

117TH CONGRESS
1ST SESSION

S. 1074

To amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to promote competition in the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 12, 2021

Mr. HAWLEY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to promote competition in the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Trust-Busting for the
5 Twenty-First Century Act”.

6 **SEC. 2. SHERMAN ACT AMENDMENTS.**

7 The Sherman Act (15 U.S.C. 1 et seq.) is amended—

8 (1) in section 2 (15 U.S.C. 2)—

1 (A) by striking “Every” and inserting “(a)
2 Every”; and

3 (B) by adding at the end the following:

4 “(b)(1) In any case alleging a violation of this section
5 or section 1 in which a plaintiff establishes by a prepon-
6 derance of the evidence (including direct evidence) the ex-
7 istence of substantial market power or the anticompetitive
8 or otherwise detrimental effects of particular practices, a
9 plaintiff need neither define the scope of a relevant market
10 nor establish the share of such a market controlled by the
11 defendant.

12 “(2) In any case alleging a violation of this section
13 or section 1 in which the defendant relies on alleged pro-
14 competitive effects to justify the conduct of the defendant,
15 the defendant shall establish by clear and convincing evi-
16 dence that—

17 “(A) the procompetitive effects of the conduct
18 clearly outweigh the anticompetitive effects of the
19 conduct; and

20 “(B) the defendant could not obtain substan-
21 tially similar procompetitive effects through commer-
22 cially reasonable alternatives that would involve ma-
23 terially lower competitive risks.”; and

24 (2) in section 4 (15 U.S.C. 4)—

1 (A) by striking “The several” and insert-
2 ing “(a) The several”; and

3 (B) by adding at the end the following:

4 “(b) In any action brought by the United States or
5 the Federal Trade Commission alleging a violation of this
6 Act, if the United States or the Federal Trade Commis-
7 sion establishes such a violation, the court shall order
8 disgorgement of all profits earned by the defendant as a
9 result of the conduct constituting that violation, except
10 upon a showing of extraordinary good cause.

11 “(c) It is the policy of the United States that the
12 principal standard for evaluating the permissibility of
13 practices under this Act is the protection of economic com-
14 petition within the United States.”.

15 **SEC. 3. CLAYTON ACT AMENDMENTS.**

16 The Clayton Act (15 U.S.C. 12 et seq.) is amended—

17 (1) in the first section (15 U.S.C. 12), by add-
18 ing at the end the following:

19 “(c) It is the policy of the United States that the
20 principal standard for evaluating the permissibility of
21 practices under this Act is the protection of economic com-
22 petition within the United States.”;

23 (2) in section 7 (15 U.S.C. 18), by adding at
24 the end the following:

1 “No person with a market capitalization exceeding
2 \$100,000,000,000 (as adjusted and published for each fis-
3 cal year beginning after September 30, 2022, in the same
4 manner as provided in section 8(a)(5) to reflect the per-
5 centage change in the gross national product for such fis-
6 cal year compared to the gross national product for the
7 year ending September 30, 2021) shall acquire, directly
8 or indirectly, the whole or any part of the stock or other
9 share capital or the whole or any part of the assets of
10 1 or more persons engaged in commerce or in any activity
11 affecting commerce, where in any line of commerce or in
12 any activity affecting commerce in any section of the coun-
13 try, the effect of such acquisition, of such stocks or assets,
14 or of the use of such stock by the voting or granting of
15 proxies or otherwise, may be to lessen competition in any
16 way.

17 “Where a preponderance of the evidence (including
18 direct evidence) is adduced to demonstrate that the effect
19 of an acquisition may be substantially to lessen competi-
20 tion or to tend to create a monopoly, a plaintiff need nei-
21 ther establish market shares nor the concentration of any
22 particular market.

23 “No acquisition shall be presumed not to substan-
24 tially lessen competition or tend to create a monopoly only
25 because the parties to the acquisition do not compete di-

1 rectly against one another at the time of the acquisition.”;

2 and

3 (3) in section 7a(a) (15 U.S.C. 18a(a)), in the

4 undesignated matter following paragraph

5 (2)(B)(ii)(III), by adding at the end the following:

6 “In the case of any transaction involving a person,

7 partnership, or corporation designated as a domi-

8 nant digital firm under section 10A of the Federal

9 Trade Commission Act, the person, partnership, or

10 corporation shall file notification as required by this

11 section.”.

