

Senator Hawley's Antitrust Bills Take Aim At Mega-Corporations

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Republican Senator Josh Hawley of Missouri introduced a bill on April 12 designed to “crack down on mergers and acquisitions by mega-corporations” and make it easier to break up dominant firms through antitrust enforcement.^[1] The “[Trust-Busting for the Twenty-First Century Act](#),” which targets the largest companies across all economic sectors, was then followed on April 19 by Hawley’s “[Bust Up Big Tech Act](#),” meant to “break up Big Tech companies seeking to dominate multiple industries simultaneously.”^[2]

Both bills take aim at companies like Google, Facebook, and Amazon, which [Hawley claims](#) have “gobbled up our freedom and competition” at the expense of American consumers and workers. Though politicians on the other end of the political spectrum, e.g., Senator [Amy Klobuchar](#), have also pushed for increased antitrust regulation of the most powerful companies, [Hawley's portrayal](#) of “woke mega-corporations” that are comfortable being “coddled by Washington politicians” suggests his proposals come from a different ideological perspective, more consistent with his grievance politics and antipathy to social justice, which was also recently evidenced by Senator Hawley casting the lone vote against the Senate’s recently-passed bill addressing hate crimes against Asian Americans and Pacific Islanders.

The Trust-Busting for the Twenty-First Century Act

Though short, Hawley’s Trust-Busting Act packs in numerous sea-change proposals, which Hawley has described as “some of the most dramatic changes to the antitrust law since a century ago,” when the laws were first written.^[3]

Restricting Dominant Digital Firms

The bill would empower the Federal Trade Commission to label companies “dominant digital firms,” and any acquisition exceeding \$1 million by a dominant digital firm would be presumed “an unfair or deceptive act or practice,” which the FTC Act makes unlawful. Hawley’s bill would effectively ban acquisitions by any company with dominance in the digital space, eliminating big tech acquisitions of potential competitors altogether.

The bill would also ban dominant digital firms from favoring their own search results without explicit disclosure, conduct at issue in the recent antitrust lawsuits against Google.

Banning Mergers and Acquisitions by \$100 Billion Companies

Hawley's bill would also prohibit mergers and acquisitions by companies with a market capitalization exceeding \$100 billion where "the effect of such acquisition . . . may be to lessen competition in any way."

Hawley's standard is untethered from any requirement that the lessening of competition be substantial, unreasonable, or even material. It goes further than Senator Amy Klobuchar's recent proposal to revise the merger review standard. Under Klobuchar's proposal, an acquisition is anticompetitive if it "create[s] an appreciable risk of *materially* lessening competition," a bar lower than the current Clayton Act standard asking whether an acquisition may "*substantially* lessen competition" (emphasis added). (See our post about Senator Klobuchar's recently introduced "Competition and Antitrust Law Enforcement Reform Act of 2021" [here](#).)

If taken at face value, Hawley's proposal would effectively put a full stop to mergers and acquisitions by mega-corporations—including vertical mergers—as it is difficult to imagine any merger or acquisition that would not lessen competition in *some* way, however *de minimis*.

Should any merger or acquisition be announced, Hawley's bill would clear the path for challenges, imposing a preponderance of the evidence standard and eliminating the need for a plaintiff to establish market shares or market concentration. It also does away with any presumption that an acquisition is lawful when the companies do not compete directly against one another.

Eliminating Market Definition and Market Share Analyses

Mega-corporations are the target of another Hawley proposal that seeks to eliminate the need to involve experts and to "make clear that direct evidence of anticompetitive conduct is sufficient to support an antitrust claim."^[4] By sidestepping traditional market definition and market share analyses, agencies would have an easier job breaking up dominant firms.

Under Hawley's proposal, whenever a plaintiff can demonstrate "the existence of substantial market power or the anticompetitive or otherwise detrimental effects of particular practices" by a preponderance of the evidence, the plaintiff "need neither define the scope of the relevant market nor establish the share of such a market controlled by the defendant."

This means, in an example from Hawley, that Facebook's acquisition of Instagram "should be sufficient to justify antitrust action without needing to bring in specialists to define the 'social networking market.'"^[5]

Jettisoning the Consumer Welfare Standard

Hawley's bill would replace the longstanding consumer welfare standard with a new one centered on the "protection of economic competition within the United States."

