AFFECTATION WITH A PUBLIC INTEREST BETWEEN ANTITRUST LAWS AND REGULATION: LESSONS FROM THE U.S. EXPERIENCE OF THE FIRST DECADES OF THE 20TH CENTURY FOR ONLINE ECOSYSTEMS

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ABSTRACT

Concerns related to Big Techs lead to a proliferation of legislative proposals to complete competition rules with regulatory devices that would lead gatekeepers to be subject to obligations to leave market access free and undistorted. Within this context, this contribution revisits American decision-making practice from the end of the 19th century and the beginning of the 20th century to show how sectoral regulation and the enforcement of competition rules have been activated to control the strategies of firms acting as gatekeepers. A company with private regulatory power carrying out an activity affecting the public interest could and should be subject to specific supervision.

KEYWORDS

Antitrust, Digital Platforms, US Supreme Court Case Law, Regulation.

JEL

K21, K23, L40, N11, N12.

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Abstract

Concerns related to Big Techs lead to a proliferation of legislative proposals to complete competition rules with regulatory devices that would lead gatekeepers to be subject to obligations to leave market access free and undistorted. Within this context, this contribution revisits American decision-making practice from the end of the 19th century and the beginning of the 20th century to show how sectoral regulation and the enforcement of competition rules have been activated to control the strategies of firms acting as gatekeepers. A company with private regulatory power carrying out an activity affecting the public interest could and should be subject to specific supervision.

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I- Introduction

A debate on the inadequacy of the effects-based approach to antitrust has developed on both sides of the Atlantic in the light of the competitive challenges raised by the large digital platforms. This debate even raises questions about the very purposes of competition law. Are they limited to economic efficiency, as the Chicago School defended and as the 'Antitrust Consensus[1] ' accepts since the late 1970s? In the USA, the new Brandeis movement (Khan, 2018) and more broadly the L&PE consider that a more political reading of antitrust is needed (Britton-Purdy et al., 2020). In this sense, they are reviving the progressivism of the early 20th century. One of the essential dimensions is to reintegrate into the field of *competition law and economics* the question of power which emerges at two levels: first, in the asymmetries of bargaining power in transactions, second, as from the architecture of ecosystems. These two dimensions recover the notions of asymmetries of bargaining power in transactions and private regulation on which the U.S. House of Representatives Subcommittee on Antitrust insisted on in its 2020 investigation of competition in digital markets (U.S. House, 2020).

The same holds true in the EU, with the DMA (Digital Markets Act) proposal on 15 December 2020. Its objectives are not efficiency-related as the one of competition rules (Article 102 TFEU). The DMA, unlike the NCT (New Competition Tool) of June 2020, is promoted as complementary to competition rules (Cartapanis and Marty, 2020). It addresses issues of market access (contestability) and ensuring undistorted competition (fairness). We could make an economic reading of these two objectives, namely: the lowering of barriers to enter in order to respond to the question of competition for the market on the one hand, and the absence of competitive distortion such as self-preferencing on the other, thus guaranteeing competition in the market. It aims at enhancing both the competition for the market and the competition on the market.

However, it is possible to adopt a broader reading of the objectives of the DMA. This interpretation proceeds from an approach in terms of economic sovereignty as developed by Philipp Marsden and Rupprecht Podszun (2020). In this perspective, the notion of fairness cannot be reduced to a notion of fair distribution of the surplus generated by transactions, but is more related to the protection of the competition process and, in the first place of the freedom

[1] According to Easterbrook (1984): “The goal of antitrust is to perfect the operation of competitive markets”. Efficiency (e.g. the maximisation of consumer welfare) is the only objective of competition law in such a perspective.

of agents in the markets and the guarantee of a level playing field (in other words, the absence of coercion and of biased competition). The process of competition can only be successful in a context of complete competition in an ordoliberal perspective. This is characterized by the absence of coercion. In other words, a situation of complete competition is one in which no agent uses its market power to impose a price.

A parallel can therefore be drawn with American antitrust law: in 1982, Robert Lande interpreted the Sherman Act as a prohibition on wealth transfers between economic agents that result from the exercise of market power that could not be implemented under normal conditions of competition. A second common feature can be traced between European and American traditions based on the notion of sovereignty.

Three dimensions of competition protection, related to the notion of sovereignty can be discerned in Marsden and Podszun (2020). The first is freedom of access to the market; the second is undistorted competition (i.e. absence of distortions due to the abuse of platform power, e.g. self-preference strategies); the third is the freedom to decide on its market strategy in terms of investments, technologies and prices. These three features are easily jeopardized by the architectural power of the hub platforms in digital ecosystems. These dimensions highlight interdependent relationships that are, to say the least, asymmetrical between the participants in the diverse digital ecosystems. They can be considered from the point of view of possible abuses of economic dependence but also from the prism of economic power itself.

The rise of the influence of the Chicago School from the 1970s onwards (Bougette and al., 2015) resulted in a sharp decline in the importance of the notion of economic power in antitrust doctrine. Nevertheless, the notion of power remains relevant in two respects. First, it raises the question of equilibrium in transactions. The possession of asymmetric power creates an ability to extract an undue share of the gains resulting from the transactions. Secondly, the notion of power underlies the notion of coercion. Coercion can be deployed in the economic order but also in the political one. Free competition and democracy both presuppose an equality of power. American political philosophy, particularly in its Jeffersonian version, assumes that the political body should enjoy a relative equality of conditions in terms of economic situation (Rawls, 2001) but also economic independence.

This was convergent with Louis Brandeis' perspective, which underpinned his preference for maintaining the most deconcentrated market structure possible and for preventing situations in which market players could be dependent on large firms (Bougette and Marty, 2020). The positions taken by Brandeis highlight the relationship between dispersion of power in the political sphere and its dispersion in the economic one. Excessive concentration of economic power may encourage strategies to capture political power in order to perpetuate acquired positions. Conversely, the concentration of economic power may call for government intervention to counterbalance its undesired effects. This balance between Big Business and Big Government is typical of a Hamiltonian approach (Kirat and Marty, 2021a).

In terms of public policy in relation to the issue of the concentration of economic power, this distinction has some consequences in terms of the distribution of roles between the enforcement of competition rules and the implementation of sectoral regulation. The distinction is particularly important in the current context, especially with regard to the regulation of digital platforms. Should a conception of competition law based exclusively on an effects-based approach taking into consideration the sole criterion of consumer welfare not be put into perspective with a more encompassing approach assigning broader objectives to public action, whether in terms of taking into consideration distributional effects or controlling the "political" impacts of the concentration of economic power? In a way, it is a question of broadening the focus of Law and Economics to include questions pertaining to Law and Political Economy (hereafter L&PE). This article attempts to combine, and even bridge the gap between, the approaches of the new Brandeisians and the LP&E to support the idea that the early history of antitrust in the US really provides some original insights on current events.[2] L&PE contributions can lead us to link competition and sector-specific regulation dimensions on the one hand and economic and political concerns on the other. More precisely, we'll intend make a connection between L&PE and the early 20th century institutionalism. Both deal with the issue of economic power but the specificity of L&PE is to present it as the main source of inequalities. As such, the dispersion of economic power (via structural remedies or divestitures) appears as the most adequate policy. However, it does not necessarily lead to fair or reasonable markets. Indeed, for institutionalists, inequalities came from two sources: monopoly rent and scarcity rent (Hale, 1952). From then on, institutionalists viewed with caution the tool of antitrust, which was by nature concerned with efficiency alone. Thus, they preferred the tool of regulation to antitrust in order to obtain a reasonable market outcome. According to Woodcock (2021), the reluctance of the L&PE to seize the tool of regulation - or even taxation - reveals an American tendency towards anti-statism.

[2] We thank Ramzi Woodcock for suggesting this perspective.

