

A Dagger in the Heart of American Competitiveness:

Twelve Tragic Flaws in Senator Amy Klobuchar’s Antitrust Bill

By Stephen Moore and Matthew Rees

Senator Amy Klobuchar (D-MN) is the chief sponsor of antitrust legislation that is moving through Congress. It would be a dagger in the heart of America’s high-tech competitiveness. The bill gives new and unprecedented broad powers to federal regulators. It will also be a boon to trial attorneys, who use lawsuits targeting American businesses as a multibillion dollar cash cow.

The measure, which Sen. Klobuchar calls “[The American Innovation and Choice Online Act](#),” applies to “covered platforms” with 50 million U.S.-based active monthly users or 100,000 U.S.-based active monthly business users, with market capitalizations or annual sales above \$550 billion at any point in the last two years.* The law’s primary targets are Amazon, Apple, Facebook, Google, and Microsoft, but other highly successful American companies including Walmart, AT&T and Qualcomm would likely be ensnared in the bill’s sweeping compliance mandates.

Some of the strongest criticism of the Klobuchar legislation has come from another Senate Democrat, Dianne Feinstein (CA). [For example](#): “It’s difficult to see the justification for a bill that regulates the behavior of only a handful of companies, while allowing everyone else to continue engaging in that exact same behavior.”

[She has also said](#), “Instead of updating antitrust law for our modern online economy, as it aims to do, this bill will create two separate legal standards. One that poses very significant barriers to the business operations of a few large tech companies, and one for everyone else.”

Feinstein’s right: the legislation is larded with dozens of objectionable provisions. We would add to Senator Feinstein’s objections that the bill would severely impair smaller startup tech companies that often receive their initial funding from investors in the hopes that a Google or Amazon will buy them for multiple times the original investment. In this way, the Klobuchar bill hurts the small entrepreneurs, who are the heartbeat of

* Since the bill passed out of the Senate Judiciary Committee, Meta—parent company of Facebook—saw its market cap decline by hundreds of billions. Rather than see Meta’s decline for what it was—the free market rewarding Meta’s competitors at Meta’s expense—Klobuchar insists that if a company is ever covered in the arbitrary two-year time period, that alone is sufficient to be at the FTC’s whims.

America's dynamic economy. Any Republican or Democrat who is opposed to the re-regulation of American business should oppose this bill.

Below we outline some of the most destructive provisions of the Klobuchar bill:

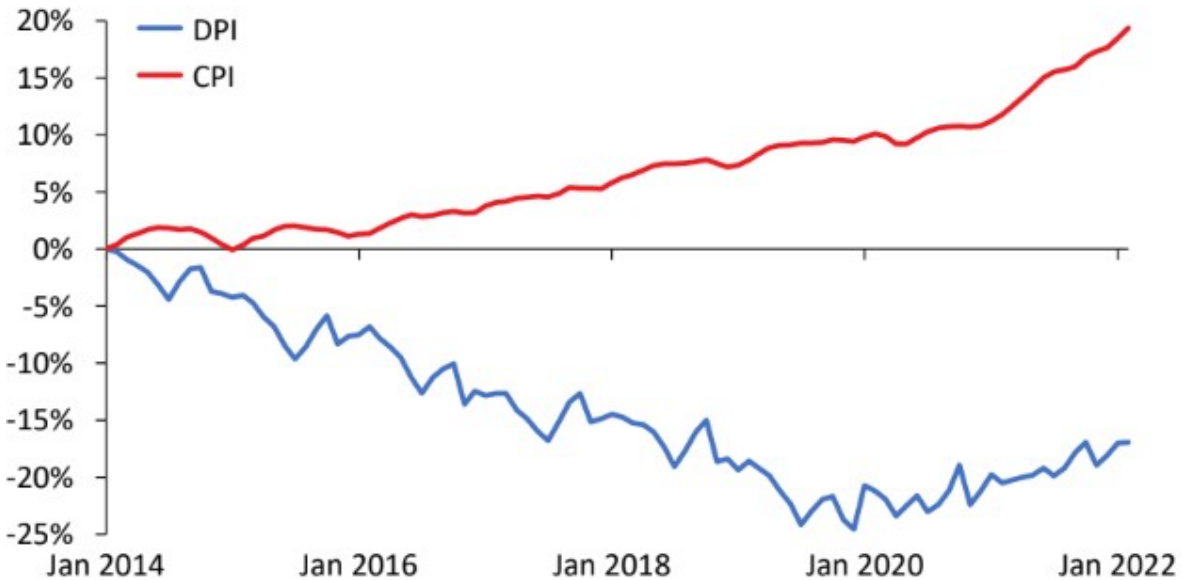
1) It Falsely Accuses Tech Companies of Monopolistic Behavior

