Legislation or Consolidation: Key Proposals for Antitrust Enforcement in the Digital Economy

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In a theoretical, perfectly competitive market economy, businesses compete with one another to provide the supply and meet the demands of consumers. This competition offers choices and keeps the prices of goods and services attractive to consumers. But markets don't always function this way. Sometimes, a business or corporation grows so much that it can exert undue influence on competitors and consumers. When a single entity gains too much market power in a single sector, effectively foreclosing on competitive entrance into the market, it is deemed a "monopoly." It can force higher prices onto consumers for its goods or products, because no other companies have access to enter that market and compete against the monopoly.

When this occurs, it is incumbent on government regulators to foster competition by ensuring that smaller companies are able to enter a market and compete against larger corporations. The set of laws giving the federal government the power to do this are known as antitrust laws.

To protect consumers, the United States federal government has a long history of intervening in the market when mergers and consolidations have reduced competition. The federal government has long played a critical role in remedying corporate consolidation, from the trust-busting of President Theodore Roosevelt against companies like Standard Oil in the early 20th century, to the breaking up of telecommunications giant Bell System in the 1980s.

In recent decades, more industries have seen rapid consolidation, ultimately passing higher costs onto consumers who are left without alternatives. Industries such as tech, healthcare, and agriculture have coalesced around an increasingly smaller number of firms, disincentivizing competition and innovation and reducing market forces that would otherwise provide a check on anti-competitive and anti-consumer behavior from dominant businesses.

The Problem with Monopolies

When an entity in one sector gains too much power in a particular market, consumers can be faced with disruptions in the supply chain and price gouging, workers could see their wages suffer, and smaller companies can be forced out of the market or fail to gain market share altogether.

Recently, for example, there has been a shortage of baby formula in America due largely to the closure of an Abbott manufacturing plant in Michigan. The closure came after four babies fell ill, including two who passed away, after consuming formula made at the facility, due to a rare bacteria. The Food and Drug Administration (FDA) issued a warning urging consumers not to use formulas produced at the facility. Abbott is one of just three companies that account for 90% of the market share of baby formula in the United States, despite numerous lawsuits to remedy its anti-competitive practices. Of that 90%, Abbott controls 48% of the market. If the baby formula market were truly competitive and there were more producers of baby formula, the closure of one plant would not have jeopardized the well-being of millions of families who rely on formula to feed their infants and toddlers.

Consolidation also hurts workers. As a condition of employment, many employees are required to sign a non-compete agreement (NCA), meaning that an employee would not be permitted to work at a competitor for a certain amount of time following employment to protect industry trade secrets.

In recent years, many industries have used NCAs to dissuade competition in the labor market, even for lower wage workers who do not necessarily have access to proprietary information. For example, fast food workers at McDonalds have been required to sign NCAs, meaning if they wanted to begin working for a competitor to improve their wages or benefits, they would not be able to do so until the NCA expires. With greater consolidation and fewer competitors, workers are often locked into these agreements with few options to transfer their skills, ultimately harming their earning potential.

Similarly, many large corporations suppress competition in the labor market by colluding with each other to not hire a competitor's employee, a practice known as "no-poach agreements." Like NCA's, no-poach agreements ultimately deprive workers of "job opportunities, information, and the ability to use competing offers to negotiate better terms of employment," often leaving them unable to easily leave dangerous or hostile work environments. The Department of Justice's (DOJ) Antitrust Division has been investigating and filing lawsuits against "naked" no-poach agreements in which the agreements "are not reasonably necessary to any separate, legitimate business collaboration between the employers." Ending these practices will ultimately give more leverage to workers seeking better working conditions and will boost competition in the labor market.

Even the foundational tenets of our democracy, such as the freedom of the press, have been challenged by monopoly power. Smaller local news outlets that have to compete with corporate giants have been closing due to lack of advertising revenue as Facebook and Google accounted for 54% of total digital ad revenue in the U.S. in 2020. In recent years, Sinclair Broadcasting has bought up 193 local television stations that have struggled to operate in a shifting digital economy, further consolidating the market. Similarly, Google and Facebook control much of the content seen by

users online, rendering the success of local news outlets with small market shares dependent on the algorithmic whims of tech giants.

