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The Big Tech Antitrust Bills

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SUMMARY

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The Big Tech Antitrust Bills

Over the past decade, Facebook, Google, Amazon, and Apple have revolutionized the digital economy. Many people now use the products and services of these "Big Tech" firms on a daily basis. Facebook boasts more than two billion monthly active users. Google licenses the world's most popular mobile operating system and runs a search engine that processes three-and-a-half billion searches a day. Amazon operates the largest online marketplace, a massive logistics network, and a leading cloud-computing company. Apple has popularized the smart phone to such a degree that consumers have grown accustomed to carrying supercomputers in their pockets.

While the Big Tech firms have plainly made important technological breakthroughs, their business practices have attracted scrutiny from antitrust regulators and some Members of Congress. In October 2020, the House Committee on the Judiciary's Subcommittee on Antitrust, Commercial and Administrative Law concluded a 16-month investigation of these practices, which culminated in a 450-page report recommending a range of measures to address the firms' allegedly anticompetitive conduct.

Many of those measures have now taken legislative form. In June 2021, the House Committee on the Judiciary ordered to be reported a series of antitrust bills directed at Big Tech. The legislative package represents the most comprehensive effort to date to tackle competition issues in the digital economy. This report reviews the bills by outlining the issues they are meant to address, discussing their approaches to those issues, situating the bills within current antitrust law, and describing the principal policy arguments made by their supporters and opponents.

H.R. 3816, the American Innovation and Choice Online Act, responds to a variety of allegations leveled against the Big Tech firms over the past decade. The bill's core concern is that Facebook, Google, Amazon, and Apple have leveraged dominance of their core markets to disadvantage competitors in related markets. "Self-preferencing"—whereby a dominant platform like Google Search boosts Google's own products (e.g., Google Shopping, Google Travel, Google Maps)—is a paradigmatic example. H.R. 3816 would address concerns regarding this type of behavior by prohibiting the Big Tech firms from engaging in specified forms of "discriminatory conduct." Supporters of such measures seek to cabin the Big Tech firms' market power to their principal lines of business. Opponents contend that many of the prohibited practices are competitively benign, and that the flexible standards employed by existing antitrust doctrine are preferable to rigid *ex ante* regulation.

H.R. 3825, the Ending Platform Monopolies Act, responds to the same set of concerns as H.R. 3816. However, instead of imposing non-discrimination rules, the bill would require *structural separation*: Big Tech firms could not operate in multiple lines of business when doing so would create various conflicts of interest. For example, Amazon could not both operate a marketplace and sell its own private-label products on that marketplace. Likewise, Google could not offer both Google Search and various vertical search engines. The bill's proponents argue that structural separation responds to the same general problem as non-discrimination rules, but is easier to administer. Opponents contend that prohibiting the Big Tech firms from entering adjacent markets would harm innovation and—counterintuitively—entrench their power.

H.R. 3826, the Platform Competition and Opportunity Act, is directed at mergers and acquisitions. The legislation would prohibit the Big Tech firms from acquiring competitors or potential competitors. The bill also would shift the burden of proof to the Big Tech firms to show by clear and convincing evidence that their proposed acquisitions would not enhance their power in their core markets. Supporters of the bill claim that Facebook, Google, Amazon, and Apple have solidified their dominance by acquiring rivals and potential rivals rather than competing with them. Opponents argue that the legislation would dampen startup investment by eliminating the prospect of being acquired by a Big Tech firm.

H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, tackles the "network effects" and "switching costs" that give Big Tech firms powerful incumbency advantages. Markets exhibit network effects when the utility of a product increases as it gains more users. For example, many people prefer Facebook to smaller social networks because their family members and friends are more likely to use Facebook. Switching costs insulate the Big Tech firms when a dominant platform's users face strong disincentives to abandon the platform for its competitors. H.R. 3849 would address these entry barriers with interoperability and data-portability mandates. The bill's proponents contend that these measures are necessary to mitigate the structural characteristics that cause tech markets to "tip" in favor of a single firm. Opponents have raised concerns about security, privacy, and the technical challenges of implementing such requirements.

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In the 1970s and 1980s, antitrust law experienced a revolution. The insurgents shared certain general commitments: that antitrust had become overly interventionist; that economic reasoning should play a more central role in antitrust decision-making; and that the maximization of consumer welfare—not the protection of small businesses or the elimination of concentrated economic power—was the only legitimate goal of competition policy. This collection of ideas came to be called the "Chicago School" of antitrust analysis, owing to many of its proponents' affiliation with the University of Chicago.[1] While the movement's prescriptions were not imported wholesale into the case law, its core tenets proved enormously influential in shaping the direction of antitrust doctrine in the courts.[2]

Now, an antitrust counter-revolution may be brewing in Congress, where a growing chorus of lawmakers has argued that America has a monopoly problem.[3] Much of this concern has focused on a handful of massive technology companies. In October 2020, the House Committee on the Judiciary's Subcommittee on Antitrust, Commercial and Administrative Law (House Antitrust Subcommittee) concluded a 16-month investigation into the market power of four of the largest tech platforms: Facebook, Google, Amazon, and Apple. The inquiry culminated in a 450-page report recommending a slew of measures to rein in the alleged abuses of these "Big Tech" firms.[4]

In June 2021, many of those measures took legislative form, as Members of the Judiciary Committee released four bills directed at Big Tech.[5] The legislative package—which the Committee later approved and ordered to be reported with amendments to the full House—represents the most comprehensive effort to date to tackle competition issues in the digital economy. This report reviews the four bills by outlining the issues they are meant to address, discussing their approaches to those issues, situating the bills within current antitrust law, and describing the principal arguments made by their supporters and opponents.

[1] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

[2] For a critical assessment, see HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008). For a largely sympathetic account, see Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, Geo. Mason L. & Econ. Research Paper No. 09-23 (Mar. 31, 2009).

[3] *See, e.g.*, JOSH HAWLEY, THE TYRANNY OF BIG TECH (2021); AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021).

[4] INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG. (2020) [hereinafter "HOUSE ANTITRUST SUBCOMM. REPORT"]. This report lists the Big Tech firms in the same order as the Subcommittee's report and will retain that order throughout.

[5] Congressman David Cicilline, House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice," (June 11, 2021), https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity. The Committee's legislative package also included two bills that are not specifically directed at the Big Tech firms. H.R. 3460, the State Antitrust Enforcement Venue Act of 2021, would exempt antitrust actions filed by state attorneys general from consolidation before the Judicial Panel on Multidistrict Litigation. H.R. 3460, 117th Cong. (2021). H.R. 3843, the Merger Filing Fee Modernization Act, would raise filing fees for large mergers, cut them for small mergers, and increase funding for the Department of Justice's Antitrust Division and the Federal Trade Commission. H.R. 3843, 117th Cong. (2021). This report omits further discussion of these bills to focus on the legislation that specifically targets Big Tech firms.