Antitrust laws exist to protect American consumers from companies that gain such large market share they can impose high monopolistic rents on consumers and other business customers.

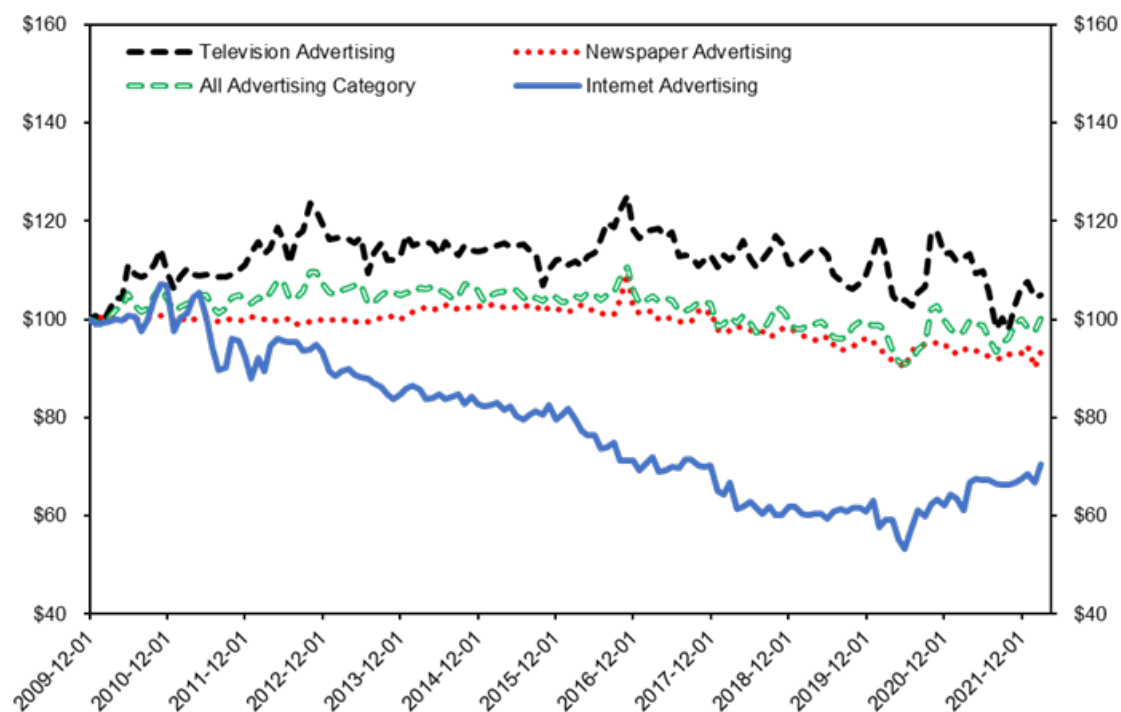
But there is virtually no evidence that Google, Apple, Amazon and other tech platforms are increasing prices. Just the opposite. The evidence is conclusive that many of the companies that would come under antitrust actions under the Klobuchar bill have been sharply reducing the prices that businesses and consumers pay. The price of everything from computer software, to making online purchases, to cell phones, to accessing social media platforms, to internet communications have fallen almost continuously over the past three decades.

Inflation Has Remained Low For Digital Goods And Services In The Technology Sector, Reflecting The Efficiency And Affordability Of Online Services:

Consumer Price Index vs. Digital Price Index, 2014 - 2022



A new [study](#) by Laffer Associates and the Committee to Unleash Prosperity finds there is no evidence that online advertising costs are rising faster than traditional advertising costs.



