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# Platform power and regulatory politics: Polanyi for the twenty-first century

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## ABSTRACT


Intensifying concerns about online platform firms' rapid rise, expansion, and growing asymmetric power have attracted political scrutiny and undermined the legitimacy of a minimalist regulatory regime that is giving way to intense debate and increasingly interventionist governmental policies and enforcement actions. First, we view the rise of, and recent political responses to, the often-predatory power and manipulative conduct of platform firm in terms of a 'Polanyian' double movement in which the destabilising and destructive effects of unchecked corporate activities and market development eventually generates political and regulatory responses to constrain private power that threaten the social, political, and economic order. Second, incipient legal changes, most notably the EU's proposed Digital Markets Act and Digital Services Act, indicate a shift in regulatory emphasis from competition (and antitrust) policy and law towards more intensive and encompassing forms of socio-economic regulation. Finally, these regulatory changes will likely vary in character and significance across political jurisdictions, and embody distinctive and possibly divergent developmental trajectories. The EU may have a first-mover advantage in regulating platform firms, but we are only at the very beginning of a protracted and conflictual transformational process.

## KEYWORDS

Platform power; platform regulation; competition policy; Polanyi; double movement; Digital Markets Act; Digital Services Act; European Union

## Introduction: the power of the online platform and the rise of the platform economy

Over the last two decades, online platforms have grown in ways that go beyond the typical Chandlerian dimensions of scale and scope and, as a result, have had a transformative impact on virtually all areas of social life, including business competition, firm organisation, labour relations, technological innovation, and the conduct and content of social and political discourse (Kenney and Zysman 2016, Srnicek 2017, Kenney et al. 2020).<sup>1</sup> A growing number of scholars, commentators, and policy makers have recognised that online platforms, and the firms deploying and embodying them, represent a new institutional form (Frenken and Fuenfschilling 2020, McIntyre et al. 2020, Stark and Pais 2020). Their distinctive attributes endow them with extraordinary capacities for expansion and for the development of asymmetric power with respect to other firms and the consumers that interact through them.

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The belated recognition of the increasing power and pervasiveness of platform firms has resulted in a remarkably rapid change in the policy framing and discourse among political elites and other state actors who had for so long viewed with little concern the unfettered growth, expansion, self-organisation, and largely unilateral private ordering of platform business models and governance (Jacobides and Lianos 2021). As a consequence, the *laissez faire* neoliberal regulatory ideology of the past quarter century that has prevailed with respect to the Internet in general and to online business platforms in particular is losing its societal legitimacy and political potency.

The rapidity and global diffusion of this change has been striking. Notwithstanding prior signs of growing societal and political concern directed at 'Big Tech', there has been limited regulatory intervention outside of China (McKnight et al. 2021). But within the past year, there has been a sea-change in the posture of regulatory and legislative institutions toward powerful platform firms. Although these are still early days of this change in the orientation of law and policy, we see evidence of a decisive shift towards governmental intervention in the internal structures, practices, and business strategies of platform firms, precisely because they affect the society more generally. Further, in a shift within this pro-intervention swing of the governance pendulum, governmental authorities are not only contemplating increased enforcement of competition and antitrust law, but also (and arguably more importantly) the authorities are moving towards more intensive and comprehensive regulation of platform firms and markets.<sup>2</sup> the changes in the regulatory and legislative environment are manifested in different ways in the European Union, the United States, China, and India – the most significant jurisdictions and geographical markets comprising the global economy (Jacobides and Lianos 2021). These emergent political and juridical responses to the growing power of online platforms and platform firms signal a transformation of the political economy of the platform economy and thus the most dynamic and disruptive areas of modern capitalism.

In *The Great Transformation* Karl Polanyi (2001) argued that the pathological disruptive and destructive effects unleashed by the coupling of radical technological innovation and unchecked private market power can trigger social and political mobilisation and resistance that reshapes the political economic order. We argue that contemporary society is at one of those rare historical inflection points in the constitution (or re-constitution) of socio-economic relations. At such moments, societies experience a 'double movement' dynamic in which the reorganisational power and prerogatives of private interests and organisations imposing a utopian ideal of the self-regulating market (the first movement) drive a reassertion of political authority and thus broader societal interests (the second movement). This engenders a struggle within which social forces attempt to create regulatory and governance mechanisms to constrain and potentially redirect political economic and social development in new ways and often along unexpected developmental trajectories (Polanyi 2001).

The increasing ubiquity of the services provided by online platforms and the ways by which they allow the reorganisation of social and economic life can be viewed as a transformative development in either the Schumpeterian or Polanyian sense (Grabher and König 2020). In response to Grabher and König, Kenney et al. (2021) mapped Polanyi's concept of 'fictitious commodities' onto the operations of a data-driven economy of information, new forms of firm organisation, and novel trajectories in the rapid evolution of markets and business models. That application of Polanyi to the platform economy, in turn, built upon prior analyses of the platform economy's growth originating in network effects and asymmetrical power over data (Kenney and Zysman 2016) and due to the transformative interactions among science, technology, and the state (Grabher and König 2020). Here, we are not concerned with fictitious commodities, nor with the developmental drivers of online platforms and markets, but with the dynamic of conflict and contestation generated by the restructuring of economic relations and power that is driven by the transition to an economy within which platforms are increasingly the constitutive infrastructure of society (Plantin and Punathambekar 2019). This restructuring is a lagging but increasingly potent reaction to the rapidly growing scale, scope, and power of platform firms.

This article extends the observations in Kenney et al. (2020) by considering how the society responds to the concentration of power into a few platforms. We more directly address the implications of the monopolistic tendencies and anti-competitive effects of online platform firms and markets, that have increased in parallel with the increasing societal perceptions of economic damage and societal injury that are both a result and a by-product of the current practices of these firms.

