violate the rules could be punished less severely or even exempted from sanctions if they reported their violations to the regulators on their own initiative[7]. In the same liberal spirit, Article 15-5 did not penalize the agreements concluded between trading partners to solve significant slumps in sales or to absorb excess production capacity during periods of economic recession.

The beginnings of the antitrust regulation in China have therefore been marked by the learning from the developed economies in the West. However, as Wentong Zheng pointed out, legal transplants would not work in China because the Chinese state is too present in the market. The Chinese government grants state-owned companies the privileges that private companies cannot enjoy. The state's omnipresence in the market, embodied in its support for state-owned enterprises, state aid to strategically important companies, and investment control, creates distortions. As a result,

[5] *Zheng Wentong (2010), "Transplanting Antitrust in China: Economic Transition, Economic Structure, and State Control",* University of Pennsylvania Journal of International Law, *vol. 32(2): 643-721.*

[6] *Susan Beth Farmer (2009), "The Evolution of Chinese Merger Notification Guidelines: A Work in Progress Integrating Global Consensus and Domestic Imperatives",* Tulane Journal of International and Comparative Law, *18(1): 1-92.*

[7] *Salil K. Mehra & Meng Yanbei (2009), "Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law", 49* Virginia Journal of International Law, *49(8).*

the regulatory model that China learnt from the West struggles to work smoothly.

Antitrust regulation of the digital economy is relatively new in China. The Chinese government has long adopted a laissez-faire approach when regulating digital companies. Like their US counterparts, Chinese regulators have been laxist with large digital companies, although their motivations are different. In the United States, there is deep interweaving between the business world and the political class. This closeness is embodied in what Wright Mills called the "revolving door" and large corporations' financial support to political parties during electoral campaigns. The political and financial links between these two worlds mean that US regulators often have their hands tied and cannot afford to take radical actions against anti-competitive business practices.

In China, on the other hand, regulators' tolerance is explained by the traditional way of doing state regulation, a mode in which the state practices a kind of orchestrated competition in order to boost strategic sectors. The Chinese digital economy has expanded in tandem with the growth of the Chinese economic power over the past thirty years. In a way, the digital economy is the engine that has allowed China to rapidly catch up with developed countries. The Chinese government deliberately let the digital economy develop before intervening into it.

In China, things have changed with the controversial speech by Jack Ma, the former CEO of Alibaba, on 24 October 2020 at the Bund Finance Summit in Shanghai. Ma criticized the pawnshop mentality of China's state-owned banks and advocated the liberalisation of the financial regulation. In his view, the Chinese financial market could not withstand systemic risks, as it had never formed a truly coherent system. His vehement comments had far-reaching consequences. Apart from the abrupt halt to the IPO (Initial Public Offering) of its financial subsidiary, Ant Financial, Alibaba was fined around €2.6 billion in April 2021, the largest sanction ever imposed to a China-based company.

In the aftermath of the failed IPO of Ant Financial, Jack Ma disappeared from the media for more than two months, which sparked much speculation. Some media claimed that the Chinese government had banned the former boss of Alibaba from leaving China; others said that the billionaire had fled abroad. It was not until mid-January 2021 that Jack Ma reappeared on a golf course in Sanya, the capital city of Hainan province. From then on, his public appearances have become much rarer.

In early 2020, the Chinese government published the draft amendment to the Anti-Monopoly Law (AML). For the first time, this law included the criteria by which regulators can judge whether an internet service provider holds a dominant position in the market. After the misfortunes of Alibaba, China specifically established an antitrust regulatory framework for the digital economy. In 2021, the Antitrust Commission of the State Council published its Guidelines on the antitrust regulation of the platform economy. This document laid down a detailed and operational regulatory framework enabling regulators to judge whether platforms are colluding with each other, holding a dominant position or organizing prohibited mergers and acquisitions. In 2022, the working report of the Chinese government stressed the need to "*strengthen and innovate regulation, combat anti-competitive practices, curb uncoordinated capital expansion, and safeguard fair competition*" in the market.

In many respects, the Chinese antitrust regulatory framework for the digital economy is modelled on the European framework. The only difference is that Chinese regulators have not yet introduced the regulations with the same legal importance as the DMA. In a similar way as their European counterparts, Chinese regulators have adopted an *ex-ante* approach, not an *ex post* one. On 29 October 2021, the State Administration for Market Regulation published two documents that illustrate this pre-emptive approach: a guide on the classification of platforms (call for contributions), and a guide on the responsibilities of platforms (call for contributions). These two documents classify platforms according

to their economic importance and stipulate different obligations for them depending on the categories they find themselves in. The more important a platform is, the more responsibilities it assumes. For example, the guide on the classification of platforms divides platforms into three categories: very large platforms, large platforms, and medium and small-sized platforms.

