

Issue Brief

NOVEMBER 3, 2021

BY: JOSH WITHROW

The Burden of Proof for Increased Merger Enforcement Should Fall Upon the Government

The popular backlash against the so-called “Big Tech” companies has increased bipartisan interest in expanding government’s antitrust powers, though with Left and Right frequently having different and even opposing motivations. An increasing number of Democrats and Republicans have expressed concerns over “bigness,” focused most intently (but not exclusively) upon internet titans such as Facebook and Amazon and Google. Suddenly antitrust, that anti-corporate government sledgehammer, has regained the political currency it had over a century ago.

Congressman Ken Buck (R-CO) placed a spotlight on how far some conservatives were willing to take this “techlash” by bucking most of his Republican colleagues on the House Subcommittee on Antitrust and concurring with several aspects of Chairman David Cicilline’s (D-RI) agenda for expanding antitrust enforcement. One of the key areas of agreement that Rep. Buck highlights in his “The Third Way” report was reforming presumptions of competitive harm and shifting the burden of proof to ease the job of antitrust enforcers in stopping mergers and acquisitions (M&As) by Big Tech firms.

Few conservatives have explicitly backed Buck’s report or the radical antitrust bills that rocketed through the House this year, but the rhetoric of the need to constrain corporate “bigness”

Key Facts:



Mergers and acquisitions (M&As) are crucial to a healthy economy; care should be taken that antitrust focus remains on consumer, not competitor, welfare.



Tightening presumptions of harm and placing the burden on companies to prove that M&As aren’t harmful undermines due process.



The economic evidence largely does not support efforts to curtail M&A activity, even by larger companies.

has become a common feature of political dialogue on both sides of the aisle. This focus on market concentration, rather than upon the actual economic outcomes of business transactions, threatens to undo the consumer welfare standard that has guided antitrust enforcement for many decades.

Furthermore, both lowering the bar on presumptions of harm and shifting the burden of proof would challenge basic assumptions about the due process and economic justifications for antitrust enforcement. More importantly, M&As are basic corporate transactions that frequently provide value to consumers by boosting economic efficiency and innovation. The benefits provided by the overwhelming majority of these transactions that are benign can be quickly destroyed by overly aggressive government intervention.

Legislative Proposals

So far, there has been a spectrum of remedies proposed to increase the number of mergers subject to scrutiny by enforcers at the Federal Trade Commission (FTC) or the Department of Justice's (DoJ) Antitrust Division. While some of these bills are limited in scope to the largest tech companies (as Buck's report called for), others would reach economy-wide (as Cicilline's report suggests).

On the extreme end of the spectrum is Senator Josh Hawley's (R-MO) "Trust-Busting for the Twenty-First Century Act," ([S. 1074](#)), which would make presumptively illegal *any* merger or acquisition by any company with a market capitalization of over \$100 billion.¹ Only slightly less draconian are the merger provisions of Senator Amy Klobuchar's (D-MN) "Competition and Antitrust Law Enforcement Reform Act," ([S. 225](#)), which would presume any acquisition that could "create an appreciable risk of materially lessening competition" by any sufficiently large company to be illegal unless the company can prove otherwise by a "preponderance of the evidence."² Neither bill has thus far attracted support from across the aisle.

In May came the tide of antitrust reforms from Cicilline's House Subcommittee on Antitrust, written specifically to target Google, Facebook, Amazon, and Apple (and, somehow, not the \$2 trillion giant Microsoft). The bill to specifically proscribe M&As by these companies was Rep. Hakeem Jeffries' "Platform Competition and Opportunity Act" ([H.R. 3826](#)), which has the support of Rep. Buck and a handful of other Republicans.³ This bill redundantly makes acquisitions by these "covered platforms" impossible by not only setting the burden of proof on the companies to "clear and convincing evidence" that not even *potential* harm to competition exists, but also by defining "competition" to include vying for "a user's attention." It passed the House Judiciary Committee and awaits floor action in the full House.

