U.S. Antitrust Legislative Proposals: A Global Perspective

This report cautions against current U.S. legislative proposals that could undermine U.S. economic and security interests and strengthen foreign rivals without any apparent benefit to U.S. consumers and workers.

U.S. CHAMBER (Feb. 16, 2022)

The United States is locked in a race with China and Europe to scale certain foundational technologies, such as semiconductors, and to develop and deploy emerging technologies, such as artificial intelligence and quantum computing. This race has both economic and national security dimensions, given the technologies' potential military applications, as well as their impact on economic competitiveness more broadly.

Faced with this challenge, China and the European Union (EU) are pursuing aggressive and broad industrial policies to alter the competitive landscape and advance their interests to achieve world-leading status in various technologies. President Xi Jinping has stated explicitly that global tech dominance is essential to the Great Rejuvenation of the Chinese Nation, and what he hopes will be China's reassumption of global and geopolitical preeminence.[1] Similarly, in Europe leading voices including French President Emmanuel Macron have doubled down in their push for "technological sovereignty," arguing that Europe needs to band together and promote European champions for key technologies, including semiconductors, electric vehicle batteries, hydrogen, and cloud computing.[2]

The resulting policy prescriptions in China and the EU involve subsidies, discriminatory regulations, and other protectionist barriers that keep U.S. competitors at bay, while promoting domestic champions. Meanwhile, in the United States, industrial policy is a much less significant factor. Instead, private companies are the driving force behind the innovation and research that determine how the U.S. will fare in this global competition.

However, Congress is considering new antitrust legislation which, perversely, would weaken leading U.S. technology companies by crafting special purpose regulations under the guise of antitrust to prohibit those firms from engaging in business conduct that is widely acceptable when engaged in by rival competitors.

A series of legislative proposals – some of which already have been approved by relevant Congressional committees – would, among other things: dismantle these companies; prohibit them from engaging in significant new acquisitions or investments; require them to disclose sensitive user data and sensitive IP and trade secrets to competitors, including those that are

foreign-owned and controlled; facilitate foreign influence in the United States; and compromise cybersecurity. These bills would fundamentally undermine American security interests while exempting from scrutiny Chinese and other foreign firms that do not meet arbitrary user and market capitalization thresholds specified in the legislation.

Many members of Congress have pointed out that these proposals could damage American interests, to the benefit of China. For example, at a recent markup in the Senate Judiciary Committee on S. 2992, the American Innovation and Choice Online Act, Senator Tom Cotton (R-AR) expressed "concerns with provisions in the bill that could require data sharing between American companies and bad actors under the control of the Chinese Communist Party." Similarly, Sen. John Cornyn (R-TX) explicitly criticized "the potential national security consequences of this bill." He explained that the bill "will harm American businesses and reward our adversaries, most notably the People's Republic of China … It serves our own companies up on a platter and does nothing to combat the bad conduct of our adversaries." These concerns span the aisle. Sen. Patrick Leahy (D-VT) wants to "make sure we're not inadvertently harming our national security," while Sen. Dianne Feinstein (D-CA) expressed concern "that this really is going to be very dangerous legislation. It may end up giving a very competitive advantage to large global businesses that narrowly escape being regulated by the bill." Many other members echoed these comments.

The United States has never used legislation to punish success. In many industries, scale is important and has resulted in significant gains for the American economy, including small businesses. U.S. competition law promotes the interests of consumers, not competitors. It should not be used to pick winners and losers in the market or to manage competitive outcomes to benefit select competitors. Aggressive competition benefits consumers and society, for example by pushing down prices, disrupting existing business models, and introducing innovative products and services.

If enacted, the legislative proposals would drag the United States down in an unfolding global technological competition. Companies captured by the legislation would be required to compete against integrated foreign rivals with one hand tied behind their backs. Those firms that are the strongest drivers of U.S. innovation in AI, quantum computing, and other strategic technologies would be hamstrung or even broken apart, while foreign and state-backed producers of these same technologies would remain unscathed and seize the opportunity to increase market share, both in the U.S. and globally. Indeed, during the markup of S. 2992, the bill's authors introduced a manager's amendment in an attempt to address some of these concerns. For instance, the amendment would have allowed covered entities to avoid sharing data with certain companies that are subject to U.S. sanctions or otherwise identified as a national security risk, but this amendment falls far short in its aim of protecting U.S. data and know-how from all or even most of our strategic competitors.

Instead of warping antitrust law to punish a discrete group of American companies, the U.S. government should focus instead on vigorous enforcement of current law and on vocally opposing and effectively countering foreign regimes that deploy competition law and other legal and regulatory methods as industrial policy tools to unfairly target U.S. companies. The U.S.

should avoid self-inflicted wounds to our competitiveness and national security that would result from turning antitrust into a weapon against dynamic and successful U.S. firms.

Unfortunately, U.S. antitrust regulators, led by new FTC Chair Lina Khan, are already grossly misinterpreting China's ongoing antitrust reforms and drawing false equivalencies to justify an approach that would be deeply damaging to U.S. competitiveness, innovation, and national security.

Khan could not be more wrong in her interpretation of China's ongoing policy changes and actions. China's recently released Opinions on Promoting the Healthy and Sustainable Development of the Platform Economy ("the Opinions")[4], in fact, appear to double down on the use of antitrust and other regulatory tools to (1) reinforce a Great Wall of data protectionism, in lockstep with other laws like the National Security Law, National Intelligence Law, Cybersecurity Law, Data Security Law, and Personal Information Protection Law; (2) strengthen industrial policy to ensure China's seizes the commanding heights in emerging technologies by creating 10,000 Chinese "Little Giants" that benefit from subsidies, tax breaks, and exemptions from regulation[5], and (3) push domestic champions to expand and deepen China's digital mercantilism abroad from a domestic market insulated from competition. Proposed U.S. legislation would supplement and perfect this intensifying effort by China – as well as ongoing efforts of the EU – to weaken American firms so that their own indigenous companies have more space in the marketplace to grow and thrive.

To be clear, the U.S. Chamber of Commerce fully supports strong enforcement of *current* U.S. antitrust law, which prevents and punishes anticompetitive conduct and promotes consumer welfare through vigorous market competition. Further, the Chamber does not question the need for a thoughtful debate about appropriately tailored and targeted legislation and regulation that addresses legitimate concerns that have arisen from the digital transformation of the economy. However, the Chamber objects to the creation or modification of antitrust laws that target particular *companies* – in this case, U.S. technology firms – instead of anticompetitive *conduct*. U.S. antitrust law should not capriciously be used to regulate or single out companies in order to manage competition, rather than promote competition in the market. Equally important, U.S. legislative proposals should not undermine U.S. economic and security interests, especially when such measures would strengthen Chinese and other foreign rivals, without any apparent benefit to U.S. consumers and workers.