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Proposed Online Platform Regs Deviate From Antitrust Norms

By **Daniel Fenske and Felipe Pereira** (June 23, 2022, 4:49 PM EDT)

Daniel Fenske

Felipe Pereira

Both the United States and the European Union are on the cusp of adopting new antitrust regulations of digital platforms. How do their proposed approaches compare? How would that change antitrust regulation and litigation, and what implications does that have?

This article sketches some answers. But two key takeaways are clear.

First, many of the proposals would impose regulations on firms based solely on their size, avoiding the traditional antitrust focus of defining the relevant market and assessing whether, regardless of size, a firm actually has market power. Second, many proposals would shift the burden to the platforms to prove that their conduct does not harm competition to avoid liability, which is very difficult to do early in litigation.

Those two changes could fundamentally change the way online platforms' conduct is litigated in both the U.S. and the EU, as it may become much more difficult for online platforms to justify their conduct without running the gauntlet of lengthy, expensive and risky antitrust litigation.

Proposed New Regulations

Concerns over perceived market dominance by online platforms have increased in recent years, to the point where both U.S. and EU regulators are on the cusp of enacting watershed legislation to rein in that perceived dominance. This article discusses four proposed laws:

1. The American Innovation and Choice Online Act
2. The U.S. Open App Markets Act;
3. The EU Digital Markets Act; and
4. The EU Digital Services Act.

American Innovation and Choice Online Act

The America Innovation and Choice Online Act, or Online Choice Act, was introduced in October 2021, and passed out of the Senate Judiciary Committee on a bipartisan 16-6 vote in January 2021.[1]

Sen. Chuck Schumer, D-N.Y., has indicated that he may bring this bill to the Senate floor for a vote this summer, but the bill's fate remains uncertain.[2]

While it passed out of the Senate Judiciary Committee on this strong bipartisan vote, many who supported the legislation indicated in committee that they would not vote for the legislation on the Senate floor unless significant changes, largely focused on privacy and security, were made.

On June 8, 2022, Sen. Amy Klobuchar, D-Minn, and lawmakers from both parties said that there are already enough votes to pass the Online Choice Act on the Senate floor and urged a prompt vote, but negotiations over the legislation are still active.[3]

The Online Choice Act would regulate large online platforms.[4] The act would cover any large platform designated by the Federal Trade Commission and that, during specified periods of time, met certain thresholds as to the number of daily active users and annual revenue.[5]

The act's ostensible aim is to limit the ability of online platforms to use their control of the platform to gain a competitive advantage for their own products and services over competitors'. It would do so through 10 separate prohibitions providing that covered platforms may not:

1. Show preference for their own products over a competitor's "in a manner that would materially harm competition";

2. Limit a competitor's ability "to compete on the covered platform relative to" how the covered platform treats its own products "in a manner that would materially harm competition";

3. Discriminate among "similarly situated business users in a manner that would materially harm competition";

4. "[M]aterially restrict, impede, or unreasonably delay" a competitor's ability to "access or interoperate" with the platform in the same way the platform operator does for its own products.

5. Condition access or "preferred status of placement" on the purchase of other products or services from the platform operator that is "not part of or intrinsic to the covered platform" (i.e., anti-tying);

6. Use nonpublic data generated by the platform to compete;

7. "[M]aterially restrict or impede a business user from accessing" data about a business user's products generated by the platform, such as by limiting the "portability" of that data;

8. "[M]aterially restrict or impede covered platform users from uninstalling" preinstalled software applications or "changing default settings" on the platform, unless necessary for the platform's security and functionality;

9. Treat the platform operator more favorably on the platform's "user interface," including in "search or ranking functionality," judged by "standards mandating the neutral, fair, and nondiscriminatory treatment of all business users"; or

10. Retaliate against any platform user who "raises concerns" with law enforcement about "actual or potential violations of State or Federal law."[6]

A few things are notable about the Online Choice Act's proposed proscriptions. Only the first three prohibitions — which bar platform self-preferencing or discrimination among users — require a finding of a material harm to competition. For the other seven prohibitions, a lack of such a harm is an affirmative defense that the covered platform would have to plead and prove.[7]

Another notable feature is that the act contains no express market power requirement. Perhaps courts will infer a market power requirement from the bill's reference to "material harm to competition," as courts have widely recognized that only firms with market power can cause such harm. But even if courts adopt that interpretation, lack of market power would only be an affirmative defense for seven of the act's prohibitions. That would be a significant change from current antitrust principles.

