

The Competition and Antitrust Law Enforcement Reform Act

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tl;dr

Background: Sen. Amy Klobuchar (D-Minn.) has introduced the [Competition and Antitrust Law Enforcement Reform Act](#) (CALERA), sweeping legislation that, if enacted, would change the antitrust rules not just for Big Tech, but for the whole economy.

KEY TAKEAWAYS

PROHIBITING MUCH MORE CONDUCT BY MANY MORE FIRMS

CALERA's effects would not be limited to the largest firms. The bill's monopolization provisions are actually indifferent to firm size. CALERA also establishes presumptions of harm for firms with greater than 50% market share or that possess significant market power, which in many markets includes small firms. The bill singles out for heightened scrutiny mergers larger than \$5 billion and acquisitions of smaller companies by those valued at more than \$100 billion, but a great many deals and firms that meet those thresholds would not be considered "outsized" by most.

The bill also sweeps in much more business activity by outlawing mergers that create an "appreciable risk" of reduced competition, not just those that actually reduce competition,

while deeming conduct that "materially disadvantages" a competitor—which covers a lot of procompetitive conduct—potentially illegal.

DISCOURAGING INVESTMENT BY HALTING ACQUISITIONS

An important unintended effect of the bill's merger provisions would be to reduce companies' ability to use acquisitions to enter new markets and compete with incumbents. Deals like Walmart's acquisitions of Jet, which it is using to improve its ecommerce business in competition with Amazon, and Thunder, which it is using to compete in the digital advertising market against Google, could be threatened altogether. [An analysis of M&A activity in 48 countries](#) concluded that venture capital investment falls when countries pass laws that make takeovers harder, and investment rises when they become easier.

GRANTING AGENCIES BROAD VETO POWERS

CALERA would require businesses to prove that challenged mergers are procompetitive—an extremely tall order. Current federal law allows firms to defend a merger likely to lessen competition by showing it would create countervailing efficiencies. To date this "efficiencies defense" has been used successfully in only a single case. Adopting a broad presumption of harm would give federal

antitrust agencies virtual veto power over any merger, because proving innocence can be impossible even when the defendants are in the right.

ABANDONING THE CONSUMER WELFARE STANDARD

Under current antitrust law, a plaintiff must show that conduct harms consumers. CALERA instead defines harm entirely in terms of the effect of conduct on competing firms. As we describe in our [tl;dr on the Consumer Welfare Standard](#) (CWS), prioritizing competitor welfare over consumer welfare would make some procompetitive behavior illegal, because conduct that benefits consumers often will also “disadvantage” competitors.

The bill would also explicitly overturn several cases that underpin much of modern antitrust. For example, it would throw out the Supreme Court’s *Brooke Group* decision, which holds that below-cost “predatory” pricing doesn’t harm consumers unless it’s likely it can later be recouped by the exercise of monopoly power.

MARKET DEFINITION CAN BE CRUCIAL

When Amazon bought Whole Foods, or when AOL and Time Warner merged, the parties occupied entirely different markets. This meant that the merged entities would not automatically have any extra market power, despite the size of the deals. This was a vital factor in those deals not being blocked. Under Sen. Klobuchar’s bill those deals would be presumptively prohibited simply because they are big.

BIG FINES FOR AMBIGUOUS VIOLATIONS

The bill proposes huge fines of up to 15% of annual revenues for antitrust violations. But antitrust law often turns on whether to permit novel conduct done in good faith that may nevertheless have some anticompetitive effects. For virtually all conduct that ends up in

court, it is simply unclear how a court would rule or even whether the conduct would be challenged at all. Raising penalties for anticompetitive conduct may cause firms to err too much on the side of caution and avoid procompetitive behavior that may be challenged, reducing businesses’ willingness to experiment with new practices.

SPIRALING LITIGATION COSTS

Sen. Klobuchar’s bill affects the whole economy, not just the tech sector. While we certainly should apply the law uniformly to the whole economy, the bill’s approach would massively expand the litigation risk that businesses face. A wide swath of manufacturers, retailers, and other firms would all feel the effects of easier challenges to their mergers and conduct, and costs could rise significantly for many of them.

For more on this issue, see ICLE’s [tl;dr on the CWS](#) and [our statement on CALERA](#).

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