

# Applying Antitrust Law to the U.S. Tech Sector: A critique of the American Innovation and Choice Online Act

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## Executive Summary

In 2019, the House Judiciary Committee initiated an investigation into the state of competition in digital markets, looking particularly at the dominance of America's biggest online platforms. Three years later, a slew of bills have been introduced at both federal and state level intended to curb the power of "Big Tech." The driving force behind many of these efforts is the claim that companies like Google, Amazon, Facebook (Meta), and Apple are simply too big, with their size posing a competitive threat to smaller tech companies. A handful of these bills are being introduced with the purpose of updating America's antitrust laws to meet the challenge of today's supposed tech monopolies.

The American Innovation and Choice Online Act (S. 2992) sponsored by Senators Amy Klobuchar, D-Minn., and Chuck Grassley, R-Iowa, for example, is being sold to Congress and the American public as being comprehensive antitrust legislation to rein in the power of "Big Tech." Whatever its merits, however, the bill isn't really based in antitrust law and policy. Rather, it's an ad hoc set of new rules which replace the current standards for antitrust enforcement based on market power and consumer welfare with a more generalized approach which targets just one industry — online platforms. The Senate bill looks at platforms with a large number of users and assumes excessive market power as a result of size, forgoing the need for economic analysis required to prove illegal monopoly power. The bill then imposes additional competitive requirements onto this predetermined set of companies.

A genuine antitrust analysis would examine not just firm size, but the conditions of the market in which a company operates, the presence of direct competitors, and its potential for consumer harm. Instead, the Senate bill takes a cookie cutter approach to

antitrust enforcement: An online platform that hosts third party business users with over 50 million U.S. monthly active users (or 100,000 business users) and a market capitalization or net annual sales over \$550 billion should be subject to different rules regarding competition. Essentially, a company-specific carveout without precedent in antitrust law.

There is a demonstrated need for changes in how antitrust law is enforced in order to encompass the business models of today's digital platforms and e-commerce sites. However, the Senate bill fails to offer a rigorous economic analysis of digital markets, fundamentally changing enforcement methods in ways unacknowledged by the bill's supporters.

This report explores three ways in which the Senate bill falls short:

- For the past 40 years, U.S. antitrust enforcement has been based on the assessment of quantifiable harm resulting from a firm's market power, which most often takes the form of price effects. Supporters of the Senate bill, however, make no such assessment.
- In addition to being incompatible with current antitrust law and practice, the American Innovation and Choice Online Act's size-based model would put American companies at a competitive disadvantage against other big competitors in global markets.
- Businesses such as internet platforms with low costs and significant network effects require a more sophisticated approach to examining consumer harm which accounts for damage to consumers other than rising prices. This might include adverse changes to company policies or reduction in accessibility of a service and may, in the

end, warrant additional regulation. The current proposed legislation does not make such a case.

Today's dominant technology companies may warrant scrutiny under antitrust law, but to investigate the merits of this claim it is critical that assessment of an illegal monopoly is based on market power rather than size. By considering metrics of consumer harm beyond price effects, it is possible to evaluate harmful market power in a way that considers the nature of these growing industries without discounting the additional value to the consumer presented by companies with large network effects.

## THE AMERICAN APPROACH TO COMPETITION LAW

Antitrust has a long history in the United States, starting with the passage of the Sherman Act in 1890. The law was crafted to be intentionally broad, the courts to set precedents on a case-by-case basis to establish what business practices fall under the Sherman Act's prohibition on "monopolization, attempted monopolization, or conspiracy or combination to monopolize."<sup>1</sup>

But as it's been interpreted by courts, being a monopoly does not by itself violate the Sherman Act. In *United States v. Grinnell Corp.* (1996), the Supreme Court ruled that an illegal monopoly under the Sherman Act had to meet two requirements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>2</sup> Essentially, not only does a company need to be proven to have monopoly power, for it to be illegal there must also be proof of anticompetitive conduct in either the methods used to obtain monopoly power or how they are able to hold onto that power. These standards were reinforced in 2004,

when the Court reaffirmed that anticompetitive conduct must be present for the possession of monopoly power to be found unlawful in order to protect incentives for innovation.<sup>3</sup> Additional legislation such as the Clayton Antitrust Act describe what this anticompetitive conduct might look like, classifying practices such as price discrimination, exclusive deals between companies, and mergers which consolidate market power as illegal being under antitrust law when they pose substantial risk to the consumer or the competitive process.<sup>4</sup>

But how to tell whether a firm is a monopoly? The first step is identifying the market in which a firm does business. This consists of the geographic market — the region in which a firm provides products or services to consumers, and the product market, which looks at the number of firms that sell substitute products, assessing the ability for the consumer to buy from companies other than the that in question. The economic analysis of geographic markets examines the region a company operates in and then accounts for shipping and transportation costs, tariffs, and other factors impacting the geographic reach of a company.

