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U.S. Senate Self-Preferencing Bill Offers Perfect Recipe for Regulatory Overreach
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Even as delivery services work to ship all of those last-minute Christmas presents that consumers bought this season from digital platforms and other e-commerce sites, the U.S. House and Senate are contemplating Grinch-like legislation that looks to stop or limit how Big Tech companies can "self-preference" or "discriminate" on their platforms.

A platform "self-preferences" when it blends various services into the delivery of a given product in ways that third parties couldn't do themselves. For example, Google self-preferences when it puts a Google Shopping box at the top of a Search page for Adidas sneakers. Amazon self-preferences when it offers its own AmazonBasics USB cables alongside those offered by Apple or Anker. Costco's placement of its own Kirkland brand of paper towels on store shelves can also be a form of self-preferencing.

Such purportedly "discriminatory" behavior constitutes much of what platforms are designed to do. Virtually every platform that offers a suite of products and services will combine them in ways that users find helpful, even if competitors find it infuriating. It surely doesn't help Yelp if Google Search users can see a Maps results box next to a search for showtimes at a local cinema. It doesn't help other manufacturers of charging cables if Amazon sells a cheaper version under a brand that consumers trust. But do consumers really care about Yelp or Apple's revenues, when all they want are relevant search results and less expensive products?

Until now, competition authorities have judged this type of conduct under the consumer welfare standard: does it hurt consumers in the long run, or does it help them? This test does seek to evaluate whether the conduct deprives consumers of choice by foreclosing rivals, which could ultimately allow the platform to exploit its customers. But it doesn't treat harm to competitors—in the form of reduced traffic and profits for Yelp, for example—as a problem in and of itself.

"Non-discrimination" bills introduced this year in both the House and Senate aim to change that, but they would do so in ways that differ in important respects.

The House bill would impose a blanket ban on virtually *all* "discrimination" by platforms. This means that even such benign behavior as Facebook linking to Facebook Marketplace on its homepage would become presumptively unlawful. The measure would, as I've written before, break a lot of the Internet as we know it, but it has the virtue of being explicit and clear about its effects.

The Senate bill is, in this sense, a lot more circumspect. Instead of a blanket ban, it would prohibit what the bill refers to as "unfair" discrimination that "materially harm[s] competition on the covered platform," with a carve-out exception for discrimination that was "necessary" to maintain or enhance the "core functionality" of the platform. In theory, this would avoid a lot of the really crazy effects of the House bill. Apple likely still could, for example, pre-install a Camera app on the iPhone.

But this greater degree of reasonableness comes at the price of ambiguity. The bill does not define "unfair discrimination," nor what it would mean for something to be "necessary" to improve the core functionality of a platform. Faced with this ambiguity, companies would be wise to be overly cautious, given the steep penalties they would face for conduct found to be "unfair": 15% of total U.S. revenues earned during the period when the conduct was ongoing. That's a lot of money to risk over a single feature!

Also unlike the House legislation, the Senate bill would not create a private right of action, thereby limiting litigation to enforce the bill's terms to actions brought by the Federal Trade Commission (FTC), U.S. Justice Department (DOJ), or state attorneys general.

Put together, these features create the perfect recipe for extensive discretionary power held by a handful of agencies. With such vague criteria and such massive penalties for lawbreaking, the mere threat of a lawsuit could force a company to change its behavior. The rules are so murky that companies might even be threatened with a lawsuit over conduct in one area in order to make them change their behavior in another.

It's hardly unprecedented for powers like this to be misused. During the Obama administration, the Internal Revenue Service (IRS) was alleged to have targeted conservative groups for investigation, for which the agency eventually had to apologize (and settle a lawsuit brought by some of the targeted groups). More than a decade ago, the Bank Secrecy Act was used to uncover then-New York Attorney General Eliot Spitzer's involvement in an international prostitution ring. Back in 2008, the British government used anti-terrorism powers to seize the assets of some Icelandic banks that had become insolvent and couldn't repay their British depositors. To this day, municipal governments in Britain use anti-terrorism powers to investigate things like illegal waste dumping and people who wrongly park in spots reserved for the disabled.

The FTC itself has a history of abusing its authority. As Commissioners Noah Phillips and Christine Wilson remind us, the commission was nearly shut down in the 1970s after trying to use its powers to "protect" children from seeing ads for sugary foods, interpreting its consumer-protection mandate so broadly that it considered tooth decay as falling within its scope.

As I've written before, both Chair Lina Khan and Commissioner Rebecca Kelly Slaughter appear to believe that the FTC ought to take a broad vision of its goals. Slaughter has argued that antitrust ought to be "antiracist." Khan believes that the "the dispersion of political and economic control" is the proper goal of antitrust, not consumer welfare or

some other economic goal.

Khan in particular does not appear especially bound by the usual norms that might constrain this sort of regulatory overreach. In recent weeks, she has pushed through contentious decisions by relying on more than 20 “zombie votes” cast by former Commissioner Rohit Chopra on the final day before he left the agency. While it has been FTC policy since 1984 to count votes cast by departed commissioners unless they are superseded by their successors, Khan’s FTC has invoked this relatively obscure rule to swing more decisions than every single predecessor *combined*.

Thus, while the Senate bill may avoid immediately breaking large portions of the Internet in ways the House bill would, it would instead place massive discretionary powers into the hands of authorities who have expansive views about the goals those powers ought to be used to pursue.

This ought to be concerning to anyone who disapproves of public policy being made by unelected bureaucrats, rather than the people’s chosen representatives. If Republicans find an empowered Khan-led FTC worrying today, surely Democrats ought to feel the same about an FTC run by Trump-style appointees in a few years. Both sides may come to regret creating an agency with so much unchecked power.

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