

117TH CONGRESS
1ST SESSION

S. 3197

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 4, 2021

Ms. KLOBUCHAR (for herself and Mr. COTTON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

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 “Platform Competition
5 and Opportunity Act of 2021”.

6 **SEC. 2. UNLAWFUL ACQUISITIONS.**

7 (a) VIOLATION.—It shall be unlawful for a covered
8 platform operator to acquire directly or indirectly—

1 (1) the whole or any part of the stock or other
2 share capital of another person engaged in com-
3 merce or in any activity affecting commerce; or

4 (2) the whole or any part of the assets of an-
5 other person engaged in commerce or in any activity
6 affecting commerce.

7 (b) EXCLUSION.—An acquisition shall not be unlaw-
8 ful under subsection (a) if the acquiring covered platform
9 operator demonstrates by clear and convincing evidence
10 that—

11 (1) the acquisition is a transaction that is de-
12 scribed in section 7A(c) of the Clayton Act;

13 (2) the acquired stock, other share capital, or
14 assets are valued at less than \$50,000,000; or

15 (3) the acquired assets or the issuer of the ac-
16 quired stock do not—

17 (A) compete with the covered platform or
18 covered platform operator for the sale or provi-
19 sion of any product or service;

20 (B) constitute nascent or potential com-
21 petition to the covered platform or covered plat-
22 form operator for the sale or provision of any
23 product or service;

24 (C) enhance or increase the covered plat-
25 form's or covered platform operator's market

1 position with respect to the sale or provision of
2 any product or service offered on or directly re-
3 lated to the covered platform; and

4 (D) enhance or increase the covered plat-
5 form’s or covered platform operator’s ability to
6 maintain its market position with respect to the
7 sale or provision of any product or service of-
8 fered on or directly related to the covered plat-
9 form.

10 (c) USER ATTENTION.—For purposes of this Act,
11 competition, nascent competition, or potential competition
12 for the sale or provision of any product or service includes
13 competition for a user’s attention.

14 (d) ROLE OF DATA.—For purposes of this Act, an
15 acquisition that results in access to additional data may,
16 without more—

17 (1) enhance or increase the market position of
18 a covered platform or covered platform operator; or

19 (2) enhance or increase the ability of a covered
20 platform or covered platform operator to maintain
21 its market position.

22 **SEC. 3. DEFINITIONS.**

23 (a) ANTITRUST LAWS.—The term “antitrust laws”
24 has the meaning given the term in subsection (a) of sec-
25 tion 1 of the Clayton Act (15 U.S.C. 12).

1 (b) COMMISSION.—The term “Commission” means
2 the Federal Trade Commission.

3 (c) CONTROL.—The term “control” with respect to
4 a person means—

5 (1) holding 25 percent or more of the stock of
6 the person;

7 (2) having the right to 25 percent or more of
8 the profits of the person;

9 (3) having the right to 25 percent or more of
10 the assets of the person, in the event of the person’s
11 dissolution;

12 (4) if the person is a corporation, having the
13 power to designate 25 percent or more of the direc-
14 tors of the person;

15 (5) if the person is a trust, having the power
16 to designate 25 percent or more of the trustees; or

17 (6) otherwise exercises substantial control over
18 the person.

19 (d) COVERED PLATFORM.—The term “covered plat-
20 form” means an online platform—

21 (1) that has been designated as a “covered plat-
22 form” under section 4(a); or

23 (2) that—

24 (A) at any point during the 12 months
25 preceding a designation under section 4(a) or at

1 any point during the 12 months preceding the
2 filing of a complaint for an alleged violation of
3 this Act—

4 (i) has at least 50,000,000 United
5 States-based monthly active users on the
6 online platform operator; or

7 (ii) has at least 100,000 United
8 States-based monthly active business users
9 on the online platform;

10 (B) as of the date of enactment of this
11 Act, was owned or controlled by a person with
12 United States net annual sales of
13 \$600,000,000,000 in the prior calendar year or
14 with a market capitalization of greater than
15 \$600,000,000,000, as measured by the simple
16 average of the closing price per share of the
17 common stock issued by the person for the
18 trading days in the 180-day period ending on
19 the date of enactment of this Act; and

20 (C) is a critical trading partner for the sale
21 or provision of any product or service offered on
22 or directly related to the online platform.