For product markets, the most common way to show market power is the Hypothetical Monopolist Test in which economists simulate the effects of a firm enacting what is called an SSNIP — a small but significant non-transitory increase in price.<sup>5</sup> If consumers would react to the price increase by purchasing a substitute product, those products are included in the market of the original firm.

Essentially, two companies operating in the same geographic region with similar products are likely competitors. Once it is determined what the market for a company is, you can then look at how big a firm is in comparison to the size of the market, providing a good basis to evaluate a firm's market share. Firms with high market share may have significant

market power or perhaps even be considered monopolies.

But simply having a high share of the market is not illegal, and market share does not always translate into market power, which is the key metric to enforcement. A firm has market power if it can control the market price of a product, meaning that it could significantly raise prices or reduce the quality of its product without losing profit. This happens when consumers lack substitute products and are thus forced to pay the higher price or accept the reduction in quality. To trigger an antitrust investigation, market power must be significant and sustained over time. If the market is easily disrupted, it is unlikely that courts will find evidence of lasting market power.

## THE EVOLVING THEORY BEHIND ANTITRUST ENFORCEMENT

Prior to the 1970s, antitrust enforcement focused on the structure of markets, with the assumption that concentrated markets are more conducive to anticompetitive conduct. Under this approach, it was easier to bring antitrust cases against large firms without definitive proof of consumer harm, assuming regulators found that a company's size in the relevant market proved to be a threat to the competitive process.<sup>6</sup>

But this assumption changed with the rise of the "Chicago School" of antitrust economics in the 1970s and 1980s. It posited that the government didn't need to bring so many antitrust suits, because markets had the power to self-correct competitive abuses. This thinking gave rise to the consumer welfare standard, which focused enforcement on instances of quantifiable harm to consumers rather than on an ideal structure of a market as defined by the federal government. Consumer harm as it's currently enforced is largely based on rises in prices, but can also encompass reduced product quality, reduced

product variety, or diminished innovation.

Today, the debate continues as to whether this is the correct approach. Critics contend that a return to economic structuralism is needed to address the power of modern tech companies given the difficulty of proving consumer harm based on prices in a market where the consumer often faces little to no monetary cost. Supporters of the consumer welfare standard argue that without harm to consumers there is no need for enforcement at all. The reality falls somewhere in between. If a company's actions benefit consumers, antitrust enforcement will have adverse effects and may result in higher prices. On the other hand, modern companies can potentially behave in ways which may harm consumers beyond rising prices, which should also be considered.

However, supporters of the Senate antitrust bill take a different approach, lacking in the nuance of assessing market power. Their approach prescribes conditions for companies in digital markets under the assumption that companies larger than a predetermined threshold should be subject to different rules in order to prevent market concentration. While the intention is more aligned with the structuralist view of the danger of concentrated markets than the prioritization of consumer welfare, the bill falls somewhere outside the two major camps in terms by taking away the burden of proof to the claim that a large company has market power.

## SINGLING OUT TECH PLATFORMS

The Klobuchar-Grassley bill creates wholly new criteria for determining which companies should get antitrust scrutiny. It targets only firms operating online platforms that have at least 50 million U.S. users or 100,000 business users, a market capitalization or net annual sales over \$550 billion and classification as a "critical trading partner," meaning the company has the ability to restrict business

users on their platform.<sup>7</sup> Companies which fall within this definition are considered “covered platforms” and are then subject to the bill’s outlawing of self-preferencing a company’s own products on its platform. The idea being that once a firm is sufficiently large, providing their own products and services alongside those of third parties which utilize their platforms should be considered an anticompetitive action.

Regardless of the self-preferencing rules being imposed on covered platforms under the bill, the problem with this size-based approach is that it skirts an essential part of antitrust analysis: Defining the relevant market in which firms operate and determining whether consumers in that market can find substitutes for the goods and services the big platforms offer. By designating covered platforms based on size alone, regulators fail to consider their actual market power. As the Antitrust Law Section of the American Bar Association points out in its comments on the bill, “prohibiting conduct without regard to market power invites arbitrary enforcement and wasteful disruption of normal competitive processes. The risks of unintended consequences are especially severe in digital markets characterized by multi-sided competition, dynamic complexities, and interdependence.”<sup>8</sup>

An individual firm may be large, but if that size is proportional to the size of the market, that firm may not have a preponderant or even significant market share. And when considering the level of international competition in the market for online platforms, size-based regulation is not going to limit the size of the world’s dominant tech platforms, it’s just going to ensure they’re not American companies.

