

The House's Antitrust Legislative Package: An Innovation Perspective

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House Antitrust Subcommittee Chairman David N. Cicilline (D-RI) and Ranking Member Ken Buck (R-CO) on June 11, 2021, announced a legislative package of five bills on antitrust in digital markets. A sixth bill, the State Antitrust Enforcement Venue Act of 2021, joined a markup hearing on June 23–24, during which the full Judiciary Committee approved all six bills via rollcall votes:

1. The American Innovation and Choice Online Act (H.R. 3816), sponsored by Rep. Cicilline and Rep. Lance Gooden (R-TX), prohibits a tightly defined handful of digital platforms from giving advantage to their own products or services on their platforms.
2. The Platform Competition and Opportunity Act (H.R. 3826), sponsored by Rep. Hakeem Jeffries (D-NY) and Rep. Buck, effectively prohibits mergers for a similarly narrow handful of digital platforms.
3. The Ending Platform Monopolies Act (H.R. 3825), sponsored by Rep. Pramila Jayapal (D-WA) and Rep. Gooden, would break up a big digital platforms when they offer their own products or services alongside third-party offering. The bill would ban these platforms from offering a service whenever a similar service already exists on their platforms.
4. The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act (H.R. 3849), sponsored by Reps. Mary Gay Scanlon (D-PA) and Burgess Owens (R-UT), requires a handful of digital platforms to make consumer data available for rivals.
5. The Merger Filing Fee Modernization Act (H.R. 3843), sponsored by Reps. Joe Neguse (D-CO) and Victoria Spartz (R-IN), increases federal antitrust agencies' resources by increasing pre-filing merger fees for large mergers.
6. The State Antitrust Enforcement Venue Act of 2021 (H.R. 3460), sponsored by Reps. Buck and Cicilline, empowers state attorneys general with the ability to remain in their preferred court rather than be compelled to move to the defendant's choice of court.

The first four bills would reform antitrust laws according to firms' size, not their conduct. Under these proposals, pro-competitive conduct would become anticompetitive simply because the concerned companies have reached a certain size threshold. Introducing a size threshold to enforce antitrust laws is reminiscent of a populist "big is bad" motto and is problematic for many reasons:

- **The bills would create the conditions for unfair competition:** Rivals may be treated dissimilarly depending on discrete quantitative thresholds. For instance, Amazon may no longer feature its Amazon Basics products on the first page of its search results, whereas Walmart would remain able to do so. Also, Facebook may no longer be able to offer sign-up buttons, whereas Twitter would remain able to do so. The prohibition of anticompetitive conduct must apply to all market actors irrespective of arbitrary size thresholds, otherwise the resultant distorted playing field would hamper the very process of competition on the merits.
- **The bills would create the conditions to stifle innovation:** The numerous prohibitions in the bills that would apply only to a handful of large, innovative companies would stifle not just their innovations but also the ability of small start-ups to innovate within the large digital ecosystems. For instance,

blocking acquisitions by large tech companies would hinder small start-ups' ability to scale and innovate. Also, to prevent a company from opening a new line of business in order to offer cheaper prices would harm consumers and would prevent efficient and innovative ways to fairly compete. Also, to prohibit a company to offer bundled services such as a smartphone with pre-installed apps, would destroy the incentive to innovate with new and cheaper products. As innovation requires market power to materialize, the bills would drastically reduce large companies' ability to offer efficient and innovative products and services for American consumers.

- **The bills would create the conditions for Chinese tech leadership:** The regulation of large American tech companies will generate a considerable comparative advantage for Chinese tech companies in the global race for digital leadership. Indeed, as the bills attack U.S. tech companies and exempt Chinese tech companies from the new regulatory prohibitions, Chinese tech companies will immediately experience improved market positions. For instance, Amazon's competitiveness will decline at the benefit of the Chinese behemoth Alibaba; Facebook's attractiveness will suffer while the Chinese platform TikTok will continue to thrive; Apple's smartphones and app store may lose popularity at the benefit of Xiaomi's smartphones and products; Google's search capabilities will stall in face of Baidu's search capabilities; and finally, Microsoft's products and services will be less competitive compared to China's Kingsoft.

There is little chance that Congress could amend those bills sufficiently enough to redeem their flaws. Lawmakers should instead reject them.

The last two bills do not regulate firms' conduct by size but rather improve effectiveness of antitrust laws without creating considerable costs for innovative companies. These two bills may nevertheless be improved as following:

- **The Merger Filing Fee Modernization Act (H.R. 3843) modernizes merger filing fees.** It is likely to increase the resources allocated to the Justice Department's Antitrust Division and to the Federal Trade Commission (FTC) from \$184 million to \$252 million and from \$330.2 million to \$418 million, respectively. The bill does not give Congress appropriate oversight over how the antitrust agencies will use the increase in resources. Consequently—and since the antitrust agencies' increased resources result from perceived under-staffing—Congress should amend the bill to better streamline the increased resources exclusively to increase human resources dedicated to antitrust enforcement.
- **The State Antitrust Enforcement Venue Act of 2021 (H.R. 3460) extends to state enforcers the federal enforcers' benefits of the exception of antitrust actions to not be subject to transfer by the Judicial Panel of Multidistrict Litigation (JPML) for pretrial consolidation with other cases into a single multidistrict litigation (MDL).** MDL consolidation may handicap state enforcers' antitrust actions. The bill intends to treat similarly state enforcers and federal enforcers when it comes to the benefit of being exempt from JPML's transfer authority. However, the bill errs in aligning these exemptions by extending the exemption to any antitrust action, unlike the federal enforcers' exemption, which is currently limited to antitrust actions involving criminal sanctions and seeking injunctive relief. Consequently, in order to best rationalize antitrust enforcement actions at state and federal levels without unduly disadvantaging defendants at state levels, Congress should amend the bill so that the JPML's exemption at state level remains limited to criminal actions and actions seeking injunctive relief alike the JPML's exemption at the federal level.

At the end of the day, as the Information Technology and Innovation Foundation (ITIF) articulated in its June 2021 report "Principles of Dynamic Antitrust," the goal of antitrust reform should be to advance a modern approach to competition policy that elevates innovation to become a central concern for antitrust enforcement.

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