The intersection between competition concerns and regulation concepts is increasingly evident considering the litigation of several US public authorities and even in the decisional practice of the Supreme Court. On 8 June 2021, Ohio AG Dave Yost filed a lawsuit to declare Google a public utility. According to the press release issued following the filing, “it seeks a legal declaration that Google is a common carrier (or public utility) subject to proper government regulation”. Alongside the notion of public utility, therefore, one should consider the common carrier one. One can find it in a separate and convergent option by Supreme Court Justice Clarence Thomas in a ruling on the suspension of Donald Trump's account by Twitter issued in April 2021. It seems more and more obvious that a kind of regulation may be applied to digital platforms in addition to competition laws enforcement.

Our contribution aims at analyzing these issues under the lens of U.S. political and legal debates from the late 19th to the first half of the 20th century by outlining how the issue of concentration of economic power has been addressed by both regulatory and antitrust laws.

From the start, we depart from Antonin Scalia's position in Trinko (Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 2004) who strictly separated the two fields. In our view, regulation is not just a matter of addressing market failures. It can involve overseeing the full sovereignty of market players (i.e. the absence of coercion through the exercise of private coercive power) and limiting imbalances in the distribution of transaction surpluses (protection of investments and reasonable financial returns on the one hand and prevention of undue transfers of welfare between economic agents on the other).

To this end, our contribution is structured as follows.

A first section focuses on the public interest model of regulation implemented in the United States from the 1880s until the 1940s. It emphasizes that regulation was applied in sectors not characterized by market failure in the microeconomic sense, i.e. beyond the network industries. Regulation is part of a political logic aimed both at preventing private regulation of markets and at avoiding an excessively unbalanced distribution of the surplus, primarily for political reasons.

A second section focuses on the role of antitrust in this respect. It shows that the American Antitrust had to deal with non-efficiency issues at the same time as Thurman Arnold was Assistant Attorney General in the late 1930s and early 1940s. This period is even more interesting to consider because it was part of a twofold split. He opposed both the model of regulated competition embodied in the First New Deal and the NIRA and the positions of

Brandeis who considered (as did Justice Douglas after the Second World War) that market concentration and firm size were problems in themselves. Thurman Arnold's emphasis on efficiency as the goal of antitrust seems to prefigure the normative goals of the Second Chicago School.

However, two central differences remain. The first one deals with the notion of gatekeeper. His 1940 book, *The bottlenecks of business*, testifies that his conception of antitrust enforcement led him to deal with the case of firms evolving in such a position. This one may allow a company to control access to the market of third parties and to deprive other dependent economic actors (trading partners and consumers) of their fair share of efficiency gains. The second difference lays in the rejection of private regulation of markets whatever its net effect in terms of efficiency. We illustrate this point with the 1941 Originators Guild Supreme Court ruling that shows that the mere exercise of a private regulatory power could be sanctioned as such whatever its actual consequences in terms of welfare.

Finally, a third section concludes by comparing these features with the current debates on the regulation of large Internet firms and by presenting some of the proposals of the L&PE movement in this field.

II- The American experience in regulating activities affected with the public interest.

The problem of the public interest was at the heart of the preoccupations of the institutionalist economists of the beginning of the 20th century, who are known as "old institutionalism". They did not consider the public interest per se, but from broader perspectives that addressed the functioning of markets, power relations in transactions, and jurisprudence (A). A brief presentation of institutionalist views will be followed by a study of the notion of public interest, from public utilities to antitrust (B).

A. Private property and public interest. Institutionalist insights

One of the major issues raised by institutionalism in the first decade of the 20th century is whether private property rights may support the viability of the free market based economy. J.R. Commons put the emphasis on the changing significance of “property” in jurisprudence on public utilities rates; J.M. Clark argued that in the modern economy the business firms could no longer be considered as a sole private property matter. R. G. Tugwell was searching for an economic basis of public interest. Robert Hale was conceptualizing the market exchange as a system of mutual coercion. What is fascinating is the fact that these institutionalist scholars were thinking simultaneously the functioning of a market-based economic system and the regulation of public utilities.

For Commons, in the last decades of the 19th century the courts recognized that the old concept of property limited to the physical property of tangible assets was no longer sustainable. The reason lies in the growing use of police power by the States in regulation of rate of a number of private businesses. As long as the courts were admitting that this kind of economic regulation was not a deprivation of ownership, they were considering property, in Commons' terms, as "use-value". The judicial concept of property radically changed in the Supreme court rulings, in particular the Munn case and the Minnesota case: "The Munn Case recognized the economic power of property, distinguished from the economic power of a monopoly; the Minnesota case defined this economic power or exchange-value, as the essence of property, which therefore could not be taken from its owner except by judicial process instead of legislative process" (Commons, 1924, p. 36)[3].

The new judicial theory started a new era: the court's duty is now to review the reasonability of the exercise of police power in rate regulation. In Commons' analysis, the definition of property as exchange-value was leading to stress the liberty of access to the market as essential (Commons, 1924, p. 17). However, the excess of liberty of access to the market was leading to a risk of destruction of the exchange-value of property. In other terms, cutthroat or unfair competition were destructing part of the intangible property (other words for "exchange value" theory). In other terms, "liberty is inseparable from power" '(Commons, 1924, p. 29): it is "equivalent to the exercise of power and the choice of opportunities which it permits (ibid). As a consequence, freedom to choose between opportunities is in reality freedom to choose between different degrees of power over other persons. At this point, Commons stresses the growing importance of 'the power of property owners to withhold from others that which they need but not own" (Dugger, 1996, p. 428), which reflects the sovereignty of the business concern, besides the sovereignty is based on the power of the state to exercise violence. According to Commons, this concept of liberty and power "was first admitted to the decision of the Supreme court in … Munn v. Illinois, in 1876" (Commons, 1924, p. 34) in which, for the first time "it came to be seen that… the power of property was the economic power to withhold

[3] Tugwell formulates the same argument: "The police power is the power of the courts to interpret the concept-property, and to establish its metes and bounds" (Tugwell, 1922, p. 7).

from others what belongs to self but is needed by others" (ibid. p. 32). In this case, the Court decided that a grain elevator and warehouse, despite of the fact that it not enjoy a special grant of sovereign power, can however be regulated through the police power of the State. According to Commons, the majority recognized that the importance of the activity to the public was leading to the loss of a purely private character of the business. Finally, the Munn decision acts the fact that regulation of utilities derives from economic facts rather than grant of sovereignty.

The idea that power is intrinsic to the functioning of a private property-based economy is a core idea in Robert Hale's analysis. Like the other institutionalists, Hale was interested in the regulation of utility rates (Duxbury, 1990; Samuels, 1973). In a theorization close to Commons' ideas, Hale was arguing that the free market and possibility of choice do not exclude the presence of duress. He was insisting of the fact that "an economy is never naturally 'free', but always 'shot through with coercion' "(Duxbury, 1990, pp. 430-31). Hale was conceptualizing the economic process – of exchange and bargaining – as a system of mutual coercion; the governance of the economy, through the legal and political process, concerns the structure of attribution of rights which reflect a structure of power. But the private government proceeds in the same way, and this was a great concern for Hale who was fearing that, unless restrained by law, "is as capable in some circumstances of destroying liberty as is public government itself" (Samuels, 1973, p. 297).

Utility price regulation is a subject on which Robert Hale has worked extensively. But he was only interested in the issue from the perspective of a critique of judicial reasoning. In particular, he criticized the Smyth v. Ames decision for conflating the separate principles of eminent domain and police power, and for defining fair value too imprecisely (Duxbury, p. 426-28).

Like Commons and Hale, J.M. Clark was involved in a critical analysis of the legitimacy of private power and defended the necessity of a public interest-based regulation. More precisely, JM Clark the question of representation of interests and their conflicts is central in J.M. Clark's work. Amongst other elements, he wonders about the procedural modalities of resolution of conflicts of interest and invokes, in that regard, the problem of private economic powers' legitimacy (J.M. Clark, 1926, p. 18).