## THE PROBLEM WITH ANTITRUST AND “BIG TECH”

Despite the Senate bill’s glaring flaws, it’s true

that the current methods of proving consumer harm may be too narrow to judge antitrust behavior in digital markets. Internet platforms such as social media and e-commerce sites are particularly hard to fit into the mold given that many of these services accrue revenue through paid advertisements and are thus offered at no cost to the consumer. This is further compounded by the fact that traditional antitrust enforcement was not designed to deal with network effects.

In simplest terms, the network effect means that the value of an online good or service goes up or down with the number of people using them.<sup>9</sup> For example, phone service is only as valuable as the amount of people you’re able to use it to communicate with.<sup>10</sup> This means that the purchase of service itself becomes more valuable as more people buy it. The inverse is also true. If suddenly a large portion of cell phone users decided to stop paying for phone service, the value for an individual buyer drops because they are not able to use it to contact as many people.

Internet platforms provide perhaps one of the best examples of network effects. For a social media site whose purpose is connecting with individuals or groups, the value of the service is tied to how many you’re able to use the platform to connect with. In e-commerce, large online retailers like Amazon or Etsy rely on third party sellers to list products on their sites, making them more valuable to consumers as more sellers participate. And, conversely, large retail platforms are more valuable to sellers the with the more consumers who participate. Ride sharing and food delivery service platforms see similar impacts, with the value of a firm such as Uber being contingent on both the number of riders and drivers who use it. With these kinds of products, even though a small business might be able to make their own platform, it is not a direct substitute product because it lacks the value associated with the network obtained by their competitors.

## DYNAMICS OF INDUSTRIES WITH SIGNIFICANT NETWORK EFFECTS

Industries with network effects are more conducive to being a monopoly in a market because of the incentives to the consumer associated with choosing a large network over a small one. If the goal is to share photos with friends, an account on Instagram will be more valuable than an account on a startup's platform with the same functionality. Because of this, platforms which are direct substitutes for existing products may have a more difficult time establishing a user base.

However, innovative platforms are still able to penetrate the market, and those that do have enjoyed incredibly rapid growth because of the benefits of network effects. A prime example is TikTok, a platform which after acquiring Musical.ly in November 2017, went from 133 million annual users in 2018 to 902 million annual users just three years later in 2021. Its biggest year-over-year growth was between 2019 and 2020, when the app went from 381 million to 700 million annual active users — an 83% increase.<sup>11</sup> But even without the benefits of acquisition, innovative

have proven competitive. BeReal, a photo-sharing app created in 2020, experienced an enormous increase in downloads in the first quarter of 2022. The mobile app garnered 7.67 million downloads between January and May 2022, representing 74.5% of its lifetime installs and an increase in monthly active users of 315% as more users discovered the platform, allowing them to grow rapidly.<sup>12</sup>

Another reason company size may not translate into market power is that users can "multihome," or use multiple platforms. Even if firms have a large user base and rapid growth via network effects, multihoming indicates that competitive dynamics are present in the market.<sup>13</sup> Not only does this complicate definition of the market in question for the purpose of identifying competitors because platforms do not need to act as substitutes, but this also translates to questions of whether they truly hold market power. Figure 1 shows the user overlap between eight popular social media platforms. Note that no firm has more than 1.3% of their global users who exclusively use their product, highlighting the prevalence of multihoming on social media and communications platforms.<sup>14</sup>

