Business

How to Tame Google, Facebook, Amazon, and Apple

There hasn't been a concerted effort to stop the runaway tech giants—yet. Would today's laws even be up to the challenge?

By Peter Coy

November 29, 2017 at 5:00 AM EST

Illustration: Kurt Woerpel for Bloomberg

IT'S HARDER TO FIX A PROBLEM THAN TO IDENTIFY IT. THAT GOES QUADRUPLE FOR APPLE INC., Alphabet Inc.'s Google, Amazon.com Inc., and Facebook Inc.

On the upside, these U.S. tech giants provide some of the world's best-loved products and services. Investors love them, too. They're the first-, second-, fourth-, and fifth-most-valuable companies. (Microsoft Corp. places third.)

Yet the four, taken together, also stand widely accused of the sins associated with corporate bullies: crushing competition, avoiding taxes, undermining democracy and invading privacy. Russian operatives have used American social media companies as a playground. Executives of Facebook, Google, and Twitter Inc. told Congress on Oct. 31 that they can't even measure the extent of

Russia's manipulation of the U.S. presidential election and don't yet have the tools to stop it the next time.

The result, so far, has been threats of new taxes, regulations, laws and antitrust actions–not only in Europe, where the giants have long been treated as problems, but increasingly from what has been long seen as the more hands-off U.S. government. Some experts see the Justice Department's lawsuit to block AT&T Inc.'s purchase of Time Warner Inc. as a possible precursor of actions against the tech giants. Even the experts are confused. Are these companies our friends, enemies or frenemies? Are they basically familiar entities that can be dealt with using tried-and-true remedies–or something new that requires a fresh approach?

"We are living through a moment in which the forms of our legal institutions are being revealed to us as obsolete," said Julie Cohen, a professor at Georgetown Law School who is working on a book about rethinking antitrust law for the new era of powerful online platforms. "Our regulatory institutions date to the early 20th century. They were created in response to particular problems. They're not timeless."

Part of the difficulty is that, right now at least, every allegation against Google, Amazon, Facebook, and Apple Inc. is weighed as a separate matter. That doesn't make sense economically. Actions against each one, taken in combination, could result in death or diminution by a thousand cuts. Or, at the other extreme, the big four could manage to escape serious reform by exploiting the authorities' lack of coordination the way LeBron James splits defenders on his way to the hoop.

So it's important to think holistically about these tech giants. To do that, we collected some of the best thinking about what regulators could do, stopping to consider the possible consequences. We made sure to include cases wherein it makes sense simply to back off and leave them alone.

If regulators wanted to fix the playing field, would Google become five Googlettes? Should Facebook become a regulated utility, treated more like your local phone company than your favorite social network? Could Amazon.com be barred from selling its own books, movies and TV shows to protect other sellers on its all-powerful platform? Do governments work together to take away the tax shelters behind Apple's nearly quarter-trillion-dollar cash hoard?

No one knows, of course, but it's still valuable to think through possible actions and consequences. Here, then, are scenarios in which regulators and politicians might try to tame four of the most valuable companies on the planet.

Google: Breaking Up a Tech Giant Is Hard to Do

When people worry that companies are too powerful, the first impulse is to reach back into trust-busting history and break them into pieces, just as when Standard Oil was splintered into 34 independent companies in 1911. A breakup hasn't shattered a major U.S. company in more than three decades.

The last big breakup came in 1982, after the Justice Department entered into a consent decree with what was then called American Telephone & Telegraph Co. As a result, on the first day of 1984, Ma Bell spawned seven regional Baby Bells to provide local and regional phone service. The rump company that retained the AT&T name provided long-distance service and manufactured equipment.

The result of the split was generally positive: first cheaper long-distance calls, then the mobile-phone revolution. The Baby Bells eventually escaped some regulatory restraints. But there were losses, too: Bell Laboratories, a visionary research and development center that gave birth to the transistor and the laser, couldn't be sustained without monopoly profits.

Google—or rather its parent company, Alphabet—is the tech giant that most frequently inspires imagined breakup scenarios. An op-ed in the New York Times earlier this year dared to pose the

question in a headline: “Is It Time to Break Up Google?” So let’s use the case of Google to evaluate the argument for chopping up any overgrown tech company.

Just as Ma Bell’s demise doomed Bell Labs, the disintegration of Google would probably spell the end to Google X, the R&D operation that calls itself a “moonshot factory” and is working on everything from balloon-based internet service to fuel from seawater. Presumably its researchers would carry on elsewhere, perhaps with less generous funding.