The current efforts to regulate the platform economy reveal a renewed contestation of the balance and, more fundamentally, the nature of the relationship between public and private power. This transformation is still in its political and juridical infancy, but it raises consequential questions regarding a new era in political economic relations and development. How and to what degree should government and governmental authorities respond to platform power? What ends should government intervention pursue? Using what legal and regulatory tools? At what level of public or private governance?

There are no certain answers to these questions at present, either as a normative or as an empirical matter. We suggest in the alternative that we are at the beginning of what promises to be long, conflictual, and highly politicised processes of political economic change that will open multiple paths and possibilities of development before platform firms will be able to settle into new and reasonably predictable path-dependent trajectories acceptable to the societies and polities in which they are embedded or, rather, in which they are becoming re-embedded.

This essay identifies the emerging regulatory and political dynamics of this socio-political transformation and rebalancing of the platform economy. First, it frames the rise of and recent political responses to the ongoing dynamic of online platforms reorganising markets in terms of the 'Polanyian' double movement of political economic development. Multiple governments have initiated studies, espoused policy initiatives, introduced legislation seeking to change legal and regulatory mechanisms regarding platform firms and markets – actions which reflect an underlying struggle over the future configuration of the platform economy. Second, it then examines the substance and form of proposed legal and regulatory changes in the treatment of platform firms and markets, focusing on the EU's recent legislative proposals addressing concerns with competition in digital markets and the provision of digital services. We trace the shift in regulatory emphasis from narrow-drawn competition policy based on consumer harm to broader considerations of antitrust and a competition policy that considers market structure and the various market sides affected by the platform's power as an intermediary. This global movement suggests that recognition of the societal impact of platforms is triggering a broader and more encompassing consideration of social and economic regulation. Finally, the essay concludes with a set of observations on how the dynamics of legal and institutional change open up new possibilities for political economic and societal reordering, how the particular changes will likely vary in character and significance across political jurisdictions, and therefore follow distinctive – and possibly divergent – development trajectories.

## **The double movement of the platform economy – Polanyi in the twenty-first century**

The internet and the online platforms that it enabled emerged during the zenith of American neo-liberalism and its characteristic resistance – if not outright hostility – to the regulation of business and markets. The libertarian ideology, as characterised by the iconic phrase (often attributed to Uber's founder, Travis Kalanick), 'it's better to beg forgiveness than ask permission', illustrates the rise of a particular mindset and business model. This was complemented by the libertarian politics underlying the techno-utopianism of the early internet era. In the mid-2010s, scholars were suggesting that these various platforms were building a 'sharing economy' (Sundararajan 2017). This justified, whether naively or cynically, a *laissez faire* approach to governing the emerging online platforms, the most successful of which experienced venture capital-fueled explosive growth, increasing structural power, and rise to economic centrality that has been reflected in their extraordinary stock market valuations.

This historical arc shares significant parallels with Polanyi's account of the double movement in the rise, crisis, and eventual reform of industrial capitalism (Grabher and König 2020, Kenney et al. 2020). Viewed through this Polanyian lens, we have been living through a quarter century of the 'first movement' of an economic upheaval unleashed by a revolution in digital communications technology, data networks, and digital business platforms. Like the industrial revolution that Polanyi sought to understand, this digital revolution has had a pervasively disruptive, destabilising, and often disorienting impact on social, economic, and political affairs. It has concretized the oft-repeated words of Facebook (now Meta) founder Mark Zuckerberg that success in the platform economy requires firms to 'move fast and break things'. Consistent with Polanyi's account of historical dynamics, the 'first movement' in the development of the platform economy is one in which private interests, enterprises, organisations seize the developmental initiative and scale up often with breathtaking speed, generate and accumulate enormous reserves of political economic power, and leverage their speed and power to outpace and thwart the capacities of states to govern and regulate them effectively.<sup>3</sup> Platform firms have at times circumvented or simply ignored regulation, and have consistently deployed growing political influence to protect and advance their command of increasingly concentrated market power and control over resources (Kenney et al. 2020).

We are *not* arguing for the inherent normative or efficiency-enhancing superiority of regulatory interventions, or that the socio-political forces coalescing and mobilising against the power of large platform firms is an expression or instantiation of some sort of romantically conceived and reified 'authentic' society (Cf. Fraser 2017, p. 7). The interests underlying the growing opposition to large-scale platform firms and markets are often as narrowly economic as those of their giant antagonists. Further, it is far too early to tell what form these political and regulatory interventions will take and their consequent distribution of benefits and costs across and within societies.<sup>4</sup>

We argue, rather, that we are witnessing an incipient 'second movement' during which societal forces mobilize against the growing and increasingly concentrated power of private firms and markets by enlisting state power through economic governance and regulation. These social forces can include not only oppositional forces such as 'classes', but also business sectors and firms such as Walmart, Target, and other retailers' increasing opposition to Amazon; the *New York Times* and *Washington Post* opposing Facebook, Twitter and the like; advertising firms opposing Google and Facebook's grip on the advertising market; local car dealerships opposing Carvana, AutoTrader, and other online car platforms; ad infinitum. Not only incumbent businesses, but also other social groups and communitarian interests can crystallise ideationally and mobilise politically in opposition to increasingly dominant private firms and markets. These forces and actors drive political conflicts to subordinate and re-embed the newly dominant firms within acceptable and sustainable institutional arrangements. In short, we are witnessing the opening moves in a new struggle over the legitimation and thus the future form of the platform economy in general, and the largest, most pervasive and powerful platform firms in particular.