There are many reasons why lawmakers and Americans may not like the discriminatory behavior and the cancel culture of the big tech companies. But based on the cost of tech services, it's clear that the industry has not been engaged in monopolistic behavior.

2) It Guts the Traditional “Consumer Welfare” Standard of American Antitrust Law

Today, one of the baselines for the government to sue companies on antitrust grounds is evidence of harm: consumers must have suffered as a byproduct of, say, anticompetitive conduct or bid rigging. In a nutshell, under the consumer welfare standard—the broadly supported analytical framework widely used for decades in antitrust litigation—business practices that benefit consumers through price cuts, innovation, greater choices, and so on are often lawful; those that harm consumers through prices increases, reduced quality, or stifled innovation, for example, are often unlawful.

But one of the striking features of the Klobuchar legislation is that there's no requirement for the government, when bringing an antitrust case, to show that a company has caused harm to consumers. The government would simply need to prove only that an action “would materially harm competition.”

But any company building a better product at a lower cost, and that consumers want to buy, almost by definition harms its competitors. This is the very essence of what Joseph Schumpeter described as the “creative gales of destruction.” Without these competitive forces, our system of free-market capitalism couldn’t exist.

Even worse, the text of the bill uses the future tense – “would.” In other words, the harm hasn’t happened yet. But government lawyers and regulators apparently possess the wisdom and expertise needed to foresee how one company’s business strategy could “harm competition.” (Keep in mind that regulators once investigated Blockbuster Video for its alleged monopoly on video distribution.)

The Disruptive Competition Project [pinpoints](#) the risks in this approach:

With such a speculative standard, even a trivial violation could result in billions in penalties. This standard promises legal uncertainty and increased litigation. As a single violation could erase several years of returns, targeted firms like Amazon are likely to face investor pressure to mitigate risks, ultimately resulting in restructuring or completely eliminating at-risk products and features, including Prime.

3) The Bill Would Nearly Double the Budget of One of the Most Intrusive/Anti-Business Regulatory Agencies of Government

Republicans are supposed to be the party of deregulating the economy so that American businesses can succeed. This is especially critical now when Biden’s regulatory assault is hampering businesses throughout the country.

But incredibly, the Klobuchar bill would increase the budget for the Federal Trade Commission by \$300 million a year. The FTC is one of the leading agencies engaged in the harassment of American companies. The chairman of the FTC is Lina Khan – a 33-year-old former law professor who has never worked in business – and is on a regulatory assault on U.S. businesses big and small. Nothing good can come from hiring thousands of additional regulators to snoop on business.

4) The Law Would Make Companies Guilty Until They Can Prove Their Innocence

No less harmful, there will be a 180-degree-shift in the burden of proof. In antitrust cases today, the government must show evidence of harm. Under the legislation, the targeted companies would have to prove that select measures will not result in harm. In other words, harm *that has not happened – and may never happen*. Thus they are guilty until they can prove themselves innocent.

This stacking of the deck in the government's favor comes against the backdrop of the Justice Department and the Federal Trade Commission exerting enormous power over these proceedings and already winning about 85 percent of the antitrust cases they've brought in the past 20 years. Because government prosecutors have almost unlimited budgets to pursue these actions and tie them up in court for years, companies often terminate their merger plans once there is a federal challenge "because the legal standard is so favorable to the government," points out [Jan Rybnicek](#), an antitrust attorney at Freshfields, a leading law firm.

The effect of the proposed provision, [writes the National Taxpayers Union Foundation](#), will be to "lessen the need for the government to justify their enforcement decisions" and to "leave antitrust far more open to inconsistent, even capricious, enforcement."

5) It Will Ban Routine and Popular Retail Practices

The Klobuchar bill would prohibit what's colloquially known as "self-preferencing" – showing your own products online in a preferred way. In other words, when a consumer searches for, say, ground ginger, Amazon could not show the Amazon brand of ground ginger before that offered by companies using the Amazon platform even if it's the cheapest, most popular, or highest rated.

