

# Lessons for the United States from the EU's Approach to Antitrust

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tl;dr

**Background...** Some U.S. antitrust advocates, including [members of Congress](#), recently have advocated the United States adopt a more European approach to antitrust policy. This comes as the European Commission itself is proposing a Digital Markets Act (DMA) that would impose new regulations on Big Tech platforms and ban many forms of conduct outright.

**But...** Europe's economies are less innovative, less dynamic, and ultimately, significantly poorer than the United States. Europe's technology markets, in particular, are relatively stagnant. Regulating them directly is likely to make Europe's problems with innovation worse, and would serve as a poor model for the United States to follow.

## KEY TAKEAWAYS

### THE EU'S PRECAUTIONARY PRINCIPLE IS BAD FOR INNOVATION

The biggest challenge facing competition enforcers is to differentiate procompetitive conduct from anticompetitive conduct. A careless approach could serve to ban conduct that improves consumer welfare and drives innovation forward, thereby making markets less competitive. The U.S. approach to

antitrust is designed to consider the potential cost of mistakes by enforcement agencies; when in doubt, American antitrust enforcers tend to allow conduct to continue and to correct it later, if necessary.

The EU, on the other hand, employs a more precautionary approach: if conduct might be anticompetitive, it is stopped. This means that European competition policy tends to prohibit a lot of beneficial conduct, missing out on the innovative business activity and behavior that enhance competition.

### EU ANTITRUST RELIES ON PRESUMED HARM, RATHER THAN EFFECTS ON COMPETITION

The U.S. approach is based on economic analysis of how conduct affects prices, innovation, and consumers. The DMA, by contrast, preemptively bans some behavior that could be procompetitive—such as combining different digital services on a single page—without reference to its actual effects. This means that innovative and beneficial behavior may be outlawed even if its real-world effects would have improved outcomes for everyone.

### DMA PROHIBITS CONDUCT THAT BENEFITS CONSUMERS

The DMA prohibits some common business practices like self-preferencing, anti-steering policies, and exclusivity agreements—all of which can be good for competition.

“Self-preferencing” is common in many markets, as when grocery stores promote their store-brand goods at the end of a shopping aisle, or when Google puts a Maps box in the search results page for a restaurant. Ecommerce platforms often use “anti-steering” policies to bar buyers and sellers from communicating alternative means to transact business, which would undercut the platform and undermine its ability to exist. Platforms also often use exclusivity agreements to make it viable to invest in free software and services; Google’s search bar exclusivity agreements with handset manufacturers make it profitable for Google to invest in Android.

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### EU PENALIZES MONOPOLY, US FOCUSES ON EXERCISE OF MONOPOLY POWER

In the U.S. framework, a business that has grown by offering the best products and lowest prices has done nothing wrong. The EU approach sometimes leads enforcers to target companies that lack monopoly power, but that may possess an innovative and successful business model. In actions against companies from soda manufacturers to digital platforms, the EU has declared some firms to be “essential facilities” that must grant their less successful rivals access to their data or other property.

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### EU COMPETITION POLICY PROTECTS COMPETITORS FROM HARM

European firms can be held liable for practices that prejudice consumers, place trading partners at a disadvantage, or impose obligations that depend on the behavior of other, non-contracting parties. The result is that EU regulators can choose cases that fit within their political agenda, not ones focused on improving competition and outcomes for ordinary consumers.

By penalizing companies for conduct that hurts competitors but benefits consumers, EU competition law can hamper competition. Improving a product or lowering its price in a sustainable way can harm competitors, but these are typically considered to be the goals of competition. The EU’s Google Shopping case penalized Google for putting Shopping results on relevant Search pages; not because this harmed consumers, but because it hurt competing price-comparison websites.

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### EUROPE’S DIGITAL ECONOMY IS MORIBUND

Just [three of the world’s top 50 internet companies](#) by revenue are based in EU member states. Including the UK, Europe is home to just [60 private companies valued at \\$1 billion or more](#), compared to [242 in the United States](#) and [119 in China](#). And the EU’s largest economies are all significantly [poorer than the United States](#) on a per-capita basis. Europe’s approach does not obviously lead to better outcomes for its citizens.

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