Non-Discrimination Requirements: H.R. 3816, American Innovation and Choice Online Act

The Issue

H.R. 3816, the American Innovation and Choice Online Act, responds to a range of allegations leveled against the Big Tech firms over the past decade, some of which are the subject of pending antitrust litigation.[6] An exhaustive review of these claims is beyond the scope of this report; a sampling offers a general sense of the terrain.

- Facebook has been accused of imposing anticompetitive limitations on access to "Facebook Platform"—a set of tools that enable app developers to access Facebook data and create apps that interoperate with Facebook.[7] In a recently dismissed lawsuit, the Federal Trade Commission (FTC) argued that Facebook Platform has become key infrastructure for app developers, giving Facebook significant power over the trajectories of promising new apps. The Commission alleged that Facebook abused that power by denying access to Facebook Platform to developers whose apps competed with Facebook products.[8]
- Google has been accused of conditioning mobile-device manufacturers' access to its Google Play app store on manufacturers' pre-installation of Google Search, thereby leveraging Google's power in the app-store market to disadvantage competitors in the search market.[9] The tech giant has also allegedly given preferential placement to its own *vertical* search engines (e.g., Google Travel, Google Maps) in *general* search results, using its power in general search to disadvantage vertical rivals (e.g., Expedia, MapQuest).[10]

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[6] During the House Judiciary Committee's markup process, an amendment changed H.R. 3816's short title from the "American Choice and Innovation Online Act" to the "American Innovation and Choice Online Act." *See* Amendment in the Nature of a Substitute to H.R. 3816 Offered by Mr. Nadler of New York, Markups, H.R. 3843, the Merger Filing Fee Modernization Act of 2021, et al., H. COMM. ON THE JUDICIARY, 117TH CONG. (June 21, 2021), https://docs.house.gov/meetings/JU/JU00/20210623/112818/BILLS-117-HR3816-N000002-Amdt-5.pdf.

This report analyzes and cites the Big Tech antitrust bills that the House Judiciary Committee approved and ordered to be reported to the full House of Representatives, including amendments made during the Committee's markup. For a compilation of those amendments, see Markups, H.R. 3843, the Merger Filing Fee Modernization Act of 2021, et al., H. COMM. ON THE JUDICIARY, 117TH CONG. (June 23, 2021), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4601. As of the publication of this report, the bills have not been reported to the House floor. Therefore, the committee amendments to the bills have not been published as new bill versions by the Government Publishing Office or made available on congress.gov.

[7] "Apps" are software programs that enable users of mobile devices to engage in specific tasks, like sending messages, taking photos, ordering food, or arranging transportation. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518 (2019).

[8] Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, No. 1:20-cv-03590 ¶¶ 22-26 (D.D.C. Jan. 13, 2021); *see also* HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 166-70.

[9] Complaint, United States v. Google LLC, No. 1:20-cv-03010 ¶¶ 72-77 (D.D.C. Oct. 20, 2020); HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 213.

[10] HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 187-92; Brody Mullins, Rolfe Winkler & Brent Kendall, *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015), https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274. "Vertical" search engines like Expedia and MapQuest are search engines dedicated to specific types of online content (e.g., travel, maps). More generally, the Big Tech firms' "vertical" rivals are companies that compete with Facebook, Google, Amazon, or Apple in markets that are related to or depend upon those firms' main platform businesses.

- Amazon has allegedly:
  - ranked its own private-label products higher than more popular competitors in product search results;[11]
  - used merchant data to identify profitable new lines of business for its private-label products;[12]
  - required merchants to purchase ads and use Amazon fulfillment services to receive prominent placement in search results;[13] and
  - prohibited merchants from offering products on its marketplace that they sell elsewhere at lower prices.[14]
- Apple is embroiled in litigation targeting its requirement that purchases within iPhone apps use Apple's payment system—a practice that allegedly allows Apple to extract monopolistic rents from app developers.[15] The iPhone maker has also faced charges that it preferentially ranks its own apps over more popular and highly rated competitors in its app store.[16]

The Legislation

H.R. 3816 aims to prohibit Big Tech firms from engaging in much—if not all—of this behavior.[17] The legislation would prohibit operators of "covered platforms" from engaging in various forms of "discriminatory conduct."[18] "Covered platforms" are defined to include platforms that:

- have at least 50 million U.S.-based monthly active users or 100,000 U.S.-based monthly active business users;
- are owned or controlled by firms with net annual sales or market capitalizations greater than $600 billion; and
- are "critical trading partner[s]" for the sale or provision of any product or service offered on or directly related to the platforms.[19]

The bill's drafters reportedly maintain that only Facebook, Google, Amazon, and Apple meet all three criteria.[20]

[11] Dana Mattioli, *Amazon Changed Search Algorithms in Ways That Boost Its Own Products*, WALL ST. J. (Sept. 16, 2019), https://www.wsj.com/articles/amazon-changed-search-algorithm-in-ways-that-boost-its-own-products-11568645345.

[12] HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 274-82.

[13] *Id.* at 287-92.

[14] *Id.* at 295-97.

[15] *See* Motion for Temporary Restraining Order, Epic Games, Inc. v. Apple Inc., No. 3:20-cv-05640 (N.D. Cal. Aug. 17, 2020).

[16] Jack Nicas & Keith Collins, *How Apple's Apps Topped Rivals in the App Store It Controls*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html.

[17] H.R. 3816, 117th Cong. (2021).

[18] *Id.* § 2.

[19] *Id.* § 2(g)(4).

[20] Dana Mattioli & Ryan Tracy, *House Bills Seek to Break Up Amazon and Other Big Tech Companies*, WALL ST. J. (June 11, 2021), https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248.

The legislation lists 13 forms of prohibited discriminatory conduct. Among other things, the bill would prohibit operators of covered platforms from:

- advantaging their own products or services over those of other business users (commonly called "self-preferencing");[21]
- restricting business users from accessing a covered platform or its software on the same terms as the platform operator's own businesses;[22]
- conditioning access to or preferred placement within a covered platform on the use of other products or services offered by the platform operator;[23]
- using data obtained from business users or their customers to support the platform operator's own products or services;[24]
- restricting or impeding business users from providing links to facilitate off-platform business;[25] and
- interfering with or restricting business users' pricing of their goods or services.[26]

After amendments from the markup process, the bill offers the Big Tech platforms three affirmative defenses. First, the bill offers an affirmative defense to covered platform operators that establish by clear and convincing evidence that their conduct would not harm the competitive process.[27] Second, an affirmative defense is available to defendants that prove by clear and convincing evidence that their conduct was necessary to prevent a violation of law or protect user privacy, provided that certain other requirements are met.[28] Third, the bill allows the Big Tech firms to avoid liability if they show by clear and convincing evidence that their conduct increases consumer welfare.[29]

Effect on Current Law

H.R. 3816 would move significantly beyond existing monopolization doctrine. Under current law, monopolization is a two-element offense: plaintiffs must establish that a defendant (1) has monopoly power, and (2) engaged in exclusionary conduct.[30] The first element—monopoly power—typically turns on factors like a defendant's market share and entry barriers shielding the defendant from would-be competitors.[31] The second element—exclusionary conduct—involves a burden-shifting framework. Under that framework, monopolization plaintiffs must first make a *prima facie* case that the defendant's conduct had anticompetitive effects. If a plaintiff makes this

[21] H.R. 3816, 117th Cong. § 2(a)(1).