In October 2020, following a sixteen-month investigation into the state of competition in the digital economy, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law published a report focusing primarily on the monopolistic practices of the four largest tech firms: Apple, Amazon, Alphabet, and Facebook (now Meta). The report concluded that the dominant platforms have:

- Consolidated segments of the digital marketplace and abused monopoly power by advantaging their own products and services on their platforms over independent or smaller ones;
- Acquired hundreds of companies within the past decade, including purchasing potential competitors and shutting down or discontinuing services to foreclose the market; and
- Developed and acted on a financial incentive to abuse their significant and durable market power.

The report also recognized that there is more Congress could do to increase competition, particularly in the digital economy. This resulted in the introduction of numerous proposals to rein in the excesses of tech monopolization.

Key Antitrust Bills Before Congress

On June 23, 2021, the House Judiciary Committee marked up five bills intended to provide more competition in the digital economy, known as the "A Stronger Online Economy: Opportunity, Innovation, Choice" agenda. Below are summaries of each of the bills, which were passed favorably out of committee but have not yet been considered in the full House of Representatives:

- H.R. 3816, the American Choice and Innovation Online Act
    - *Sponsor:* Rep. David Cicilline (D-RI-01)
    - *Original Cosponsors:* Reps. Gooden (R-TX-05), Nadler (D-NY-10), and Buck (R-CO-04)
    - *Senate Companion:* S.2992, American Innovation and Choice Online Act (Sponsor: Sen. Klobuchar [D-MN])
    - *Summary:* This bill would prohibit dominant online platforms with gatekeeper power over markets, like Amazon, from preferencing their products or services over the products or services of a competitor. For example, if a user searches for socks on a platform, that platform could not use their control to place their own product ahead of a competitor's.
    - *Notable Actions:* On March 2, 2022, the Senate Judiciary Committee favorably reported S.2992, American Innovation and Choice Online Act out of committee with a bipartisan, 16-6 vote. It now awaits consideration by the full Senate.

- H.R. 3843, the Merger Filing Fee Modernization Act
    - *Sponsor*: Rep. Joe Neguse (D-CO-02)
    - *Original Cosponsors:* Reps. Spartz (R-IN-05), Cicilline (D-RI-01), Buck (R-CO-04), Nadler (D-NY-10), and Roy (R-TX-21)
    - *Senate Companion:* S.228, Merger Filing Fee Modernization Act (Sponsor: Sen. Klobuchar [D-MN])
    - *Summary:* This bill would reduce the filing fees for a proposed merger for smaller businesses and increase the fee for large mergers (more than $1 billion in valuation). The collected fees would increase the resources available for the antitrust enforcement agencies to review proposed transactions and to enforce antitrust laws.
    - *Notable Actions:* On June 8, 2021, the Senate passed S. 1260, the United States Innovation and Competition Act (USICA), which included the Merger Filing Fee Modernization Act as a provision. A final version of USICA is now being developed in a bicameral conference committee.

- H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act
    - *Sponsor:* Rep. Mary Gay Scanlon (D-PA-05)
    - *Original Cosponsors:* Reps. Owens (R-UT-04), Cicilline (D-RI-01), Buck (R-CO-04), and Nadler (D-NY-10)
    - *Senate Companion:* None introduced at the time of publication
    - *Summary*: This bill would require dominant platforms to establish an interoperability regime to allow users to move their personal data to a competitor and to protect the privacy of the user's information. For example, if users wanted to delete their Facebook account, Meta would be required to let the users download and transfer their data (such as photos) directly from Facebook to a competitor. This would operate similarly to email, as Gmail accounts can email Outlook accounts and vice versa, for example.

