



Insight

Continuing a Principled Approach to Antitrust

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Executive Summary

- Yesterday’s hearing with the CEOs of some of the largest tech companies demonstrated a desire among many in Congress to use antitrust laws to regulate the tech industry.
- Examining alleged antitrust behaviors should undergo appropriate scrutiny with a focus on issues of harm to consumer welfare and the impact on the competitive market.
- Many of the concerns policymakers express regarding tech companies’ actions are not related to competition policy at all and would not be solved by antitrust enforcement.

Introduction

Yesterday, the Antitrust, Commercial, and Administrative Law subcommittee of the House Judiciary Committee [held a hearing](#) with the CEOs of Amazon, Apple, Facebook, and Google as part of an ongoing committee investigation of online platforms and market power. The hearing—titled “Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google”—was the latest indication of the desire of many in Congress to use antitrust laws to regulate tech companies.

Yet this hearing did not clearly indicate that policymakers’ concerns are properly considered a competition-related issue. While concerns about potentially anticompetitive behavior may exist, any enforcement efforts should focus on competition related issues and apply the objective consumer welfare standard rather than seeking to politicize antitrust or use it for policy goals to which it is ill-suited.

Analyzing Antitrust Arguments Against Big Tech

While many of the questions focused on issues unrelated to competition policy, some members of the committee did express various concerns about potential anticompetitive behavior particularly around acquisitions by the companies and their alleged dominance in certain markets—issues that are squarely within the purview of antitrust law. When examining such concerns, policymakers should take a principled approach to carefully consider if alleged consumer harm is occurring and to fully understand the market. These considerations provide useful context for concerns about the largest tech companies.

The largest technology companies operate in complicated and rapidly shifting markets, many times competing each other. As [NetChoice’s Chris Marchese illustrates](#) in a recent white paper, the emergence of an online ad market has lured new players, including Amazon, and lowered the overall prices for advertising in a way that benefits those advertisers. Market definition will be a critical point of debate in any antitrust analysis and will also need to show the dominance and unfair use of that dominance by a company. In many cases, an assessment

of this dominance may be overly narrow, such that it misses competitors on a global or national level, or overly broad, such that it misses the hyper-local nature of competition for a service.

In some cases, these allegations of dominance or anticompetitive behavior may miss the competitive benefits of new markets. For example, the explosion of smartphones and mobile apps has brought with it an entirely new and dynamic market in which app stores attempt to improve consumers access to these products. Developers can now create products for a range of platforms that often compete with one another. App stores have helped facilitate this rapid growth, as a [study from ACT \(The App Association\)](#) and [Deloitte](#) found that app stores had reduced transaction costs and barriers to entry and improved competition.

Similarly, some members of Congress also raised concerns that tech giants might have created a “kill zone” in which companies acquire potential competitors to choke out new competitors before they can challenge their dominance. The reasons for such [acquisitions are often complicated](#), and some startups see their ultimate goal as to be acquired. The [Center for Growth and Opportunity’s Will Rinehart](#) argues that acquisitions by large tech companies are far from a “kill zone” and actually present a “cultivation zone” by providing more exit strategies in the innovation and startup lifecycle in ways that can encourage improvements, investment, and continue the lifecycle of innovation.

When examining the alleged antitrust behaviors of successful firms, policymakers should take an objective approach considering if these actions are actually harming consumers or abusing market power within a clearly defined market. To merely presume “big is bad” would mean a return to an [earlier era of antitrust](#) enforcement that could deter success and create uncertainty, particularly in dynamic markets.

Policymakers’ Concerns about Tech Are Not Solved by Antitrust

During the hearing, policymakers directed many questions to the CEOs that were not related to the competition concerns antitrust is designed to remedy. These concerns included comments and questions about everything from perceived political bias, geofence warrants, cancel culture, the use of forced Uighur labor by the Chinese, and improving diversity in tech and leadership roles. While many of these are worthy issues, such policy concerns would not likely be resolved by changing antitrust law.

One common line of questioning concerned content moderation. In fact, Rep. Matt Gaetz criticized YouTube for removing a video claiming that hydroxychloroquine effectively treats COVID-19 and Rep. David Cicilline criticized Facebook for not removing the same video quickly enough. This dichotomy shows the difficulty faced in content moderation decisions. But regardless of whether policymakers believe there is too much or too little content moderation, antitrust remedies will not be able to solve the problem. In fact, breaking up tech companies could make the task of content moderation more difficult as [smaller companies would have fewer resources](#) to invest in content moderation. These debates over content moderation also apply to smaller platforms who similarly face criticism over such decisions. The diversity of decisions in content moderation between platforms such as Google’s YouTube and Facebook could actually be seen as a sign of the competitive nature of the market. Using antitrust law to dictate the speech platforms must carry or remove would represent a dangerous opening to the politicization of antitrust law.

Many of the other issues brought up were even further afield of the questions of competition. At times, members of Congress questioned the decisions of companies not to pursue certain military contracts. There is no guarantee that a smaller company would not arrive at the same conclusion when facing similar internal pressure from employees. Commitments from the CEOs on issues such as improving diversity and ensuring that they are

not using forced labor in their supply chain are laudable, but again, far from the competition issues for which antitrust is a remedy.

Antitrust Law Still Works

To utilize antitrust law to solve problems unrelated to competition would be to fundamentally reshape U.S. antitrust law. Most of the [comments submitted](#) to the committee from a wide range of scholars show a general consensus that the current standards for antitrust are fair and able to serve the purposes of antitrust law. This general consensus reflects the [conclusion of the Antitrust Modernization Commission](#) during the Obama Administration that found, “There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.” Maintaining the current standards allows competition and innovation to continue to flourish without unnecessary government intervention and its potential consequences. As subcommittee Ranking Member Rep. Jim Sensenbrenner stated during yesterday’s hearing, “Congress does a poor job picking winners and losers. I have reached the conclusion that our antitrust laws work and do not need to change.”

Further, changing antitrust laws would intervene in a currently competitive and dynamic market. To see how rapidly technology changes, one need only consider that not long ago similar claims of unassailable dominance were faced by companies such as Blockbuster, AOL, and MySpace that now rest in nostalgia. As the CEOs at yesterday’s hearing all pointed out, technology and innovation are quintessentially American values and enable other entrepreneurs to better serve their consumers.

Not only do current antitrust laws work for dynamic markets, any changes to these laws could have consequences on numerous markets beyond technology and open the door for the use of competition law for more political purposes. Antitrust action based on either an incomplete analysis or a non-competition issue could prevent consumers from receiving the benefits of acquisition and could spread to other industries that might one day find themselves the subject of political ire. To ensure the U.S. economy remains a leader in innovation—in other words, to ensure that competitors to the largest tech companies can emerge—it remains critical that competition policy and antitrust enforcement remain reserved for their intended objective purposes.