Figure 1: Overlap of Active Users on Social Media Platforms – April 2022

|                | Unique To Platform | Also Use Facebook | Also Use YouTube | Also Use TikTok | Also Use WhatsApp | Also Use Snapchat | Also Use Twitter | Also Use Reddit | Also Use LinkedIn | Also Use Telegram |
|----------------|--------------------|-------------------|------------------|-----------------|-------------------|-------------------|------------------|-----------------|-------------------|-------------------|
| Facebook Users | 0.6%               | —                 | 74.7%            | 48.5%           | 73.1%             | 32.5%             | 48.3%            | 14.2%           | 31.0%             | 43.0%             |
| YouTube Users  | 0.9%               | 79.1%             | —                | 46.6%           | 72.6%             | 30.2%             | 50.1%            | 16.3%           | 29.7%             | 46.1%             |
| TikTok Users   | 0.1%               | 84.7%             | 79.3%            | —               | 73.2%             | 41.6%             | 56.2%            | 16.9%           | 30.3%             | 47.8%             |
| WhatsApp Users | 1.3%               | 81.4%             | 76.6%            | 46.7%           | —                 | 34.1%             | 48.3%            | 13.3%           | 32.2%             | 49.9%             |
| Snapchat Users | 0.0%               | 83.9%             | 78.6%            | 61.4%           | 79.0%             | —                 | 60.8%            | 22.7%           | 38.2%             | 53.3%             |
| Twitter Users  | 0.1%               | 84.1%             | 79.3%            | 56.0%           | 75.5%             | 41.0%             | —                | 21.8%           | 51.2%             | 53.3%             |
| Reddit Users   | 0.1%               | 82.1%             | 80.2%            | 55.8%           | 69.0%             | 50.7%             | 72.3%            | —               | 41.8%             | 51.5%             |
| LinkedIn Users | 0.2%               | 88.1%             | 77.0%            | 49.4%           | 82.3%             | 42.2%             | 64.9%            | 25.3%           | —                 | 55.7%             |
| Telegram Users | 0.1%               | 83.3%             | 81.7%            | 53.0%           | 86.9%             | 40.1%             | 59.3%            | 17.3%           | 38.0%             | —                 |

Source: DataReportal

This is also true in other types of online platform engagement as well. In ridesharing, 66% of rideshare drivers use both Uber and Lyft regularly, rather than limiting themselves to just one service.<sup>15</sup>

Additionally, the degree to which consumers are “locked in” upon buying or using a product or service should be considered in assessing the level competition in this type of market. If a platform has a large amount of users but it is easy switch to a substitute platform, the platform might have a high market share, but not market power. However, if switching costs are high, both in monetary or opportunity cost, this may be exclusionary and thus harmful to competition because of high market power.

## DEFINING A MARKET FOR INTERNET PLATFORMS

Focusing narrowly on the size of U.S. tech firms, the Klobuchar-Grassley bill fails to take into account the global scope of the market in which they operate. The inevitable result of making these companies smaller, as the legislation intends, will put U.S. companies at a competitive disadvantage in international markets, where they face plenty of giant competitors.

Consider WhatsApp, owned by the American company Meta, and Telegram, a service created in Russia and now headquartered in London. Both are messaging apps which advertise their secure, encrypted platform for online messaging and allow easy contact between devices internationally. Both companies operate globally and have different levels of popularity in different geographic regions. American users make up 4% of total global WhatsApp users,<sup>16</sup> and 2% of global Telegram users. The biggest market for both apps is in India, which accounts for 17% of WhatsApp Users and 20% of Telegram Users.<sup>17</sup> The biggest market for both apps is in India, which accounts for 17% of WhatsApp Users<sup>18</sup> and 20% of Telegram Users.<sup>19</sup>

The best indication that these two companies operate in the same market came after WhatsApp’s parent company Meta (then Facebook) changed their privacy policies in January 2021, requiring users to share their data with Facebook. Within 72 hours of the announcement, 25 million users signed up for Telegram — an enormous surge for a company which had roughly 500 million users in 2021.<sup>20</sup> This is a clear indication that Telegram provided a substitute product to WhatsApp and, in response to consumer harm which in this case is in terms of data privacy rather than price effects, it is not difficult for consumers to find an alternative product. In this case, the global market provides a direct substitute.

In e-commerce, the market provides a similar example. Globally, 58% of e-commerce was concentrated in just six companies in 2020. As shown in Figure 2, of these 6 companies, 4 are based in China while 2 (Amazon and eBay) are based in the United States. Taobao and TMall, the top two companies, are both owned by Alibaba Group.<sup>21</sup>

*Figure 2: Global Market Share in E-commerce in 2020*

| Company    | Global Market Share |
|------------|---------------------|
| Taobao.com | 15%                 |
| TMall.com  | 14%                 |
| Amazon     | 13%                 |
| JD.com     | 9%                  |
| Pinduoduo  | 4%                  |
| eBay       | 3%                  |

*Source: Forbes*

Both Amazon and Alibaba have dominant positions in the e-commerce markets of their respective countries of origin, with Amazon being the largest e-commerce platform in the American market in terms of monthly active users and Alibaba establishing a similar stronghold of active users in China.<sup>22</sup> However,

outside of their home markets, competition for market share in the e-commerce space is more contentious.