23 (e) COVERED PLATFORM OPERATOR.—The term
24 “covered platform operator” means a person that owns or
25 controls a covered platform.

1 (f) CRITICAL TRADING PARTNER.—The term “crit-
2 ical trading partner” means a person that—

3 (1) owns or controls an online platform; and

4 (2) has the ability to restrict or impede the ac-
5 cess of—

6 (A) a business user to its users or cus-
7 tomers; or

8 (B) a business user to a tool or service
9 that it needs to effectively serve its users or
10 customers.

11 (g) BUSINESS USER.—The term “business user”
12 means a person that utilizes or plans to utilize the covered
13 platform for the sale or provision of products or services.

14 (h) ONLINE PLATFORM.—The term “online plat-
15 form” means a website, online or mobile application, mo-
16 bile operating system, digital assistant, or online service
17 that—

18 (1) enables a user to generate content that can
19 be viewed by other users on the platform or to inter-
20 act with other content on the platform;

21 (2) facilitates the offering, sale, purchase, pay-
22 ment, or shipping of products or services, including
23 software applications, between and among con-
24 sumers or businesses not controlled by the platform
25 operator; or

1 (3) enables user searches or queries that access
2 or display a large volume of information.

3 (i) PERSON.—The term “person” has the meaning
4 given the term in subsection (a) of section 1 of the Clayton
5 Act (15 U.S.C. 12).

6 (j) STATE.—The term “State” means a State, the
7 District of Columbia, the Commonwealth of Puerto Rico,
8 and any other territory or possession of the United States.

9 **SEC. 4. IMPLEMENTATION.**

10 (a) COVERED PLATFORM DESIGNATION.—

11 (1) The Federal Trade Commission or Depart-
12 ment of Justice shall designate whether an entity is
13 a covered platform for the purpose of implementing
14 and enforcing this Act. Such designation shall—

15 (A) be based on a finding that the criteria
16 set forth in section 3(d)(2)(A)–(C) are met;

17 (B) be issued in writing and published in
18 the Federal Register; and

19 (C) apply for 10 years from its issuance
20 regardless of whether there is a change in con-
21 trol or ownership over the covered platform un-
22 less the Commission or the Department of Jus-
23 tice removes the designation under subsection
24 (b).

1 (b) REMOVAL OF COVERED PLATFORM DESIGNA-
2 TION.—The Commission or the Department of Justice
3 shall—

4 (1) consider whether its designation of a cov-
5 ered platform under subsection (a) should be re-
6 moved prior to the expiration of the 10-year period
7 if the covered platform operator files a request with
8 the Commission or the Department of Justice, which
9 shows that the online platform no longer meets the
10 criteria set forth in section 3(d)(2)(A)–(C);

11 (2) determine whether to grant a request sub-
12 mitted under paragraph 1 not later than 120 days
13 after the date of the filing of such request; and

14 (3) obtain the concurrence of the Commission
15 or the Department of Justice, as appropriate, before
16 granting a request submitted under paragraph (1).

17 **SEC. 5. ENFORCEMENT.**

18 (a) IN GENERAL.—Except as otherwise provided in
19 this Act—

20 (1) the Commission shall enforce this Act in the
21 same manner, by the same means, and with the
22 same jurisdiction, powers, and duties as though all
23 applicable terms of the Federal Trade Commission
24 Act (15 U.S.C. 41 et seq.) were incorporated into
25 and made a part of this Act;

1 (2) the Attorney General shall enforce this Act
2 in the same manner, by the same means, and with
3 the same jurisdiction, powers and duties as though
4 all applicable terms of the Sherman Act (15 U.S.C.
5 1 et seq.), Clayton Act (15 U.S.C. 12 et seq.), and
6 Antitrust Civil Process Act (15 U.S.C. 1311 et seq.)
7 were incorporated into and made a part of this Act;
8 and

9 (3) any attorney general of a State shall en-
10 force this Act in the same manner, by the same
11 means, and with the same jurisdiction, powers and
12 duties as though all applicable terms of the Sherman
13 Act (15 U.S.C. 1 et seq.) and the Clayton Act (15
14 U.S.C. 12 et seq.) were incorporated into and made
15 a part of this Act.