[22] *Id.* § 2(b)(1).

[23] *Id.* § 2(b)(2).

[24] *Id.* § 2(b)(3).

[25] *Id.* § 2(b)(6).

[26] *Id.* § 2(b)(8).

[27] *Id.* § 2(c)(1).

[28] *Id.* § 2(c)(2).

[29] *Id.* § 2(c)(3); *see also* Amendment to the Amendment in the Nature of a Substitute to H.R. 3816, Offered by Mr. Bentz of Oregon, Markups, H.R. 3843, the Merger Filing Fee Modernization Act of 2021, et al., H. COMM. ON THE JUDICIARY, 117TH CONG. (June 24, 2021), https://docs.house.gov/meetings/JU/JU00/20210623/112818/BILLS-117-HR3816-B000668-Amdt-5.pdf.

[30] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[31] *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).

showing, the burden shifts to the defendant to rebut the plaintiff's evidence or proffer a procompetitive justification for its conduct. If the defendant fails at this stage, the plaintiff prevails. However, if the defendant succeeds, the burden shifts back to the plaintiff to show that the anticompetitive harms of the challenged conduct outweigh the procompetitive benefits.[32]

H.R. 3816 would adopt a separate, ostensibly more plaintiff-friendly regulatory regime for the Big Tech firms. Under that regime, plaintiffs challenging discriminatory conduct would not need to show that the Big Tech firms possess monopoly power—a task that can require extensive discovery and expert testimony. In place of that requirement, plaintiffs would face the far more straightforward task of demonstrating that a defendant satisfies the three criteria necessary to qualify as a "covered platform."[33]

The changes to the exclusionary-conduct burden-shifting framework are also considerable. Here, the bill's new regulatory regime would dispense with the fact-intensive weighing of competitive effects embodied in current monopolization law. In place of that analysis, the bill prohibits the specified categories of discriminatory conduct.

H.R. 3816 offers the Big Tech firms various affirmative defenses (e.g., for conduct that increases consumer welfare).[34] However, these defenses set a high evidentiary bar—clear and convincing evidence—that would likely be difficult to meet.[35] In all but the rarest of cases, judicial analysis of the bill's defenses would probably be significantly truncated relative to current law, which does not impose heightened evidentiary burdens on defendants seeking to rebut a *prima facie* case of competitive harm.

While these changes to the doctrine appear straightforward, H.R. 3816 has already generated interpretive controversies. Commentators have debated whether Section 2(a)(1) of the bill—which prohibits platform operators from advantaging their own products—would prevent Google and Apple from pre-installing their own apps on devices that use their operating systems (Android and iOS).[36] University of Chicago Law Professor Randy Picker has argued that Section 2(a)(1) seems to prohibit such pre-installation.[37] In contrast, the economist Hal Singer has disputed that reading of the legislation. Singer contends that Section 2(b)(5) of the bill—which bars the Big Tech firms from restricting or impeding the *uninstallation* of pre-installed apps—suggests that the legislation both contemplates and tolerates pre-installation.[38] Picker and Singer have also expressed different views on whether Section 2(a)(3) of the bill—which prohibits the Big Tech platforms from discriminating among similarly situated business users—would require Google

[32] United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001).

[33] H.R. 3816, 117th Cong. § 2(g)(4) (2021).

[34] *Id*. § 2(c)(1)(A).

[35] The "clear and convincing evidence" standard is an intermediate evidentiary burden that lies between "preponderance of the evidence" (the typical burden in civil litigation) and "beyond a reasonable doubt" (the paradigmatic criminal standard). The Supreme Court has explained that the burden is met when the evidence supporting a contention makes the contention "highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984). While courts ordinarily resist efforts at quantification, one large survey of judges found that 75-percent probability was the mean, median, and mode figure capturing the "clear and convincing evidence" standard. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1328-29 (1982).

[36] H.R. 3816, 117th Cong. § 2(a)(1) (2021).

[37] Randy Picker, *The House's Recent Spate of Antitrust Bills Would Change Big Tech as We Know It*, PROMARKET (June 29, 2021), https://promarket.org/2021/06/29/house-antitrust-bills-big-tech-apple-preinstallation/.

[38] Hal Singer, *Rep. Cicilline's Bill Would Offer a Lifeline to Independent App Developers*, PROMARKET (July 2, 2021), https://promarket.org/2021/07/02/antitrust-self-preferencing-preinstallation-app-developers-apple/.

and Apple to pre-install *every* app in a given category if they pre-install *any* apps within that category.[39]

Comparing Legislation: S. 225, the Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA)

The House Antitrust Subcommittee's legislative package is not the only significant antitrust legislation in the 117th Congress. In February 2021, Senator Amy Klobuchar introduced a bill that would make notable changes to monopolization doctrine and several other elements of antitrust law. As relevant here, S. 225, the Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), would:

- Amend the Clayton Antitrust Act to prohibit "exclusionary conduct that presents an appreciable risk of harming competition." S. 225, 117th Cong. § 9 (2021);
- Define "exclusionary conduct" to include behavior that "materially disadvantages" actual or potential competitors or "tends to foreclose or limit the ability or incentive" of actual or potential competitors to compete. *Id.*;
- Adopt a presumption that exclusionary conduct "presents an appreciable risk of harming competition" if it is undertaken by a firm with a market share greater than 50% or a firm that otherwise possesses "significant market power." *Id.*;
- Provide that defendants can rebut this presumption by establishing by a preponderance of the evidence that their exclusionary conduct does not present an appreciable risk of harming competition. *Id.*; and
- Eliminate several defendant-friendly requirements in the monopolization case law, including limitations on plaintiffs' ability to prevail in refusal-to-deal litigation, predatory-pricing claims, and cases involving two-sided markets. *Id.*

These changes to monopolization law would be both broader and narrower than H.R. 3816's prohibitions. CALERA is broader than H.R. 3816 insofar as it would subject a larger number of firms and a wider range of behavior to heightened antitrust scrutiny. While H.R. 3816 is limited to "covered platforms" (the Big Tech firms), S. 225's conduct-related presumption would extend to all firms that possess "significant market power." Likewise, while H.R. 3816 would prohibit only specified forms of discriminatory behavior, S. 225 would extend to any "exclusionary conduct."

However, CALERA's substantive changes to monopolization law would be more modest than H.R. 3816's non-discrimination requirements for the Big Tech firms. While CALERA would allow defendants to rebut the relevant presumption of competitive harm by a preponderance of the evidence, H.R. 3816's affirmative defenses employ the more demanding clear-and-convincing-evidence standard.