The animating concern of the consumer welfare standard is to determine whether conduct would increase prices for consumers or lessen variety, innovation, or quality. Hawley's "protection of economic competition" standard shifts the focus away from consumers and is meant to ensure mega-corporations can no longer "escape scrutiny by focusing on short-term considerations."^[6]

Hawley does not provide guidance on what the "protection of economic competition" standard means or how it should be applied.

Mandating Disgorgement of Profits

Companies that lose antitrust lawsuits would face significantly higher penalties under Hawley's bill, which requires courts to "order disgorgement of all profits earned by the defendant as a result of the conduct constituting that violation." The single escape valve is "upon a showing of extraordinary good cause."

The Bust Up Big Tech Act

Hawley's Bust Up Big Tech Act seeks to impose further restrictions for major companies offering search engines, marketplaces, and exchanges—and is expressly directed at "Woke Big Tech companies like Google and Amazon."^[7]

The bill reins in the services and capabilities of big tech companies in two ways, then provides for accompanying enforcement mechanisms.

Prohibitions on Big Tech Companies

First, the bill prohibits big tech companies from selling, advertising, or otherwise promoting their own goods and services on their own platforms. This provision would ban Amazon, for instance, from selling Amazon products on Amazon Marketplace, where Amazon competes with third-party vendors.

Second, big tech companies that operate platforms would be banned from providing “online hosting services or back-end online services” to other companies. This provision is designed to prevent big tech companies from “expanding their power and creating anticompetitive conflicts of interest.”^[8] For instance, Amazon would be prohibited from offering Amazon Web Services—which Amazon describes as “the world’s most comprehensive and broadly adopted cloud platform”—to other companies.

Enforcement Mechanisms

To ensure compliance, Hawley’s bill authorizes the FTC to “hire sufficient staff ... to monitor compliance,” as well as to conduct annual audits of each company subject to restriction. The bill also empowers state attorneys general to bring civil actions to enjoin prohibited conduct and enforce compliance. Further, any individual who suffers injury from any prohibited conduct may seek up to \$1 million in damages.

While it remains to be seen how much support Hawley can muster, his proposals show that there is some level of bi-partisan support for increased regulation of big tech companies in general. However, Hawley can also expect some opposition from his own party. Senator Mike Lee, the ranking member of the Senate Judiciary Antitrust Subcommittee, issued a statement in February voicing support for the consumer welfare standard that Hawley seeks to eliminate in his Trust-Busting Act. Senator Lee made clear that “any legislative attempt to replace or undermine the consumer welfare standard is a non-starter.”

While both parties have set their enforcement sights on big tech companies, recent proposals from Senator Klobuchar (and forthcoming proposals from Representative David Cicilline^[9]) may find more support in a Democratic Congress.

[1] Press Release, *Senator Hawley Introduces The ‘Trust-Busting for the Twenty-First Century Act’: A Plan to Bust Up Anti-Competitive Big Businesses* (Apr. 12, 2021), <https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big> (“Trust-Busting Act Press Release”).

[2] Press Release, *Senator Hawley Introduces the Bust Up Big Tech Act* (Apr. 19, 2021), <https://www.hawley.senate.gov/senator-hawley-introduces-bust-big-tech-act> (“Bust Up Big Tech Act Press Release”).

[3] Bryan Koenig, Law360, *Sen. Wants To Ban ‘Dominant’ Tech, \$100B Cos. From All M&A* (Apr. 12, 2021), <https://www.law360.com/articles/1374386/sen-wants-to-ban-dominant-tech-100b-cos-from-all-m-a>.

[4] Trust-Busting Act Press Release, *supra* note 1.

[5] *Id.*

[6] *Id.*

[7] Bust Up Big Tech Act Press Release, *supra*, note 2.

[8] *Id.*

[9] Jonathan Swan, Axios, *Inside the Democrats’ Strategy to Bombard Big Technology* (Mar. 21, 2021), <https://www.axios.com/tech-antitrust-facebook-google-amazon-apple-275f122d-b3f5-49cb-b223-f77c95a49252.html>.
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