What is basically at stake is the compatibility between the practices of private enterprises and the public interest. J.M. Clark's proposal for reform ultimately comes back to raising the issue of alternative means of social control of enterprises: by the public taking control of the activity as in a collectivist system, by voluntary cooperation between producers and consumers, or by structural changes to private industry. Excluding the first possibility, Clark finds expressions of the second in Europe and envisages reflections of the latter in the United States, in the fields of public utility regulation, in the development of “treaties” between organizations of employees and their employers, and in the "publicization" of the private contracts[4]. Indeed, he saw signs of its transformation into an instrument of social control in the evolution of the legal doctrine of the contract with respect to the implementation of contractual obligations by the courts (Kirat, 2007).

It is significant that J.M. Clark concludes the chapter “Business: Private Right or Public?” of *Social Control of Business* in writing:

“[…] the most powerful individuals in modern industry are corporations […]. They act, of course, through real persons who are their agents, officials, or employees. Presumably a corporation follows its own interests precisely as a single individual would do, but why? If individuals are by nature so devoted to their personal interests that they cannot be trusted to manage their affairs as a collective enterprise […], why will not the agents, officials, and employees follow their personal interests at the expense of the corporation? The answer is that they frequently do, and that the maintenance of integrity in our corporate business organizations is one of the fields of public interest and action in modern industry. To this extent, all corporate industry is ‘affected with a public interest.’" (J.M. Clark, 1926, pp. 49-50).

Rexford Tugwell devoted his PhD thesis to the economic basis of public interest (Tugwell, 1922). He defined public interest as “a legal concept under which [the] economic interests of consumers may be protected” (Tugwell, 1922, p. 4). Starting from Ely’s discussion of present of future developments of private property, Tugwell was focusing on “the development of [its] social side” owing to the fact that the “regulation of business fit in […] under the doctrine of public interest” (Tugwell, 1922, p, 15). More precisely, he argues that the doctrine of public interest reveals “the state’s protection of the economic interests of the public” (p. 16), which are disadvantaged by the monopoles. Monopolist positions as well as “the modern tendency toward combination” and larger-scale business (*Ibid*., p. 25) reduce the possibility of choice of consumers, restrict output and leads to higher prices. After a critical review of the main judicial

[4] “The power to enforce carries with it the power to interpret, and the legal conception of a contract includes not merely the agreement itself, but the entire body of law governing its interpretation and enforcement so that social control becomes an integral part of the contract itself.” (J. M. Clark, 1926, p. 120).

analysis of the basis of public interest, Tugwell defends the idea that the core of a relevant legal-economic doctrine of public interest in regulation lies in the protection of consumers' interest.

Having highlighted the main institutionalist views on the market economy and the public interest, we can now turn to the relationship between the public interest and antitrust in public utility regulation

B. Public utilities, between public interest and antitrust

According to Phillips Sawyer (2018), in the 19th century, the idea prevailed that freedom of contract and the flexibility it gave to business ensured that competitive profits could be made, and this satisfied the public interest. The author adds that, around 1880, the formation of large firms with market power challenged this belief. Henceforth, policymakers and commentators attempted to reconcile private property and freedom of contract on the one hand, with the public interest in competitive markets and fair practices on the other (Phillips Sawyer, 2018, p. 27). During the 19th century, the courts favored "free contract" over "free competition": as long as a contract arose from a fair bargain, a restraint of trade (after the Sherman Act) was a phenomenon derived from a contractual practice not itself intended to restrain trade. Such contracts introduced a reasonable restraint that the courts validated (Phillips Sawyer, 2018, p. 33). In Phillips Sawyer's analysis, public interest is taken in a broad sense.

In contrast, "affected with a public interest" is a relatively more precise notion when it becomes the core of public utility rates regulation. Hamilton (1930) points to the origin of this expression in 17th century English law, since it is present in Lord Hale's Treatise on Ports published in 1676, the notion having been created by an English court in connection with landing wharves in ports. Hamilton provides a complex and non-linear history of the incorporation of this 17th century English law term into 19th century American jurisprudence. That jurisprudence made it the test by which courts must measure the ability of the legislature to regulate the prices of certain goods and services and to interfere with private property rights. It was the Munn vs. Illinois decision (94 U. S. 113, 1877) that began this incorporation of "affected with a public interest" in the United States, this decision being a landmark decision in the emergence of public utility regulation. In this decision, the Supreme Court considered that the activity of storing grain ceased to be a private activity as soon as it had a "public use" dimension. It should be noted that Chief Justice Waite used an original argument in particular: the gateway of commerce nature of the activity. From then on, a governmental authority can validly regulate prices, by virtue of its police power. The same reasoning was later used to support the legality of railroad rate regulation by the Supreme Court (see Minnesota rate, 1890[5] ....).

For Hamilton, these decisions responded favorably to the demands of the Granger movement, which was essentially located in the Grain Belt. At the beginning of the 20th century, two contradictory trends emerged: the first trend was the expansion of the field of application of the "public interest" to activities that were in fact on its periphery, or beyond, the public services industries, which were based on the devolution of privileges by the States in the form of franchises. Thus, in German Alliance Insurance Co (1914), the Supreme Court validated the regulation of the rates of this insurance company[6], considering that this regulation responded to a "public concern": henceforth, the criterion of public demand supplemented the previous criterion of "public use". The second trend occurred in the early 1920s and went in the direction of restrictions on the field of public utilities and tariff control. Judge Taft classified industries by separating those that were clearly within the scope of public utilities because they were the subject of a special act of state; those that were historically regulated; and those that fell within the scope of competitive business, with which no notion of public utility should be associated.

One might then think that competitive business would fall within the scope of antitrust and public utilities would escape it. Kaplan (1950) argues that this dual vision is a fallacy. Public utilities have not escaped antitrust, since the Sherman Act but especially after the Clayton Act. The creation of the Interstate Commerce Commission (ICC) by the 1887 Interstate Commerce Act to regulate public utilities, primarily rail transport, suggested a division of labor between jurisdictions: the Federal Trade Commission (FTC) and the Antitrust Division of the DoJ were responsible for antitrust, while the ICC was responsible for utilities and common carriers. However, early on, the Antitrust Division argued that utilities and carriers should be subject to antitrust. But the ICC argued that the activities regulated under its jurisdiction were outside the scope of antitrust for the simple reason that the ICC had no jurisdiction over antitrust enforcement. The Supreme Court's decision in McLean Trucking[7] (1944) clearly states, in the words of Justice Rutledge: "the [ICC] has no power to enforce the Sherman Act". The case of common carriers is a particularly sensitive one, since on the one hand section 11 of the Clayton Act subjects them to its provisions on price discrimination (section 2), tying contracts

[5] Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418 (1890).
[6] German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914).
[7] McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

(section 3), stock acquisitions (section 7) and interlocking directorate (section 8); on the other hand, common carriers, particularly railways, were regulated as public utilities by the ICC.

According to Kaplan, “The belief, still existing in some quarters, that public utilities are immune from the provisions of the federal antitrust laws because they are industries already being regulated by national administrative agencies is entirely unfounded.” (Kaplan, 1950, p. 22). The cases of railways pooling agreements are thus significant. These agreements were practiced by companies anxious to avoid ruinous competition, a form of cartelization aimed at sharing freight transport and revenues between participants and were sanctioned by the Supreme Court until they were legalized by the Transportation Act of 1920 (Hovenkamp, 1988, pp. 1039-1040).

Hovenkamp (1988) compares the historical significance of two theories of regulation: the public interest theory and the capture theory, which maintains that the public interest always becomes the object of capture by the regulated firms. He believes that the capture theory is a mistake, insofar as it assumes that the interests of the regulated are univocal, whereas according to Hovenkamp the regulation of tariffs and services involves a plurality of private interests. For example, it was the Midwestern merchants who provided the decisive impetus for the regulation of the railroads, with the objective of shifting from river freight to price-controlled rail transport. But for Hovenkamp, the question of the public interest comes down to the issue of the economic and financial sustainability of the railroads. It was primarily a question of federalism. In the 1880s, States could regulate internal routes, with monopoly companies charging high rates on local services; on interstate routes, the situation was the opposite; the existence of alternative carriers on long-distance routes made rates more competitive and often insufficient to cover fixed costs. Long-distance routes were regulated by the ICC.