The Arguments For

H.R. 3816 targets a diverse range of conduct raising a variety of competition issues. There is nevertheless a clear unifying theme. The bill's drafters appear to be principally concerned with the Big Tech firms' use of market power in their core business lines to disadvantage competitors in related markets. When dominant platforms preference their own offerings in search rankings, for example, they make it more difficult for their vertical competitors to compete with those offerings. Likewise, when a platform uses data derived from business users to compete with those users, the platform operates with a significant competitive advantage. Similarly, when a powerful incumbent conditions the availability of its core services on a customer's use of its related services, competition in the market for those related services suffers.[40]

[39] *See* notes 37-38 *supra*.

[40] For a leading academic discussion of these types of competitive harm, see Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019). The article's author, Lina Kahn, took office as Chair of the FTC on June 15, 2021. *Lina Khan Sworn in as Chair of the FTC*, FED. TRADE COMM'N (June 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/lina-khan-sworn-chair-ftc.

The Arguments Against

Opponents of non-discrimination requirements have offered two general types of objections to measures like H.R. 3816. First, some commentators have challenged the claim that the conduct the bill prohibits is anticompetitive. For example, some commentators have argued that platform self-preferencing is generally a procompetitive effort to enhance users' experience.[41] Similarly, Amazon's use of merchant data to identify profitable new lines of business may very well *increase* output in certain product markets.[42] Apple has also defended the rules governing participation in its app store as necessary to preserve the technical integrity of the iPhone ecosystem.[43]

Beyond arguments about specific practices, the bill's opponents have contended that the flexible, fact-intensive framework employed by current antitrust law is preferable to *ex ante* regulation.[44] Many of these arguments appeal to the "error costs" of categorical prohibitions. The Chicago School placed error costs at the center of antitrust scholarship, maintaining that the harms of "false positives" condemning procompetitive conduct usually outweigh those of "false negatives" allowing anticompetitive behavior to proceed.[45] This theoretical framework led to a general preference for flexible standards over bright-line rules in monopolization cases.[46] The debate over H.R. 3816 is in part a dispute over whether this evolution has rendered antitrust law ill-equipped to grapple with the Big Tech firms' dominance.

The participants in this debate are not writing on a blank slate. There is a massive literature on the choice between rules and standards that this report cannot comprehensively catalogue.[47] Nevertheless, some of the key themes are worth noting. General standards afford decision-makers greater ability to discriminate between harmful and benign conduct than bright-line rules. However, enforcing broad standards is usually far costlier than applying clear rules, and high enforcement costs can result in under-deterrence of anticompetitive conduct.[48] Case-by-case adjudication is also arguably less democratic than the legislative and administrative procedures

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[41] *See, e.g.*, D. Bruce Hoffman & Garrett D. Shinn, *Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem*, COMPETITION POLICY INT'L ANTITRUST CHRONICLE 5-8 (June 2021); Sam Bowman & Geoffrey Manne, *Platform Self-Preferencing Can Be Good for Consumers and Even Competitors*, TRUTH ON THE MARKET (Mar. 4, 2021), https://truthonthemarket.com/2021/03/04/platform-self-preferencing-can-be-good-for-consumers-and-even-competitors/.

[42] *See* Sam Bowman, *Amazon's Tightrope: Balancing Innovation and Competition on Amazon's Marketplace*, TRUTH ON THE MARKET (Apr. 27, 2020), https://truthonthemarket.com/2020/04/27/amazons-tightrope-balancing-innovation-and-competition-on-amazons-marketplace/ (arguing that the competitive effects of Amazon's use of merchant data likely vary based on the nature of the product at issue).

[43] Opposition to Motion for a Temporary Restraining Order, Epic Games, Inc. v. Apple Inc., No. 3:20-cv-05640 at 29 (N.D. Cal. Aug. 21, 2020).

[44] *See, e.g.*, Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, INT'L CTR. FOR L. AND ECON. 3 (May 15, 2020), https://laweconcenter.org/wp-content/uploads/2020/05/house_joint_antitrust_letter_20200514.pdf.

[45] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984). In brief, Chicago School theorists argued that the harms of monopoly are largely self-correcting because monopoly prices eventually attract the entry of new firms, whereas inefficient legal rules are far "stickier." *See id*. For a contrary view, see Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

[46] *See, e.g.*, Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007).

[47] For a prominent account of the choice between rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

[48] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 361-62 (2020) (arguing that the high costs of antitrust litigation undermine effective enforcement).

that accompany rule development.[49] Finally, rules can provide industry participants with more legal clarity than open-ended standards.[50] The bottom line is that H.R. 3816 wades into a familiar debate that has occupied antitrust scholars and students of economic regulation more generally.[51]

A Note on Self-Preferencing

Self-preferencing—whereby a tech platform vertically integrates and gives its downstream products certain advantages over competitors—is among the core concerns of H.R. 3816 and H.R. 3825. The practice has provoked a lively debate. Critics have argued that when dominant platforms favor their own products, they can leverage their power in their core markets to foreclose competition in adjacent markets. *See, e.g.*, Daniel A. Hanley, *How Self-Preferencing Can Violate Section 2 of the Sherman Act*, COMPETITION POLICY INT'L ANTITRUST CHRONICLE 4 (June 2021). The European Commission invoked this theory of harm in 2017 when it fined Google €2.42 billion for giving its own comparison-shopping service more prominent placement than rival services in its search results. *See* Case AT.39740 – Google Search (Shopping), Summary of Commission Decision, EUROPEAN COMM'N (June 27, 2017). A group of state attorneys general is also suing Google based on claims that the tech giant's advertising server (which manages advertising inventories for large publishers) unlawfully favors Google's advertising exchange (which matches publishers with advertisers). Complaint, *State of Texas, et al. v. Google LLC*, No. 4:20-cv-00957 ¶¶ 118-24 (E.D. Tex. Dec. 16, 2020).

Self-preferencing also has its proponents. Big Tech's defenders have argued that the simplest explanation for self-preferencing is that it makes platforms more attractive to consumers. *See, e.g.*, Hoffman & Shinn, *supra* note 41, at 5-7. Under this theory, Amazon sells its own private-label products and gives them conspicuous placement primarily so that customers can buy inexpensive generic items—not because its private-label business is highly profitable on a standalone basis. *See* Mattioli, *supra* note 10 (noting Amazon's assertion that its private-label business represents only "about 1% of its retail sales"). Likewise, Google's supporters have argued that the company's placement of a Google Maps box at the top of certain search results enhances users' experience by prominently highlighting valuable information. *See* Todd, *infra* note 61, at 526-27; Bowman & Manne, *supra* note 41. While different types of self-preferencing raise different issues, there is something of a meta-argument here. In brief, the practice's defenders maintain that Big Tech firms vertically integrate and self-preference only when the gains from doing so outweigh any losses from degradation of the quality of their main platform businesses. Skeptics of *ex ante* regulation argue that this calculus is usually a reasonable proxy for overall welfare, and that existing monopolization doctrine can address those instances in which it is not. *See* Hoffman & Shinn, *supra* note 41, at 7-9; *see also* Michael Salinger, *Self-Preferencing*, *in* REPORT ON THE DIGITAL ECONOMY, GEO. MASON U. GLOBAL ANTITRUST INST. (2020). For a contrary view, see Edward Iacobucci & Francesco Ducci, *The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-Sided Markets*, 47 EUROPEAN J. OF L. AND ECON. 15 (2019).