In Gramscian terms, firms and business models founded on new platform technologies and technologically enabled organisational forms have destroyed the old trench lines and online platform firms and their adversaries are embarked on a struggle to build new stable fortifications. In doing so, social and economic groups mobilise to enlist public authority and power in a countermovement against the growing power of platforms in the private sphere. A growth in power and centrality that the Covid-19 pandemic accelerated and amplified. This new 'second movement' not only has begun to contest what has been largely unaccountable and unconstrained private power, but also challenges the presumed contours and scope of the private sphere itself, conceived as a domain of presumptive private autonomy from public (i.e. governmental) regulation (Cf. Ford 2011; see generally OECD 1996, Graef 2016).

Figure 1 summarises the principal features of these two movements in the age of the platform economy:

**Movement 1: Managerial/Financial Control—Private Ordering**

- Expansion of platform firms & markets with the state frequently without the proper tools and/or will to regulate the dramatic changes.
  - E.g., Airbnb ignoring zoning ordinances, Amazon refusing to collect state sales taxes until it is in its interest when it announces free delivery with the introduction of Amazon Prime and thus must build a logistics network in close proximity to customers; Uber and Lyft ignoring taxi regulations.
- Transformative effects of platforms on markets, competition, firms, work, and socio-political relations.
  - E.g., Google and Facebook reorganizing music and advertising markets; Amazon reorganizing publishing, then retail sales and later logistical/delivery services; YouTube, Spotify, TikTok, and others entertainment media; labor platforms increasing the viability of remote gig work; Pinduoduo reorganizing the linkage between Chinese farmers and urban consumers; WeChat and Alipay reorganizing Chinese financial markets.
- Recursive increase of asymmetric market and socio-political power/influence of platform firms.
  - E.g., Facebook, Instagram, Twitter in determining what is acceptable political discourse; Google Search and Maps determining what can be found and, in this respect, what exists.

**Movement 2: Political/Regulatory Control—Public Ordering**

- Growing societal support & political momentum to regulate platforms in response to their growing scale, scope, and power.
  - E.g., Democrat and Republican legislators supporting the appointment of a leading platform critic to a seat on the Federal Trade Commission; local legislation regulating Airbnb; demands that Facebook and Google compensate news media for content use; Chinese government forbidding Chinese payment and transaction platforms from demanding merchants exclusivity; EU investigations and fines of Google Search for self-preferencing; US court ruling that Apple cannot exclude other payment alternatives in apps downloaded in Apple Appstore; Indian government regulatory action against Amazon and Walmart-owned Flipcart sales platforms requiring that they chose whether they will make direct sales to consumers or operate as marketplaces for sellers.
- Expansion of regulatory control over platform structure & conduct—reassertion of the primacy of politics.
  - E.g., Chinese government blocking the Ant Financial IPO and demanding that it and WeChat Pay register as banks; European Commission introducing the DSM and DSA as legislation.
- Re-embedding of platforms in broader social and political relations.
  - Intensifying debate over potential regulation and sanctions for online “fake news,” disinformation, and harassment.

**Figure 1.** Double movement of the platform economy.

The platform economy has always harboured a fundamental contradiction between the ideal of an open and unfettered domain of freely flowing information and communication idealised by Yochai Benkler (2008), and the pattern of monopolistic dominance that is often the case in network industries that experience powerful externalities – an outcome achieved as platform owners come to dominate the various functionalities that have become essential facilities or infrastructure in twenty-first Century economies (Plantin et al. 2018).<sup>5</sup> From the ‘Wintelist’ duopoly of



the Microsoft OS running on Intel's chips (Borrus and Zysman 1997), to the later ascendance of online platforms designed and controlled by Amazon, Apple, Facebook, Google, and Microsoft, along with various vertical platforms that become powerful arbiters in their narrow sectors, the brief history of the digital network era is one of increasing concentration of technological and economic power under private corporate control (Pasquale 2015, Zuboff 2018). This self-reinforcing concentration of market power underpinned the growing dominance of new forms of economic and social organisation that rivalled and increasingly displaced those of the analog industrial era (see, e.g. Van Dijck et al. 2018).

The power wielded by these increasingly powerful platform firms derives from both their distinctive structural characteristics and from the largely passive (and, in important ways, enabling) stance of governments in eschewing regulatory oversight and intervention.<sup>6</sup> Left to the private ordering of platforms and platform markets, the most successful platform firms expanded in scale, scope, and power through the *technological design* and architecture of their digital platform technologies and the remarkably unconstrained *legal design* of their contractual relations. These firms have deliberately constructed platforms that create two-sided (or multi-sided) markets in which they linked together and mediated vast webs of commercial relationships between buyers and sellers, vendors and consumers, and firms in different sectors – all of whom became increasingly, if not entirely, dependent on the platform (Pasquale 2015, Cutolo and Kenney 2020, Cutolo et al. 2021, see generally Rochet and Tirole 2003).<sup>7</sup>

The distinctive and peculiar interaction of technological, contractual, and physical characteristics of platform firms endowed them with additional (anti-)competitive advantages over their various categories of users and over legacy brick-and-mortar firms. As these firms digitally automated their mediation among platform users, they effectively insulated themselves from risk exposures that traditional firms could not shed (Parker et al. 2016). For example, platform firms can structure themselves to avoid taking physical possession of goods, and dictate the contractual terms under which they do – entirely at their discretion. Likewise, platform firms can position themselves contractually to shield themselves from legal responsibility for services purchased on their platform other than those involved in mediating and linking the various parties.<sup>8</sup>

Although this protective structuring is not absolute, platform firms have insulated themselves far more effectively than traditional firms from a wide array of legal risks and potential liabilities, including those under consumer protection, intellectual property, product liability, and labour and employment law.<sup>9</sup> Likewise, in their capacity as informational intermediaries, they may also shield themselves from potential liability for tortious and criminal behaviour conducted by third parties on their platforms. Further, due to their central role in the mediation of online transactions and relationships, platform firms have vast advantages in accumulating, analyzing, and commodifying data for their own use and for sale of either the data or insights gleaned from the data to other parties. Finally, and perhaps most vital, the powerful network effects of online platforms not only underpin and magnify all these economic advantages, they also create winner-take-all dynamics that define the incentives of the managers and financiers of platform firms and drive the monopolistic tendencies within the platform economy (Rahman and Thelen 2019).

