Insight

Examining Recent House Antitrust Reform Proposals

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0Executive Summary

- House Democrats last week introduced a five-bill package of antitrust reform legislation targeting large tech companies; the package would dramatically change the American approach to antitrust law by shifting the focus away from consumer welfare to a presumption that certain actions by big companies are inherently anti-competitive.
- Broad, regulation-heavy antitrust reform is likely to have far-reaching consequences on the economy by stifling innovation and weakening U.S. competitiveness in the global tech industry; such a sweeping shift is also likely to harm consumers.
- Antitrust law serves an important role by ensuring a competitive market, but it should continue to focus on consumer welfare rather than being used to achieve other policy goals or intervene into a currently competitive market.

Introduction

Last week, several Democratic members of the House Judiciary Committee introduced a package of proposals that would change the United States' approach to antitrust law. These proposals target "Big Tech" companies including Facebook, Apple, Google, and Amazon that were the subject of a 15-month investigation into digital platforms by the House Judiciary Committee in 2019 and 2020. The impact of many of these proposals could extend beyond the targeted tech companies, however, as it appears the changes would apply to any company with the specified number of users and market capitalization. Looking more systemically, these proposals represent a dramatic shift in the approach to antitrust law, and as a result they should be closely examined. While these bills have been championed by the committee's Democratic members, the package also has some bipartisan support from several of the committee's key Republican members including Antitrust Subcommittee Ranking Member Ken Buck (R-CO).

This piece considers three of the package's proposals that are likely to have the most significant impact on the U.S. approach to antitrust policy. A forthcoming piece will discuss the package's proposal targeting data portability and interoperability and its complicated relationship with competition and privacy. The package's remaining proposal, Merger Filing Fee Modernization Act, increases fees for higher value mergers to provide agencies with more enforcement resources.

Key Proposals

Platform Competition and Opportunity Act

The Platform Competition and Opportunity Act seeks to limit the ability of large players to engage in mergers and acquisitions, addressing concerns that large companies are abusing their power to create a "kill zone" that stamps out future rivals before they can challenge their dominance. The entities subject to this proposal are those with over 50,000,000 monthly online-platform users or 100,000 business users and a market capitalization over $600 billion. While this proposal is clearly targeted at tech giants, its terms are not necessarily limited to the tech industry.

As with some other antitrust reform proposals targeting mergers and acquisitions, the Platform Competition and Opportunity Act effectively bans mergers for companies that are subject to its terms. The Act would presume that such acquisitions are violations of the Clayton Act unless the large company can show by "clear and convincing evidence" that the proposed acquisition would not be a violation. In short, it shifts the burden from the government to intervene in bad mergers to companies to prove that their proposed mergers are good. As with other similar merger proposals, the likely result of this legislation is to chill good mergers along with the bad, foreclosing an important exit strategy for innovators and denying consumers the advantages that such acquisitions can bring.

Ending Platform Monopolies Act and American Innovation and Choice Act

The Ending Platform Monopolies Act and American Innovation and Choice Act combined present a sort of "Glass-Stegall for Tech," as previously called for by Antitrust Subcommittee Chair David Cicilline (D-RI), as they seek to create regulatory-enforced separation between various aspects of large market players.

The Ending Platform Monopolies Act, led by Rep. Pramila Jayapal (D-WA), prevents a covered entity, defined the same way as in the Platform Competition and Opportunity Act, from owning or operating other businesses such as those that present a conflict of interest. This is largely intended to address concerns that tech giants make it too difficult for new companies to compete due to their interest in many different markets. Effectively, this would prevent companies from engaging in certain efficient product features if they also allowed others to offer similar services. Such restrictions would likely reduce or eliminate many of the products consumers appreciate and stifle the distribution of innovation by siloing companies into only one line of business. In fact, it would likely prevent the current tech companies from competing with each other. As the International Center for Law and Economics' Sam Bowman notes, "Apple could not develop a search engine to compete with Google under these rules, and Amazon would be forced to sell its video-streaming services that compete with Netflix and Youtube."

The American Innovation and Choice Act led by Rep. Cicilline targets allegations of self-preferencing, arguing that these practices harm other innovators and entrepreneurs when large companies copy the products of small companies. This proposal would prohibit platforms from utilizing the data they collect to develop and price their own products. Contrary to concerns, this is typically benign behavior that often benefits consumers and has long occurred in traditional retail. For example, this proposal would limit the ability of app stores to set rules, prices, offer preinstalled apps on devices, or offer generic brands of other sellers' products. Such restrictions will likely harm consumers by restricting choice and competition, and by reducing manufacturers' ability to provide products that are ready to go right out of the box.

Following Europe's Lead?