- H.R. 3826, the Platform Competition and Opportunity Act
    - *Sponsor:* Rep. Hakeem Jeffries (D-NY-08)
    - *Original Cosponsors:* Reps. Buck (R-CO-04), Cicilline (D-RI-01), Nadler (D-NY-10), and Gooden (R-TX-05)
    - *Senate Companion:* S.3197, Platform Competition and Opportunity Act (Sponsor: Sen. Klobuchar [D-MN])
    - *Summary:* To combat dominant companies buying up smaller competitors, this bill would require online platforms with gatekeeper power to prove that any proposed large acquisition would not hurt competition or enable the dominant platform to consolidate market share.

- H.R. 3825, the Ending Platform Monopolies Act
    - *Sponsor:* Rep. Pramila Jayapal (D-WA-7)
    - *Original Cosponsors:* Reps. Gooden (R-TX-05), Cicilline (D-RI-01), Buck (R-CO-04), and Nadler (D-NY-10)

    - *Senate Companion:* None introduced at the time of publication
    - *Summary*: This bill would promote free and fair competition by prohibiting dominant platforms (larger than $600 billion in market capitalization) from owning two lines of business that create a conflict of interest with each other. Platforms that are found to have a conflict of interest would be required to divest from one or more lines of business to eliminate their competitive advantage. For example, the bill could prohibit Amazon, Inc. from operating both the Amazon Marketplace and the *AmazonBasics* line of products concurrently.

Other Notable Legislation to Respond to Market Consolidation

Outside of the "A Stronger Online Economy: Opportunity, Innovation, Choice" agenda, members of the the House and Senate Judiciary Committees introduced legislation to address the decline of local journalism and market consolidation in the mobile app sector:

- H.R. 1735, the Journalism Competition and Preservation Act
    - *Sponsor*: Rep. David Cicilline (D-RI-01)
    - *Original Cosponsors*: Reps. Ken Buck (R-CO-04), Mark DeSaulnier (D-CA-11)
    - *Senate Companion:* S.673, the Journalism Competition and Preservation Act (Sponsor: Sen. Amy Klobuchar [D-MN])
    - *Summary:* This bill would provide small news publishers with a 48-month exemption from antitrust laws to collectively negotiate compensation and content (such as quality, accuracy, or attribution of news sources) with companies like Facebook or Google. Currently, online platforms that host content from small news publishers are not required to financially compensate them.

- H.R. 7030, the Open App Markets Act
    - *Sponsor*: Rep. Henry "Hank" Johnson, Jr. (D-GA-04)
    - *Original Cosponsors:* Reps. Ken Buck (R-CO-04) and David Cicilline (D-RI-01)
    - *Senate Companion:* S.2710, Open App Markets Act (Sponsor: Sen. Richard Blumenthal [D-CT])
    - *Summary:* This bill would promote competition in the mobile app market by requiring companies like Google and Apple (which control the vast majority of the mobile app market through their duopoly of Google Play and the Apple App Store) to install and use apps from on their devices from sources other than their proprietary stores.
    - *Notable Actions*: On February 17, 2022, the Senate Judiciary Committee passed S.2710, the Open App Markets Act.

Conclusion: Current State of Play

Congress has a critical role to play in addressing market consolidation and protecting American consumers. From scrutinizing proposed mergers for any potential anticompetitive effects, to cracking down on monopolistic practices through legislation, Congress has the power to promote consumer protection and competition. Currently, Congress is working to find consensus and advance legislation that achieves these goals.

After the House Judiciary Committee's June 2021 markup, the Senate passed the Merger Filing Fee Modernization Act as a provision of USICA, which both chambers are still working to finalize. At the time of publication, there is new momentum in the Senate for full consideration of S.2992, the American Innovation and Choice Online Act. Senator Klobuchar is revising the legislation to find consensus among at least 60 Senators to overcome the filibuster and advance the bill. Senate Majority Leader Chuck Schumer has pledged to bring the bill to the Senate floor for a vote in the summer if there are enough Senators in favor of the bill to overcome the 60-vote threshold. Because the House bills have not advanced beyond the Judiciary Committee, the House would still need to consider S.2992 before it could become law.