Finally, Senator Mike Lee (R-UT) has attempted to thread the needle between conservative concerns about Big Tech, while not acceding to any radical expansion of antitrust laws, by introducing the "Tougher Enforcement Against Monopolists (TEAM) Act," ([S. 2039](#)).⁴ The TEAM Act codifies that the goal of antitrust should be to preserve consumer welfare, the crucial (formerly bipartisan) standard that has been held in place by precedent rather than law. At the same time, Lee's proposal also involves burden-shifting, creating a presumption that companies can rebut by a "preponderance of the evidence" that the harm to competition caused by the transaction is either "insubstantial" or "clearly outweighed by the procompetitive benefits of the transaction in the relevant market." This presumption kicks in if a company would control only 33 percent of the relevant market at the end of the transaction. At a market share of 66 percent the presumption of harm becomes irrebuttable.

¹ U.S. Congress, Senate. *Trust-Busting for the 21st Century Act*. S. 1074. 117th Congress, 1st Sess. Introduced in Senate April 12, 2021. <https://www.congress.gov/bill/117th-congress/senate-bill/1074/text>

² U.S. Congress, Senate. *Competition and Antitrust Law Enforcement Reform Act of 2021*. S. 225. 117th Congress, 1st Sess. Introduced in Senate February 4, 2021. <https://www.congress.gov/bill/117th-congress/senate-bill/225>

³ U.S. Congress, House. *Platform Competition and Opportunity Act*. H.R. 3826. 117th Congress, 1st Sess. Introduced in House June 11, 2021. <https://docs.house.gov/meetings/JU/JU00/20210623/112818/BILLS-117HR3826ih.pdf>

⁴ U.S. Congress, Senate. *Tougher Enforcement Against Monopolists (Team) Act*. S. 2039. 117th Congress, 1st Sess. Introduced in Senate June 14, 2021. <https://www.congress.gov/bill/117th-congress/senate-bill/2039/text>

Burden Shifting, Presumption, and Due Process

What makes this focus on stifling merger activity particularly troubling is that antitrust is primarily a law enforcement procedure designed to punish harms caused by corporate wrongdoing, not a regulatory framework. Shifting the burden of proof so that companies must affirm a transaction *won't* cause harm [effectively flips](#) the due process ideal of “innocent until proven guilty” on its head.⁵

This precautionary mindset is what NTUF [has taken to calling](#) antitrust “pre-crime.”⁶ Shifting burdens of proof to the companies, creating presumptions of harm based on some arbitrary percentage of market share, or banning merger activity outright all lessen the need for the government to justify their enforcement decisions. The effect is to leave antitrust far more open to inconsistent, even capricious, enforcement, which was a persistent problem in the decades leading up to the establishment of the current consumer welfare standard.

While any antitrust merger investigation inherently involves making some guesses at the unknown future harms of a transaction, it is important that such an educated guess be backed by some sort of objective evidence of potential harm. The value judgment that is made by enemies of “bigness” for its own sake is that the power that comes with corporate size and market concentration will inevitably be abused. Self-styled “Neo-Brandeisian” progressive antitrust maximalists like FTC Chair Lina Khan and National Economic Council member Tim Wu make explicit that they want the bias of antitrust enforcement to be prophylactic, even if this means curtailing many harmless transactions in the process.⁷

The danger inherent in preferring to risk false positives in identifying potentially harmful M&As was perhaps best expressed by Judge Frank Easterbrook:

“If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time.”⁸

In the absence of barriers to entry, markets erode monopolies naturally because a company exercising its market power to hike prices or suppress innovation creates a market opening for rivals.

The risk of suppressing beneficial mergers, ones that create market efficiencies or that benefit consumers by bringing a new product to a wider market, becomes more substantial the more that enforcement becomes unmoored from relatively clear, objective guidelines. As former FTC Commissioner Joshua Wright frequently points out, the FTC’s win rate when it does file a complaint is [incredibly high](#).⁹ These long odds, coupled with the ruinous expense involved in contesting the government in court, most frequently lead to companies settling or just dropping a transaction entirely.

