



Explaining the History and Future of Antitrust Laws in the U.S.

Center Forward Basics

August 2021

Overview

In June 2021, the House Judiciary Committee introduced a series of bills focusing on antitrust regulation and reform. These bills generally seek to increase the authority of U.S. antitrust agencies, prevent companies from acquiring other firms, require data portability and interoperability with competitors, and prevent platforms from selling or promoting their own products in an attempt to disadvantage competitors. They are aimed directly at Big Tech, specifically Amazon, Apple, Facebook, Google, and Microsoft. If these bills are signed into law, they would reflect the largest expansion of U.S. government antitrust powers in generations. Many critics of the proposals, including tech companies, are worried because this set of bills may hamper American competitiveness, change the user experience, and harm consumers. This Basic will highlight the history of U.S. antitrust laws while explaining the House antitrust bills and their impact on Big Tech and customers.

History of Antitrust in the U.S.

The federal government enforces three major antitrust laws (among a few minor ones such as the Robinson-Patman Act) that protect and maintain competition in order to provide consumers with lower prices and new, better products. The three major federal antitrust laws include:

1. The Sherman Antitrust Act of 1890:

- a. This law was passed in response to large new concentrations of economic wealth in trusts and in industry-dominating companies including U.S. Steel, Standard Oil, and some railroads. The law outlaws all contracts, combinations, and conspiracies that unreasonably restrain trade (e.g., agreements among competitors to fix prices, rig bids, and allocate customers) and monopolization.

2. The Clayton Act of 1914:

- a. This law prohibits, among other things, mergers or acquisitions when the effect “may be substantially to lessen competition, or to tend to create a monopoly.”
- b. The Clayton Act was amended in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require notification to the antitrust agencies of certain mergers depending on the size of the parties and the size of the transaction.

3. The Federal Trade Commission Act of 1914:

- a. This law created the Federal Trade Commission (FTC) and empowered the agency to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, conduct investigations, provide reports to Congress, and enforce

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Center Forward brings together members of Congress, not-for-profits, academic experts, trade associations, corporations and unions to find common ground. Our mission: to give centrist allies the information they need to craft common sense solutions, and provide those allies the support they need to turn those ideas into results.

In order to meet our challenges we need to put aside the partisan bickering that has gridlocked Washington and come together to find common sense solutions.

For more information, please visit www.center-forward.org

Key Terms

- **Covered platform:** a website, online, or mobile application operating system, digital assistant, or online service that meets all three of the following conditions:
 1. 50 million U.S.-based monthly active users or 100,000 U.S.-based monthly active business users;
 2. Greater than \$600 billion in net annual sales or market capitalization;
 3. Is a “critical trading partner” that can restrict business users’ access to customers.
- **Efficiencies:** Antitrust efficiencies are benefits from mergers or business practices that are of value to consumers by lowering costs or prices, or that enable higher quality or innovation.

the antitrust laws (a duty shared with the Department of Justice).

In addition to the FTC's and Department of Justice's Antitrust Division's enforcement, private parties may also bring suits under the antitrust laws. State and Territory Attorneys General also have jurisdiction to enforce both federal and state-level antitrust laws in the U.S., and state-level enforcement has been particularly active in recent years. Outside the United States, international agencies enforce their antitrust and competition laws, from jurisdictions as diverse as Australia, India, and the European Union, which are investigating conduct in Big Tech markets. In the last 20 years or so, there has been increasing discussion about whether the antitrust laws as written are sufficient and flexible enough to address the rapid change of technology and innovation.

House Antitrust Bills

The [set of bills](#) introduced in the House Judiciary Committee followed a 15-month investigation into digital tech platforms. These bills mark a departure from the antitrust law and policy that have presided over the last few decades as these laws are directly targeted at only a few companies. The bills regulate companies that are "designated as" covered platforms, which are assumed to include Amazon, Apple, Facebook, and Google, and possibly Microsoft because it operates multiple large-scale platforms, such as Windows, Office, Xbox, and LinkedIn. Some other large companies (such as telecommunications and cable) have some level of concern that the laws as written might be interpreted to apply to them as well.

1. Merger Fee Modernization Act

- a. This bill would increase the FTC and DOJ's budget by almost 30% and change the merger filing fee structure to fall more heavily on larger deals.

2. Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act

- a. This bill would require the targeted companies to make all services interoperable with competitors and third parties and permit users to transfer data to competitors. It leaves the definition of "data" up to the FTC to determine and allows the FTC to create committees, composed of bureaucrats, outside consultants, and competitors, to oversee portability and interoperability mandates.

3. Platform Competition and Opportunity Act

- a. This bill aims to limit all mergers and acquisitions by platform companies, subject to an exception for acquisitions under \$50 million. It effectively bans all acquisitions by platform companies, including partial acquisitions, regardless of the effects on consumers or competition.

4. American Choice and Innovation Online Act

- a. This bill bans numerous modes of conduct for covered companies, including but not limited to both operating a "platform" and selling a product on that platform. This bill describes such conduct as "discriminatory," though does not detail how companies could avoid alleged conflicts of interest in operating their current business models. As a practical matter this bill could prevent any aspect of product design which might disadvantage a competitor, severely limiting the ability of platform companies to design and introduce new products.

5. Ending Platform Monopolies Act

- a. This bill bans a covered entity from owning or operating multiple lines of business including ones that present an alleged conflict of interest with the ownership of the platform, or even offering different features on the same platform.