Structural Separation: H.R. 3825, Ending Platform Monopolies Act

The Issue

H.R. 3825, the Ending Platform Monopolies Act, is directed at some of the concerns mentioned above in connection with H.R. 3816.[52] Both bills respond to allegations that the Big Tech firms have leveraged dominance of their core markets to disadvantage rivals in related markets.

[49] *See generally* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013).

[50] *See* Chopra & Khan, *supra* note 48, at 358.

[51] For an overview of the relative virtues and vices of regulation, adjudication, and administration as tools of competition policy, see DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 93-108 (2011).

[52] H.R. 3825, 117th Cong. (2021).

The Legislation

While H.R. 3825 and H.R. 3816 are motivated by the same general issue, they address that issue in different ways. As discussed, H.R. 3816 would prohibit the Big Tech firms from engaging in various forms of "discriminatory conduct." In contrast, H.R. 3825 would require *structural separation*. Under the bill, operators of "covered platforms"[53] could not:

- use their platforms to sell or provide other products or services;
- require business users to utilize a product or service as a condition of accessing or receiving preferred placement on their platforms; or
- operate both a covered platform and another "line of business" if doing so would create a "conflict of interest" by giving the platform operator the incentive and ability to advantage its own offerings on the platform.[54]

Effect on Current Law

H.R. 3825 is a major departure from current antitrust doctrine. While courts theoretically have the power to order structural separation in monopolization cases, it is difficult for plaintiffs to obtain such sweeping relief in all but the most extraordinary circumstances.[55] The bill is instead a form of sector-specific competition regulation, similar to the regimes governing banking and (historically) railroads—two other industries in which entry into adjacent markets has been viewed as creating irremediable conflicts of interest.[56]

The Arguments For

The arguments for H.R. 3825 mirror those for H.R. 3816. However, structural separation may have administrability advantages over non-discrimination requirements, as commentators have argued that the latter are costlier to enforce.[57] Rules demanding that tech platforms accord equal treatment to vertical rivals may be particularly complicated to administer, requiring regulators and courts to establish some baseline level of "neutral" treatment and probe the inner workings of the platforms' algorithms. Advocates of structural separation contend that it is better to "break up" Big Tech than rely on overburdened regulators and generalist judges to parse such details.[58]

The Arguments Against

Big Tech's defenders argue that the firms' entry into new markets is almost always procompetitive.[59] Facebook, Google, Amazon, and Apple have access to deep pools of retained

[53] The bill would apply to the same "covered platforms" as H.R. 3816. *Id.* § 5(4).

[54] *Id.* § 2(a)-(b).

[55] *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1901, 1957 (2021) (explaining that, aside from merger enforcement, most antitrust relief is nonstructural).

[56] *See* Khan, *supra* note 40, at 1037-43.

[57] *See, e.g.*, HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 381 (noting this possible advantage of structural separation).

[58] *But see* Hal Singer, *Inside Tech's "Kill Zone": How to Deal With the Threat to Edge Innovation Posed by Multi-Sided Platforms*, PROMARKET (Nov. 21, 2018), https://promarket.org/2018/11/21/inside-tech-kill-zone/ (defending non-discrimination requirements over structural separation on the grounds that the latter is a "messy undertaking," because drawing boundaries around tech platforms "is not straightforward").

[59] *See, e.g.*, Invited Statement of Geoffrey A. Manne on House Judiciary Investigation Into Competition in Digital

earnings that they can plow into innovative new lines of business. Under a separation regime, Google could not have used those resources to develop products like Google Chrome and Google Maps. Likewise, Amazon may have to exit the "streaming wars" by divesting Prime Video.[60] A rule prohibiting the Big Tech firms from entering adjacent markets may also destroy well-recognized efficiencies that typically accompany vertical integration.[61] Structural separation could even entrench the Big Tech firms' power by preventing them from entering *each other's* core markets. Apple could not develop a search engine to challenge Google,[62] nor could Amazon build a video-sharing service to challenge YouTube.[63]

These objections need not be decisive. Congress could consider a structural-separation regime that would allow a designated regulator to approve a dominant platform's entry into adjacent markets in limited circumstances (i.e., when a market is dominated by another platform monopolist, or when efficiencies clearly favor integration). Moreover, the Big Tech firms' financial resources would not simply disappear under an exception-free separation regime. If Facebook, Google, Amazon, and Apple retain large amounts of cash that they cannot deploy on new projects or acquisitions, they would likely face pressure to return that money to shareholders, who could then channel it to other innovative companies.[64] The debate over structural separation may therefore turn on arguments about the desirability of "decentralized" innovation spread among a large number of firms, as opposed to "centralized" innovation concentrated in a handful of resource-rich tech companies.[65]

These debates over efficiencies and innovation sometimes intersect with difficult conceptual issues facing proponents of structural separation. In some separation regimes, there are clearly defined boundaries between product markets. For example, it is relatively uncontroversial that railroads and commodity producers operate in different lines of business.[66] However, technology markets often lack similarly crisp borders.[67] For instance, Apple produces the iOS operating system for mobile devices and a range of related features, including a voice assistant (Siri), a camera, a calculator, a calendar, an alarm, a photos app, a weather app, a news app, and a payment system (Apple Pay).[68] It is unclear which of these additional features qualifies as a "line of business" distinct from Apple's iOS platform within the meaning of H.R. 3825. (The

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Markets: Correcting Common Misperceptions About the State of Antitrust Law and Enforcement, INT'L CTR. FOR L. AND ECON. 7-8, 24-27 (Apr. 17, 2020), https://laweconcenter.org/wp-content/uploads/2020/04/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf.

[60] *See* Sam Bowman, *Breaking Down the House Democrats' Forthcoming Competition Bills*, TRUTH ON THE MARKET (June 10, 2021), https://truthonthemarket.com/2021/06/10/breaking-down-house-democrats-forthcoming-competition-bills/.

[61] Patrick F. Todd, *Digital Platforms and the Leverage Problem*, 98 NEB. L. REV. 486, 539 (2019).

[62] *See* Tim Bradshaw & Patrick McGee, *Apple Develops Alternative to Google Search*, FIN. TIMES (Oct. 28, 2020), https://www.ft.com/content/fd311801-e863-41fe-82cf-3d98c4c47e26.

[63] *See Amazon Video Direct Poses Challenge to YouTube*, BBC (May 10, 2016), https://www.bbc.com/news/technology-36259782.

[64] *See, e.g.*, Erin McCarthy, *Icahn Letter Pushes Apple to Buy Back More Shares*, WALL ST. J. (Oct. 9, 2014), https://www.wsj.com/articles/icahn-pushes-apple-to-buy-back-more-stock-1412860351#:~:text=Activist%20investor%20Carl%20C.,Executive%20Tim%20Cook%2C%20which%20Mr.

[65] Khan, *supra* note 40, at 1085-86 (noting the possible costs and tradeoffs of structural separation and recognizing this distinction).

[66] *See* Pub. L. No. 59-337 § 1, 34 Stat. 584, 585 (1906).