Under conditions of governmental unwillingness, or prevailing political inability, to impose regulatory constraints on the structure, operation, or growth of platform firms and markets, the economic and juridical advantages enjoyed by platform firms enabled their explosive and monopolistic growth patterns (Kenney et al. 2021). The concentrated market power of the platform owners has been seen by some to constitute a failure of state (Khan 2016). Despite a series of enforcement actions brought against major platform firms by the EU's DG Competition, competition law and enforcement authorities – often hobbled by the interpretive purview of skeptical and hostile EU courts – revealed the inadequacy of the political and legal status quo to constrain either the market power or growth of platform firms.<sup>10</sup>

If the first Gilded Age (ca 1880–1929) was based on coal, oil, steel, and large-scale integrated industrial firms, the present one is based upon the processing power, storage, and communications



made possible by semiconductors and networking equipment, but the true value capture is farther up the digital stack in the software and the applications that intermediate and structure users' economic and social interactions. In each case, increasing returns to scale and the power of new forms of corporate and market organisation short-circuited competition and undermined the ideology of self-regulating markets on which governmental passivity relied. Between 2019 and 2020, the regulatory politics with respect to platform firms and markets reached an inflection point globally. Scholars will no doubt debate the precise timing, causes, and substantive character of this political shift from an internationally pervasive *de facto*, and often *de jure*, norm of permissive restraint regarding the conduct and growth of platform firms to one of increasingly far-reaching regulatory scrutiny and intervention. But the shift towards regulation in the context of platform firms and markets is as undeniable as it is dramatic, highly visible, and increasingly politicised. To understand the possibilities for regulatory politics, we must look to regulatory tools and forms available in the platform economy.

### The regulatory trajectory: from competition to socio-economic regulation?

The growing pervasiveness, disruptiveness, and influence of online platforms have drawn scrutiny and increasing criticism in the U.S. and Europe during the past decade (Newman 2015, Khan 2016, Pike 2018, Todino et al. 2019, Suominen 2020). However, with the notable exception of concerns regarding privacy rights and personal data, regulatory debates regarding platforms were almost entirely framed in terms of competition policy and law. Consequently, the debate focused on both the *market expansion* and far less upon the ever-expanding *market power* of platform firms. This may be considered the 'old' regulatory debate with respect to platforms, markets and firms, which remained premised on and largely limited to the ideal of market competition, lower prices for consumer, and continued largely intact as a matter of public discourse and policy through the first two decades of the twenty-first century. As vast platform firms and markets came to dominate a rapidly growing share of the economy, the warning Frank Pasquale issued in 2015 had become reality:

a few giant firms with a viselike grip over the very marketplaces where their competitors would need to succeed in order to thrive. Antitrust law flirts with irrelevance if it disdains the technical tools necessary to understand a modern information economy. (Pasquale 2015, p. 162)

With astonishing speed, this competition-centred framing of the regulatory debate has been displaced and decades of competition law orthodoxy challenged by a broader and more comprehensive conception of online platform regulation. This change is epitomised in Lina M. Khan's (2016) path-breaking article on the antitrust issues raised by Amazon's growth strategies, which has been widely credited for inspiring this fundamental rethinking and upheaval of competition and antitrust law and policy as applied to online platforms (See also Khan 2019). The new regulatory debate reflects a widespread and deep transformation in public opinion and among political elites around the world as unease has grown with respect to platform firms and markets. If the central question of the old debate was whether competition law should be strengthened in response to platforms' growing market power, the new debate that is crystallised over the question of what expansion of multiple areas of regulation and governance are necessary to address the pervasive and complex economic, social, and ultimately political significance and effects of online platforms.

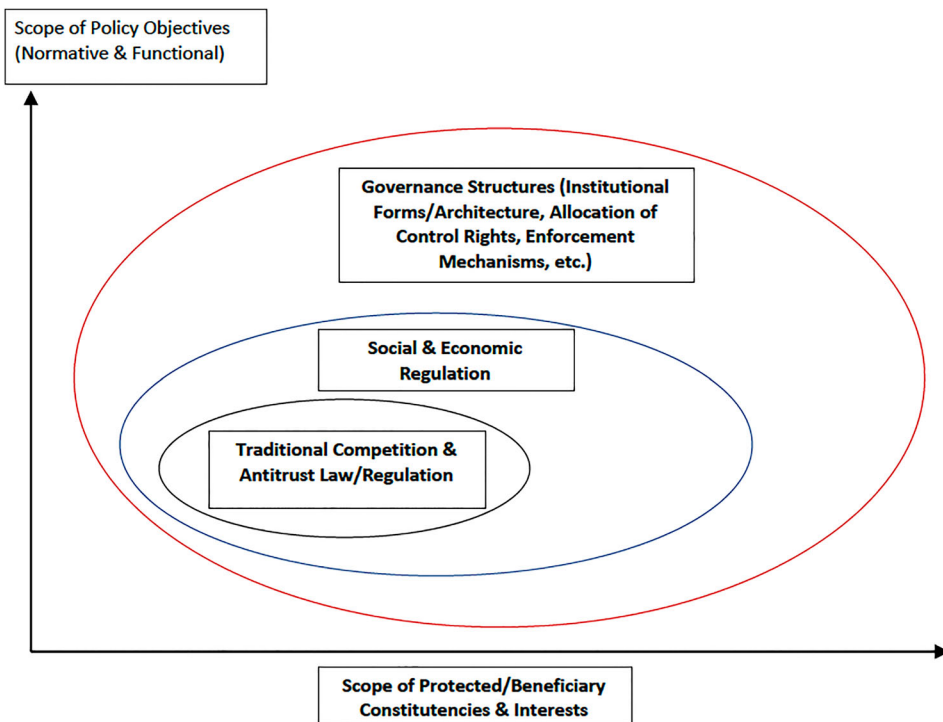
To understand the importance of this change and regulatory politics one must examine more closely the relationship between competition policy and law, on the one hand, and socio-economic regulation more broadly speaking, on the other. Competition (or anti-trust) law has been a narrow and limited subcategory of economic regulation, and one biased towards market mechanisms, private ordering, and minimal governmental intervention into the private sphere. The limitations of contemporary competition law are by now deeply entrenched in legal doctrine and jurisprudence, with liability contingent on evidentiary findings of market dominance and harm to consumer interests narrowly defined in terms of market prices. As a form of regulation, competition law is generally