This provision discriminates against companies that make their sales through online platforms. Brick and mortar retail stores sell their own branded products right alongside other brands – and no one is proposing to ban CVS from selling its own cold relief pills (yet).

But it's not just a simple matter of Amazon being prohibited from listing its own products first. The Information Technology and Innovation Foundation [points out](#) that the legislation "may prevent Microsoft from displaying LinkedIn profiles in Outlook emails, prevent Facebook from helping consumers exchange on its marketplace, prevent Google from helping scholars find articles via Google Scholar, prevent Apple from pre-installing any app on its smartphone and prevent it from prohibiting the safety-decreasing practice of sideloading, and prevent Amazon from promoting Whole Foods' products on its platform."

It would also kill Amazon Prime, [which](#) has about 150 million subscribers in the United States alone. To put that number in perspective, it exceeds the number of households in the United States ([about 130 million](#)). Its success is a tribute to providing consumers with vast product options, low prices, and includes speedy delivery. Subscribers pay \$139 per year for Prime, and it is widely embraced as a good value. The benefit to American consumers in lower prices and greater convenience is in the tens of billions of dollars.

However, Amazon Prime would be rendered unrecognizable if the Klobuchar bill became law. The law would prevent Amazon from favoring Prime sellers – those who pay seller fees to have Amazon manage inventory and fulfill orders with expedited shipping. This “Fulfillment by Amazon” (FBA) service would be illegal discrimination under Klobuchar’s legislation. The law would likewise prohibit Amazon from giving preference to Prime sellers in search results.

Complying with the law would require Amazon to provide FBA services to all sellers at cost, since that’s how Amazon does fulfillment for its own products. Doing otherwise would be “discriminatory” under the legislation.

A [helpful explanation](#) comes from the Disruptive Competition Project:

Amazon could not profit from this costly but innovative supply chain service offering, and in order to comply with the proposed legislation, it would be required to expand and maintain operations to provide for *all* potential third-party sellers to participate in the fulfillment services. The legislation’s cost-prohibitive mandates, combined with an obligation to bear risk without a corresponding opportunity for return, would thus result in the elimination of this service valued by both consumers and sellers.

6) It Will Stifle Innovation

The legislation transforms companies into supplicants – having to seek permission from government regulators to pursue innovative measures.

Companies may engage in conduct if they believe the *government* may agree with them that the conduct is “necessary to . . . maintain or enhance the core functionality of the covered platform.” The word “necessary” is key here. As antitrust scholars [Sam Bowman](#) and [Geoffrey Manne point out](#), this sets a “guilty until proven innocent” standard” that likely to be impossible to meet: “The threat of permanent injunctions and enormous fines will mean that, in many cases, companies simply won’t be able to justify the expense of endeavoring to improve even the ‘core functionality’ of their platforms in any way that could trigger the bill’s liability provisions.” And the effect of this, they write, “will likely be to diminish product innovation in these areas, because companies could not know in advance whether the benefits of doing so would be worth the legal risk.

They also point to what may be the biggest loss of all: “things we don’t even know about yet, that just never happen because the reward from experimentation is not worth the risk of being found to be ‘discriminating against a competitor.’”

7) It Will Cost American Jobs

One former FTC general counsel advises that if the bill becomes law, “companies will do everything in their power to stay beneath [the annual threshold], even at the expense of innovation, growth, and employment.”

The technology-e-commerce ecosystem added 1.4 million jobs from September 2017 to September 2021, [reports the Progressive Policy Institute](#), citing data from the Bureau of Labor Statistics. In fact, tech created more jobs than any sector, with health care coming in second at 500,000 jobs. The rest of the economy, points out PPI, lost 900,000 jobs.

[PPI also points out](#) that these jobs workers with at least some college earn 32 percent more in tech-e-commerce than workers in the rest of the economy. The pay is better than in manufacturing in 42 states and better than in health care in every state.