Some of the features of these proposals resemble the European Union (EU)'s proposed Digital Markets Act and other tech regulatory proposals currently being debated in Europe. Notably, the European approach to antitrust

focuses on abuse of dominance rather than consumer welfare. More generally, these proposals shift to a much more regulatory and interventionist *ex ante* approach rather than the typical U.S. *ex post* approach that intervenes only when consumer harm has occurred or is likely to occur.

Fortunately, some policymakers have recognized the detrimental impact that Europe's approach could have on American companies' competitiveness. For example, as House Energy and Commerce Committee Ranking Member Cathy McMorris Rogers (R-WA) recently noted, "The EU seeks to regulate tech companies … I fear that protectionist policies, like the EU's Digital Markets Act and the Digital Services Act will not result in more consumer protection. The Congress and this administration have an obligation to push back on such protectionism, especially when U.S. companies are the target and refocus our allies' misguided aggression on legitimate threats like China." Similarly, the bipartisan chairs of the House Digital Caucus urged the Biden Administration to push back against the EU's policies targeting American companies.

Unfortunately, House Democrats' antitrust package would engage in the same sort of misguided market interventions as the European counterparts. Should the proposals become law, they would subject our own tech industry to overly broad and burdensome regulations that will deter beneficial innovation, weaken competitiveness, and ultimately harm consumers.

Potential Ramifications Beyond Tech

Based on the $600 billion market capitalization required under much of this package, there are only a handful of companies that currently would be subject to the regulations, including Google, Microsoft, Apple, Facebook, and Amazon. This package of reforms is crafted in such a way that other industries such as banking and retail could find themselves ensnared, however.

For example, like the tech industry, the banking industry often engages in merger and acquisition behavior that can drive innovation and benefit consumers. While Visa, with a current market capitalization of $513 billion, would not today be subject to a regulation such as the Platform Competition and Opportunity Act currently, should its market value grow to exceed $600 billion, it could be similarly prohibited from engaging in mergers that could bring beneficial financial innovations to consumers. For those companies close to the threshold, onerous requirements could also disincentivize pursuing actions that might benefit consumers as the cost associated with such actions increases dramatically due to exceeding a threshold.

Similarly, the Ending Platform Monopolies Act and American Innovation and Choice Act also disallow those subject to the market capitalization and monthly user thresholds to engage in typical practices in retail. While retail giants such as Walmart (which has a market capitalization of $391 billion) and Home Depot ($331 billion) are under the current thresholds, the continued growth of these companies could lead them to reach the $600 billion market capitalization threshold. In such a scenario, they too would face the separation requirements and "anti-self-preferencing" rules that could limit their ability to offer or promote their own products or services such as generic store brands. In fact, traditional retailers such as Walmart and Target offer a substantially higher percentage of private labels than tech giants such as Amazon and thus may face harsher impacts from such

requirements. Likewise, many retail giants such as Walmart and Target offer a third-party marketplace on their e-commerce site for other sellers similar to Amazon's program. Notably, these players often have a larger share of the retail market than big tech companies, but these practices would be considered illegal for companies that cross the thresholds, subjecting them to this new antitrust legislation. At the same time, these rules are likely to result in some regulatory decisions that prohibit only some successful businesses in the same industry from engaging in best practices to serve their consumers. As Progressive Policy Institute's Alec Stapp notes, "It seems difficult to argue that it's a problem when Amazon uses data to inform its private label business, but not when a company [Walmart] more than three times its size ($388 billion vs. $121 billion) does the same thing at a rate 15 times higher (15% vs. 1%)."

While policymakers may be concerned about certain behaviors of technology companies, such as content moderation and data privacy, antitrust is likely the wrong tool to address these concerns. Tech policy concerns would be better addressed by targeted and appropriate regulation as necessary, while broad antitrust reform is likely to have far-reaching consequences.

Who Should Antitrust Protect?

Perhaps the real questions raised by proposed reforms of antitrust is "who should antitrust laws protect?" While these proposals do not directly discuss the consumer welfare standard, they represent a shift away from the focus on consumers to instead a policy presumption that "big" is inherently harmful. In fact, the concerns about concentration and size at the heart of many calls for antitrust reforms may not be as dramatic as proponents for change argue. A recent Information Technology and Innovation Foundation study found that 45 percent of the United States industries had become less concentrated since 2002 and only four percent of industries could be considered highly concentrated.

But focusing on competitors and concentration rather than consumers could undermine the very consumer protection that antitrust is designed to provide. The impact of these bills will not be felt merely by today's tech giants, but by consumers and small businesses who lose out on services they find beneficial. Antitrust law serves an important role by ensuring a competitive market, but it should continue to focus on where consumer welfare is harmed rather than being used to achieve other policy goals or intervene into a currently competitive market.