[67] *See* Todd, *supra* note 61, at 535-37; Singer, *supra* note 58.

[68] Darren Orf, *A Brief History of iOS*, GIZMODO (June 7, 2016), https://gizmodo.com/a-brief-history-of-ios-1780790760.

legislation does not define that term.)[69] Moreover, technology markets are not static; the Big Tech firms continually release updated versions of their platforms with new features that could theoretically be provided by third parties. A prohibition of integration into separate "lines of business" may chill this type of innovation to the detriment of consumers.

Mergers and Acquisitions: H.R. 3826, Platform Competition and Opportunity Act

The Issue

H.R. 3826, the Platform Competition and Opportunity Act, is directed at mergers and acquisitions—another means by which the Big Tech firms have allegedly maintained and extended their power.[70] The House Antitrust Subcommittee's October 2020 report found that the Big Tech firms had acquired hundreds of companies over the prior decade.[71] Prominent examples include Facebook's acquisitions of Instagram and WhatsApp; Amazon's acquisitions of IMDb, Audible, and Zappos; Google's acquisitions of YouTube, DoubleClick, and Waze; and Apple's acquisition of Shazam.[72] According to Big Tech's critics, many of the firms' deals have allowed them to solidify their dominance by acquiring competitors and potential rivals.[73] The Subcommittee's report also alleges that the tech giants acquired some of these firms for the purpose of shutting them down or discontinuing their main services—a phenomenon that has been dubbed the "killer acquisition."[74] To address these concerns, the report recommends legislation that would shift the burden of proof to dominant platforms to show that their proposed transactions are in the public interest.[75]

The Legislation

H.R. 3826 takes up the Subcommittee's recommendation. The bill would prohibit "covered platform operators"—defined to mean operators of the same "covered platforms" subject to the bills discussed above—from acquiring other firms unless platform operators can demonstrate by clear and convincing evidence that:

- the target firm does not compete with the platform operator;
- the target firm is not a "nascent or potential" competitor of the platform operator;
- the acquisition would not enhance the platform operator's market position for services related to its existing platform; and

[69] H.R. 3825, 117th Cong. § 2 (2021).

[70] H.R. 3826, 117th Cong. (2021).

[71] HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 406-50.

[72] *See id*.

[73] *See, e.g.*, Gilad Edelman, *Why the FTC Wants to Revisit Hundreds of Deals by Big Tech*, WIRED (Feb. 12, 2020), https://www.wired.com/story/ftc-special-order-review-big-tech-killer-acquisitions/; JOHN KWOKA, CONTROLLING MERGERS AND MARKET POWER: A PROGRAM FOR REVIVING ANTITRUST IN AMERICA 109-17 (2020); Diana Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AM. ANTITRUST INST. (July 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.

[74] HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 38.

[75] *Id*. at 387-88.

- the acquisition would not enhance the platform operator's "ability to maintain its market position" for services related to its existing platform.[76]

As amended, the bill would also provide an exception to its general prohibition for transactions involving target companies valued at less than $50 million.[77]

Effect on Current Law

Under current law, mergers and acquisitions are governed by Section 7 of the Clayton Act, which prohibits deals that may "substantially lessen" competition.[78] Courts typically evaluate merger cases using a burden-shifting framework that resembles the standards employed in monopolization litigation. Under this framework, the plaintiff bears the initial burden of showing that a proposed transaction will have anticompetitive effects. If the plaintiff succeeds, the burden shifts to the defendant to rebut the plaintiff's case or produce evidence of the deal's procompetitive benefits. If the defendant fails at this stage, the plaintiff prevails. However, if the defendant succeeds, the burden shifts back to the plaintiff to show that the acquisition's anticompetitive harms outweigh its procompetitive benefits.[79]

Courts have also developed special tests for evaluating mergers between *potential* competitors—firms that do not compete when an acquisition is proposed, but may otherwise compete in the future.[80] The nuances of this doctrine are outside the scope of this report. For present purposes, it suffices to note that the courts have generally imposed heavy evidentiary burdens on plaintiffs challenging mergers involving potential rivals.[81]

H.R. 3826 would significantly alter these legal standards for the Big Tech firms. The bill would prohibit Facebook, Google, Amazon, and Apple from engaging in mergers or acquisitions unless they can show by clear and convincing evidence that their deals would not fall into any of the specified categories.[82] The legislation's prohibition of acquisitions of potential competitors is particularly significant, given current law's deferential posture toward those transactions. While the Big Tech firms could theoretically press ahead with deals that fall outside of the prohibited categories, the legislation's demanding evidentiary requirements may create disincentives for acquisitions that arguably straddle the boundaries of those provisions.[83]

[76] H.R. 3826, 117th Cong. § 2(a)-(b) (2021).

[77] *See* Amendment to the Amendment in the Nature of a Substitute to H.R. 3826 Offered by Ms. Ross of North Carolina, Markups, H.R. 3843, the Merger Filing Fee Modernization Act of 2021, et al., H. COMM. ON THE JUDICIARY, 117TH CONG. (June 24, 2021), https://docs.house.gov/meetings/JU/JU00/20210623/112818/BILLS-117-HR3826-R000305-Amdt-1.pdf.

[78] 15 U.S.C. § 18. Under current law, firms must submit information about mergers and acquisitions exceeding certain size thresholds to the Department of Justice and the FTC for review before consummating their transactions. 15 U.S.C. § 18a. H.R. 3826 would not alter this requirement.

[79] *See, e.g.*, St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015).

[80] *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

[81] *See generally* Darren Bush & Salvatore Massa, *Rethinking Potential Competition Doctrine*, 2004 WIS. L. REV. 1035 (2004).

[82] H.R. 3826, 117th Cong. § 2(b).

[83] *See* note 35 *supra*.

Comparing Legislation: S. 225, the Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), and S. 1074, the Trust-Busting for the Twenty-First Century Act

H.R. 3826 is not the only significant merger legislation in the 117th Congress. In addition to the changes to monopolization law discussed above, Senator Klobuchar's CALERA legislation would amend the Clayton Act to prohibit mergers that "create an appreciable risk of materially lessening competition." S. 225, 117th Cong. § 4 (2021). The bill would also shift the burden of proof from the government to the merging party for certain mergers involving potential rivals, significant increases in market concentration, or firms that exceed specified size thresholds. *Id.* In these circumstances, the merging party would bear the burden of showing by a preponderance of the evidence that its proposed transaction would not violate the amended Clayton Act standard. *Id.*

These changes would be both broader and narrower than those in H.R. 3826. CALERA is broader than H.R. 3826 insofar as it would apply to a wider range of mergers. While H.R. 3826 is limited to deals involving "covered platform operators," CALERA would alter the legal standard governing all mergers and adopt generally applicable presumptions.