Hovenkamp (1988) underlines that: “States began to regulate railroad rates some forty years before the federal government did. Most of the monopoly rates were charged for short hauls, which were predominantly intrastate, while most long-haul, interstate rates were quite low. From the viewpoint of the federal government, which had jurisdiction only over interstate shipments, rates seemed quite competitive, or even so low that they were unremunerative.” (Hovenkamp, 1988, p. 1039).

At first, the Supreme Court used a "classical theory of federalism", which consisted in leaving the privilege of regulation to the States and limiting federal regulation. This view gave way to a more open interpretation of federal and state regulation: the issue for the Supreme Court was whether or not the states could impose uniform rates on local and interstate services passing through state territory. The Wabash Railway decision (Wabash, St. L. & Pac.Ry. v. Illinois, 118 U.S. 557, 568-69 (1886)) was to enshrine the second interpretation: "The Court found that application of the antidiscrimination statute to these transactions was a regulation of interstate commerce forbidden to the states." (Hovenkamp, 1988, p. 1063).

III- Public enforcement of Antitrust Laws and Public Interest

Our two next sub-sections deal with the resources provided by the history of antitrust law enforcement from 1938 to 1941. It will lead us to stress their potential application in our own situation. The first subsection deals with the notion of bottleneck as defined by Thurman Arnold, then Assistant Attorney General in charge of the Antitrust Division of the DoJ, in his1940 book: *The Bottlenecks of Business*. The second subsection discusses the appropriateness of performing a balance of effects when a firm exercises private regulatory power over an ecosystem. The Supreme Court's decision in Fashion Originators' Guild of America (1941) is interesting to consider in this light. The US Supreme Court stated that whatever its effects in terms of quality, welfare, or even consumer protection, the exercise of such a unilateral regulatory power must be sanctioned.

A - Fighting against the abuses of gatekeepers

The enforcement of US competition rules by the public authorities, notably the Sherman Act, underwent a very chaotic evolution between 1890 and 1941. The most active period was that of the Taft presidency from 1908 to 1912, much more so than the Theodore Roosevelt presidency (Waller, 2004). In contrast, the 1920s had marked a low point in terms of public enforcement. The trend even worsened with the first term of President Franklin Roosevelt and the implementation of the NIRA (National Industrial Recovery Act), which in fact amounted to a cartelization of the economy under the auspices of the government. The break came on the one hand from Supreme Court rulings declaring the NIRA unconstitutional in 1935 and on the other hand from a reversal of Roosevelt's policy which only became apparent around 1937 with the appointment of Robert Jackson as US DoJ Assistant attorney General in charge of the Antitrust Division. Jackson was designated Solicitor General in 1938, leading to the appointment of Thurman Arnold as head of the DoJ's Antitrust Division. Arnold, a professor of law, who had previously been critical of the Sherman Act and its enforcement through the common law, courts (Kirat and Marty, 2021b).

The notion of gatekeeper was used by Thurman Arnold in a 1940 book, The Bottlenecks of Business. It can be discussed in the light of the notion of a gatekeeper as used by the EU Commission in its Digital Markets Act proposal.

Two points should be noted from Thurman Arnold's view.

First, he draws an implicit parallel between the Supreme Court decisions that ended the first New Deal and the case of the exercise of private regulatory power over markets. In both cases, it is an unconstitutional delegation of legislative power. The case of private exercise of regulatory power is more damaging than the case of the NIRA and related laws in that private economic power cannot have its powers reduced or challenged through the electoral process as is the case with political power. Indeed, according to Rahman (2018, p.1629), a firm with enjoys a regulatory power exercises coercive powers over third parties in the same way as regulation by the legislature but without the accountability processes to which political power is subject

A second issue is of significance in Thurman Arnold's analysis. Antitrust is not the domain of private interests but is primarily a matter of public one, both in economic and political terms. Therefore, its enforcement cannot be left to private enforcement alone. The rules must be subject to strong public enforcement in order not to implicitly delegate regulatory power to private actors. For example, Thurman Arnold considered that the power to decide unilaterally on market access was even more damaging when exercised by a private company as it was not dependent on a legislative grant of power that was likely to be reconsidered with each legislature. However, whatever the origin of the barrier to entry, public or private, its effects on competition (and by implication on democracy) are identical (Strong, 1941).

Although the 1940 book may seem outdated today, it is of particular interest because it presents a well-founded defense of the antitrust policy of the Second New Deal, a policy that was strongly criticized by the business community and that received little support from the President, who was uninterested in such matters.

The firms' opposition was largely since the cases on which the DoJ based its actions were largely based on exchanges with the government over the inter-firm co-ordination encouraged under the NIRA. Moreover, the DoJ made unprecedented use of negotiated, non-litigious procedures that allowed it to deal with cases quickly and effectively remedy competition problems, but which prevented firms from really benefiting from the advantages of adversarial proceedings. The firms were certainly not obliged to accept these transactional channels but they were strongly encouraged to do so.

Thurman Arnold gave a twofold mark to Antitrust. The first is to refuse an analysis that looks at concentration as a problem in itself. The second is to refuse to separate economic and political issues.

a) Antitrust laws aim at guaranteeing the passing on of efficiency gains to consumers.

The first dimension is important. It is not a question, as it was the case for Louis Brandeis, of considering that the size of firms or the concentration of markets is a problem in itself[8], but on the contrary of considering that the aim of the Sherman Act is to remedy market inefficiencies resulting from firms' strategies. The size of firms is not a relevant issue for Thurman Arnold: in his view, firms should be punished if they do not behave in a way that is consistent with the public interest, which is the passing on of efficiency gains to consumers (Hunter, 1941, p.284).

Thurman Arnold sees the Brandesian contention of firm size per se – the evil of bigness[9] –as an archaism. « If the antitrust laws are simply an expression of a religion which condemns largeness as an expression of a religion, which condemns largeness as an economic sin, they will be regarded as an anachronism in a machine age » (Arnold, 1940, p.4). What the Sherman Act seeks, in his perspective, is to address the case of efficient firms that control a market position that allows them not to pass on efficiencies to consumers. Firm size or market concentration are problems only insofar as they make it possible to exercise control over the market[10].

The Sherman Act must address economic inefficiencies that are defined by Thurman Arnold as « the failure to distribute the products of industry to the greatest advantage of the consumers" (Boyd, 1941, p.837). In other words, Antitrust should be activated when market mechanisms -

[8] According to Teachout and Khan (2014, p. 63) "Ironically, the greatest burst of antitrust enforcement –as distinguished from the antitrust laws themselves – was accompanied by an effort to tone down the political content. Thurman Arnold who brought antitrust and competition policy to the centre of the Roosevelt Administration's economic policy, downplayed the political problems of scale and concentration, and focused on the economic harms". We should note that despite the Teachout and Khan's view it is far from certain that President Roosevelt has considered the antitrust laws enforcement as a crucial public policy.

[9] Arnold, 1940, p. 4.

[10] « It is not the size i itself that we went to destroy, but the use of organized power to restraint trade unreasonably, without justification in terms of greater distribution of goods" (Arnold, 1940, p.113). The novelty of Arnold's approach is also evident at this point. Antitrust law should not sanction dominance per se. An efficiency defence must be accepted and one of the criteria for the acceptability of market power is that a substantial part of the gains is passed on to consumers. The modern principles of merger control are underlying in such an approach.

implicitly understood as optimal - are impeded by a given market position that gives its holder the ability to impede third party access to the market, without being able to exercise countervailing market power. The definition of the impediment to competition is quite similar to that advocated by Lande (1982). The underlying model is that of a fully competitive situation in which the firm is forced to pass on its efficiencies to the consumer. Therefore, it is possible to consider that this strong lock-in position does not necessarily result from dominance on a given relevant market. It can be relative to the parties involved in a transaction insofar as the bottleneck is an obliged commercial partner.