- **Excessive pricing:** Excessive pricing is the view that a company prices its products at too high of a price point. High prices are not prohibited by U.S. antitrust law.
- **Market allocation:** Market division or allocation schemes are agreements in which competitors divide markets among themselves and agree not to compete.
- **Monopoly/Market Power:** Monopoly or market power (the terms are used interchangeably) is the ability to raise market-wide prices above or reduce output below the competitive level over an extended period of time.
- **Monopsony power:** Monopsony (one buyer) or oligopsony (a few buyers), are the mirror image of monopoly or oligopoly, that is, they exist when there are one of a few buyers instead of sellers.
- **Price fixing:** Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold.

What Do These Bills Really Do?

The antitrust bills are complex and if passed would have far reaching implications, even outside of “Big Tech,” given the breadth of the covered platform definitions. Overall, they would impose provisions that would change the basic structure and functions of many tech firms and beyond. If these bills are passed, these companies would not be able to offer certain products and services, and would be hindered in maintaining the privacy and security features that currently protect users. For example, Apple stated that the proposed antitrust laws would “undermine consumers’ ability to choose products that offer state-of-the-art Privacy and Security” and would make it easier for criminal actors to put iPhone users at risk. The proposed changes also have potential cybersecurity and national security implications that include limiting the ability of apps to access data from other apps, track user locations, and defraud users. Amazon states the bills would also have “significant negative effects on the hundreds of thousands of American small- and medium-sized businesses that sell in our store.”

Below is a list of some of the user experiences that would be impacted if the bills were passed:

- Apple could not pre-install any apps (FaceTime, iMessage, Mail, and Music) on Apple products. It would also not be able to recommend the best apps on the App Store.
- Amazon could not offer Prime since the bills require equal treatment of all products in a marketplace, which would prevent distinguishing between products based on Prime status. The inability to engage in standard retail practices, and the requirement to divest numerous business lines, including AWS and its fulfillment assets, would force Amazon to close its marketplace.
- Google search results would change and would not be able to show restaurants “near me” on Google Maps but instead have to show links to competitive mapping services.
- Google would also have to spin off YouTube, Android, Chrome, the Play Store, and its apps (Gmail, Google Maps, Drive, etc.) into separate businesses.
- Facebook couldn’t allow for easy cross-posting to Instagram, due to the conflict of interest and non-discrimination provisions.

Conclusion

Critics have argued that the Big Tech companies have become too large and that government regulators need to break them up or weaken them by increasing the size and budget of antitrust agencies, changing how companies can acquire potential rivals, and preventing platforms from selling or promoting their own products. Some members of Congress even suggest that the federal government should be more aggressive in using its power to challenge prior mergers that previous Administrations declined to challenge. On the other hand, many argue this authority should rarely be used because revisiting past transactions and applying a different analytical approach or a heightened level of scrutiny could slow economic growth, which would harm workers and investors.

In July 2021, President Biden signed an [Executive Order](#) to promote competition in the American economy by lowering prices for consumers, increasing wages, and promoting faster economic growth. This order is broad reaching and affects health care, internet services, labor, transportation and shipping, agriculture, and banking and finance, in addition to Big Tech. While the bills were voted out of the House Judiciary Committee, they have a long road ahead in the House of Representatives and the Senate before being passed and signed by the President. On August 11th, Senator Richard Blumenthal introduced the Open App Markets Act. It has some overlap with the House’s bills, but it would target Apple and Google’s management of their app stores. Senators are still working on additional companion legislation for the House bills, but the bills aren’t expected until later in the fall.

Links to Other Resources

- American Action Forum — [Examining Recent House Antitrust Reform Proposals](#)

- Chamber of Commerce — [Antitrust Laws](#)
- Chamber of Progress — [New House Bills Would Ban These 15 Tech Conveniences That Consumers Love](#)
- Connected Commerce Council — [When you Change the Model, You Change the Math for American Small Businesses](#)
- DisCO — [Antitrust in 60 Seconds: Does Size Matter in Competition Policy?](#)
- Foley Hoag — [Antitrust Implications of HHS' Proposed Rule to Limit Manufacturer Rebates](#)
- ITIF — [Is Big Business Really That Bad?](#)
- IFIF — [Monopoly Myths: Do Internet Platforms Threaten Competition?](#)
- ITIF — [Seizing the Moment to Dust Off the Anti-Big Agenda](#)
- Mercatus Center — [US Antitrust Laws: A Primer](#)
- Nextgov — [Changing How App Stores Operate Could Have National Security Implications](#)
- New Democrat Coalition — [New Democrat Coalition Leadership Members Urge Leadership and House Judiciary to Hold Legislative Hearings on Upcoming Antitrust Legislation](#)
- New York Times — [Antitrust Overhaul Passes Its First Tests. Now, the Hard Parts.](#)
- Progressive Policy Institute — [California Tech-Ecommerce Jobs and Tax Revenues](#)
- Progressive Policy Institute — [The Good, the Bad, and the Ugly in the House Judiciary Committee's Tech Antitrust Bills](#)
- Progressive Policy Institute — [Rush to Judgement: House Antitrust Panel Misses the Mark on Digital Competition](#)
- Real Clear Policy — [Understanding Antitrust](#)
- TechDirt — [Will Congress' Big New Push On Antitrust Actually Solve Any Competition Issues?](#)
- Truth on the Market — [Breaking Down House Democrats' Forthcoming Competition Bills](#)
- U.S. Department of Justice — [Antitrust Laws and You](#)
- The Washington Post — [The battle to break up Big Tech has just begun](#)
- The Washington Post — [Antitrust Overhaul Passes Its First Tests. Now, the Hard Parts.](#)
- 9 to 5 Mac — [Apple pens letter to House Judiciary Committee saying proposed antitrust legislation would 'create a race to the bottom for privacy'](#)