characterised by *ex post* case-specific enforcement, either fashioned by or subject to the far-reaching review of courts, i.e. ideally suited to a 'beg-forgiveness' business strategy.<sup>11</sup>

In online markets, the assumption by entrepreneurs is that by the time regulators question their actions the market will have tipped and there will no longer be alternative firms or paths. This business logic is ideally suited for a regulatory logic based on *deterrence* of harmful behaviour by the risk of later enforcement action and/or civil liability, undercut by the delays in enforcement and uncertainty over the applicable legal rules. Likewise, legal remedies in competition anti-trust law are case-specific and tailored in *ad hoc* fashion with respect to specific firms and markets, leaving maximum latitude for the firm-driven private ordering of corporate and platform structures and practices. In short, competition law is the form of regulation well suited to the neoliberal financialised political economy and perfectly suited to the expansion of platform firms that simply pay deterrent threats such as large fines, but retain their centrality in the now 'tipped' market.

In contrast, the broader domains of social and economic regulation are commonly typified by *ex ante* proscriptive and /or prescriptive rules of general application governing widely varying categories of behaviour in order to *prevent* categorical forms of harm. Whereas competition law is narrowly concerned with the actions of firms abusing their market power, social and economic regulation beyond competition law recognises and addresses a broader range of economic and non-economic interests, values, and constituencies. Regulation in this broader sense not only implicates the interests of a wider array of social, economic, and political constituencies, it may also embody rules and deploy enforcement mechanisms that explicitly or implicitly override or displace market mechanisms. Accordingly, the movement of regulatory politics and debates beyond competition policy in law represents a categorical shift in the relationship between the private sphere of the economy and the public sphere of politics, law, and the regulatory state.

The relationships among different forms of regulation in government in highly abstract and simplified form is illustrated in [Figure 2](#). Essentially, there are two scope dimensions. The first represents



**Figure 2.** Relationships among forms of regulation and governance.

the scope of normative and functional objectives of policy. The second is the range of groups and interests recognised politically and juridically within regulation. Several implications flow from the broadening of each scope condition. As the subject matter and normative concerns of regulation expand, the greater the number of constituencies and socioeconomic groups become swept up and involved in regulatory politics. It follows that the politics of regulatory change and reform only becomes more complex, it also potentially becomes more indeterminate and uncertain with respect to the outcomes in terms of legislation and regulatory rules.

## The European Union's platform regulation proposals and the double movement of regulatory expansion

The European Union's proposed Digital Markets Act (DMA) and Digital Services Act (DSA), officially released simultaneously in December 2020, if enacted as drafted, would represent the furthest reaching expansion of platform regulation in the OECD nations to date. At present, it is the clearest indication of how policy debates in Western nations over platform power have shifted towards regulatory intervention. Although, at this point, China appears to be the leader in addressing platform firm power (European Commission 2020a, 2020b, Jia and Kenney 2021, McKnight et al. 2021), the formal legal character of the EU regulatory package is likely to have more influence in countries and rule-making bodies dependent upon Western legal traditions. Further, despite recent legislative and regulatory initiatives in the U.S., the continuing political dysfunction and the increasingly conservative and anti-regulation tilt of the federal courts make the ultimate outcome of these efforts less clear than in the EU. Accordingly, the DMA and DSA are positioned to have an outsized international influence over the burgeoning debates over platform regulation and governance owing to the size of the European market, their regulatory form, early-mover advantages, and relative coherence of legislative and regulatory processes in the EU and its member states.<sup>12</sup>

The broad contours and formal characteristics of these EU's DMA and DSA regulatory proposals indicate the emerging political and institutional dynamics of political change and regulatory upheaval surrounding online platforms. The DMA revises EU competition law, but also departs from the established structure and judicial doctrines of competition law in several ways. First, it establishes quantitative criteria to designate large platform firms as 'gatekeeper' platforms subject to the terms of the act and therefore to heightened scrutiny (European Commission 2020a). In contrast to the existing state of competition and antitrust law, these gatekeeper firms *do not have to be shown to have achieved market dominance* before the terms of the act apply to their structure, practices, and behaviour (European Commission 2020a). Likewise, *all* mergers and acquisitions conducted by gatekeeper firms are subject to review by the EU competition authority. (European Commission 2020a, Chap. 1, ¶ 31, Chap. 5, Art. 1, ¶¶1–3) Finally, financial penalties for violation of competition law by gatekeeper platforms are calculated on the basis of the firm's global turnover (European Commission 2020a, Chap. 2, Art. 3, ¶¶2(b), 6(a)), rather than through the more laborious and difficult process of calculating economic damages that is typical under extant competition and anti-trust law. Indeed, these departures from the classic competition and anti-trust law paradigm are sufficiently significant such that competition authorities in the EU do not regard the DMA as part of the competition law, but rather as a distinct and ancillary body of regulation – a striking display of legal formalism and avoidance of cognitive dissonance among regulatory professionals who have internalised much of the normative framework of competition law grounded in neoclassical law and economics. Resistance to substantial deviations from established competition law doctrines within DG Competition resulted in DG Connect taking the lead in drafting the DMA and the proposal's striking silence regarding which directorate of the Commission will have responsibility for enforcing its terms.