As such, bottleneck as defined by Thurman Arnold does echo in some way the notion of gatekeeper as used eighty years later by the EU Commission in its DMA proposal. A bottleneck situation corresponds to a position in which a firm can exercise unilateral market power over its trading partners, which may be reflected in the ability to deny market access or to associate such access with unfair trading conditions.

As we shall see in the next section, we are confronted here with the two objectives assigned by the EU Commission to the DMA, namely free and fair access to the market. According to Thurman Arnold, certain market positions give the holder power over third party firms that cannot be counterbalanced in any way by market mechanisms alone. As soon as a firm has a controlling position in the market, it can impose its price and its contractual conditions. The power to unilaterally determine its price can result in a mark-up to the detriment of the downstream partner or a mark-down to the detriment of the upstream firms. In each case, the effect is to inflict damage on the other parties in the transaction.

Public intervention is then necessary. It may go as far as dismantling the actor concerned in the case of a company if it holds a monopolistic position. However, a gatekeeper position is not always linked to the size of the firm. It may come from the fact that it has unquestionable market power in the economic sense of the term: it is impossible to circumvent its "gatekeeper position" and it is impossible to replicate it.

b) Antitrust laws enforcement as a protection of the democratic process

The second central dimension of Thurman Arnold's analysis lies in the belief that the preservation of free competition in the market is both a condition of economic efficiency (or at least of the passing on of its gains to consumers) and a requirement in terms of the defense of democracy. One of the main structuring dimensions of Thurman Arnold's approach is the link he establishes between industrial democracy and political democracy. In his view, the industrial democracy is the only basis on which a political democracy can rest (Strong, 1941). As Thurman Arnold (1940, p. 11) states: "the maintenance of a free market, therefore, becomes the first concern of every political democracy". He also draws, in his *bottleneck of business*, a parallel with the German economy of 1914: faced with a legal framework that authorizes firms to form cartels in the name of freedom of contract, the only possible measure on the government's side is to set up a centralization of political power to negotiate with firms, with the subsequent consequences in terms of the concentration of political power[11]. Concentration is only acceptable if it generates efficiency gains to the benefit of consumers and if it remains under to control of antitrust laws.

The purpose of the Sherman Act for Thurman Arnold is to preserve freedom of commerce. An impediment linked to public regulation is subject to legal and political control and can therefore be reviewed by the Supreme Court or by the legislative branch. This is not the case for private economic power if it has control of a bottleneck and an ironclad market position: « preventing private groups from seizing and capitalizing special privileges in secret ways which the democratic process cannot correct » (Arnold, 1940, p.110). This concern was not specific to Thurman Arnold. Adolf Berle and Gardiner Means (see Tsuk (2005) and Waller (2011)) also stressed that corporations may be able to exert a quasi-sovereign authority not only on their business partners but also on the whole economy and society, "absent of the checks and balances that accompany the exercise of public power in republican governance" (Rahman, 2018, p. 1631).

The link between the dispersion of economic power and the dispersion of political power must, however, be understood in both directions: as Thurman Arnold has shown, the concentration of economic power also makes it possible to influence the democratic process. Controlling a bottleneck has an impact not only on the market for goods and services but also on the market for ideas: « if you control the market, you can control political expression » (Arnold, 1940, p. 113). Later in his essay, Thurman Arnold (1940, p. 283) further elaborates on this link between lack of access control in the market for goods and services and in the market for ideas:

[11] It should be noted that this point was also central to Wilson's critique (with his New Democracy) of Theodore Roosevelt's program (with his New Nationalism) during the 1912 election campaign (Waller, 2004). The opposition between Jeffersonian and Hamiltonian tradition in the US was also related to the issue of the political consequences of the increase of interventionism induced by the need to regulated private economic power. It was also one of the main reasons that led Justice Brandeis to join the majority of the US Supreme Court in its rejection of NIRA in 1935 (Hamilton, 1938).

« Free commercial enterprise breeds dissemination of ideas. Freedom from intellectual tyranny is impossible without freedom from commercial tyranny”.

In conclusion, according to Thurman Arnold, antitrust must be oriented towards the defense of productive efficiency and be implemented by the public authorities, a sine qua non condition in his view to avoid instrumentalization by competitors and to guarantee the realization of the objective that he assigns to this policy: to prevent competitive lock-in positions that allow firms to regulate the market for their own benefit, whether it be the market for goods and services or the market for ideas (Arnold, 1940, p. 143).

B - Fighting against private regulation

As stated earlier, most institutional economists were concerned with the development of what Hale named a “private government” exercised by minorities with strong economic powers (Duxbury, 1990).

On the practical side, an important question in competition enforcement is whether a balance of effects should be struck when a company exercises private regulatory power in a market and implements practices that may enhance its efficiency. Do pro-efficiency effects, therefore, make the exercise of private coercive power permissible? The Supreme Court's decision in Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) as analyzed by Nachbar (2013) is particularly interesting to consider in this light. The challenged trade association's actions were aimed at a "public interest objective". It was to preserve the "quality" of products and the "integrity" of trade-relations from infringement to “common rules[12]”.

In the case of the Fashion Originators' Guild of America, it was a matter of protecting the member companies of the association against outside companies copying their designs (not protected by intellectual property rights) and commercializing them at a lower price. The guild threatened distributors who were selling these products with boycott measures. The control was organized by unannounced visits to the stores. If there were any violations, standard procedures were followed, ranging from the inspection of the stores' account books to boycotts and

[12] The European Commission's Android decision of July 18, 2018 indirectly echoes such issues in its fork-related developments. Indeed, the pivotal firms of digital ecosystems impose restraints aimed at ensuring interoperability of services, compatibility of products and security of users.... at the cost of restrictive competition clauses. EU Commission, decision Google Android, case 40099.

financial penalties. Like today's social networks[13], internal courts were created to allow the companies concerned to appeal decisions taken against them.

Regardless of the justifications offered by the companies and regardless of the effects on the market, the Supreme Court found that these devices violated both the Sherman Act and the Clayton Act. Whatever the assessment of the proportionality of the induced restrictions of competition to the economic gains, the scheme amounted to coercion of the market behavior of third parties and the regulation and restriction of interstate commerce.

In the view of Justice Black, who wrote the Court's majority opinion, this private regulation rationale (which was not far from the NIRA codes of conduct) amounted to setting aside the functioning of the market from competition rules. The market freedoms of the players, both inside and outside the guild, were therefore limited. Moreover, this private "regulation" was even more problematic in legal terms than the one that had given rise in 1935 to the Schechter Poultry decision that had led to the end of the NIRA (A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). Indeed, according to Justice Black: « The combination is in reality an extra-governmental agency which prescribes rules for the regulation and restraint of interstate commerce and provides extrajudicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of national legislature and violates the statute'".

There is no room for an efficiency defense. In other words, rule of reason approach does not apply. The reasonableness assessment of the restraint, as applied by the Supreme Court in Appalachian Coals Inc. v U.S., 288 US 344, 1933 and Sugar Institute v U.S., 297 US 553, 1936, does not hold if a private regulatory power is exercised. As Nachbar (2013, p.59) notes: « […] The Supreme Court did not analyze the style protection system under the rule of reason but rather declared the system as a 'per se' violation of the antitrust laws, striking the Guild's style protection system more for the threat it posed to Congress legislative power than the threat it posed to consumers' buying power".

This example leads Nachbar (2013, p. 57) to consider that the analysis in terms of efficiency does not on its own capture the Sherman Act's purpose, which is also to regulate private economic power. There are therefore two kinds of damage: damage to efficiency (market harm) and damage to the market freedoms of third parties (regulatory harm). A firm acquires private

[13] See the Facebook's supreme court for instance – Klonick (2021).

regulatory power when its counterparts have to accept the contractual terms that it imposes because there is no alternative.

