Let Americans break up Big Tech

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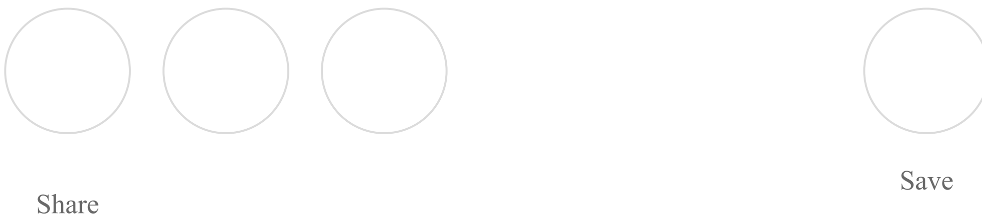

Calls to break-up Big Tech grow louder. In recent weeks Chris Hughes, Facebook's co-founder, argued in a *New York Times* op-ed that it's time to break up Facebook and *The Wall Street Journal* published a piece titled: "Amazon's size is becoming a problem – for Amazon."

Elizabeth Warren, the US Democratic presidential hopeful, is campaigning for the break-up of "too big and too dominant" tech firms. Margrethe Vestager, the European competition commissioner and a contender to succeed Jean-Claude Juncker as European Commission president, said that urgent enforcement

action was needed in digital markets and that tech firms could be broken up.

Government investigations are multiplying, too. Competition agencies in Australia, France, Germany, the Netherlands, Denmark, India, Singapore, South Korea, Turkey and the UK have open Big Tech investigations. The European Commission imposed fines for competition law offences on Google totalling over €8 billion and is investigating both Amazon's and Apple's market practices. In the US, a Federal Trade Commission investigation may force Facebook to put in place new corporate governance arrangements.

Critics say that recent calls by Mark Zuckerberg for greater regulation are a rearguard action. A *Wall Street Journal* editorial put it this way: "Sooner or later you knew it would happen — Big tech would invite government regulation to deflect even greater intervention such as an antitrust break-up."

For Ireland, this is an important debate. Our seat on an important EU advisory committee provides a degree of influence on European Commission competition law enforcement. Amazon, Apple, Facebook and Google employ around 20,000 people in this country. National interest apart, what can we bring to the debate?

Competition law, or “antitrust” in the US, provides a ready legal handle to break up technology firms, proponents for intervention say. “We already have the tools we need to check the domination of Facebook. We just seem to have forgotten about them,” according to a *New York Times* op-ed.

Is that right? True, there is some precedent — at least in the United States. In the early 1980s, the Department of Justice successfully sued for break-up of the monopoly AT&T, resulting in a split of that company into eight constituent parts. But in 40 years of modern antitrust enforcement, this is the sole example. Though it has the power to do so, the European Commission has never forced a company break-up on dominance grounds.

Antitrust scholars and experts disagree on the merits of intervention, but probably the orthodox view is that forced break-up of Big Tech could do more harm than good. Not to be forgotten here, these scholars say, are the pro-competitive and pro-consumer benefits of Big Tech. So-called “innocent monopolies” earned by merit are not illegal. Amazon has lowered prices and increased choice for millions across Europe. Google is the No 1 search engine, preferred by 90 per cent of Europeans, on merit — it is fast and accurate. Like Facebook, with 2.3 billion active users worldwide, it is also ostensibly free.

Without Apple, there’d be no innovative App Store. Breaking up these giants might be populist. It might potentially benefit smaller rivals. But will it help consumers?

Another complex question: break-up into what? Could Facebook be required to split off Instagram and Whatsapp? Could Google be required to divest Doubleclick or Apple to carve out its App Store, as Spotify is arguing in the European Union? In a complaint to the European Commission, the music streaming service argues that Apple has favoured its own steaming service, Apple Music, by imposing a 30 per cent “tax” on Spotify subscriptions. Senator Warren proposes to split the companies into heavily regulated “platform utilities,” but what does that mean?

The same experts argue that such action would change existing competition law enforcement standards. A long-established fundamental aim of competition law — endorsed by the Irish Supreme Court in a landmark 2007 judgment ILCU v Competition Authority — is so-called “consumer welfare”. This standard deems competition law enforcement justified if it demonstrably benefits consumers via lower prices or greater choice. Big is not necessarily bad — what matters is anticompetitive conduct that hurts consumers.

But a new generation of antitrust scholars argue market intervention is warranted regardless of whether it benefits consumer welfare. In 2017, Lina Khan, a legal scholar and now adviser to the US House sub-committee on antitrust, commercial and administrative law, published a paper in the *Yale Law Journal*, "Amazon's antitrust paradox", which has since become hugely influential. Online titans should not get a pass from competition law, she argues, simply because consumers are happy: technology giants' structural power should cause concern even if consumer welfare is not harmed.

Likewise Columbia law professor and antitrust specialist Tim Wu insists that big is bad. In a *New York Times* op-ed late last year, he warned there is "a direct link between [market] concentration and the distortion of democratic process".

This view could prevail. If so, maybe the US will grasp this nettle? These are predominantly American firms. Unilateral EU action against them will doubtless create a US backlash. Under the Obama administration, the United States openly criticised EU competition law enforcement after state aid decisions against Apple and McDonald's as biased. In response to the European Commission's most recent fine against Google, President Trump accused the EU of having "taken advantage of the US" and of "one of its great companies".