India, for example, has a fast-growing e-commerce market driven by a large population and increasing access to internet service and mobile devices. With the growth of access and the boost in online activity facilitated by the pandemic, India has become a market for significant competition between global e-commerce companies. As of 2021, Amazon held the leading spot for e-commerce businesses in India with an estimated 322.54 million monthly active users. Flipkart, an Indian company acquired by American retail giant Walmart in 2018, had the second most monthly traffic at an estimated 242.62 million users, leaving Alibaba.com in third place with an estimated 175.95 million users.<sup>23</sup> But even with international giants leveraging their own economies of scale to expand into India, Indian companies have sought to enter the market. JioMart is an e-commerce platform run by Reliance Retail — an Indian retail company with a wide presence of physical stores — has established a presence across 200 Indian cities since its launch in 2020 in partnership with 300,000 local vendors. This is rapid growth when compared to Amazon, which had 50,000 sellers across 450 cities at the same time in 2021.<sup>24</sup>

This race to become the largest platform displays how market dominance in countries like India where there is an untapped market of new internet users remains in question. Both international and American companies have positioned themselves to expand into these markets as necessary. Despite this, the Klobuchar-Grassley bill seems blind to the reality that the “relevant market” in which they operate is global, not national. By reducing Amazon’s capacity for economies of scale by limiting the size of the company, the Senate bill makes a critical error, allowing international corporations — whether from China, India, or elsewhere — to maintain global

economies of scale while Amazon is limited in their ability to do, making it more difficult to compete globally. The presence of American companies such as Walmart as a dominant platform in India further highlights this example, proving that these companies do not domicile in domestic markets and are able to be exceedingly successful overseas.

## RECOMMENDATIONS

Legislation to update U.S. antitrust laws should avoid overly prescriptive requirements based on company size without consideration of market power, as well as legislation that makes business practices illegal for only certain types of companies as the Senate bill does with self-preferencing.

Lawmakers also should acknowledge that consumers benefit enormously from large platforms with network effects. In fact, by network effects alone, the product which is most valuable to the consumer on many online platforms is that has the most users. That potential for growth made possible by network effects is not indicative of a monopoly or even market power. And, even in cases where there is a monopoly, that is not necessarily indicative of illegal anticompetitive conduct. To account for this, antitrust reform should focus on new ways to calculate market power in a properly defined market where multihoming and product substitution are common.

The absence of high prices in the tech-e-commerce sector does make it difficult to apply the consumer welfare standard in antitrust enforcement against online platforms. Therefore, to evaluate market power on a case-by-case basis rather than relying on a predetermined size threshold, evaluations of market power should be made by methods similar to the Hypothetical Monopolist Test, while accounting for factors of consumer harm beyond price increases. Similarly, market power can be measured by

whether changes in tech companies' practices result in a significant loss in users. If consumers can move to a different platform under these circumstances, the firm is not a monopoly in that market. This method preserves the central idea of consumer welfare while accounting for non-price effects.

These considerations can also account for the ease of switching from one product or platform to another in the assessment of market power. If it is simple and inexpensive to switch platforms, that firm likely does not have market power. Additionally, if switching from one platform to another makes other, integrated services unavailable because of a lack of interoperability and there are no direct substitute products there may be evidence of market power through exclusionary conduct, which should also be considered in consumer harm. For example, if the only way to use an online product is to log in with a Facebook account, this lack of interoperability makes it more difficult for someone to decide that they do not want to use Facebook.

Lawmakers should take a similar approach to address self-preferencing, a key concern of the Senate bill. Regulators should evaluate whether a significant change in the behavior of a company's level of preferencing of their own products results in users leaving the platform. Or, if self-preferencing is identified as anticompetitive behavior that poses serious harm to the competitive process comparably to anticompetitive conduct identified in the Clayton Act, this should not be made industry-specific and apply to all cases of monopolistic anticompetitive conduct.

## CONCLUSION

Digital markets are dynamic and change quickly. Platform dominance, particularly in the case of social media platforms which lack the exclusivity to tie users to only one product, is not by itself indicative of market power. Unfortunately, the American Innovation and Choice Online Act is not based on a sophisticated economic analysis of how digital markets work. The size-based, company-specific approach fails to account for the reality of the global market for online platforms, and a departure from the precedent of assessing market power prior to imposing rules associated with competition.

This is not to say that there are no companies with monopoly power in the larger market for online platforms, but the methods presented by the Senate's efforts at reform do nothing to analyze this claim in terms of market power. There is a demonstrated need to update the current model for antitrust enforcement to cover consumer harm beyond price effects as industries evolve towards an advertiser-funded business model. And to do this, additional regulation may be needed. But any additional regulation should be crafted with the intent to guide new tests for market power and anticompetitive conduct, recognizing that the current framework of a consumer-welfare driven approach does not give a pass to no cost network industries so long as enforcers are able to recognize quantifiable instances of consumer harm.

## ABOUT THE AUTHOR

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