Finally, note that the Online Choice Act does not confer a private right of action. Its enforcement provisions only confer authority on the U.S. Department of Justice, the FTC and state attorneys general.[8]

U.S. Open App Markets Act

Also a bipartisan initiative, this bill would regulate app stores, that is, online platforms from which a user can download third-party apps. The bill passed the Senate Judiciary Committee in February 2022 by a 20-2 vote, signaling bipartisan support.[9]

In a recent statement, the chief counsel of the U.S. House Judiciary Antitrust Subcommittee indicated the House's companion bill is expected to pass in the House of Representatives later this year.[10]

The Open App Markets Act targets app stores with at least 50 million U.S. users.[11] Its ostensible purpose is to broaden the apps available to users. It does so through two main provisions. The first requires app store operators who also control a device's operating system — essentially, Apple Inc. and Google LLC — to allow users to download apps outside the app store and to delete apps provided by the operator.[12]

The second bars app store owners from requiring developers to use the store's in-app payment system, precludes app stores from barring developers from offering better pricing for an app obtained outside the store, and prohibits app store operators from punishing developers for doing so.[13]

Beyond those two prohibitions, the act also bars an app store from using nonpublic data "derived from a third party app for the purpose of competing with that app," and prohibits covered app stores from restricting certain in-app communications between developers and users "concerning legitimate business offers," such as pricing terms.[14]

The Open App Markets Act also contains anti-preferencing prohibitions similar to those in the Online Choice Act. The former would prohibit app stores from preferencing their own apps or those of business partners, and would require app stores to provide necessary access to its hardware and software systems, on nondiscriminatory terms, to enable third-party developers to create apps.[15]

The Open App Markets Act also provides certain affirmative defenses. Notably, lack of "material harm to competition" is not an affirmative defense in the current draft of the bill. Thus, "harm to competition" is simply irrelevant to the Open App Markets Act.

Instead, the app store operator can escape liability only if its actions were "necessary to achieve user privacy, security, or digital safety," were "taken to prevent spam or fraud," were "necessary to prevent" a violation of intellectual property rights, or were "taken to prevent" a violation of law.[16]

Critically, however, to avail itself of any defense, the app store operator would have to prove "by a preponderance of the evidence" that its actions were:

- Consistently applied to third-party apps and its own apps (or its partners');
- Were not a pretext to impose "unnecessary or discriminatory terms" on third-party developers; and
- Were "narrowly tailored and could not be achieved through a less discriminatory and technically possible means."[17]

That language appears to impose something akin to the constitutional law principle of strict scrutiny to app store conduct.

In addition to conferring enforcement powers on the DOJ, the FTC and state attorneys general, the Open App Markets Act gives developers a private right of action and authorizes injunctive relief and treble damages.[18]

EU Digital Markets Act

In March, the European Parliament and Council came to a tentative agreement on the scope of the EU Digital Markets Act.[19] Like the Online Choice Act, the DMA would regulate large digital platforms, which it refers to as "gatekeepers."

One of the most important features of the DMA is that it eschews a detailed inquiry into whether particular platforms have market power (or "dominance," in European parlance) in favor of clear rules based strictly on size. Those platforms owned by companies "with a market capitalization of at least 75 billion euro or an annual turnover of 7.5 billion," and have "at least 45 million monthly end users in the EU and 10,000 annual business users" would be covered.[20]

The DMA also includes no express requirement that regulators prove harm to competition before condemning a practice. Instead, the DMA sets out a number of clear rules, among the most important of which are:

- A ban on self-preferencing by ranking the platform operator's products ahead of competitors'.
- A ban on preventing consumers from connecting with a business outside of the platform.
- A requirement that certain large messaging services (like Facebook Messenger, iMessage, and WhatsApp) must interoperate with smaller messaging services upon request. (The negotiators

agreed to table for future discussions broader interoperability requirements for social networks.)