If antitrust regulation in China resembles that in Europe, it is because the two regulatory frameworks use both qualitative and quantitative criteria to judge whether a platform constitutes a very large platform. There are four criteria: number of users, categories of services provided, market capitalization of the firm, and its ability to hinder competition on the market. While the first three criteria are quantitative, the last one is qualitative. This stipulation is similar to that used by the European Commission for deciding whether a platform can be designated as a gatekeeper under the DMA.

Kepeng Xue and Xin Zhao, respectively professor and doctoral student at the China University of Political Science and Law, are among China's leading experts on antitrust regulation of the digital economy. They pointed out that despite similarities, China still has much to learn from the EU[8]. First, although the existing regulations in China set out various obligations for platforms, the penalties for non-compliance remain unclear. This is in particular because the two guides have no binding effects and that they serve more as public policy tools. For these regulations to take on concrete effect, they must be raised to a higher level on the legal hierarchy and be proclaimed either as ministerial decisions or as legislations.

Second, although China has adopted the *ex ante* approach to regulating the digital economy and that, within this framework, platforms are subject to different obligations, the differentiation of the obligations for the platforms that provide different services is insufficient. Since the way in which platforms compete with each other varies according to their sector of activities, it is not wise to subject very large platforms in different economic sectors to the same obligations. Chinese regulators are advised to allow platforms to negotiate with regulators, the aim being to leave regulators with greater flexibility when it comes to judge whether the practices of platforms can be considered as anti-competitive or not.

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Antitrust regulation of the digital economy has become one of the most pressing issues for national governments nowadays. Given that the digital economy produces its impact on the economic, political, social and cultural spheres, antitrust regulation affects all these areas, too. For the time being, the European Union is the most active of all political entities in enforcing anti-trust regulation. The misfortunes of the digital giants of the Silicon Valley in Europe provide telling evidence. China has drawn a great deal of inspiration from the European antitrust regulatory model, both for traditional economic sectors and for the digital economy. The European Union has created a sort of homogenising pressure well beyond its borders. China has learned from the European model on two points: first, *ex ante* regulation by classifying platforms on the basis of established criteria, and second, the use of quantitative and qualitative criteria when defining the dominant position of digital firms. Despite the differences that persist between the two, the institutional imitation is clear.

According to Wentong Zheng, legal transplants from Europe cannot work in China because of the excessive presence of the Chinese government in the market. However, compared with traditional sectors, the particularity of the digital economy in China lies precisely in lack of state intervention, except for online content[9]. Since the arrival of the internet in China, there has been an informal division of labour between state-owned and private companies. While the former are primarily active in telecommunications, the latter are more active in music sharing, video sharing, social networking, and instant messaging. In a way, the presence of the Chinese state in the digital economy is much weaker

[8] *Kepeng Xue, Xin Zhao (2022), « Les obstacles institutionnelles au changement de régulation antitrust de l'économie numérique et les solutions »,* Exploration et Discussion*, no.7, pp. 56-65.*

[9] *Aifang Ma,* Digital regulation: China, USA, France.

than in the sectors that form the backbone of the national economy, such as telecommunications, civil aviation, or the automotive industry. This increases the similarity of the conditions in the Chinese and European digital markets and reinforces the feasibility of the regulatory approaches that China has learned from the EU.

In response to the point raised in the introduction on the development of the antitrust regulatory framework in the future, analysis of the Chinese and European experiences shows that it is possible for states with different political regimes to combat unfair competition in a similar way. This development is desirable in the long term, in that it will help to reduce the difficulties of establishing a transnational regulatory antitrust framework. Given the global presence of large digital platforms, it is in the interests of consumers and smaller digital firms to support this cause. Antitrust laws differ from the laws on data protection in that the latter are politically more sensitive, making it difficult for countries to reach consensus. The stakes are not the same for antitrust regulation. Not only is it politically less sensitive, but also it is an area that tangibly affects the well-being of citizens. As a result, inter-state cooperation in antitrust regulation within a transnational framework will gain greater support from governments, firms and civil society. The fact that countries with different political regimes regulate their digital economy in the same way helps to make this a reality, despite their significant differences in other areas.

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