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Breaking Down House Democrats' Forthcoming Competition Bills
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Democratic leadership of the House Judiciary Committee have leaked the approach they plan to take to revise U.S. antitrust law and enforcement, with a particular focus on digital platforms.

Broadly speaking, the bills would: raise fees for larger mergers and increase appropriations to the FTC and DOJ; require data portability and interoperability; declare that large platforms can't own businesses that compete with other businesses that use the platform; effectively ban large platforms from making any acquisitions; and generally declare that large platforms cannot preference their own products or services.

All of these are ideas that have been discussed before. They are very much in line with the EU's approach to competition, which places more regulation-like burdens on big businesses, and which is introducing a Digital Markets Act that mirrors the Democrats' proposals. Some Republicans are reportedly supportive of the proposals, which is surprising since they mean

giving broad, discretionary powers to antitrust authorities that are controlled by Democrats who take an expansive view of antitrust enforcement as a way to achieve their other social and political goals. The proposals may also be unpopular with consumers if, for example, they would mean that popular features like integrating Maps into relevant Google Search results becomes prohibited.

The multi-bill approach here suggests that the committee is trying to throw as much at the wall as possible to see what sticks. It may reflect a lack of confidence among the proposers in their ability to get their proposals through wholesale, especially given that Amy Klobuchar's CALERA bill in the Senate creates an alternative that, while still highly interventionist, does not create *ex ante* regulation of the Internet the same way these proposals do.

In general, the bills are misguided for three main reasons.

One, they seek to make digital platforms into narrow conduits for other firms to operate on, ignoring the value created by platforms curating their own services by, for example, creating quality controls on entry (as Apple does on its App Store) or by integrating their services with related products (like, say, Google adding events from Gmail to users' Google Calendars).

Two, they ignore the procompetitive effects of digital platforms extending into each other's markets and competing with each other there, in ways that often lead to far more intense competition—and better outcomes for consumers—than if the only firms that could compete with the incumbent platform were small startups.

Three, they ignore the importance of incentives for innovation. Platforms invest in new and better products when they can make money from doing so, and limiting their ability to do that means weakened incentives to innovate. Startups and their founders and investors are driven, in part, by the prospect of being acquired, often by the platforms themselves. Making those acquisitions more difficult, or even impossible, means removing one of the key ways startup founders can exit their firms, and hence one of the key rewards and incentives for starting an innovative new business.

For more, our "Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners" set out why many of the House Democrats' assumptions about the state of the economy and antitrust enforcement were mistaken. And my post, "Buck's "Third Way": A Different Road to the Same Destination", argued that House Republicans like Ken Buck were misguided in believing they could support some of the proposals and avoid the massive regulatory oversight that they said they rejected.

Platform Anti-Monopoly Act

The flagship bill, introduced by Antitrust Subcommittee Chairman David Cicilline (D-R.I.), establishes a definition of "covered platform" used by several of the other bills. The

measures would apply to platforms with at least 500,000 U.S.-based users, a market capitalization of more than $600 billion, and that is deemed a "critical trading partner" with the ability to restrict or impede the access that a "dependent business" has to its users or customers.

Cicilline's bill would bar these covered platforms from being able to promote their own products and services over the products and services of competitors who use the platform. It also defines a number of other practices that would be regarded as discriminatory, including:

- Restricting or impeding "dependent businesses" from being able to access the platform or its software on the same terms as the platform's own lines of business;
- Conditioning access or status on purchasing other products or services from the platform;
- Using user data to support the platform's own products in ways not extended to competitors;
- Restricting the platform's commercial users from using or accessing data generated on the platform from their own customers;
- Restricting platform users from uninstalling software pre-installed on the platform;
- Restricting platform users from providing links to facilitate business off of the platform;
- Preferencing the platform's own products or services in search results or rankings;
- Interfering with how a dependent business prices its products;
- Impeding a dependent business' users from connecting to services or products that compete with those offered by the platform; and
- Retaliating against users who raise concerns with law enforcement about potential violations of the act.