- Personal data may be provided for targeted advertising only with the individual's "explicit consent."
- Users must be able to "freely choose their browser, virtual assistants or search engines."[21]

EU Digital Services Act

The EU Digital Services Act has received less attention from antitrust practitioners. The EU has announced that the EU Parliament and Council reached agreement on its terms on April 23, and it should be formally approved soon.[22] The DSA "sets out an unprecedented new standard for the accountability of online platforms regarding illegal and harmful content," according a European Commission statement.[23]

At a high level, the DSA sets forth requirements to counter markets for illegal goods and services online, to address platform content moderation decisions, to take "risk-based action" to prevent misuse of their systems, to address "crises affecting public security or public health," to protect minors, and to impose "limits on the use of sensitive personal data for targeted advertising."[24]

Of particular note here are the DSA's regulations of large online platforms. Like the DMA, the DSA imposes additional obligations on platforms based strictly on size. Thus, "very large online platforms," that is, those "with a reach of more than 10% of the 450 million consumers in the EU," must comply with additional rules.[25]

These rules will address risk management obligations and crisis response, auditing and compliance functions, user choice, data sharing with authorities and researchers, codes of conduct, and crisis response cooperation.[26]

Implications

The proposed changes to U.S. and EU regulation of online platforms are notable for their break with traditional antitrust/competition law principles. To differing degrees, all the laws discussed in this article eschew the traditional antitrust and competition law approach of defining relevant markets, assessing the anti-competitive consequences of given conduct, and then balancing potential pro-competitive benefits of that conduct.

Instead, the laws generally: (1) clearly define covered firms and (2) impose broad prohibitions on particular conduct, without engaging in a case-by-case assessment of the pros and cons of that conduct.

This approach sacrifices flexibility to gain certainty, with unknowable consequences. As the American Bar Association Antitrust Section's comments on the EU DMA stated:

Although such an approach could in theory enhance legal certainty, it would likely give rise to unintended consequences, including chilling legitimate competition and investment if applied to all gatekeeper platforms without regard to competitive conditions in the markets in which those gatekeeper platforms are active.[27]

The preference for clear rules over detailed market-based analyses is reflected most glaringly in the

proposed bills' approaches to market power. Put simply, none of the bills expressly requires market power. The DMA, DSA and the Open App Markets Act do not reference market power even by implication.

Both simply apply their prohibitions to firms of a defined size — measured, essentially, by market capitalization, revenue or number of users.

Focusing only on a firm's size is not a proxy for a real analysis of market power. Economists and antitrust law have consistently recognized that even a firm with a very large share of a market will not have market power if any attempt to reduce output and increase prices would result in prompt entry or expansion by competitors.[28]

The Online Choice Act similarly breaks with traditional antitrust law approaches to market power. Like the DMA and Open App Markets Act, the Online Choice Act would apply certain regulations to digital platforms based only on size.

To be sure, the act incorporates — as either an element of a claim or an affirmative defense — whether "material harm to competition" occurred, which courts could interpret to implicitly require market power.

But for seven of its 10 prohibitions, the Online Choice Act only permits harm to competition to be considered as an affirmative defense. Thus, while under traditional antitrust law, a regulator would have to include plausible factual allegations in its complaint demonstrating that a platform operator had market power, the Online Choice Act relieves plaintiffs of that burden entirely.

Shifting the burden to the defendant, as both the Online Choice Act and the Open App Markets Act do in certain critical respects, will make it much harder for platforms to escape litigation. Under current law, a plaintiff has to plead harm to competition in its complaint, and include concrete factual allegations demonstrating that such harm is at least plausible.

But under U.S. pleading standards, a plaintiff's complaint does not have to plead around a defendant's anticipated affirmative defenses. Thus, defendants will not be able to assert lack of harm to competition as a defense to many Online Choice Act claims until summary judgment, and thus, after lengthy and expensive discovery has taken place.

The Open App Markets Act makes harm to competition completely irrelevant. And for the affirmative defense that bill does include, it foists on the defendant the requirement to prove in every case that its policies were narrowly tailored to serve legitimate ends, a potentially demanding test depending on how courts construe it.

Thus, both the Online Choice Act and the Open App Markets Act could portend a sea change in litigation over these issues. Under current U.S. antitrust law, platforms may have robust arguments to dismiss antitrust claims regarding their platform policies for failure to properly define the relevant market, to plead the market power, or to plausibly allege harm to competition.

The two acts in question would eliminate many of those opportunities for early dismissal by making those issues relevant, if at all, only at the affirmative defense stage.

In sum, the U.S. and EU are on the cusp of enacting legislation that moves away from traditional

antitrust regulation, with its focus on a careful analysis of market realities and a balancing of benefits and harms, with a regime that more closely resembles traditional public-utility regulation — clear, across-the-board rules on what a digital platform operator can and cannot do, enforced by government officials, and subject only to narrow affirmative defenses.