Shifting the burden to force companies to effectively prove a negative - that a merger definitely won't negatively impact competition - is like giving antitrust enforcers superpowers. Companies, particularly in industries under heavy scrutiny like tech, will certainly slow their M&A activity, but it's not at all clear that this is either a just outcome or one that benefits anyone but the government.

⁵ Sperry, Ben. “The Dangerous Implications of Changing Antitrust Presumptions,” Truth on the Market blog, Oct. 27, 2020. <https://truthonthemarket.com/2020/10/27/the-dangerous-implications-of-changing-antitrust-presumptions/>

⁶ Withrow, Josh. “Antitrust Precrime: What Regulators Can't Know Will Hurt You,” National Taxpayers Union Foundation Issue Brief, Apr. 20, 2021. <https://www.ntu.org/foundation/detail/antitrust-precime-what-regulators-cant-know-will-hurt-you>

⁷ Lina Khan, for example, opines that “By anchoring enforcement in a default preference for false negatives, the current antitrust framework structurally favors under-enforcement.” In “The Ideological Roots of America’s Market Power Problem,” *Yale Law Review Journal Forum*, June 4, 2018.

⁸ Easterbrook, Frank H. “The Limits of Antitrust,” *Texas Law Review*, Vol. 63, No. 1, Aug. 1984.

⁹ Stouch, J. Cooper. “Do Antitrust Laws Need Overhauling?,” *Boston College Law School Magazine*, Apr. 9, 2021. <https://lawmagazine.bc.edu/2021/04/do-antitrust-laws-need-overhauling/>

Lack of Economic Justification for Presumptions Based on Market Concentration Alone

Aside from these concerns about fairness and due process, the economic case for basing presumptions of harm on some standard percentage of market concentration is weak at best. With respect to the digital economy, economists Geoff Manne and Dirk Auer [note](#) that the perception that the current tech giants somehow hold a unique position that makes their dominance insurmountable is rooted in “dystopian” thinking that is ill-supported by actual economic data. They note that the courts and legislators shaped the existing antitrust framework with an understanding that “policy makers are often quick to find a monopoly explanation for behavior that they fail to understand.”¹⁰

To begin with, defining the “relevant market” that a business holds a percentage of is not an easy or exact science itself. As NetChoice’s Jennifer Huddleston, formerly of the American Action Forum, [observes](#), defining market share poses enforcers with a “Goldilocks problem,” in which defining a market either too narrowly or too broadly can create a warped view of potential harms to consumers.¹¹ This is a serious problem when defining markets for digital services or platforms, where various competitors are not necessarily direct substitutes for one another in the way that, say, one auto manufacturer competes with another.

Moreover, even if the market is defined competently, it may not be fair to presume that a given percentage of market share allows for the abuse of monopoly power by a company. This is particularly true in emerging technologies, where a single entrant may have created a popular new device or service that for a time holds a de facto monopoly in its space (Google among search engines and the iPod among music listening devices being two obvious examples). The kind of disruptive innovation that topples today’s so-called “monopolies” frequently works not by competing on even ground with existing firms but rather by bypassing them entirely, which is easily missed by enforcers looking at market share within narrow markets in a snapshot in time.¹²

Vertical Mergers Particularly Harmless, Yet Still in the Crosshairs

“Antitrust’s concern with vertical mergers is mistaken,” Judge Robert Bork wrote bluntly in *The Antitrust Paradox*, describing the practice of combining two companies in the same industry but at different stages of production (like an automaker merging with a parts supplier). “Vertical mergers,” he continues, “are a means of creating efficiency, not of injuring competition.”¹³

