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The American Innovation and Choice Online Act: Lessons from the 1950 Celler-Kevaufer Amendment

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Several bills introduced in Congress would, if enacted, bolster antitrust enforcement for the digital economy. They designate “covered platforms” that are understood to include Alphabet (Google), Apple, Meta (Facebook) and Amazon, and might include others such as Microsoft. The limitation to a subset of firms is troubling. A virtue of existing antitrust laws is that they are agnostic to the identities of the firms that might engage in unlawful conduct, with only a few statutory exceptions. This anonymity insulates antitrust enforcement from regulatory capture: the tendency of regulators to serve the interests of the industries they are tasked with regulating.

Putting regulatory capture aside, the central question is whether the bills would benefit consumers and the economy. Many, myself included, believe that antitrust enforcement needs a dose of adrenaline to awaken from the spell cast by the Chicago School. The U.S. antitrust agencies have not prevented the major tech companies from acquiring hundreds of existing firms and startups, some of which might have grown up to become significant competitors. In the twenty years before the Department of Justice filed its monopolization case against Google, the Department filed only two non-merger monopolization cases, neither of which involved a major tech company. During this period, the U.S. Supreme Court wrote opinions, such as *Verizon v. Trinko*, *Pac. Bell v. linkLine*, and *Ohio v. American Express*, that make it more difficult to challenge exclusionary conduct.

But the proposed American Innovation and Choice Online Act (AICOA) (S. 2992 and its companion in the House, H.R. 3816) goes too far. Among its other provisions, the Act would make it unlawful to engage in conduct that would “unfairly preference the covered platform operator’s own products, services, or lines of business over

those of another business user on the covered platform in a manner that would materially harm competition on the covered platform.”

If the AICOA becomes law, antitrust authorities and courts would have to determine enforcement standards for “unfairly preference” and “materially harm competition”. Experience with the 1950 Celler-Kefauver Amendment to the Clayton Act raises the possibility that courts would interpret these terms narrowly, at least for the short run, with adverse consequences for consumers and the economy.

The Celler-Kefauver Amendment merely patched a loophole in the 1914 Clayton Act, which allowed companies to evade enforcement by structuring mergers or acquisitions as purchases or exchanges of assets rather than stock. The Amendment did not change the Clayton Act’s prohibition of mergers or acquisitions whose effects “may be substantially to lessen competition, or to tend to create a monopoly.” But in 1950, and for several years thereafter, courts had little experience to inform the meaning of a lessening of competition. Instead, they relied heavily on their understanding of congressional intent that led to the 1950 Amendment.

The first test of the amendment at the Supreme Court arose in *U.S. v. Brown Shoe*. The proposed merger of the Brown Shoe and Kinney Shoe companies had both horizontal and vertical dimensions. The Court upheld a challenge to the merger, notwithstanding that the levels of concentration and market foreclosure were far below the levels that would attract modern antitrust scrutiny. The Court noted that “The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy ... Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure.”¹

The Supreme Court re-iterated its interpretation of congressional intent a few years later when it upheld a challenge to the proposed merger of Von’s Grocery Company and Shopping Bag, two grocery retailers that operated in Los Angeles. At the time Von’s was the third largest grocery retailer in the region with 4.7 percent of sales and Shopping Bag was the sixth largest retailer with 4.2 percent of sales. Justice Black, writing for the majority, rejected the parties’ argument that the merger would have no adverse effect on the competitiveness of the Los Angeles grocery market. He stated that “the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business.” The Court further noted that congressional intent of the 1950 Amendment was “not only to prohibit mergers between competitors, the

¹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 332 (1962).

effect of which ‘may be substantially to lessen competition, or to tend to create a monopoly’ but to prohibit all mergers having that effect.”²

Although there is a healthy debate today about whether merger enforcement has become too permissive, most antitrust scholars point to *Brown Shoe* and *Von’s Grocery* as anachronistic episodes of severely misguided antitrust enforcement. But these cases were decided at a time when there was almost no judicial precedent to inform the meaning of a lessening of competition and almost no scholarly agreement on an appropriate standard. The decisions reflected the justices’ understanding of congressional intent.

Something similar could happen if the proposed American Innovation and Choice Online Act becomes law. Unfair preferencing and material harm to competition are terms that do not have defined meanings from either antitrust jurisprudence or economics. Courts could point to the congressional debate preceding the proposed Act, which emphasized mostly non-specific concerns about abusive behavior by the major tech platforms, to justify a narrow interpretation that condemns any self-preferencing by a dominant platform. It would then be unlawful under the Act: (i) for Google to launch only Google maps in response to a query for “Italian restaurants near me” or place any Google service at the top of a search results page unless it is accompanied by all possible rival services; (ii) for Amazon to showcase its branded products or favor third-party products that use its fulfillment service for its buy-box; or (iii) for Apple to supply prominent app search results for its own apps, even if they are rated above competing apps.

On the other side of the Atlantic, antitrust enforcers have already endorsed a narrow definition of liability for conduct that favors a dominant platform owner’s product, service, or line of business. In its *Google Shopping* case, the European Commission concluded that Google abused its dominant position in internet search by featuring its own comparison shopping service in search results. The Commission stated that it “does not object to Google applying rich features to certain results but to the fact that Google applies such rich features only to its own comparison shopping service and not to competing comparison shopping services.”³ The proposed Digital Markets Act under review by the European Parliament would codify this approach.⁴

By contrast, the Federal Trade Commission did not find Google liable for unfairly promoting the ranking of its own shopping service in its search results. In its closing statement the Commission wrote that “The totality of the evidence indicates

² *United States v. Von’s Grocery Co.*, 384 U.S. 270, 276 (1966).

³ European Commission, *Google Search (Shopping)*, AT. 39740, Decision, June 27, 2017, at ¶ 538. Confirmed in Judgment of the General Court, Case T-612/17, November 10, 2021.

⁴ European Commission (2020). Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act). COM/2020/842 final.

that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose.”⁵

The AICOA effectively rejects the Federal Trade Commission’s decision in the Google shopping case and endorses the European standard for unfair conduct and material harm to competition. I believe this is the wrong policy, for several reasons. First, antitrust enforcement should not condemn conduct that merely promotes a new product, service, or line of business but instead should condemn conduct only if it prevents consumers from using a competing product without an efficiency justification. The U.S. Court of Appeals for the Second Circuit endorsed this latter standard in its *Berkey Photo* decision.⁶

Google’s algorithms might have coerced the use of its shopping service without an efficiency justification, but the European Commission did not address this question specifically. Instead, the Commission found that Google had an obligation to do unto others as it does for itself. The European standard for unfair conduct suppresses the incentives of covered platforms to innovate because the platforms would have to ensure that they do not benefit asymmetrically from an innovation that has any adverse effects on rivals, as most innovations do.

Second, conduct that unfairly preferences a product, service, or line of business has no clear definition. Consequently, the boundary that separates fair from unfair conduct and the products, services, and lines of business circumscribed by that boundary would be subjects of persistent debate. Related to the second concern, a third problem is that measures to prevent unfair self-preferencing are difficult to define and enforce, as evidenced by the convoluted history of proposed remedies for the European Commission’s Google Shopping case.

Uncertainty about the best way to govern monopoly conduct is a fourth reason why U.S. antitrust law should not mimic the European approach to unfair preferencing by a dominant platform.

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⁵ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. FTC File Number 111-0163, January 3, 2013. The author was a consultant to the Commission in its Google Shopping investigation.

⁶ See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263, 285 (2d Cir. 1979). (“If a monopolist’s products gain acceptance in the market, ... it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion.”)

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