8) It Will Be a Drag on the Economy

NERA, an economic consulting firm, estimates that complying with the legislation would cost the five targeted companies \$319 billion. “These cost increases would ultimately be passed through and borne by the consumers and business users of the platforms in the form of higher retail costs and the loss of free and valued services.” Indeed, they estimate that consumer welfare loss from neutering Amazon Prime would be an astonishing \$22 billion per year – or \$148 per year for every Prime member in the United States.

9) It Will be a Bonanza for Cyber Thieves and Cyber Predators

The Klobuchar legislation would make it unlawful to “materially restrict, impede, or unreasonably delay” a business user to “access or interoperate with the same platform, operating system, or hardware or software features” used by the covered platform. In other words, the five companies that have spent years developing and refining their platforms must—under federal dictate—share it with others.

As [the Information Technology and Innovation Foundation points out](#), the provision “opens the door for almost any competing business user to demand access to core functionality of large platforms, even if it would significantly harm consumers.”

It gives these examples:

- “Facebook and YouTube would be restricted from imposing any limits on their activities, such as deplatforming them or limiting their ability to advertise, without facing the risk of running afoul of this legislation.”
- “The interoperability provision would prohibit platforms from restricting third-party apps, even if those apps present potential privacy or security risks to users,

such as capturing their logins or misusing their personal data. In addition, Facebook would not be able to restrict others from creating an alternative to its Messenger Kids app, which has been specifically designed with child safety in mind. As a result, Facebook would have little ability to prevent children on its platform from receiving inappropriate content.”

1) It Will Endanger Network Security and Data Privacy

The legislation will make it easier for other companies – whether domestic or foreign – to access sensitive data collected by covered platforms. That devastating shortcoming prompted Sen. Feinstein to say that the bill “causes some very significant security concern...We’re requiring companies to take down protections that are in place today, and instead, allow hackers and those looking to steal personal data to access the devices.”

Indeed, the implications are ominous, as [Edward Longe points out](#):

Large tech companies would have to share data with smaller businesses. Unfortunately, many small businesses don't have the sophisticated cybersecurity and data privacy protections offered by big tech platforms meaning cybercriminals and hackers have more opportunities to exploit these vulnerabilities. The net result could be sensitive consumer data left unnecessarily vulnerable to criminals and data breaches become a common, but avoidable, occurrence.

11) The Bill’s Biggest Beneficiary Will Be China

Chinese tech companies are desperately trying to knock America’s tech giants – including Google, Apple, Microsoft and Facebook - off of their dominant perches. These companies have gained global market share through an unceasing commitment to innovation, productivity, and superior product designs.

The Klobuchar legislation would threaten America’s tech superiority and potentially jeopardize U.S. economic and national security. [Here’s](#) what a bipartisan group of 12 former high-level national security officials, including former Defense Secretary Leon Panetta, have said:

Congress risks undermining America’s key advantage vis-à-vis China by pursuing domestic legislation that threatens to impede U.S. companies and their ability to pursue . . . innovation. Recent congressional antitrust proposals that target specific American technology firms would degrade critical R&D priorities, allow foreign competitors to displace leaders in the U.S. tech sector both at home and abroad, and potentially put sensitive U.S. data and IP in the hands of Beijing.

[ITIF](#) gives an example of how the law would hurt American competitiveness. It calls for regulating Apple Music and Amazon Music, which have 16 percent and 13 percent of the global market for subscription music streaming; respectively. “But it leaves the Swedish company Spotify, the dominant player with 32 percent market share, entirely unregulated.”

12) It Punishes Economic Success

The five targets of the legislation are among the most successful and dynamic American companies – not just in the past 20 years, but through all of American history. Combined they have added 1) hundreds of thousands of high-paying American jobs, 2) trillions of dollars of consumer surplus to American businesses and shoppers, and 3) trillions of dollars to the value of Americans’ stock portfolios. Their success has been enabled by their innovative business practices and methods and not special pleading for government favoritism.

Senator Mike Lee asks the critical question: “What do we gain by giving deep-state bureaucrats control over Big Tech? They don’t want to break up Big Tech to protect us, but to control it and use it against us.”

Rejecting the bill would send a much-needed signal that Congress recognizes the need to unleash opportunity – not punish it.