Breaking up Google by regions, as happened to AT&T, wouldn’t work because Google isn’t organized that way. An alternative would be to split Google into, say, five smaller companies that would be quite similar to one another. Call them Google, Hoogle, Ioogle, Joogle and Koogle. They might compete by charging less for advertising, which is by far Google’s main revenue source. That would presumably benefit advertisers and, eventually, consumers.

But five little Googlettes might not last any longer on their own than the seven Baby Bells did. If there are economies of scale and a winner-take-all tendency, one of the little five could soon come to dominate the others.

A more logical breakup of Google would be along functional lines. Search could be walled off as a stand-alone business, with its own shareholders, to prevent Alphabet from favoring its own products over those of rivals in search results. The sky-high profits generated from search-related ads would no longer be able to subsidize the invasion of other market segments. In a classic antitrust case, the monopoly part of the business would then be subject to price regulation.

The problem with price regulation is that Google doesn’t charge high prices—at least not to consumers, the traditional victims in monopoly cases. The company initially helped wipe out the profitability of newspapers and magazines, in part, by undercutting the price of print advertising. These days, however, Google can charge hefty prices to advertisers because it controls so much inventory and user data. Advertisers can feel they have no choice but to pay up, while consumers pay precisely zero to do searches or send emails.

Critics of the tech giants have started to argue that current antitrust policy is blinkered by the emphasis on direct harm to consumers beyond other anti-competitive behaviors. Companies can do evil, even if their prices are low—if they acquire too much political power, for instance, or smother new ideas and kill small businesses.

Enforcing antitrust law isn’t a cure-all. “There are attempts to try to give the antitrust courts a quasi-executive mandate to go across the terrain and fix every problem they encounter,” said Herbert

Hovenkamp, an antitrust expert at University of Pennsylvania's Wharton School and Law School. Some concerns might be better dealt with other ways, he said, such as campaign finance reform.

As an alternative to breakup, trustbusters could limit themselves to forcing Alphabet to split off some of the acquisitions financed with its near-monopoly profits. In contrast to trying to regulate preferential treatment between business units inside a big company, "structural separation is just cleaner and neater," said Lina Khan, an associate research scholar at Yale Law School.

YouTube and Waze could be shed relatively easily. It would be harder to break off such businesses as DoubleClick, which have been tightly integrated into Google's business. In June, to take one example, the European Union fined Google 2.4 billion euros ($2.8 billion) for favoring its own comparison-shopping service in search results. Rather than spin off its shopping service to placate the EU, Google is putting it in a stand-alone unit and requiring it to bid against rivals for ads shown on the top of its search page.

But breaking up a company is an extreme measure—almost the corporate equivalent of a death sentence—and the benefits are unclear. That's why even some of the most assertive foes of tech giants shy away from calling for outright dismemberment.

Even Jonathan Taplin, author of the Times op-ed asking if it's time to break up Google, never answered affirmatively. He called for something considerably short of that: requiring Google to license its patents freely, as the U.S. required AT&T to do in a 1956 consent decree. Another solution favored by Gary Reback, a Silicon Valley antitrust lawyer who's been a nemesis of Big Tech, focuses on getting Google to treat rivals better in search results.

Barry Lynn, who runs an advocacy group called Open Markets Institute and has been an outspoken critic of Google, says platform companies should be treated like railroads and forbidden from going into businesses in which they compete with their customers.

If Google and its brethren get any bigger and more powerful, we might eventually see an antitrust action along these lines. It's tricky, though, since hampering one of these giants could backfire by making it easier for another to expand. "You hate to cripple any one of them, and you hate to discourage them from attacking one another," said Scott Hemphill, a visiting professor of antitrust and intellectual property at New York University School of Law.

If breaking up a tech giant is hard, another class of remedy would be to assert more control over a giant's behavior. This second category can also apply to Google, Facebook and Apple, but let's focus on what it might do to Amazon.

Amazon.com: Trying the Gulliver Solution

The world has a love-hate relationship with Amazon. Consumers mainly love it, competitors hate it and the government is pulled in both directions. Almost 240 cities are vying to host the second U.S. headquarters of a company that many of them have condemned for putting local retailers out of business.

Amazon is a "cheetelephant," said one analyst: an elephant that runs as fast as a cheetah. It's considerably faster than the regulators and lawmakers who have been caught flat-footed and are now wondering what, if anything, to do about its increasing market power, from books to groceries to moviemaking.

In a widely read article in the January issue of the Yale Law Journal entitled "Amazon's Antitrust Paradox," Yale's Khan laid out the two main options for dealing with Amazon and other companies that run on online platform markets, such as Google and Facebook. One is to discipline them via competition, relying on antitrust law to make sure they don't put competitors out of business. The other is to throw in the towel on competition and "accept that they are inherently monopolistic or oligopolistic and regulate them instead." You'd pursue the second option if you thought there were

such important economies of scale that it made sense for Amazon to be huge, even dominant. In that case you'd let it grow, Khan wrote, "while neutering the firm's ability to exploit its dominance."