That said, however, there are striking *omissions* in the substance of the DMA that call into question the efficacy of competition law in curbing platform power, and that may spur further expansion of administrative regulation over platform firms and markets. First, the DMA contains no substantive

strengthening or other alteration of *merger review* procedures or standards. Consequently, the single most effective way in which platform firms achieve and perpetuate market dominance and expand their market power, and arguably the most injurious to competition and technological innovation, remains unaddressed. In addition, the DMA contains no provisions expanding the discretionary authority to impose structural remedies (e.g. breaking up dominant firms, delimiting markets in which they can operate, or revising the contractual terms imposed on consumers or weaker firms) beyond those already permitted by existing law. Given that the status quo in terms of competition law remedies has proven inadequate and left EU regulators reliant on demonstrably ineffective monetary sanctions, the failure to include more expansive structural remedial powers in the DMA calls into question the effectiveness and primacy of competition law as a mode of regulating and policing the power of platform firms and markets.

What makes these omissions particularly important in the assessment of the likely trajectory of continued expansion of platform regulation is that merger review and structural remedies are the most 'regulatory' aspects of the classical competition law paradigm. They intervene most directly and displace most completely the private ordering of contractual and market relations. If effective constraints on platform power cannot be achieved and maintained through the reform of competition law, the political forces generating this wave of regulatory expansion over platform firms and markets – which show no sign of abating – are more likely to be channelled into building up regulatory law *outside* of competition policy. In sum, the current substantive and organisational limits of EU competition law and its enforcement indicate that the ongoing double movement of public authority to limit and control the private power embodied in platform firms and markets is increasingly likely to take the form of comprehensive prescriptive regulation rather than competition law – a path that China is already taking (McKnight et al. 2021).

If this is the case, then it follows that the DSA, a more quintessentially regulatory piece of legislation, is more likely the shape of things to come in the EU when we look to the future of the substantive terms of platform governance and regulation. The DSA is both broader in coverage and its normative provisions are immediately applicable to a wider array of platforms than those of the DMA. Moreover, the DSA is more uniform in its approach than the DMA, eschewing distinctions among platforms of different types and scales, and targets specific forms of platform *behaviour*. In this sense, the DSA, like other bodies of socio-economic regulation, covers a broader array of regulated entities, behaviours, and substantive normative concerns than does competition law and the DMA. Likewise, the form of legal rules promulgated by the DSA diverges from that common in competition law. Whereas competition law tends to take the form of the application of broad abstract principles *ex post*, the regulatory approach of the DSA contains a large number of more precisely drafted and detailed *ex ante* prescriptive and proscriptive rules of general application. Among the more expansive range of policy objectives embodied within the DSA are consumer protection; personal privacy; the prescribed modes of handling personal and financial data; and the transparency of the platforms' contractual terms, conditions, and market practices. In comparison with competition law and the DMA, the DSA is drafted to address a wider array of market failures, and to recognise and protect explicitly non-economic interests and values.

Following from the above observations, we infer that EU regulatory politics with respect to platform firms and markets has begun to pivot away from competition policy in favour of more comprehensive regulation, and that this movement has both functional and institutional causes. The regulatory approach, particularly when compared with the post-Chicago School orthodoxy that has become dominant in competition law, appears increasingly attractive for purposes of practical efficacy and political control over policy, substantive law, and enforcement. Relying more on administrative regulation serves the goals and ambitions of political elites seeking not only to constrain platform power, but also to retain more control over policymaking and its implementation and enforcement. This has become an increasingly salient concern in light of the limited success of competition authorities in addressing concentrations and abuses of market power by platform firms and the frustration of enforcement efforts by courts, particularly the European Court of Justice, which has

shown itself to be ideologically captured and manifestly hostile to the more stringent enforcement of competition law. Administrative regulation by definition confers, at a minimum, a degree of discretionary authority and power onto governmental officials (See generally Bernatt 2016). The consequent limitation on the power of courts is itself a justification and rationale for the expansion of formal regulation and the regulatory state under conditions where the ideological or jurisprudential position of the courts is an impediment to the development and implementation of social and economic policy.

Socio-economic regulation also confers functional advantages over a narrower emphasis and reliance on competition policy and law. Controlling the behaviour of platform firms through regulation offers the possibility of addressing market failures or the complete collapse of market competition with measures short of the extraordinary and possibly disruptive remedy of breaking up platform firms or the continued reliance on ineffective *post hoc* monetary sanctions. Finding such regulatory alternatives to effectively constrain platform power becomes particularly imperative – but also particularly difficult – *when the platform is the market itself*, and that increasing returns to scale and centralised coordination and control of such a monopoly market is intrinsic to the benefits created by the platform.

Administrative regulation may be the legal modality and institutional structure best suited to address the novel problems posed by the new organisational form of the online platform. The uniformity of *ex ante* rules and their general application creates a level playing field on which all market participants must play and to which they must conform. In this respect, however, regulation may become a double-edged sword. On the one hand, the uniformity of regulatory rules and their broad applicability should reduce opportunities and incentives for platform firms to engage in regulatory arbitrage endowing them with economic advantages unrelated to productive activity. On the other hand, however, the broader imposition of increasingly detailed and complex *ex ante* regulatory rules across-the-board to all economic actors or firms regardless of size may also have the practical effect (perhaps by intention and design) of becoming a barrier to entry warding off would-be competitors via the increased costs and other associated burdens of regulatory compliance. However, underlying the tactical and strategic struggles for structural and positional advantage that accompanies any and all conflicts over significant legal change, a shift from a primary reliance on *ex post* review of private transactions and conduct to *ex ante* regulatory prescription and proscription also represents a Polanyian countermovement away from a default position in which private ordering is the assumed baseline for legitimate economic activity to one in which state-mandated norms and constraints take precedence in an expanding number of domains.