CALERA's substantive changes are more modest than those in H.R. 3826. H.R. 3826 would prohibit the Big Tech firms from acquiring rivals and potential rivals, while CALERA would merely alter the legal standard and (in many cases) the burden of proof for such transactions. Moreover, H.R. 3826 would require the Big Tech firms to establish by *clear and convincing evidence* that their proposed mergers do not fall within four prohibited categories. In contrast, if CALERA became law and a Big Tech merger triggered its presumption of illegality, the Big Tech firm could rebut that presumption by showing by a *preponderance of the evidence* that the transaction would not violate the amended Clayton Act standard.

Senator Josh Hawley has introduced legislation that would make more sweeping changes to the merger laws governing Big Tech firms than either CALERA or H.R. 3826. S. 1074, the Trust-Busting for the Twenty-First Century Act, would prohibit firms with market capitalizations exceeding $100 billion—a category that comfortably includes all of the Big Tech firms—from engaging in mergers that "may . . . lessen competition in any way." S. 1074, 117th Cong. § 3 (2021). Senator Hawley's office has characterized this language as functionally equivalent to a categorical ban on mergers involving firms larger than the relevant threshold. *See Senator Hawley Introduces The "Trust-Busting for the Twenty-First Century Act": A Plan to Bust Up Anti-Competitive Big Businesses*, OFFICE OF SEN. JOSH HAWLEY (Apr. 12, 2021), https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big.

The Arguments For

As discussed, supporters of H.R. 3826 contend that the Big Tech firms have preserved and extended their monopoly power by acquiring competitors and potential competitors.[84] Commentators have placed some of the blame for these transactions on the permissive legal standards that courts have developed over the past several decades, especially the doctrine governing acquisitions of potential competitors.[85] By prohibiting the Big Tech firms from engaging in such acquisitions and other types of potentially anticompetitive transactions, the bill would address one of the major problems identified by Big Tech's critics.

The Arguments Against

Big Tech's defenders have responded to this line of argument by appealing to the incentive effects of potential acquisitions. According to one narrative, the prospect of being acquired by a Big Tech firm induces entrepreneurs and their venture-capital (VC) backers to enter tech markets. The possibility of an acquisition thus arguably mitigates the so-called VC "kill zone," in which investors are reluctant to commit capital to areas dominated by the Big Four.[86] Some

[84] *See* notes 73-75 *supra*.

[85] *See* note 73 *supra*.

[86] Biz Carson, *DOJ Lawyers Ask Startup Investors About Big Tech's "Kill Zones,"* PROTOCOL (Feb. 12, 2020),

commentators have argued that, by eliminating the option of being bought out by Big Tech, measures like H.R. 3826 may dampen startup investment.[87] Debate over the bill may therefore require Congress to weigh the possible costs of these "barriers to exit" against the benefits of blocking anticompetitive transactions.

Interoperability and Data Portability: H.R. 3849, Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act

The Issue

H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, is directed at the "network effects" and "switching costs" that give dominant tech platforms powerful incumbency advantages.[88] Markets exhibit network effects when a product's utility depends on the number of people who use it. The idea is intuitive: people want to use Facebook—as opposed to a smaller social network—because their friends and family are on Facebook. Likewise, advertisers want to run ads on Facebook—as opposed to a smaller social network—because Facebook allows them to advertise to a larger number of users. The same basic reasoning applies to Google Search, Amazon Marketplace, and Apple's App Store. These network effects create significant entry barriers that deter startups from competing with the tech giants.[89]

Even when consumers prefer a smaller competitor over a Big Tech firm, they may face "switching costs" when deciding whether to make a change. Commentators have argued that certain digital markets exhibit high switching costs, causing user "lock-in" and creating another barrier deterring entry by prospective rivals.[90] For example, users who abandon Facebook for another social network must leave behind large amounts of data (e.g., friends, messages, "likes") that enhance their user experience.

The combination of powerful network effects and high switching costs makes many digital markets prone to "tipping" in favor of one or two large companies, leading to a form of "winner-take-all" economics in which Big Tech firms are shielded from competition after they have assumed dominant positions.[91]

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https://www.protocol.com/doj-antitrust-venture-capital-workshop.

[87] *See, e.g.*, Jeff Farrah, *Restrictions on Acquisitions Would Stifle the US Startup Ecosystem, Not Rein In Big Tech*, TECHCRUNCH (May 19, 2021), https://techcrunch.com/2021/05/19/restrictions-on-acquisitions-would-stifle-the-us-startup-ecosystem-not-rein-in-big-tech/; Sam Bowman, *Cracking Down on Mergers Would Leave Us All Worse Off*, THE HILL (Mar. 12, 2021), https://thehill.com/blogs/congress-blog/politics/542880-cracking-down-on-mergers-would-leave-us-all-worse-off.

[88] H.R. 3849, 117th Cong. (2021).

[89] *See, e.g.*, HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 39-40; Stigler Committee on Digital Platforms, Final Report, U. CHI. BOOTH SCH. OF BUS., STIGLER CTR. FOR THE STUDY OF THE ECONOMY AND THE STATE 38-39 (2019) [hereinafter "STIGLER REPORT"].

[90] *See, e.g.*, HOUSE ANTITRUST SUBCOMM. REPORT, *supra* note 4, at 41-42.

[91] STIGLER REPORT, *supra* note 89, at 34-36. For an argument that the Big Tech firms face meaningful competitive pressures despite operating in "tipped" markets, see generally NICOLAS PETIT, BIG TECH AND THE DIGITAL ECONOMY: THE MOLIGOPOLY SCENARIO (2020).

The Legislation

H.R. 3849 addresses these issues with two sets of requirements: interoperability and data portability. The interoperability mandate would require Big Tech firms to make their products and services compatible with those offered by competitors.[92] The bill directs the FTC to develop standards fleshing out the content of these obligations, and requires firms that interconnect with covered platforms to take "reasonable steps" to avoid introducing security risks to the platforms' information systems.[93] While the exact contours of this regime would vary from platform to platform, one can make some educated guesses about what it would entail. Facebook, for example, may have to develop tools that allow its users to communicate with users of rival social networks. Similarly, Apple may have to make its app store compatible with third-party payment systems.

The data-portability mandate shares a similar structure. The legislation would require the Big Tech firms to enable users to transfer their data to competitors, authorize the FTC to develop data-portability standards, and impose certain security requirements on companies that receive ported data.[94] While the precise content of platforms' obligations would depend on the FTC's implementation of the bill, the general idea is simple. Facebook, for example, would likely have to allow users to transfer their data (e.g., friends, messages, "likes") to competing social networks.

Effect on Current Law

Interoperability and data-portability requirements are forms of what antitrust law has traditionally called "duties to deal" with rivals. While companies are generally free to choose their counterparties, antitrust duties to deal can arise in several circumstances. First, regulators have imposed such duties as remedies for certain types of antitrust violations.[95] Second, monopolists may have duties to deal when they control an "essential facility" that cannot reasonably be duplicated.[96] Finally, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Supreme Court held that monopolists can be liable for terminating profitable courses of dealing with rivals absent a valid business justification.[97]

This body of case law is not a promising vehicle for imposing interoperability and data-portability requirements on the Big Tech firms. For a court to impose such requirements as *remedies*, a plaintiff would have to establish substantive antitrust violations for which interoperability or data portability is an appropriate form of redress. While the Justice Department's 2002 consent decree with Microsoft contained a prominent example of an interoperability mandate,[98] it is unclear whether any of the Big Tech firms' conduct would prompt a court to order a similar remedy.