For those who want to rely on the competition solution, a key problem is coming up with a standard for judging when Amazon is competing unfairly. Let's say Amazon slashes prices. Is that a "predatory" move designed to drive a competitor out of business and clear the way to raise prices and profits? Or is it just aggressive pricing by a company that has no intention of raising prices in the future?

"If you look at the business models of these firms, none of these is a predatory pricing model. These firms are making a lot of money doing what they're currently doing," said Penn's Hovenkamp. Besides, he said, "there are constantly new entrants" that would prevent a company from earning monopolistic profits. For antitrust enforcers, the problem is that by the time you know for sure whether a company predatorily drove rivals out of business, it's too late to prevent it.

If the choice is to accept rather than fight Amazon's dominance, one traditional solution would be to regulate Amazon the same as the local electricity, gas, water or sewer utilities. That would involve treating it like a "common carrier," meaning it would be barred from favoring its own products over those of competitors by, say, displaying them more prominently.

Short of that, Amazon's network could be declared an "essential facility," meaning Amazon would have to let any competitor use its platform without question. Khan argues that Amazon's delivery service, its Marketplace and Amazon Web Services could all come to be considered essential facilities someday, "in light of the company's current trajectory."

"Essential" is kind of a stretch, at least for now. Vendors don't have to use the Amazon Marketplace if they don't want to, and there are plenty of other choices for cloud providers.

Customers might not notice much change right away if Amazon's various platforms were declared essential facilities that are open to everyone. After all, other companies already account for half the items sold on Amazon Marketplace. But over time, the reliability of merchandise sold through Amazon might decline if the company had to accept all vendors, including crappy ones.

Another option, designating Amazon as a common carrier, would let regulators control what Amazon charges vendors for appearing on its site or using its delivery service. There again, the change might not be immediately apparent to customers, especially if regulators stepped in only to halt obviously unfair treatment.

So far we've looked at a breakup solution for Google and a regulation solution for Amazon. The Google breakup seems far-fetched, and the result of our Amazon regulation scenario is

underwhelming. What else? Another solution that's being floated is to hold companies liable for the things that happen on their platforms. Let's see how that would play out for Facebook.

Facebook: Making It Liable for its Customers' Posts

None other than British Prime Minister Theresa May has floated the idea of treating Facebook, Google and Twitter like news organizations, making them responsible for content appearing on their platforms. In the U.S. Senate, the Stop Enabling Sex Traffickers Act (SESTA) would expose internet companies such as Facebook and Google to civil lawsuits over content created by their customers. There's a similar bill in the House.

To turn Facebook into a publisher, Congress would have to repeal or amend Section 230 of the Communications Decency Act of 1996. The section protects social networks from lawsuits over content created by others. There's also a Good Samaritan provision, which says that if the companies do choose to kill some offensive customer-created content, they don't thereby lose their legal protection and become responsible for every other bad thing customers do on their platforms.

Notice how making Facebook liable for customers' content is very different–opposite, really–from the solution of making it and others into common carriers. A common carrier, such as a plain vanilla phone company, submits to regulation of its prices and terms of service but has pretty much complete immunity against lawsuits over customers' behavior. No one holds the phone company responsible for things people say to each other on the phone.

It's clear that the government isn't willing to excuse Facebook for the content that has appeared on its site, from animal abuse to live-streamed suicides. The company has become far more aggressive about rooting out offensive material, including fake news, sex-trafficking and hate speech. By monitoring itself, it's hoping to dodge government control.

But that's creating a whole new set of problems, including backlash from customers and activists, who say Facebook is setting itself up as an unofficial censor. Right-leaning groups accuse Facebook of a liberal bias. Facebook considers itself a marketplace of ideas and rails against the notion that it's a media company. Some critics are asserting a First Amendment right to free speech on Facebook, saying that it has become, in effect, a public space. They cite a 1946 Supreme Court decision, Marsh v. Alabama, that said a state trespassing statute couldn't prevent distribution of religious materials on the sidewalk, even in a privately owned company town.

"A lot of people aren't thinking hard about the world they are asking [Silicon Valley] to build," Facebook's chief security officer, Alex Stamos, wrote in October. "When the gods wish to punish us they answer our prayers."

Facebook, in other words, is damned if it does censor and damned if it doesn't. How is this likely to evolve? One possibility is that Facebook will tire of taking the heat and voluntarily submit to government regulation. John Battelle, a tech writer and entrepreneur who helped launch Wired and the Industry Standard, has argued for just this approach.

