ICLE tl;dr

Platform Self-Preferencing: Benefits to Consumers and to Competition

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tl;dr

Background: Four months after a similar antitrust measure was advanced to the floor of the U.S. House, a bipartisan group of senators, led by Sens. Amy Klobuchar (D-Minn.) and Chuck Grassley (R-Iowa), announced that they will introduce legislation designed to drastically reduce the ability of digital platforms to favor their own goods and services. Dubbed the American Innovation and Choice Online Act, the bill presumes that the practice of "self-preferencing" is inherently harmful to competition.

But... While the draft Senate bill does make certain improvements over its House counterpart, the legislation fundamentally misunderstands the nature of platform competition and the benefits that accrue to consumers from many self-preferencing practices. The bills also would delegate enormous power and discretion to antitrust regulators, who may use that power to achieve fundamentally political ends.

KEY TAKEAWAYS

FEW DIFFERENCES FROM HOUSE BILL

The Senate bill closely resembles the House version and the small improvements it makes will probably not amount to much in practice. Among other things, it makes slight changes to the definition of "covered platform" by lowering the minimum market capitalization to $550 billion; it also changes the formula to calculate penalties, lowering it to 15% of revenues during the period when the conduct occurred.

More significantly, rather than ban all self-preferencing by covered platforms, it would only prohibit conduct that "unfairly" preferences, limits, or discriminates between the platform's products and others, and that "materially harms" competition. It also would allow a platform to escape liability if it can establish that challenged conduct was necessary to "maintain or enhance the core functionality of the covered platform."

However, the Senate bill's list of conduct that would be presumed violations of the law is largely unchanged from the House bill. And it is unclear whether employing slippery standards like "unfair" and "material" would significantly alter the course of enforcement. Platforms would still have to affirmatively demonstrate that their conduct did not violate the law—effectively a "guilty until proven innocent" standard.

Also, notable is that, unlike the House bill, the Senate bill does not create a private right of action. Only the DOJ, FTC, and state attorneys-generals could bring enforcement actions under the law. That addresses one major defect of the House bill—that it enables

competitors to pepper covered platforms with frivolous lawsuits.

FTC WOULD HAVE ENORMOUS DISCRETION

While the Senate bill does remove the private right of action, it still grants the FTC and DOJ tremendous power to threaten covered platforms with a broad array of lawsuits. Depending on the leadership of those agencies at any given time, they could potentially use that power to influence or control platforms' conduct in other, unrelated areas.

There are reasons to be skeptical about how this power will be used. Current FTC Chair Lina Khan, for example, has argued that "the dispersion of political and economic control" ought to be the goal of antitrust policy. Commissioner Rebecca Kelly-Slaughter has argued that antitrust should be "antiracist."

Whatever the desirability of these goals, the broad discretionary authority the bills confer on the antitrust agencies means that individual commissioners would have significantly greater scope to pursue their own agenda, rather than one set by Congress.

CONSUMERS ENJOY MANY FORMS OF PLATFORM SELF-PREFERENCING

Consumers don't want digital platforms to be dumb pipes, or to act like a telephone network or sewer system. The Internet is filled with a superabundance of information and options, as well as a host of malicious actors. Good digital platforms act as middlemen, sorting information in useful ways and taking on some of the risk that exists when, inevitably, we end up doing business with untrustworthy actors.

When users have the choice, they tend to prefer platforms that do quite a bit of "discrimination"—that is, favoring some sellers over others, or offering their own related products or services through the platform. Most people prefer Amazon to eBay because eBay is chaotic and riskier to use.

THE U.S. ECONOMY IS ALREADY COMPETITIVE

The proposals are based on fundamental misunderstandings about the current state of competition and antitrust enforcement. The belief that the U.S. economy has seen diminished competition is mistaken, particularly with respect to digital markets. While some national metrics show rising levels of market concentration, local levels of concentration are falling, driven by more efficient chains setting up more stores in areas that were previously served by only one or two firms.

Similarly, where profit margins are rising, in areas like manufacturing, it appears to be mainly driven by increased productivity. Falling costs, not higher prices, are what has allowed profit margins to grow.

For more on this issue, see the *Truth on the Market* blog post "5 Thoughts on the Senate's Proposed Platform Self-Preferencing Ban," and Sam Bowman's earlier post on the House legislation.

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