On a basic level, these would prohibit lots of behavior that is benign and that can improve the quality of digital services for users. Apple pre-installing a Weather app on the iPhone would, for example, run afoul of these rules, and the rules as proposed could prohibit iPhones from coming with pre-installed apps at all. Instead, users would have to manually download each app themselves, if indeed Apple was allowed to include the *App Store itself* pre-installed on the iPhone, given that this competes with other would-be app stores.

Apart from the obvious reduction in the quality of services and convenience for users that this would involve, this kind of conduct (known as "self-preferencing") is usually procompetitive. For example, self-preferencing allows platforms to compete with one another by using their strength in one market to enter a different one; Google's Shopping results in the Search page increase the competition that Amazon faces, because it presents consumers with a convenient alternative when they're shopping online for products. Similarly, Amazon's purchase of the video-game streaming service Twitch, and the self-preferencing it does to encourage Amazon customers to use Twitch and support content creators on that platform, strengthens the competition that rivals like YouTube face.

It also helps innovation, because it gives firms a reason to invest in services that would otherwise be unprofitable for them. Google invests in Android, and gives much of it away for free, because it can bundle Google Search into the OS, and make money from that. If Google could not self-preference Google Search on Android, the open source business model simply wouldn't work—it wouldn't be able to make money from Android, and would have to charge for it in other ways that may be less profitable and hence give it less reason to invest in the operating system.

This behavior can also *increase* innovation by the competitors of these companies, both by prompting them to improve their products (as, for example, Google Android did with Microsoft's mobile operating system offerings) and by growing the size of the customer base for products of this kind. For example, video games published by console manufacturers (like Nintendo's Zelda and Mario games) are often blockbusters that grow the overall size of the user base for the consoles, increasing demand for third-party titles as well.

For more, check out "Against the Vertical Discrimination Presumption" by Geoffrey Manne and Dirk Auer's piece "On the Origin of Platforms: An Evolutionary Perspective".

Ending Platform Monopolies Act

Sponsored by Rep. Pramila Jayapal (D-Wash.), this bill would make it illegal for covered platforms to control lines of business that pose "irreconcilable conflicts of interest," enforced through civil litigation powers granted to the Federal Trade Commission (FTC) and the U.S. Justice Department (DOJ).

Specifically, the bill targets lines of business that create "a substantial incentive" for the platform to advantage its own products or services over those of competitors that use the platform, or to exclude or disadvantage competing businesses from using the platform. The FTC and DOJ could potentially order that platforms divest lines of business that violate the act.

This targets similar conduct as the previous bill, but involves the forced separation of different lines of business. It also appears to go even further, seemingly implying that companies like Google could not even develop services like Google Maps or Chrome because their existence would create such "substantial incentives" to self-preference them over the products of their competitors.

Apart from the straightforward loss of innovation and product developments this would involve, requiring every tech company to be narrowly focused on a single line of business would substantially *entrench* Big Tech incumbents, because it would make it impossible for them to extend into adjacent markets to compete with one another. For example, 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.

For more, check out Geoffrey Manne's written testimony to the House Antitrust

Subcommittee and "Platform Self-Preferencing Can Be Good for Consumers and Even Competitors" by Geoffrey and me.

Platform Competition and Opportunity Act

Introduced by Rep. Hakeem Jeffries (D-N.Y.), this bill would bar covered platforms from making essentially any acquisitions at all. To be excluded from the ban on acquisitions, the platform would have to present "clear and convincing evidence" that the acquired business does not compete with the platform for any product or service, does not pose a potential competitive threat to the platform, and would not in any way enhance or help maintain the acquiring platform's market position.

The two main ways that founders and investors can make a return on a successful startup are to float the company at IPO or to be acquired by another business. The latter of these, acquisitions, is extremely important. Between 2008 and 2019, 90 percent of U.S. start-up exits happened through acquisition. In a recent survey, half of current startup executives said they aimed to be acquired. One study found that countries that made it easier for firms to be taken over saw a 40-50 percent increase in VC activity, and that U.S. states that made acquisitions harder saw a 27 percent decrease in VC investment deals.