12 **SEC. 4. RESTRICTIONS ON DOMINANT DIGITAL FIRMS.**

13 The Federal Trade Commission Act (15 U.S.C. 41

14 et seq.) is amended by inserting after section 10 the fol-

15 lowing:

16 **“SEC. 10A. RESTRICTIONS ON DOMINANT DIGITAL FIRMS.**

17 “(a) DEFINITIONS.—In this section:

18 “(1) DOMINANT DIGITAL FIRM.—The term

19 ‘dominant digital firm’ means a person, partnership,

20 or corporation that—

21 “(A) provides a website or service acces-

22 sible through the internet; and

23 “(B) possesses dominant market power in

24 any market related to that website or service.

1 “(2) SEARCH FUNCTIONALITY.—The term
 2 ‘search functionality’ means any feature or aspect of
 3 a website or service accessible through the internet
 4 that allows a user to input alphanumeric data in
 5 order to retrieve and display a ranked list of relevant
 6 results.

7 “(b) DESIGNATION AS A DOMINANT DIGITAL
 8 FIRM.—

9 “(1) IN GENERAL.—The Commission shall have
 10 power to designate a person, partnership, or cor-
 11 poration as a dominant digital firm.

12 “(2) FACTORS TO BE CONSIDERED.—In deter-
 13 mining whether a person, partnership, or corpora-
 14 tion possesses dominant market power under para-
 15 graph (1), the Commission shall consider factors in-
 16 cluding—

17 “(A) dominance of the firm in other mar-
 18 kets and durability of the dominance;

19 “(B) the extent to which the firm benefits
 20 from government contracts or other privileges;

21 “(C) exclusivity agreements entered into by
 22 the firm;

23 “(D) network effects; and

1 “(E) any ownership stake of the firm in
2 other entities within the supply chain of the
3 firm.

4 “(3) INVESTIGATIVE AUTHORITY.—In deter-
5 mining whether to designate a person, partnership,
6 or corporation as a dominant digital firm under
7 paragraph (1), the Commission shall have power to
8 issue investigative demands.

9 “(c) REQUIREMENTS.—

10 “(1) IN GENERAL.—Any designation made by
11 the Commission under subsection (b) shall be pre-
12 ceded by a notice and comment period in accordance
13 with section 553 of title 5, United States Code, ex-
14 cept that the required publication and service of any
15 designation by the Commission may be made not
16 less than 15 days before the effective date of the
17 designation.

18 “(2) JUDICIAL REVIEW.—Any designation made
19 by the Commission under subsection (b) shall be
20 subject to judicial review pursuant to section 706 of
21 title 5, United States Code.

22 “(d) PRESUMPTION AS UNFAIR OR DECEPTIVE ACT
23 OR PRACTICE.—Any acquisition by a person, partnership,
24 or corporation designated as a dominant digital firm under
25 this section, direct or indirect, of the whole or any part

1 of the stock or other share capital or the whole or any
2 part of the assets of 1 or more persons engaged in com-
3 merce or in any activity affecting commerce, where such
4 acquisition exceeds \$1,000,000 (as adjusted and published
5 for each fiscal year beginning after September 30, 2022,
6 in the same manner as provided in section 8(a)(5) of the
7 Clayton Act to reflect the percentage change in the gross
8 national product for such fiscal year compared to the gross
9 national product for the year ending September 30, 2021)
10 shall be presumed to be a unfair or deceptive act or prac-
11 tice.

12 “(e) UNFAIR OR DECEPTIVE ACT OR PRACTICE.—It
13 shall be an unfair or deceptive act or practice if a person,
14 partnership, or corporation designated as a dominant dig-
15 ital firm under this section—

16 “(1) provides search functionality;

17 “(2) promotes or demotes particular search re-
18 sults, on the basis of whether those results are affili-
19 ated or not affiliated with the dominant digital firm;
20 and

21 “(3) does not disclose such affiliation to users
22 of the search functionality.”.

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