



Executive Analysis: House Of Representatives Antitrust Legislative Package 2021

Summary

In June 2021, Democratic representatives introduced a series of antitrust-related bills with the aim of regulating a selected group of digital service providers, so-called “covered platforms” (Covered Platforms). The Antitrust Bills represent a shift from market-oriented principles that have thus far characterized the American economy towards European-style industrial intervention, in an effort to prevent the Covered Platforms from successfully conducting regular business.

The Antitrust Bills comprise the following:

- The American Choice and Innovation Online Act*
- The Ending Platforms Monopoly Act*
- The ACCESS Act of 2021*
- The Platform Competition & Opportunity Act*
- The Merger Filing Fee Modernization Act of 2021*

As set forth in this analysis, the antitrust bills will impose (a) discriminatory prohibitions, (b) common carrier-type of obligations with respect to data sharing, (c) preventing Covered Platforms from engaging in mergers and acquisitions activities, (d) and/or forcing structural remedies on the Covered Platforms.

The American Choice and Innovation Online Act

The American Choice and Innovation Online Act grants the U.S. Federal Trade Commission (FTC) the mandate to classify a digital service as a Covered Platform based on three cumulative conditions, namely: number active users, market capitalization, and critical nature of the service. The classification will last for 10 years although the Act provides for a process to have a company removed from being considered a Covered Platform earlier than the statutory duration.

In essence, this Act considers the services offered by Covered Platforms of a distinct critical nature, and forces these companies to conduct business under an obligation to be neutral vis-a-vis other competitors and service providers that might be willing to operate on the Covered Platforms’ services. To ensure this artificially created neutrality, this Act imposes limitations and obligations on the normal conduct of business of these Covered Platforms. Among others, it prohibits Covered Platforms from engaging in self-preferencing, discrimination, exclusionary arrangements, etc.

While the Act foresees some limited instances where a Covered Platform would be allowed to defend non-compliance, generally, failure to comply will amount to draconian penalties of up to the highest of 15% of the total United States revenue (not profit) of the Covered Platform for the previous calendar year; or 30



percent of the United States revenue of the corporation in any line of business affected or targeted by the conduct during the relevant period. The Bill also foresees the possibility of seeking private right of actions for infringement.

The Ending Platforms Monopoly Act

Under this Act, the U.S. government would direct designated companies to restructure their current, lawful business models to meet government policy objectives. In furtherance of the Platform Antimonopoly Act, the Ending Platforms Monopoly Act would impose structural separation on Covered Platforms, effectively re-designing their business models and the nature of the services they provide - a policy proposal sometimes referred to as 'Glass-Steagall for the Internet'. This Act also imposes limitations on the persons that can form part of the Board of Directors of Covered Platforms.

At core, the Ending Platforms Monopoly Act empowers the FTC or the Department of Justice (DOJ) to initiate proceedings to seek a court order requiring a Covered Platform separates its line of businesses if an "irreconcilable conflict of interest" as defined by the Act, exists. This statutory definition prevents digital services from integrating their different line of businesses and could result in consumers not taking advantage of these business models that bring about efficiencies to their daily lives.

The ACCESS Act

The Augmenting Compatibility and Competition by Enabling Service Switching ("ACCESS") Act of 2021 expands the scope of Section 5 of the Federal Trade Commission Act (FTC Act) to impose requirements on Covered Platforms to share user data, potentially without the express permission of data subjects, and to build interfaces that enable interoperability with competing and potential competing businesses. The text of the specific obligations to provide for data portability and interoperability closely mirror S.2658, introduced by Senator Warner in 2019.

The Act grants the FTC broad rulemaking authority over difficult policy and operational issues and further instructs the Commission to develop technical interoperability standards for specific services within only 180 days of the designation of a Covered Platform. The Act also lacks robust safeguards to ensure that the privacy of consumers' personal data is respected when it is transferred to a third party entity, relying on Covered Platforms to set standards for access that are consistent with industry best practices and to report any suspected violations. Finally, the Act imposes limitations on the commercialization of certain data that is unclearly defined and may limit the ability of businesses to improve, innovate, and differentiate the services offered to consumers.

The Platform Competition & Opportunity Act

Contrary to U.S. market economy principles, the Platform Competition & Opportunity Act is a tailored merger control regulation that will prohibit Covered Platforms from engaging in transactions that would otherwise be reasonable from a business perspective. This Act is deemed to complement the existing U.S. merger control



regime currently operating under the Clayton Act. However, this Act differs from the Clayton Act because the latter only bans anticompetitive transactions as opposed to imposing a discriminatory prohibition on certain companies.

In short, this Act will prohibit Covered Platforms from acquiring another company or parts of a company that, e.g., (a) competes with the acquirer, (b) is a potential competitor, (c) enhances the Covered Platform's market position, or (d) facilitates a Covered Platform's ability to maintain its market position. Given the business rationale that are typically behind transactions, essentially, this Act will effectively prevent Covered Platforms from engaging in any meaningful mergers or acquisitions.

The Merger Filing Fee Modernization Act of 2021

This Act aims to increase FTC and DOJ funding through an adjustment of the merger filing fees. Whereas it is laudable to ensure that antitrust agencies are sufficiently funded, it is worth noting that changes to the filing fees might impact mergers and acquisitions activities involving medium companies that are obliged to comply with the Clayton Act and refer a transaction to the Authorities. Moreover, it is worth noting that this Act won't impact Covered Platforms since they would be prevented almost in their totality from engaging in transactions.