This uncertainty is partially attributable to the courts' significant narrowing of *substantive* refusal-to-deal liability. The essential-facilities case law exemplifies this trend, as lower federal courts

[92] H.R. 3849, 117th Cong. § 4. The bill's requirements would apply to the same "covered platforms" as the legislation discussed above. *Id.* § 5(6).

[93] *Id.* § 4.

[94] *Id.* § 3.

[95] *See, e.g.*, United States v. Microsoft, 231 F. Supp. 2d 144, 190-92 (D.D.C. 2002).

[96] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); MCI Comm'cns Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983).

[97] 472 U.S. 585 (1985).

[98] *Microsoft*, 231 F. Supp. 2d at 190-92.

have become increasingly sparing in applying that doctrine.[99] The Supreme Court has also contributed to this tapering. In *Verizon Communications, Inc. v. Trinko*, the Court referred to the essential-facilities doctrine as a creation of the lower courts, while declining to either recognize or repudiate it.[100] Commentators have described this treatment of the essential-facilities case law as inflicting "death by dicta"[101] and wondered whether the doctrine is now a "dead letter."[102] *Trinko* also cabined refusal-to-deal liability more generally by characterizing *Aspen Skiing* as "at or near the outer boundary" of monopolization law.[103] Accordingly, current antitrust doctrine does not offer an attractive means of imposing interoperability or data portability on Big Tech firms that do not already offer those options.[104] H.R. 3849 seeks to plug this alleged gap with a regulatory fix.

The Arguments For

As noted, H.R. 3849's interoperability requirements are directed at the network effects that insulate Big Tech firms from competition. The bill represents an attempt to shift those network effects from individual firms to the market as a whole, leveling the playing field for smaller rivals.[105] Here, the bill borrows a regulatory tool that has played an important role in telecommunications law, where carriers must allow rivals to interconnect with their facilities and equipment.[106] The legislation's data-portability requirement would address a different entry barrier by attempting to reduce the switching costs facing users of Big Tech platforms.[107] Again, telecom regulation imposes an analogous mandate, requiring phone carriers to allow customers to keep their phone numbers when they switch to rival services.[108] Together, interoperability and data portability would arguably mitigate the structural characteristics that cause certain tech markets to "tip" in favor of a single dominant firm.

The Arguments Against

The traditional arguments against interoperability and data portability appeal to worries about security, privacy, technical challenges, and innovation harms. "Closed systems" like Apple's iOS arguably have certain security advantages over their open rivals, which interoperability could

[99] Spencer Weber Waller & Brett Frischmann, *Revitalizing the Essential Facilities Doctrine*, 74 ANTITRUST L.J. 1, 7 (2008).

[100] 540 U.S. 398, 411-12 (2004).

[101] Waller & Frischmann, *supra* note 99, at 3.

[102] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 801 (2017).

[103] 540 U.S. at 409. In applying *Trinko*, lower courts have coalesced around a three-part test for refusal-to-deal liability. Under that test, a plaintiff bringing a refusal-to-deal claim must show that the defendant-monopolist (1) terminated a profitable course of dealing with a competitor, (2) continued to sell the relevant product or service to other similarly situated customers, and (3) was willing to forsake short-term profits for an anticompetitive end, rather than a legitimate business purpose. *See* FTC v. Qualcomm Inc., 969 F.3d 974, 993-94 (9th Cir. 2020); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074-76 (10th Cir. 2013) (Gorsuch, J.).

[104] In June 2021, a federal district court dismissed the FTC's allegations that Facebook's restrictions on access to Facebook Platform constituted unlawful refusals to deal. Memorandum Opinion, FTC v. Facebook, Inc., 1:20-cv-03590 at 39-50 (D.D.C. June 28, 2021).

[105] *See, e.g.*, Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, WASH. CTR. FOR EQUITABLE GROWTH (Sept. 23, 2020).

[106] 47 U.S.C. § 251(a).

[107] *See, e.g.*, Josh Constine, *Friend Portability Is the Must-Have Facebook Regulation*, TECHCRUNCH (May 12, 2019), https://techcrunch.com/2019/05/12/friends-wherever/.

[108] 47 U.S.C. § 251(b)(2).

diminish or eliminate.[109] Privacy is also a concern. Often, a platform user's data is co-mingled with the data of other users. For example, multiple users might be "tagged" in a photo on Facebook, and messages typically include information about their senders *and* recipients. Allowing users to port such data from a Big Tech firm to another platform without the consent of other parties would have important privacy implications.[110] Interoperability and data-portability mandates would also likely be complicated to develop and enforce.[111] The Telecommunications Act of 1996—which contains perhaps the most prominent example of an interoperability requirement—prompted over a decade of litigation that included multiple trips to the Supreme Court.[112] H.R. 3849's critics have cited this experience as a reason to be skeptical of the government's capacity to craft and administer technically complex interoperability regulations without getting bogged down in litigation.[113] In addition, opponents of expansive refusal-to-deal liability have argued that duties to deal inappropriately privilege static competition (price competition among sellers of undifferentiated products or services) over dynamic competition (innovation via the development of new products and services).[114] Some commentators have argued that interoperability would reduce dynamic competition by inducing firms that interoperate with the Big Tech platforms to eschew significant investments in innovation because of their need to maintain interoperability. Instead of making such investments, firms that interoperate may confine themselves to narrower competition focused on repackaging the services already offered by Big Tech.[115]

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[109] Hanno F. Kaiser, *Are "Closed Systems" an Antitrust Problem?*, 7 COMPETITION POLICY INT'L 91, 100 (2011).

[110] Peter Swire & Yianni Lagos, *Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critiques*, 72 MD. L. REV. 335, 348 (2013).

[111] *See* Randy Picker, *Forcing Interoperability on Tech Platforms Would Be Difficult to Do*, PROMARKET (Mar. 11, 2021), https://promarket.org/2021/03/11/interoperability-tech-platforms-1996-telecommunications-act/.

[112] *See* Verizon Commc'ns v. FCC, 535 U.S. 467 (2002); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[113] Gus Hurwitz, *Digital Duty to Deal, Data Portability, and Interoperability*, *in* REPORT ON THE DIGITAL ECONOMY, GEO. MASON U. GLOBAL ANTITRUST INST. (2020).

[114] *See id*.; *see also* CRANE, *supra* note 51, at 172 ("Economists and antitrust scholars increasingly view static consumer injuries as far less significant than dynamic injuries."); JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84-85 (1942).

[115] Hurwitz, *supra* note 113. For an argument that interoperability can *promote* dynamic competition, see Brian Feldman, *U.S. v. Microsoft Proved That Antitrust Can Keep Tech Power in Check*, N.Y. MAGAZINE (Dec. 12, 2017), https://nymag.com/intelligencer/2017/12/u-s-v-microsoft-proved-that-antitrust-can-check-tech-power.html.

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