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IS CONGRESS COMMITTED TO MAKING AMERICAN CONSUMERS' LIVES COSTLIER?

by Aurelien Portuese

As the Senate Judiciary Committee will consider the 'American Innovation and Choice Online Act' on January 13, it appears that Congress is ready to make it harder and more expensive for consumers to enjoy the benefits of digital platforms. Senators Amy Klobuchar (D-MN) and Chuck Grassley (R-IA) recently introduced a bill that prohibits large firms from promoting their own products and services over those of rivals—the 'American Innovation and Choice Online Act'. Another bill introduced by Senators Tom Cotton (R-AK) and Amy Klobuchar (D-MN) prohibits a select group of digital platforms from acquiring any corporate asset—the 'Platform Competition and Opportunity Act'. These are the latest examples of legislative efforts prompted to bolster "fair competition" but which eventually will promote neither fairness nor competition.

The Klobuchar-Grassley bill aims at banning even the most common business practices such as promoting one's products on one's own platform, although consumers prefer the much cheaper "private labels." This preference is visible in both the offline space, but also online—simply putting it, for every customer who buys a Walmart Great Value product in-store there'll be one who chooses Amazon Basics over some other brand. And the price is the main driver. The bill prohibits practices that overwhelmingly are procompetitive. This bill appears to be the most advanced in the congressional procedure.

The Cotton-Klobuchar bill would prohibit mergers that may improve the digital platform's products and services only because the designated digital platform is already "large enough." For instance, Google may no longer be able to improve its search algorithm through acquisitions despite search users benefitting from an improved search experience. The bill prohibits mergers based on unsubstantiated assumptions and unproven claims.

These bills would generate three unfortunate consequences. First, they emulate the European Commission's Digital Markets Act, which targets large U.S. tech companies in the vain hope of helping European tech companies. In that respect, the Klobuchar-Grassley and Cotton-Klobuchar bills not only legitimize Brussels' techlash against U.S. superstar firms who propelled American digital leadership and innovation, but these bills would also undermine the credibility of any concern raised by U.S. lawmakers or the U.S. administration against Brussels' techlash. European lawmakers have already started using that argument: How come the U.S. laments about the Digital Markets Act, which targets U.S. tech platforms, at the same time U.S. lawmakers themselves introduce bills that emulate the Digital Markets Act? Brussels' leadership in regulation (not innovation) can only further increase.

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Second, these bills will harm American consumers by slowing down the rate of innovations from superstar firms due to prohibitively costly obligations that these platforms will pass on their customers and end-users. For instance, Amazon could no longer display Amazon Basics among its top search results, but the Chinese Alibaba or other U.S. rivals can still lead with their own private labels. How can treating similar rivals differently be a fair competition? Also, Google could no longer display the Google Maps or Google Search link when users search for something and Facebook could no longer promote, say, its virtual reality product Oculus, but rivals of this product may have claims to be enjoy a similar placement of Oculus products on Facebook's platform, thereby creating a chilling effect on investments by Facebook into Oculus products. These bills would harm American consumers both with lower investments on popular products and services, and with a bias in favor of foreign rivals or less disruptive rivals.

Third, these bills would unfairly discriminate between companies and distort competition—ironically, all in the name of “fair competition.” The bills promote unfair competition and discriminates against a handful of U.S. companies—namely Google, Apple, Amazon and Facebook. They do not consider powerful foreign rivals, domestic offline rivals and domestic smaller rivals. Moreover, the discriminatory nature of these bills reaches levels of regulatory capture. For instance, the Cotton-Klobuchar prohibit mergers for digital platforms only for these companies which have a market capitalization greater than \$600 billion “as of the date of enactment” of the bill. In other words, a company that may grow big after Congress passes the bill would not be subject to the bill's prohibitions. This leads for instance to Amazon being potentially subject to the bill while its direct competitors are not even though they may subsequently reach this \$600 billion threshold. This is not fair competition for the benefit of consumers, it is distorted competition at the expense of consumers and at the discretion of regulators.

The Klobuchar-Grassley bill and the Cotton-Klobuchar bill illustrate the bipartisan support in Congress to emulate Brussels's techlash against a few large U.S. tech companies even if this emulation harms American consumers. This bipartisanship rests upon antitrust populism, not economic pragmatism: It cast stones on a few successful companies and does not serve broad economic interests as illustrated by the bipartisan infrastructure bill. Bipartisanship cannot disservice the American consumer. And yet, recent antitrust bipartisanship would do exactly that.

As the Senate Judiciary Committee will consider the Klobuchar-Grassley bill this Thursday, U.S. senators need to better grasp the considerable unintended consequences before hastily approving a bill that would harm small businesses (through non-discriminatory requirements) and consumers (through costlier and less innovative products). U.S. senators must ensure that American innovation leadership rests upon innovative companies, else such leadership would inevitably shift to China on the premise of ill-suited legislation such as the Klobuchar-Grassley bill.