ICLE tl;dr

Congressman Buck's Third Way

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tl;dr

Background: U.S. Rep. Ken Buck (R-Colo.) has proposed what he calls a "Third Way" to improve competition in digital markets. While Buck rejects many of the remedies proposed by the House Judiciary Committee's Democrats, he generally accepts their premises about the state of the market. Ultimately, Buck's "Third Way" is intended to highlight areas where he and the Democrats agree, while avoiding some of the specific regulations the Democrats have proposed.

But… Buck's proposals would lead to a similar outcome to what the Democrats are proposing, even if he wants to avoid that. His most significant proposals—to apply the essential facilities doctrine to digital platforms, require them to be interoperable with other services, to ban self-preferencing by those platforms, and to ban below-cost selling—would constrain significantly the abilities of existing platforms to serve their customers and of would-be entrants to compete with incumbents. They also would most likely necessitate significant regulation, including price controls.

KEY TAKEAWAYS

THE ESSENTIAL FACILITIES DOCTRINE GIVES UP ON COMPETITION.

Treating a digital platform as an essential facility means giving up the idea it can ever face competition, either through normal market dynamics or after antitrust action. It would treat a digital platform like a piece of physical infrastructure, requiring price controls on both sides of the platform and ongoing regulation to determine whether the platform was treating its customers "fairly." Markets regulated in this way suffer from extreme rent-seeking and low rates of innovation and entry.

INTEROPERABILITY MANDATES NEED A REGULATOR TO WORK.

Interoperability is a huge undertaking and requires someone—presumably a regulator—to make important decisions about design and security where there is no straightforward answer. Open Banking in the United Kingdom, the most significant example of mandated interoperability so far, has required a huge amount of work, time and money, and ultimately has needed a quasi-regulator to make decisions. And that has been for a relatively simple set of data in a homogeneous market not defined by innovation. A similar task in digital markets would be an order of magnitude more difficult, and regulatory oversight would be virtually unavoidable.

SELF-PREFERENCING IS GOOD FOR COMPETITION.

Self-preferencing is extremely common across the economy and is often a fundamental part of how businesses operate. When platforms do it, it is often done to fill gaps in a platform's marketplace, or provide a service that makes users' lives easier, like Google putting Maps and Shopping results on relevant Search results pages. Objections to self-preferencing usually rest on self-preferencing's harm to competitors, but competitors' welfare is not a proxy for consumer welfare. Other procompetitive acts, like price cuts, likewise are usually unpleasant for competitors while being unambiguously good for consumers.

BELOW-COST SELLING IS NOT PREDATORY PRICING.

Buck's criticisms of below-cost selling badly miss the mark about why firms do this and, in particular, why platforms do it. While predatory pricing seeks to put rivals out of business, most below-cost selling happens either to promote a new product that consumers are unfamiliar with or to build one side of a platform so that the platform's network is large enough to sustain both sides of its market. Uber, for example, often subsidizes rides in new cities it enters until there are enough regular riders and drivers to make the app reliable for both.

BUCK'S "THIRD WAY" COULD END COMPETITION IN DIGITAL PLATFORM MARKETS.

Put together, Buck's proposals would lead to similar outcomes to the Democrats' proposals, almost certainly requiring a discretionary regulator to manage the pricing, design and access decisions of digital platforms on a literally daily basis. This would neuter competition in digital markets. Existing platforms would be able to develop close relationships with their regulators and new platforms would not be able to do any of the activities they need to build themselves up to challenge incumbents. These recommendations may make sense for certain physical infrastructure where new entry is literally impossible, but not for markets like smartphones, search engines, retail or social media.

For more on this issue, see ICLE's recently filed comments with the FTC as part of its "Workshop on Data Portability."

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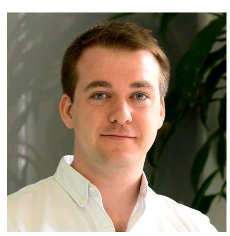

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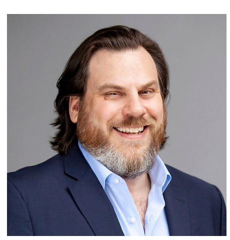

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