It remains to be seen, of course, which provisions will ultimately become law. But operators of online platforms should be prepared for fundamentally different regulatory regimes in both the EU and U.S. than they currently face.

Daniel T. Fenske is a partner at Mayer Brown LLP.

Felipe Pereira is an associate at Tauil Chequer Advogados.

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[1] Lauren Feiner, Senate committee votes to advance major tech antitrust bill, CNBC, https://www.cnbc.com/2022/01/20/senate-committee-votes-to-advance-major-tech-antitrust-bill.html.

[2] Lauren Feiner, Lawmakers are racing to pass tech antitrust reforms before midterms, CNBC, https://www.cnbc.com/2022/06/04/lawmakers-racing-to-pass-tech-antitrust-tech-reforms-before-midterms.html.

[3] Diane Bartz, U.S. Senate likely to pass bill to bar tech firms' favoring themselves in searches, Reuters, https://www.reuters.com/technology/us-senate-likely-pass-bill-bar-tech-firms-favoring-themselves-searches-2022-06-08/.
Rebecca Klar, Four Senate Democrats push Klobuchar to revise antitrust bill over hate speech concerns, The Hill,
https://thehill.com/policy/technology/3524475-four-senate-democrats-push-klobuchar-to-revise-antitrust-bill-over-hate-speech-concerns/.

[4] American Innovation and Choice Online Act of 2021, S.2992, 117th Congress (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.

[5] American Innovation and Choice Online Act of 2021, S.2992, 117th Congress § 2(a)(5) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.

[6] American Innovation and Choice Online Act of 2021, S.2992, 117th Congress § 3(a) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.

[7] American Innovation and Choice Online Act of 2021, S.2992, 117th Congress § 3(b) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.

[8] American Innovation and Choice Online Act of 2021, S.2992, 117th Congress § 5 (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.

[9] Diane Bartz, Bill targeting Apple and Google approved by U.S. Senate panel, https://www.reuters.com/technology/us-senate-panel-votes-approve-app-store-bill-aimed-apple-google-2022-02-03/.

[10] Claude Marx, Senior US House Antitrust Subcommittee staffer predicts passage of Big Tech app, self-preferencing bills,
MLex, https://content.mlex.com/#/content/1370588?referrer=email_instantcontentset.

[11] Open App Markets Act of 2021, S.2710, 117th Congress § 2(3) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text.

[12] Open App Markets Act of 2021, S.2710, 117th Congress § 3(d) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text.

[13] Open App Markets Act of 2021, S.2710, 117th Congress § 3(a) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text.

[14] Open App Markets Act of 2021, S.2710, 117th Congress § 3(b), (c) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text.

[15] Open App Markets Act of 2021, S.2710, 117th Congress § 3(e), (f) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text.

[16] Open App Markets Act of 2021, S.2710, 117th Congress § 4(a) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text.

[17] Open App Markets Act of 2021, S.2710, 117th Congress § 4(b) (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text. .

[18] Open App Markets Act of 2021, S.2710, 117th Congress § 5 (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2710/text. .

[19] Press room, Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users, European Parliament, https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users.

[20] Id.

[21] See Press Room, Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users, European Parliament https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users; European Commission, The Digital Markets Act: ensuring fair and open digital markets, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[22] European Commission, Questions and Answers: Digital Services Act, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348.

[23] European Commission, Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545.

[24] Id.

[25] Id.

[26] European Commission, The Digital Services Act: ensuring a safe and accountable online environment, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

[27] American Bar Association, Comments Of The American Bar Association Antitrust Law Section On The European Commission's Digital Services Act Package: Open Public Consultation, Sept. 8, 2020, at 6, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/september-2020/comments-9820-belgium-dsa.pdf.

[28] Richard A. Posner, Antitrust Law 22 (2d ed. 2001) ("the freedom" of even firms with 100% share "to vary price and output will be constrained by the threat of new entry"); American Bar Association, Comments of the American Bar Association Antitrust Law Section Regarding The American Innovation and Choice Online Act (S.2992) Before The 117th Congress at 8, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at-comments/2022/comments-aico-act.pdf ("A firm may be large, as measured in these terms, yet lack the power to influence prices or exclude competitors. Because of this, the Section has long cautioned against the use of mere size as a proxy for market power.").