Regulatory power has long been exercised by private corporations[14]. The historical development of competition rules has, in this perspective, had a purpose more in terms of guaranteeing the full exercise of market freedoms than in terms of efficiency. Nachbar (2013, p.80) shows that the first legal actions against private monopolies in England in the 17th English modernity after the two revolutions of 1642 and 1688, of which the American Revolution was the heir, is based on the separation of firms and the State. The former no longer have any public regulation missions. The result is a non-delegation doctrine of legislative power, which is exercised as much with respect to private firms as to executive agencies[15]. In this perspective, the development of competition laws was not based on efficiency issues but on freedom of trade considerations[16].

The rules applicable at the time were most like the ones criticized by the fashion designers' guild: Schechter, who was at the origin of the Supreme Court's decision that put an end to the NIRA, was accused of violating the live poultry code by selling unfit chickens to unlicensed butchers. The Supreme Court struck down the NIRA not based on the Sherman Act but on the basis of its failure to comply with the constitutional doctrine of no delegation and its failure to comply with the Commerce Clause.

The Supreme Court's hostility to the delegation of regulatory power to a private entity through the establishment of codes of conduct was reaffirmed a year later with the termination of the Bituminous Coal Conservation Act through its ruling in Carter v Carter Coal Co, 298 US 238 (1936). According to the Supreme Court, the legislative power amounts to giving a political majority the power to regulate the affairs of all, including a minority opposed to the majority choice. This process, which is admissible in the political sphere, cannot be transposed through a delegation of regulatory power to the private sphere. A firm or a coalition of firms cannot impose its choices on competitors or commercial partners. Thus, « a statute which attempts to

[14] See the case of commercial companies such as the British India Company and the Dutch East India Company.

[15] This tradition was in stark contrast to the NIRA, but also to the models of regulated competition advocated in the 1920s by Hoover, for whom a business commonwealth could effectively substitute for market forces and the destructive competition that could result (Kirat and Marty, 2021). In the end, the NIRA was based on a delegation of regulatory power to the executive branch, coupled with a validation of self-regulation by the branches themselves. The executive was limited to approving the codes of conduct established by the industries, if they did not "impose any inequitable restriction on admission to membership and are truly representative".

[16] See for the English common law rulings Darcy v Allen (*The case of monopolies*), 1603, 77 Eng. Rep. 1603, East-India Co v Sandys (*The great case of monopolies*), 10 St. Tr, 371 KB and Mayor of Winton v Wilks, 1705, 92 Eng. Rep., 247 KB.

confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Corp v US, 295 US at 237".

If it is unconstitutional to delegate regulatory power to a private company, it is also unconstitutional for companies to take it upon themselves. The Supreme Court in Addyston Pipe & Steel Co v US, 175 US 211, (1899) makes it clear that any regulation that may impede interstate commerce, whether by state legislation or by agreements between companies, must be placed under the supervision of Congress, the holder of the legislative power.

Thus, while the application of antitrust rules makes it possible to prevent the implementation of certain behaviors, it does not make it possible to ensure the functioning of markets combining, as proposed by the European DMA, the contestability of acquired positions and a certain degree of fairness (conceived in terms of the reasonableness of market results - in terms of the distribution of welfare - but also in terms of loyalty and the absence of coercion in transactions).

IV - From the debates on digital economy to the controversies between Law and Economics and Law and Political Economy

A- A current debate related to online gatekeepers

Legislative proposals to regulate digital platforms, as they are developing in the United States with the bipartisan bills introduced in June 2021 in the House of Representatives or in the EU with the European Commission's draft Digital Markets Act (DMA) presented in December 2020, offer a similar diagnosis of the effects of the development of large digital ecosystems, not only in terms of consumer harms but also of regulatory harm.

Firstly, the enforcement of competition rules is confronted with difficulties in characterizing certain practices as anti-competitive. This is due to damages that are difficult to measure in terms of allocative efficiency, but which lie more in distributive effects and constraints in terms of economic freedoms (freedom of choice for consumers, absence of coercion for commercial partners).

Second, competitive remedies do not appear to be sufficient to restore the conditions for free and undistorted competition. Financial sanctions are not sufficient to deter firms from securing and expanding their dominant positions on any basis other than those of merit. Moreover, behavioral remedies are particularly difficult to craft for competition authorities. Their proper implementation is also difficult to monitor. The only remaining remedies available in the competition-law enforcer's arsenal are structural remedies (dismantling or divesting assets and businesses). However, they present several problems. Some are legal (infringement of property rights and the principle of proportionality), others are economic. Such remedies would be particularly costly in terms of transaction costs but would also entail foregoing significant efficiency gains.

Nevertheless, efficiency is not the main competitive concern that emerges from the development of digital ecosystems.

The most significant competitive risks relate to the inhibition of the competitive process through the acquisition of a long-lasting, if not irreversible, dominant position, the resulting foreclosure of access to the market, and the market architecture power enjoyed by the dominant operator. The latter can decide who enters the market and under what conditions. This poses several problems in terms of capturing the rents associated with the transactions and the reasonableness of their conditions, and thus in terms of the distribution of welfare. Distribution is not neutral in terms of economic efficiency, if only in dynamic terms (Bougette et al., 2019).

Another essential question is that of the exercise of coercive power through the platform's use of its control rights. In fact, its architectural power gives it control rights over the ecosystem that go far beyond the mere perimeter of its property rights. The pivotal firm of the ecosystem can unilaterally decide on prices, technical standards and even the investments of firms that must pass through its ecosystem to access the market. It evolves as a private regulator placing its partners in transactions in a situation of economic and technical dependence.

A final issue to be addressed concerns the effects of this concentration of economic power and control on democracy itself. On the one hand, the concentration of economic power can jeopardize democracy in that it disrupts a social contract conceived as being based on a certain equality of conditions and a certain degree of independence. The concentration of economic power then provides the incentives and the capacity to influence political power to obtain protection both against public policy initiatives that might challenge it and against competition itself. On the other hand, the control exercised by platforms can also result in control over information, whether this takes the form of capturing advertising resources at the expense of the traditional media or creating filter bubbles that can hinder democratic deliberation.

The notion mobilized by American institutional economists of affectation with the public interest, which has its roots in English common law and was first used in 1676 for harbor infrastructures, can be of great use, as it can be activated beyond the scope of network industries. Hamilton (1930) himself insisted on the plasticity of the concept: “The survival of the term "affected with a public interest" is in large measure due to the ease with which it is adapted to a changing common sense and judicial opinion”. The nexus between digital platforms and public interest activities is increasingly highlighted in U.S. litigation in the second quarter of 2021.

This was first the case with a separate but converging opinion by Supreme Court Justice Clarence Thomas in a 2021 decision involving the suspension of former President Donald Trump's Twitter account. The point here is not to revisit the merits of the case but simply to follow the reasoning of Justice Thomas, a conservative and originalist judge, in his proposal to consider certain platforms under the common carrier theory of information and knowledge dissemination.

There is indeed a sharp contrast between the unilateral capacity of each platform to suspend an account - even with the possibility of recourse to internal appeal bodies - and the fact that they constitute a privileged, and in some cases exclusive, access to the marketplace of ideas for significant segments of public opinion: « Today’s digital platforms provide avenue for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms” (US Supreme Court, Justice Thomas’ concurring opinion, Joseph R. Biden, Jr., President of the United States, et al. v. Knight First Amendment Institute at Columbia University, et al., 593 U.S. __, 2021).

The question is to know to what extent the qualification as public utility or common carrier can be used to control the right of an economic actor such as a platform to exclude third parties. The qualification of common carrier allows public authorities to regulate the exercise of the right to exclude (Candeub, 2020). The advantage of activating the notion of common carrier is that it does not depend on the demonstration of a dominant position on the market. The notion of common carrier is not limited to network industries and can also be extended to activities that have not previously been given this qualification. This qualification may be given when: « a business, by circumstances and its nature, … rise[s] from private to be a public concern » (German Alliance Ins. Co. v Lewis, 233 U.S., 389, 1914).