A regulated Facebook would still have to employ people and algorithms to scour its website of forbidden materials, as it does today, but at least it could point the finger at lawmakers and regulators if questioned about its choices. The same would go for Google and some companies not covered here, such as Twitter.

But as troubling as censorship by Facebook is, censorship by the government could turn out worse: "A lot of the people who say, 'Well, these tech giants ought to be regulated,' are also people who are quite critical of the current government. They haven't really thought through what it means to give more regulatory tools to a government they disapprove of," said Michael Godwin, a tech law veteran who is director of innovation policy at the R Street Institute, a free-market think tank.

That brings us to Apple, which differs from the others in that it's not mainly a platform company making money by bringing together friends and advertisers or suppliers and customers. Many of the issues that affect Google, Amazon and Facebook are less important for Apple. But one–taxation–is huge for Apple and important for all four companies.

Apple: How the Taxman Could Get Another Bite Out of It

Apple, the world's most valuable company, finished its last fiscal year with $216 billion in cash and marketable securities held by foreign subsidiaries. As Congress looks under the seat cushions for spare change, Apple's foreign treasure is a tempting target–especially since, in reality, the money is mostly held in the U.S. in dollar-denominated securities such as Treasury bonds.

Right now Apple doesn't have to pay U.S. tax on profits earned abroad until it "repatriates" the money, by paying a dividend or benefiting shareholders in some other way. Tax bills under consideration call for changing that system, taxing the entire sum now, although at preferential rates–7 percent to 14 percent in the House plan and 5 percent to 10 percent in the Senate's. The economic rationale for the super-low rates is shaky. In principle, although it's highly unlikely, nothing is stopping Congress from charging companies the entire 35 percent they owe.

The Europeans are even more exercised than the Americans over how hard it is to tax Apple and the other tech giants. The European Commission claims that Apple struck a sweetheart deal with Ireland that allowed it to pay an effective tax rate in 2014 of just 0.005 percent on its European profits. In 2016, it ordered Ireland to collect as much as 13 billion euros in back taxes from Apple. Ireland, which uses a low tax rate to attract business, has balked. Apple Chief Executive Officer Tim Cook called the commission's order "total political crap," saying his company had paid its fair share of taxes.

Until recently, tech companies have had lots of ways to minimize their taxes legally. The general idea has been to take advantage of transfer-pricing rules by deeming as much of your profits as possible to have been earned in a low-tax jurisdiction such as Ireland. But the Europeans are tightening those loopholes. Aside from the Apple case, Amazon this year was also ordered to pay 250 million euros in back taxes to Luxembourg.

It's a good bet that there will be more such orders in coming years. Governments want money, and the four tech giants have a lot of it. In the meantime, while trying to come up with a better tax system, Europe is toying with the idea of taxing the tech companies' revenue rather than their profits. The reasoning is that revenue is harder to manipulate. But revenue is a crude measure of a company's ability to pay taxes. Revenue-based taxation would be too hard on companies with lots of revenue but little profit, and too easy on companies with little revenue but lots of profit.

"I liken it to a drunk looking for his keys under the lamp post because the light is better there," said Scott Marcus, a senior fellow at the Brussels-based Bruegel Institute. "The mere fact that it's easier to measure revenue doesn't mean it's the right thing to tax."

What would be smarter would be changing the tax code to take away the incentive for companies to attribute their profits to low-tax jurisdictions. Some Europeans are discussing an idea of splitting a company's worldwide tax liability among countries, according to how much revenue the company derives in each country. Assets or employment in a country could also be used as yardsticks. This column from September explains the basic concept:

> Under an apportionment system, each country is still permitted to set its corporate tax rate however it chooses. But it will be able to charge its rate only on its little slice of the company's global profit—a slice that's determined by an agreed-upon formula. A country can no longer grab a bigger piece of a shrinking corporate-tax pie by cutting its rate below other countries'. In one stroke, the race to the bottom in tax rates is cut short.

The European Commission raised the idea in 2011 and again in 2016 in the form of something called the Common Consolidated Corporate Tax Base. "It's an amazing change. Ten years ago nobody talked about this," said Jose Antonio Ocampo, a Columbia University professor and former Colombian finance minister who is chairman of the Independent Commission for the Reform of International Corporate Taxation.

Getting low-tax countries to go along with an apportionment system would be tough, though. No country wants to give up what makes it special. So something like the current tax system, albeit with fewer loopholes, is likely to persist for at least awhile. Apple, Google, Facebook and Amazon will keep finding ways to pit countries against one another.

As the four tech giants grow and invade each other's turf, it may turn out that the strongest force preventing them from abusing the public is the force of competition–i.e., each other.

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