16 (b) UNFAIR METHODS OF COMPETITION.—A viola-
17 tion of this Act shall also constitute an unfair method of
18 competition under section 5 of the Federal Trade Commis-
19 sion Act (15 U.S.C. 45).

20 (c) COMMISSION INDEPENDENT LITIGATION AU-
21 THORITY.—If the Commission has reason to believe that
22 a person violated this Act, the Commission may commence
23 a civil action, in its own name by any of its attorneys des-
24 ignated by it for such purpose, to recover a civil penalty

1 and seek other appropriate relief in a district court of the
2 United States.

3 (d) PARENS PATRIAE.—Any attorney general of a
4 State may bring a civil action in the name of such State
5 for a violation of this Act as parens patriae on behalf of
6 natural persons residing in such State, in any district
7 court of the United States having jurisdiction of the de-
8 fendant, and may secure any form of relief provided for
9 in this section.

10 (e) INJUNCTIVE RELIEF.—The Assistant Attorney
11 General of the Antitrust Division, the Commission, or the
12 attorney general of any State may seek, and the court may
13 order, relief in equity as necessary to prevent, restrain,
14 or prohibit violations of this Act.

15 (f) REMEDIES.—Remedies provided in this subsection
16 are in addition to, and not in lieu of, any other remedy
17 available under Federal or State law.

18 **SEC. 6. ENFORCEMENT GUIDELINES.**

19 (a) IN GENERAL.—Not later than 1 year after the
20 date of enactment of this Act, the Commission and the
21 Assistant Attorney General of the Antitrust Division shall
22 jointly issue guidelines outlining policies and practices, re-
23 lating to agency enforcement of this Act, with the goal
24 of promoting transparency and deterring violations.

1 (b) UPDATES.—The Commission and the Assistant
2 Attorney General of the Antitrust Division shall update
3 the joint guidelines issued under subsection (a), as needed
4 to reflect current agency policies and practices, but not
5 less frequently than once every 4 years beginning on the
6 date of enactment of this Act.

7 (c) OPERATION.—The Joint Guidelines issued under
8 this section do not confer any rights upon any person,
9 State, or locality, nor shall they operate to bind the Com-
10 mission, Department of Justice, or any person, State, or
11 locality to the approach recommended in such Guidelines.

12 **SEC. 7. SUITS BY PERSONS INJURED.**

13 (a) IN GENERAL.—Except as provided in subsection
14 (b), any person who shall be injured in his business or
15 property by reason of anything forbidden in this Act may
16 sue therefor in any district court of the United States in
17 the district in which the defendant resides or is found or
18 has an agent, without respect to the amount in con-
19 troversy, and shall recover threefold the damages by him
20 sustained, and the cost of suit, including a reasonable at-
21 torney's fee. The court may award under this section, pur-
22 suant to a motion by such person promptly made, simple
23 interest on actual damages for the period beginning on
24 the date of service of such person's pleading setting forth
25 a claim under this Act and ending on the date of judg-

1 ment, or for any shorter period therein, if the court finds
2 that the award of such interest for such period is just in
3 the circumstances. In determining whether an award of
4 interest under this section for any period is just in the
5 circumstances, the court shall consider only—

6 (1) whether such person or the opposing party,
7 or either party's representative, made motions or as-
8 serted claims or defenses so lacking in merit as to
9 show that such party or representative acted inten-
10 tionally for delay, or otherwise acted in bad faith;

11 (2) whether, in the course of the action in-
12 volved, such person or the opposing party, or either
13 party's representative, violated any applicable rule,
14 statute, or court order providing for sanctions for
15 dilatory behavior or otherwise providing for expedi-
16 tious proceedings; and

17 (3) whether such person or the opposing party,
18 or either party's representative, engaged in conduct
19 primarily for the purpose of delaying the litigation
20 or increasing the cost thereof.