Until recently, the vast majority of antitrust enforcers and economists agreed that there was simply very little objective evidence to support government intervention in vertical M&As, except in rare circumstances. Indeed, the vast majority of economic studies [have agreed](#) that vertical integration frequently works to the benefit of consumers. The FTC and DOJ vertical merger guidelines have long reflected this understanding.¹⁴

Progressives’ response to this evidence has frequently been to simply emphasize concerns about firm size and market “power” as being a higher priority than whether vertical integration produces economic benefits. Though their aim is not limited to Big Tech, the Neo-Brandeisians have been quick to emphasize the rise of the internet giants as an exemplar of the kind of dangerous “bigness” they wish to prevent. Works like Tim Wu’s *The Master Switch* play up conjectural fears about novel

¹⁰ Manne, Geoffrey and Dirk Auer. “Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins,” *George Mason University Law Review*, Vol. 28 : No. 4. https://lawreview.gmu.edu/print_issues/anti-trust-dystopia-and-antitrust-nostalgia-alarmist-theories-of-harm-in-digital-markets-and-their-origins/

¹¹ Huddleston, Jennifer. “Facebook, Market Definitions, and the Goldilocks Problem,” American Action Forum, Aug. 25, 2021. <https://www.americanactionforum.org/insight/market-definition-and-the-debates-over-big-tech/>

¹² Netflix’s rapid displacement of Blockbuster and other physical retail video rental services is one instructive example.

¹³ Bork, Robert H.. *The Antitrust Paradox: A Policy at War with Itself*, Bork Publishing, 2021, pg. 232.

¹⁴ Agarwal, Asheesh and Andy Jung. “The Long and Successful History of Nascent Acquisitions Suggests Caution in Re-thinking Antitrust Enforcement,” November 20, 2020. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3734429

developments like the data-driven information economy in order to bypass the problem that there is [little proof](#) that the concentration in digital markets has significantly harmed prices or innovation.¹⁵

A number of the most popular products in the digital economy are a result of successful acquisitions of smaller companies by larger, established firms who had the infrastructure in place to scale up their products to their existing large audiences. Prominent examples include Apple's purchase of SoundJam (which became iTunes), Google buying Android, eBay buying PayPal, and Facebook buying Instagram. Each of these purchases by already-large tech companies turned relatively small, promising startups into products that hundreds of millions of consumers have benefited from - and each of which has contributed in its own way to the vibrancy of the competitive landscape.

Nascent Acquisitions and "Potential Competition"

Yet these sort of "nascent acquisitions" of startups by larger, established platforms are squarely in the crosshairs of Big Tech's detractors, who see their purchasing power as enabling them to purchase potential threats and strangle them in the crib. The evidence that such "kill zones" exist in the digital economy has been [thin at best](#),¹⁶ and supporting studies often prove to be [easily debunked](#).¹⁷ Much more prolific are examples like the above, of savvy digital platforms buying innovative startups and figuring out how to scale them up to reach a massive new audience.

That the purchase of Instagram by Facebook is now the subject of an FTC lawsuit (ten years later) is a [perfect example](#) of the sort of backwards thinking about *potential* harms to competition that could turn into an innovation-killing nightmare.¹⁸ While some in retrospect argue that the FTC missed its "duty" to stop Facebook from acquiring a promising future competitor, at the time many observers [mocked](#) Facebook for paying \$1 billion for a company that wasn't making any money and wouldn't be profitable absent massive investments of money, time, and technological know-how.¹⁹ That Instagram has become wildly profitable for Facebook and now boasts [over 1 billion](#) global monthly users²⁰ ought to be seen as an M&A success story, not a competitive harm.

Meanwhile, curtailing these nascent acquisitions will almost certainly curb investment and innovation, because startups - and particularly tech startups - are [especially reliant](#) upon acquisition by large, established companies as a potential exit strategy when securing venture capital.²¹ Effectively, getting integrated with Google or Apple or Microsoft is just one of the normal paths of development for an innovative tech startup looking to scale up quickly, or just to cash in and move on to a new venture.