So this proposal would probably reduce investment in U.S. startups, since it makes it more difficult for them to be acquired. It would therefore reduce innovation as a result. It would also reduce inter-platform competition by banning deals that allow firms to move into new markets, like the acquisition of Beats that helped Apple to build a Spotify competitor, or the deals that helped Google, Microsoft, and Amazon build cloud-computing services that all compete with each other. It could also reduce competition faced by old industries, by preventing tech companies from buying firms that enable it to move into new markets—like Amazon's acquisitions of health-care companies that it has used to build a health-care offering. Even Walmart's acquisition of Jet.com, which it has used to build an Amazon competitor, could have been banned under this law if Walmart had had a higher market cap at the time.

For more, check out Dirk Auer's piece "Facebook and the Pros and Cons of Ex Post Merger Reviews" and my piece "Cracking down on mergers would leave us all worse off".

ACCESS Act

The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, sponsored by Rep. Mary Gay Scanlon (D-Pa.), would establish data portability and interoperability requirements for platforms.

Under terms of the legislation, covered platforms would be required to allow third parties to transfer data to their users or, with the user's consent, to a competing business. It also would require platforms to facilitate compatible and interoperable communications with competing businesses. The law directs the FTC to establish technical committees to

promulgate the standards for portability and interoperability.

Data portability and interoperability involve trade-offs in terms of security and usability, and overseeing them can be extremely costly and difficult. In security terms, interoperability requirements prevent companies from using closed systems to protect users from hostile third parties. Mandatory openness means increasing—sometimes, substantially so—the risk of data breaches and leaks. In practice, that could mean users' private messages or photos being leaked more frequently, or activity on a social media page that a user considers to be "their" private data, but that "belongs" to another user under the terms of use, can be exported and publicized as such.

It can also make digital services more buggy and unreliable, by requiring that they are built in a more "open" way that may be more prone to unanticipated software mismatches. A good example is that of Windows vs iOS; Windows is far more interoperable with third-party software than iOS is, but tends to be less stable as a result, and users often prefer the closed, stable system.

Interoperability requirements also entail ongoing regulatory oversight, to make sure data is being provided to third parties reliably. It's difficult to build an app around another company's data without assurance that the data will be available when users want it. For a requirement as broad as this bill's, that could mean setting up quite a large new *de facto* regulator.

In the UK, Open Banking (an interoperability requirement imposed on British retail banks) has suffered from significant service outages, and targets a level of uptime that many developers complain is too low for them to build products around. Nor has Open Banking yet led to any obvious competition benefits.

For more, check out Gus Hurwitz's piece "Portable Social Media Aren't Like Portable Phone Numbers" and my piece "Why Data Interoperability Is Harder Than It Looks: The Open Banking Experience".

Merger Filing Fee Modernization Act

A bill that mirrors language in the Endless Frontier Act recently passed by the U.S. Senate, would significantly raise filing fees for the largest mergers. Rather than the current cap of $280,000 for mergers valued at more than $500 million, the bill—sponsored by Rep. Joe Neguse (D-Colo.)–the new schedule would assess fees of $2.25 million for mergers valued at more than $5 billion; $800,000 for those valued at between $2 billion and $5 billion; and $400,000 for those between $1 billion and $2 billion.

Smaller mergers would actually see their filing fees cut: from $280,000 to $250,000 for those between $500 million and $1 billion; from $125,000 to $100,000 for those between $161.5 million and $500 million; and from $45,000 to $30,000 for those less than $161.5 million.

In addition, the bill would appropriate $418 million to the FTC and $252 million to the DOJ's Antitrust Division for Fiscal Year 2022. Most people in the antitrust world are generally supportive of more funding for the FTC and DOJ, although whether this is actually good or not depends both on how it's spent at those places.

It's hard to object if it goes towards *deepening* the agencies' capacities and knowledge, by hiring and retaining higher quality staff with salaries that are more competitive with those offered by the private sector, and on greater efforts to study the effects of the antitrust laws and past cases on the economy. If it goes toward *broadening* the activities of the agencies, by doing more and enabling them to pursue a more aggressive enforcement agenda, and supporting whatever of the above proposals make it into law, then it could be very harmful.

For more, check out my post "Buck's "Third Way": A Different Road to the Same Destination" and Thom Lambert's post "Bad Blood at the FTC".

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