

ABA'S ANTITRUST LAW SECTION SAYS SENATOR KLOBUCHAR'S ANTITRUST BILL "RISKS CAUSING UNPREDICTED AND UNINTENDED CONSEQUENCES"

A 21 page analysis by The American Bar Association's Antitrust Law Section—the world's largest professional organization for antitrust law—warns that Senator Klobuchar's American Innovation and Choice Online Act, S.2992, "risks causing unpredicted and unintended consequences" because it:

Relies on vague and undefined terms that will "inject variability and uncertainty"

- "The Section expresses concern about ambiguous terminology in the Bill regarding fairness, preferencing, materiality, and harm to competition on covered platforms"
- "Failure to adequately define key terms—or clearly delegate authority to the FTC and DOJ to define key terms—will inject variability and uncertainty into the administration of the law, to the potential detriment of businesses and consumers alike"
- The Bill "creates significant uncertainty and undermines its effectiveness at protecting welfare-enhancing conduct on digital platforms"
- "If the Bill means to articulate entirely new substantive standards than those applied in current antitrust practice, it should state so explicitly and take steps to further define these concepts to minimize ambiguity"

Offers only ineffective and ambiguous defenses

- "The Section expresses concern, however, that the Bill's specific language establishing affirmative defenses creates significant uncertainty and undermines its effectiveness at protecting welfare-enhancing conduct on digital platforms"
- "They also invite judicial second-guessing into the operation of business decisions"

Picks winners and losers, prioritizing commercial rivals over consumers

- The bill's language indicates "a return to competition policy picking winners and losers by protecting certain competitors against others"
- "The Section cautions against departing from the antitrust laws' commitment to protecting the competitive process as distinguished from favoring one set of competitors over another. This tenet of antitrust has served as a lodestar to antitrust enforcement and should not be omitted."

Imposes a blanket ban on self-preferencing that could harm consumers

- "Section 3(a)(9)'s prohibition on self-preferencing similarly risks consumer harm."
- "Antitrust law contains no general prohibition on self-preferencing"
- "Recent research finds that self-preferencing conduct on a platform can be welfare-enhancing"
- "The economics of self-preferencing are complex, and the Bill raises a serious risk of unintended consequence based on the broad language of these violations"
- "Prohibition of self-preferencing on the basis of vague and abstract concepts like 'fairness' thus risks the destruction of beneficial competition to the detriment of consumers"

Imposes forced data access that could harm consumers

- "Forced interoperability can, however, cause consumer harm by increasing costs and decreasing innovation"
- "[M]aking all functions interoperable with all firms may not be efficient, as it deprives platforms of control over their own system and security"
- "Interoperability requirements can also dampen incentives to innovate"
- "The Section cautions against broad-brush assumptions that compelled data sharing and interoperability requirements will promote competition"

Is a dangerous departure from principled antitrust

- "It is widely accepted that substantial market power is a prerequisite to a firm's ability to harm competitive processes. Market power should be a factor in every prohibited act and defense in the Bill."
- "The Section urges Congress to require harm to the competitive process for each of the violations"
- "The conclusions of prior legislative hearings on digital markets should not be expected to substitute for case-by-case factual analysis"

Sets arbitrary size thresholds that do not reflect harm to consumers or competition

- "Size, in the sense of number of users or market capitalization, is not by itself evidence of market power"
- "Prohibiting conduct without regard to market power invites arbitrary enforcement and wasteful disruption of normal competitive processes. The risks of unintended consequences are especially severe in digital markets characterized by multi-sided competition, dynamic complexities, and interdependence."
- "antitrust has never distinguished varying size requirements based on distinctions between publicly traded and non-publicly traded companies"