## Regulatory politics and political realignments

The most visible signs of a critical shift of the regulatory paradigm and politics surrounding platform firms and markets emerged first outside the US. The European economy at the national and EU levels has few, if any, powerful home-grown platforms, the ranks of which are dominated by US firms. As a consequence, platforms are less politically influential in European politics at the national and EU levels than incumbent firms and other interests threatened by the growing economic power of foreign platforms. Similarly, as indicated by the far more extensive and effective regulatory efforts by European and EU authorities to protect online privacy and personal data, European politics appears less captured by corporate interests and by platform firms in particular than is the case in the US. Finally, the EU may encompass a sufficiently large market and wields enough geo-political and legislative power to resist anti-regulatory pressure from even the US and its powerful platform firms.

The DMA and DSA, as proposed, also raise important and potentially disquieting questions regarding the future regulatory policy and politics around online platforms. As the scope of regulatory concerns and objectives embodied in legislation and rule-making widens, a growing number of constituencies, social groups, and substantive interests have begun to interpose themselves in the

intensifying regulatory politics engulfing platforms. This opens the way for more complex, divisive, and potentially unpredictable policy and legal outcomes. Different regulatory forms appeal to different constituencies. Competition law—and its limits—may appeal to firms within platform ecosystems and investors such as venture capitalists. Businesses dependent upon platforms may favour initiatives that do not threaten the existence of the platform, but rather shift the balance of power between them and the platform. Other constituencies and societal groups, ranging from organised labour to racial or ethnic minorities to social activists of many stripes, with interests and core values not served by, or contrary to, market competition frequently favour social regulation to advance their economic and non-economic agendas. Yet, as the number of groups, interests, policy ends and tradeoffs, and competing political agendas grows within regulatory politics, the number of possible alliances, coalitions, and outcomes also increases. This also means that policy and regulatory outcomes become more uncertain and unpredictable – at least during the initial phases of regulatory expansion.

The new regulatory expansion not only represents a transformation in the form and substance of rules, but as the outcome of politics, in a Gramscian sense, it also constitutes new political terrain on which fierce and consequential struggles for power, wealth, and competitive advantage will be fought. As suggested above, regulation can serve as both a sword and shield – for the state, for constituencies and interests protected under law, and for platform firms themselves. State actors, political parties, managers and financiers of platform firms, and other powerful political economic actors and groups will manoeuvre strategically against and with one another in regulatory politics and administrative rulemaking. Certain regulations may benefit specific platforms over others and also non-platform competitors. The potentially beneficial and injurious effects of regulation are likely to induce ever-greater mobilisation of businesses and lobbying groups with stakes in the outcomes of these regulatory battles.

Given the enormity of the stakes, the new regulatory politics and expansion of regulatory intervention into the platform domain, we have already begun to see changing strategies and tactics by the most powerful platforms seeking to use regulation to their own advantage with respect to one another. For example, Google quickly moved to cooperate with the Australian government in the latter's move to force platforms to compensate media sources for platform links to their published material, and used this stance against Facebook's notorious – and successful – oppositional bullying of the government (Morrison 2021). Microsoft has supported similar regulatory proposals in the US as a way of attacking Google (Soper 2021, Warren 2021). The new regulatory politics of platforms will produce shifting alliances (often of odd bedfellows) and new conflicts among powerful firms that previously have been jointly opposed to governmental oversight and intervention into their affairs. This transformed political and legal terrain will drive the mobilisation of new groups and political actors, along with their shifting configurations inside and outside of party politics and formal legal processes.

The actions taken by governments globally suggests that we may be in the initial stages of developing a new era of the platform economy characterised by increasing efforts to control some its features. The emerging political and policy dynamics will reshape the political economic and character of platforms, and some features of the economic and legal relations among nations. Different countries have already begun to adopt divergent approaches to the platform regulation. The EU's proposed legal framework for platform regulation may have some first-mover advantages, even though, there is much talk about harmonious development (EU-US Trade and Technology Council 2021) it is possible that EU decisions could embroil it in an intensifying international conflict with the US over the form and substance of such regulation. These conflicts may fuel tensions and trade-offs involving regulatory uniformity and divergence.

These trade-offs pose larger questions of whether the emerging regulation of platform technologies and organisational forms, i.e. those most capable of spanning borders and taking on a truly global scale, will result in a countermovement leading to an increasing Balkanisation of the digital realm that mirrors the political divisions and boundaries of territorial sovereignty (including



'pooled sovereignty' in the case of the EU) (Floridi 2020). It also is an emerging and politically constructed terrain of conflict over the relative power of platforms and states. The struggles over the institutional and substantive regulatory contours of this new terrain will constitute new actors, new interests, and new political economic alliances and coalitions that will shape and reflect who benefits from regulatory uniformity and fragmentation.