To the extent that this might pose a competitive problem, the solution lies not in banning these acquisitions, but in removing barriers to other ways that startups can provide a return on their

¹⁵ Skorup, Brent and Adam Thierer. "Uncreative Destruction: The Misguided War on Vertical Integration in the Information Economy," *Federal Communications Law Journal*, Vol. 65 : No. 2, April 2013. https://www.mercatus.org/system/files/Uncreative-Destruction---The-War-on-Vertical-Integration-in-the-Info-Economy---Brent-Skorup-%26-Adam-Thierer-%2865-Fed-Comm-Law-Jour---April-2012%29_0.pdf

¹⁶ Kennedy, Joe. "Monopoly Myths: Is Big Tech Creating 'Kill Zones'?", Information Technology & Innovation Foundation, Nov. 9, 2020. <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones>

¹⁷ Jamison, Mark. "Research shows that blocking mergers improves innovation? Not so fast!" American Enterprise Institute Blog, Dec. 2, 2019. <https://www.aei.org/technology-and-innovation/research-shows-that-blocking-mergers-improves-innovation-not-so-fast/>

¹⁸ As economist Dirk Auer notes, "*ex-post* reviews will, by definition, focus on mergers where today's outcomes seem pre-ordained — when, in fact, they were probabilistic. This will skew decisions toward finding anticompetitive conduct." In "Facebook and the Pros and Cons of Ex Post Merger Reviews," Truth on the Market blog, Dec. 11, 2020. <https://truthonthe-market.com/2020/12/11/facebook-and-the-pros-and-cons-of-ex-post-merger-reviews/>

¹⁹ Sperry, Ben. "Killer Acquisition or Successful Integration?: The Case of the Facebook/Instagram Merger," *The Hill*, Oct. 8, 2020. <https://thehill.com/blogs/congress-blog/politics/520211-killer-acquisition-or-successful-integration-the-case-of-the>

²⁰ Enberg, Jasmine. "Global Instagram Users, 2020," eMarketer, Dec. 8, 2020. <https://www.emarketer.com/content/global-instagram-users-2020>

²¹ Farrah, Jeff. "Don't Hurt Startups When Reining in Big Tech: Four Lessons from a New Academic Report," National Venture Capital Association Blog, July 8, 2021. <https://nvca.org/dont-hurt-startups-when-reining-in-big-tech-four-lessons-from-a-new-academic-report/>

venture capital. Unfortunately, Congress seems intent on taking an approach that would effectively entrench big companies as dominant players in their fields while also making it impossible for them to acquire innovative new businesses, exacerbating the challenges start-ups face.

Conclusion

Antitrust laws and the penalties that may be imposed for breaking them are among the most powerful economic interventions available to the government, and thus it is crucial that their enforcers are held to a high standard in justifying their use. The bar for presuming anti-competitive harm to consumers based on firm size should thus remain high, and the burden should always be on the government to prove that antitrust enforcement is necessary to address potential future harms.

Placing the burden of proof upon companies to justify M&As - especially non-horizontal mergers - subverts the due process of law and risks incentivizing enforcers to interfere more often in business transactions which pose little risk to consumer welfare. Likewise, ramping up antitrust pre-crime enforcement against mergers risks placing abstract theories about “the competitive process” or political grudges against “Big Tech” ahead of consumers in the functioning of markets.

For antitrust interference with M&As to be more beneficial than harmful, it must be backed by solid, economic evidence that blocking the transaction is necessary to avoid some real, concrete harm to consumers. Otherwise, the harms of overenforcement will be felt in reduced investment and innovation, in startups and entrepreneurs whose products most will never have the chance to see.

About the Author

Josh Withrow is the Director of Technology Policy for National Taxpayers Union Foundation.



2021 National Taxpayers Union Foundation
122 C Street NW, Suite 650, Washington, DC 20001
ntuf@ntu.org