It is the notion of public interest that makes it possible to qualify a company in this way and that can lead it to be regulated in such a way as to give access to its services to all users without discrimination[17]. Justice Thomas also implicitly notes what can distinguish this notion from that of essential facility - criticized in his time by Justice Scalia in Trinko: "But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable". For many of today's digital platforms, nothing is. The dominance test in each relevant market and the infrastructure essentiality test are thus not required[18].

This same approach is taken up and extended by a complaint filed in June 2021 by the attorney general of the State of Ohio (Dave Yost) against Google[19]. Google's position in the online search market, and the resulting risks of self-preferencing, led the attorney general to propose that the company be qualified as a common carrier or public utility within the meaning of Ohio state law. He thus takes up Justice Thomas' argument "[t]here is a fair argument that some digital platforms are sufficiently akin to common carrier or places of accommodation to be regulated". The definition of public utility under Ohio law provided by the Public Utility Commission of Ohio states that: "an entity may be characterized as a public utility if the nature of its operation is a matter of public concern and if membership is indiscriminately and reasonably made available to the public. A corporation subjects those services to public utility or common carrier status when it serves a substantial part of the public in a way that makes its

[17] We can also refer here to the notion of self-preferencing. Justice Clarence Thomas, who also uses the notion of gatekeeper, covers in his reasoning both the market of goods and services and the market of ideas: « [The gatekeeper] can suppress content by deindexing or down listing a search result or by steering users away from certain content by manually altering autocomplete results ».

[18] A parallel can be drawn with the EU General Court Judgment in the Case T-612/17 in Google and Alphabet v Commission (Google Shopping) pronounced on November 10th, 2021. The Court largely dismissed the action brought by Google against the Commission decision of June 2017 that led to impose a fine of € 2.42 bn and behavioural injunctions to sanction demoting practices (on the upstream of online general search services) at the detriment of Google's competitors on a downstream market (specialised search services). The General Court does not used the concept of self-preferencing but sanctions the unequal treatment on a "quasi essential-facility". It is not a case of refusal to supply as one can observe in litigations related to downstream competitors to essential infrastructures, that requires in the EU competition case law to demonstrate the essentiality of the access to compete. In the case of a search engine, impairing an equal access involves a certain form of abnormality as the attractiveness of the search engine in a multi-sided platform model depends on the exhaustivity and the veracity of its results. A no-economic sense test could be considered in parallel with neutrality obligations in a "common-carrier" like perspective.

[19] Common pleas court of Delaware County, Ohio civil division, case n°21 CV H 06 0274.

methods of operations a matter of public concern, welfare, and interest". A regulation appears as possible way to tackle competition law related issues which consequences go far beyond the efficiency dimension.

B- The private economic power and its regulation in a L&PE perspective

a) A Brandeisian view on the issue of private economic power

Looking at damages to competition other than those related to economic efficiency and conducting antitrust analysis on other grounds than a cost-benefit calculation undoubtedly breaks with the antitrust consensus as it was built up in the late 1970s. Taking into consideration the link between market competition and democracy on the one hand, and integrating into the analysis questions related to power relations and distribution on the other, cannot make sense in an approach inherited from the Chicago School. With these questions, we find the foundations of the criticism formulated by the promoters of L&PE against L&E (Britton-Purdy et al., 2020).

The critique carried on by the L&PE can be used in this perspective of enriching and broadening the competitive approach to digital ecosystems. The L&PE significantly relies on the positions taken by Louis Brandeis in the first third of the 20th century when it comes to dealing with antitrust issues. It is not surprising in this respect that some of the structuring elements of this movement's analyses of competition rules and regulation were prefigured by a contribution by Teachout and Khan published in 2014. They analyzed market structures and the private economic powers they generate in terms of their political consequences[20] and are opposed to the separation of the political and economic spheres advocated by the Second Chicago School since the 1950s. This separation was introduced by this second school and was not present in the First Chicago School as it developed in the 1930s and 1940s under the leadership of Frank Knight, Jacob Viner, and Henry Simons (Marty and Kirat, 2018).

From Teachout and Khan's (2014) perspective, the possession of market power (monopolistic or oligopolistic) allows firms to influence the democratic process through a number of channels: by influencing the definition of public policy, by exercising private regulatory power, by imposing a tax on other market actors, and finally by taking advantage of the benefits

[20] Their perspective is unquestionably Brandesian and represents a radical departure from the conception defended by the Antitrust Consensus that prevailed at the time, or from the perspective that was held by Thurman Arnold in the late 1940s. For Teachout and Khan (2014, p. 40): "Antitrust means for us, government power to limit company size and concentration".

intrinsically linked to market dominance in itself. The influence of firms can be exercised through off-market strategies by which dominant firms « seek to influence [social and political beings] formally, through laws and regulation, and informally through social pressure, activism and efforts to shape the public perception of business. [Companies executives] engage with their social and political environment, helping shape the rules of the game and reducing the risk of being hemmed in by external actors" (Bach and Bruce Allen, 2010, p. 9).

These non-market strategies have four components.

The first one concerns the influence exerted on public policies. This power of influence on the design and implementation of public policies can be exercised through several channels: lobbying, the financing of electoral campaigns or revolving doors mechanisms, but also through the production and dissemination of knowledge through academic or para-academic publications or activities that support the interests of the firms concerned[21].

A second aspect of non-market strategies is even more relevant for our purposes: private regulatory power. Dominance over customers and trading partners enables the exercise of regulatory power. This power can be exercised through the unilateral fixing of contractual provisions or the imposition of technical standards. The dominant firm can decide on the access of dependent third parties to the market, on their pricing strategies, but also on their technological trajectory and, by implication, the success or failure of their investments.

The third aspect highlighted by Teachout and Khan (2014) concerns the power to tax[22]. In our view, this should be understood in the same way as Lande (1982), for whom the Sherman Act was primarily aimed at preventing undue wealth transfers between economic agents. The undue nature of the transfer is then attributed to the deviation from the distribution of the surplus that would have prevailed in the absence of the exercise of economic power[23]. A position of economic power - we could say a position of pivotal platform in an ecosystem or gatekeeper - gives the possibility of imposing mark-ups on customers and mark-downs on suppliers.

The fourth component relates to dominance itself in that it constrains and directs the actions of other market participants. Teachout and Khan (2014, p. 58) draws on Louis Brandeis's

[21] These strategies can include the financing of chairs, research centers, the organization of training seminars, etc. (see Kirat and Marty, 2020).

[22] « We use 'tax' to connote the systemic capture of resources for private ends » (Teachout and Khan, 2014, p. 56).

[23] The notion of complete competition proposed by the ordoliberals, in which all agents must be price takers, seems to be a relevant one to draw a parallel. In this framework, if an agent holds a dominant position, he must not use it, even involuntarily, and behave as if he did not benefit from this market position (Marty, 2021).

dissenting opinion in American Column (American Column & Lumber Co v United States, 257 U.S. 377, 1921) to show that the mere possession of market power has the effect of restricting the freedom of action of other market participants, even without the intent to do so.

The critique of market power is thus articulated with the Jeffersonian tradition cited in the introduction[24]. Teachout and Khan's approach (2014, p. 60) is part of a tradition inherited from the English Revolution of 1642. Monopoly is rejected as part of a "colbertist" policy leading the royal power to grant exclusive rights to a given actor. During the American Revolution of 1776, Thomas Jefferson unsuccessfully proposed the insertion of an anti-monopoly clause in the Bill of Rights of the U.S. Constitution. Teachout and Khan (2014) follow a logic that does not consider the sole issue of the Sherman act should be the economic damage induced by a firm in a situation of dominance, as Thurman Arnold did at the end of the 1930s, but the dominance itself, regardless of the use made of it.

The approach is comparable to Justice Louis Brandeis' one but also to Justice William Douglas' one. William Douglas embodied the post-war Brandeisian tradition that later converged with a structuralist approach. In his dissenting opinion in the Supreme Court's 1948 Columbia Steel decision (United States v Columbia Steel Co., 334 U.S. 495), Justice Douglas stated: « We have the problem of bigness…The philosophy of the Sherman Act is that… all power tends to develop into a government in itself. Power that controls the economy… should be scattered into many hands so that the fortunes of the people will not dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and command of the Sherman Act".