21 (b) AMOUNT OF DAMAGES PAYABLE TO FOREIGN
22 STATES AND INSTRUMENTALITIES OF FOREIGN
23 STATES.—

24 (1) Except as provided in paragraph (2), any
25 person who is a foreign state may not recover under

1 subsection (a) an amount in excess of the actual
2 damages sustained by it and the cost of suit, includ-
3 ing a reasonable attorney's fee.

4 (2) Paragraph (1) shall not apply to a foreign
5 state if—

6 (A) such foreign state would be denied,
7 under section 1605(a)(2) of title 28, United
8 States Code, immunity in a case in which the
9 action is based upon a commercial activity, or
10 an act, that is the subject matter of its claim
11 under this section;

12 (B) such foreign state waives all defenses
13 based upon or arising out of its status as a for-
14 eign state, to any claims brought against it in
15 the same action;

16 (C) such foreign state engages primarily in
17 commercial activities; and

18 (D) such foreign state does not function,
19 with respect to the commercial activity, or the
20 act, that is the subject matter of its claim
21 under this section as a procurement entity for
22 itself or for another foreign state.

23 (c) INJUNCTIVE RELIEF.—Any person shall be enti-
24 tled to sue for and have injunctive relief, in any court of
25 the United States having jurisdiction over the parties,

1 against threatened loss or damage by a violation of this
2 Act, when and under the same conditions and principles
3 as injunctive relief against threatened conduct that will
4 cause loss or damage is granted by courts of equity, under
5 the rules governing such proceedings, and upon the execu-
6 tion of proper bond against damages for an injunction im-
7 providently granted and a showing that the danger of ir-
8 reparable loss or damage is immediate, a preliminary in-
9 junction may issue: *Provided*, That nothing herein con-
10 tained shall be construed to entitle any person, except the
11 United States, to bring suit for injunctive relief against
12 any common carrier subject to the jurisdiction of the Sur-
13 face Transportation Board under subtitle IV of title 49.
14 In any action under this section in which the plaintiff sub-
15 stantially prevails, the court shall award the cost of suit,
16 including a reasonable attorney's fee, to such plaintiff.

17 **SEC. 8. JUDICIAL REVIEW.**

18 (a) IN GENERAL.—Any party that is subject to a cov-
19 ered platform designation under section 4(a) of this Act,
20 a decision in response to a request to remove a covered
21 platform designation under section 4(b) of this Act, a final
22 order issued in any district court under this Act, or a final
23 order of the Commission issued in an administrative adju-
24 dicative proceeding under this Act may within 30 days of
25 the issuance of such designation, decision, or order, peti-

1 tion for review of such designation, decision, or order in
2 the United States Court of Appeals for the District of Co-
3 lumbia Circuit.

4 (b) TREATMENT OF FINDINGS.—In a proceeding for
5 judicial review of a covered platform designation under
6 section 4(a) of this Act, a decision in response to a request
7 to remove a covered platform designation under section
8 4(b) of this Act, or a final order of the Commission issued
9 in an administrative adjudicative proceeding under this
10 Act, the findings of the Commission or the Assistant At-
11 torney General as to the facts, if supported by evidence,
12 shall be conclusive.

13 **SEC. 9. RULES OF CONSTRUCTION.**

14 Nothing in this Act shall be construed to limit any
15 authority of the Attorney General or the Commission
16 under the antitrust laws, the Federal Trade Commission
17 Act (15 U.S.C. 45), or any other provision of law or to
18 limit the application of any law.

19 **SEC. 10. SEVERABILITY.**

20 If any provision of this Act, an amendment made by
21 this Act, or the application of such provision or amend-
22 ment to any person or circumstance is held to be unconsti-
23 tutional, the remainder of this Act and of the amendments
24 made by this Act, and the application of the remaining

- 1 provisions of this Act and amendments to any person or
- 2 circumstance shall not be affected.

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