## Conclusion

These are the early days of a great regulatory transformation of the platform economy. As such, it is an era fraught with conflicts, tensions, and profound uncertainties – as was the rise and crises of the industrial era. The regulatory expansion that is just beginning to emerge is displacing a neoliberal ideology that has been in deep crisis for at least a decade and is filling the vacuum of governance and legitimation that has formed at the core of contemporary capitalism. The regulation of platforms is an essential, if not primary, aspect of the re-embedding of platforms within social, political, and legal frameworks that make productive, equitable, and sustainable economic relations possible. The pronounced turn in policy debates and legislative politics towards exploring and clarifying the dangers to the larger social order posed by the platform firms and markets is an initial counter-movement to displace the neoliberal primacy of private ordering and to subordinate competition policy and law that privileges markets and contracts. The reassertion of a broad range of societal interests – from the material and economic to the communitarian and solidaristic – over the constant drive by platform firms to grow and integrate ever greater swathes of the economy could re-embed these platform firms and the markets they control within mutually constitutive social and political relations or, more radically, understand these platform firms as infrastructure that is so vital that they should be publicly owned or operated in the manner of public utilities subject to direct and intensive governmental control.

The political settlements and juridical frameworks that emerge out of struggles to define the era of the platform economy will vary across societies, polities, and governmental systems – just as industrial capitalism took different forms during the nineteenth and twentieth centuries. And despite the deep and inescapable uncertainty surrounding the long-term outcomes of these dynamics, all indications suggest that governments around the world will initiate state and regulatory responses that are likely to increase as platforms intermediate ever-greater swathes of the economy.

## Notes

1. For a comprehensive overview of how platforms operate, see generally Cusumano et al. (2019). Our concern here is with the online platform firms and markets that have achieved market power and dominance over ever-larger parts of the advanced economies. Thus, we do not consider offline platforms, such as, Windows or other PC software, as the business activities we study, though clearly Windows was a platform and Microsoft's use of it to control the PC industry was a direct precursor to today's online platforms. The core of these giant online platform firms are business-to-consumer and peer-to-peer platforms, as opposed to business-to-business platforms that may use proprietary networks and often occupy narrow market niches. (Cf. Sturgeon 2019). Likewise, we regard 'gig economy' firms such as Uber, Lyft, and Airbnb as of marginal importance in the platform economy, as they appear almost entirely dependent on regulatory evasion and arbitrage, and have not demonstrated that their business models are sustainable.
2. Skepticism and frustration with competition policy and law is neither new nor novel (Kovacic 1989, pp. 1105–6). For a collection of more recent essays criticising the influence of the *laissez faire* Chicago School of economics on antitrust law and adjudication, see Pitofsky (2008).
3. In contrast, Caporaso and Tarrow (2009), perhaps the leading Polanyian analysis of EU policy, argue that the market is *always* embedded in broader social relations and values and that the case law of the European Court of Justice addressing the free movement of labour within the EC and EU consistently reflected and embodied this embeddedness even prior to the Maastricht Treaty and the Single Market Act.



4. Indeed, we are mindful that, far from inherently beneficent, Polanyi's 'second movement' against the material and moral ravages of laissez faire took a variety of forms that, in addition to social democracy and Keynesian liberalism, included authoritarian nationalism and fascism (See, e.g., Lim 2021; see also Fraser 2017, p. 7).
5. While we recognise the importance of techno-economic phenomenon such as network externalities and winner-take-most/all outcomes, this explanation entirely ignores the importance of mergers and acquisitions that these firms have used to dominate markets. For example, as Figure 1 in Kenney et al. (2020) indicates Amazon's global expansion was often predicated upon the acquisition of global competitors, a strategy that was, in part, made possible by the easy access to capital characteristic of highly capitalised and liquid US capital markets with the capacity to finance highly speculative investments and large-scale M&A activity. Accordingly, regulatory review of mergers and acquisitions is likely to become an increasingly crucial means of regulating and governing the platform economy.
6. To illustrate, the US, in particular, allowed platform firms such as Google, Facebook, etc. to use copyright-protected content under generous fair use provisions, expressly insulated them from legal liability for potentially illicit content posted by users, and generally refused to recognise user rights to data and online privacy (Chander 2014). In both the US and EU, permissive legal doctrines and weak enforcement of competition law allowed the largely unfettered growth and market dominance of platform firms and their expansion into new markets.
7. In addition, the United States Supreme Court has ruled that the ability of platform firms to construct such one-sided contractual frameworks in furtherance of firm expansion, market concentration, and rent-extraction was outside the scope of antitrust liability unless *both* sides of a two-sided market, e.g., third-party vendors *and* their buyers, are harmed by the contractual terms and practices. See *Ohio v. American Express Co.* (2018a).
8. This observation is true in nations that have adopted Western jurisprudence, but may not be applicable to China, for example.
9. This insulation from legal obligations and liability derives from both favorable statutory and formal regulatory rules, in addition to strategically designed contracting and corporate organisation. Formal legal insulation and immunisation has been particularly pronounced in the U.S., but the EU and many of its member states have carved out legal protections and 'safe harbors' for online platform firms. (See generally Chander 2014; Verbiest et al. 2007; Peguera 2009) Of course, one should also recognise the decades of substantial sales tax advantages granted online sellers under federal law in the U.S. prior to the Supreme Court's decision in *South Dakota v. Wayfair, Inc.* (2018b), which opened the way for states to require online retailers to collect sales taxes on their behalf.
10. Notably, despite an enforcement record that failed to alter the core business models and anti-competitive strategies of dominant platform firms, the EU competition authorities with their large fines assessed against these platforms, have been far more interventionist in their attempts to enforce competition law compared to the quiescent passivity of US antitrust authorities in the Federal Trade Commission and the Department of Justice.
11. Although competition law contains *ex ante* procedures as well, most importantly in the area of review and assessment of mergers and acquisitions. These review processes are more classically 'regulatory' in form and function, but in recent decades have either been undermined by prevailing politics and jurisprudential paradigms, or have simply been inadequate and unequal to the challenges posed by platform firms.
12. For a general treatment of the EU's global influence over regulatory policy, see Bradford (2020, p. 99).

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