Teachout and Khan's (2014) approach, which prefigures as indicated above that of L&PE, does not deal with the question of effects - i.e. the impact of firms' behaviors on welfare - but with the question of market power itself insofar as it deprives third parties of alternative or opportunity and insofar as it undermines the dispersion of political power[25].

b) The L&PE approach of private economic power regulation

The application of the concept of public utility to large platforms has been proposed in the L&PE literature prior to the publication of Justice Clarence Thomas' opinion and the Ohio

[24] See Calabresi et Leibowitz (2012).
[25] According to Milton (1988, 1220), the Sherman act pertains to « tradition that aimed to control political power through decentralization of economic power ».

Attorney General's complaint. This is the case of Rahman (2018, p. 1625) who proposes to apply the notion to "social infrastructure[s] where private actors accumulate outsized control over those goods or services that form the vital foundation or backbone of our political economy." Again, Louis Brandeis's Supreme Court opinions provide a basis for extending the notion beyond the perimeter of industries characterized by market failures.

Rahman (2018, p.1632) relies in this respect on the dissenting opinion of Louis Brandeis in New State Ice Co. v Liebmann, 285 US 262, 1932. The majority of the Court had struck down a regulation of the State of Oklahoma which regulated the entry into the market of industrial ice production. The Court held that such production "was not sufficiently affected with a public interest to warrant such extensive regulation". Brandeis objected to this analysis since the essential nature of the production for the users and the risks to the supply in case of destructive competition. In his view, it is normal to regulate any essential service to guarantee its operation in the public interest. It is therefore up to the police power of the states to regulate the operation of essential services even if they do not have a network industry character that would justify intervention based on correcting a market failure. In other words, the basis for intervention is not efficiency but the affectation with a public interest.

In this perspective, regulation makes it possible to reconcile the existence of private property with the accountability of private economic power to guarantee third-party access to the service and the equity of the latter. Once again, we find the principles of the European DMA. The interest of the return to Brandeis by the L&PE makes it possible to go beyond the alternative between regulation confined to the sphere of correcting market failures and antitrust intervention that could only guarantee competition through the dismantling of dominant operators. It makes it possible to regulate an essential service even if the company in question is not dominant in the sense of competition law.

The notion of "common carrier" (or "public callings"), highlighted by Clarence Thomas and Dave Yost, has an advantage over the theory of essential facilities[26], already noted by Rahman (2018, p. 1635): it makes these companies "subject to special restrictions, such as the duty to provide a service once undertaken, to serve all comers, to charge reasonable prices, and to offer acceptance compensations. As we have seen in our sections above, this statute was applied at the end of the 19th century for the railroads to guarantee the reasonableness of tariffs and to

[26] See Marty (2018) on the condition under which the essential facility doctrine can be used in competition-law based litigations.

avoid discrimination between users[27]. Such a position echoes the EU General Court judgment in Google Shopping in November 2021, insisting on the necessity of guaranteeing an equal treatment.

In this sense, economic activities can be divided into three groups (Hamilton, 1932). The first corresponds to non-essential services. In this case, the functioning of markets can be left to competition alone. A second set corresponds to services that are highly concentrated in terms of their supply, with dependent consumers. Unfair or discriminatory market access conditions can then be observed. Public supervision is necessary. A third group corresponds to network industries for which a classical regulation such as the one set up in the United States since the beginning of the 20th century. The second category is therefore the most interesting for our purposes in that supervision does not respond to the correction of a market failure but simply to the prevention of discriminatory or exploitative practices. The American experience of the progressive era thus makes it possible to extend the scope of legitimate public supervision to all activities "affected with the public interest[28]".

Several lessons can be drawn from this experience for the issue of large online platforms. The issues of access and non-discrimination, and not just efficiency, must be addressed when the service provided corresponds to a social necessity for users and an essential condition for market access for commercial partners. Similarly, when the services at stake have a significant impact on the dissemination of ideas and information, the issue is no longer simply economic but also political, even beyond considerations of the links between concentration of economic power and dispersion of political power[29].

By drawing a portrait of the activities classified in the second category by Hamilton (1932) and which therefore deserve supervision in the name of the assignment with the public interest, Rahman (2018, p.1641) points out some characteristics corresponding to digital ecosystems. It is a production characterized by high barriers to entry, high potential sunk costs, increasing returns and diversification-based benefits[30]. It is then an infrastructure whose value is dependent on the downstream activity it makes possible. Symmetrically, a refusal of access or

[27] See Interstate Commerce Commission v Balt. & O.R. Co., 145 US 263, 1892.
[28] See the US Supreme Court decisional practice from Munn v Illinois, 94 US 113, 1877 to Nebbia v New York, 291 US 502, 1934.
[29] The infrastructure in question may not only be a gateway for the circulation of goods and services but also for the circulation of ideas. The large platforms active in the market for attention, such as Google or Facebook, are essential infrastructures for citizens' access to information. They can deny access to certain information, but they are also able to shape the beliefs and frames of thought of agents by creating personalized information filter bubbles. As such, they are not passive intermediaries in the dissemination of information.
[30] A single “relevant” market entry does not allow to be as efficient as the installed operator.

access under discriminatory conditions has a significant effect on complementors and users. Finally, it is an infrastructure that is socially necessary and whose unilateral control puts third parties in a vulnerable situation.

It is not a question of dominance in the sense of antitrust but a question of dependence on third parties. It is therefore, as we have seen with Thurman Arnold, a bottleneck situation. This very term is taken up by Fishkin (2014): a bottleneck in this perspective is a critical infrastructure controlled by a private actor and for which free and unbiased access is indispensable for third parties to exercise their economic and political freedoms.

In this perspective, Rahman (2018, p. 1644) proposes a modern public utility toolkit of which we can present some of the characteristics. The first feature, very new-Brandeisian in its nature, is to impose a principle of specialty on firms that are pivotal to ecosystems. This is a firewall preventing external growth strategies towards downstream or related activities. This would certainly solve the problems of anti-competitive leveraging or self-preferencing strategies, but it would require a trade-off against possible efficiency gains. The solution of a *per se* prohibition would prevent the gatekeeper from diversifying, whether through internal or external growth[31]. The second characteristic is the application of common-carrier regulatory obligations. These are "requirements to serve all comers and avoid discrimination, and to offer fair and relatively accessible pricing (Rahman, 2018, p. 1645).

V- Conclusion

The various facets of a regulation based on the principles of market access and economic sovereignty of the players, as proposed by the L&PE, are present in the European DMA despite the differences in institutional frameworks and historical dynamics. Today, they have a growing influence on U.S. litigation, but also on legislative proposals. Indeed, in the continuity of the investigation of competition in digital markets made public in October 2020 and for which Lina Khan counselled the committee[32], several bipartisan legislative proposals have just been introduced in the House of Representatives on June 11, 2021. These constitute so many avenues for specific supervision of platforms in the name of the assignment with a public interest.

[31] See Lina Khan (2019) in this perspective.

[32] « To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons. Although these firms have delivered clear benefits to society, the dominance of Amazon, Apple, Facebook, and Google has come at a price. These firms typically run the marketplace while also competing in it—a position that enables them to write one set of rules for others, while they play by another, or to engage in a form of their own private quasi regulation that is unaccountable to anyone but themselves" (Judiciary Committee, 2020, p. 6)

Among these five proposals, we could mention the "American Innovation and Choice Online Act" whose objective is to "Prohibit discriminatory conduct by dominant platforms, including a ban on self-preferencing and picking winners and losers online", the "Platform Competition and Opportunity Act" - whose object is to "Prohibit acquisitions of competitive threats by dominant platforms, as well acquisitions that expand or entrench the market power of online platforms" and finally the "Ending Platform Monopolies Act" which aims to "Eliminate the ability of dominant platforms to leverage their control over across multiple business lines to self-preference and disadvantage competitors in ways that undermine free and fair competition".

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