The Case for Fair Market Rules for the Largest Online Platforms

ACCESS Act
American Choice and Innovation Online Act
Platform Competition and Opportunity Act

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Consumer Reports | Digital Lab

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Executive Summary

Consumers have benefitted from the development of online services compared to a world without these services. However, the question today is whether competition among online platforms is effective and benefits consumers. This is clearly not the case, as we discuss in section 1 of this paper.

Multiple investigations and studies have found that the largest online platforms have too much market power, and this results in consumer and citizen harm. These investigations include the Antitrust Subcommittee's 16-month investigation as well as investigations undertaken by the UK's CMA, the European Commission, Germany's BNetzA, and Australia's ACCC. Increasingly, consumers across the political spectrum are also aware that they are getting a raw deal, and they are calling for laws to discipline platform market power and reduce harms to consumers.

Building on the Antitrust Subcommittee's investigation, the House Judiciary Committee recently approved the ACCESS Act (HR 3849), The American Choice and Innovation Online Act (HR 3816), and the Platform Competition and Opportunity Act (HR 3826), which are the focus of this paper. We understand that the Senate is also planning to introduce these bills.

- The ACCESS Act (HR 3849): requires giant online platforms to offer interoperability and portability of data with appropriate privacy safeguards.
- The American Choice and Innovation Online Act (HR 3816): requires giant online platforms to refrain from discriminatory conduct; and
- The Platform Competition and Opportunity Act (HR 3826): will require corporations that own or control a giant online platform to justify new acquisitions over $50 million.

The ACCESS Act and the American Choice and Innovation Online Act set market rules to address current barriers that limit consumer choice, and the Platform Competition and Opportunity Act ensures that consumers have meaningful choices (alternatives) in the future as well.

It is important to keep in mind the overall market context for these bills. Many companies operating in different sectors of the economy have some degree of market power. But if a market is competitive then this market power is temporary and can be challenged by existing suppliers in the market or by potential new suppliers entering the market. The problem with a handful of giant online platforms now dominating the online marketplace is that their market power is persistent (not temporary), and the effects of this market power are widespread because these firms operate across the digital ecosystem.

Moreover, structural market features and strategic firm behavior mean this market power and related consumer harms will continue unless there is policy intervention. Structural market features include network effects, economies of scale and scope, and consumer behavior and biases like default bias. Strategic firm behavior includes building ecosystems of services to leverage and protect market power, barriers to switching, multihoming and interoperability, and a strategy of exclusionary acquisitions.

As we discuss in section 2, the bills use four common criteria to identify and designate covered platforms that the fair market rules proposed in these bills would apply to. These criteria reflect these structural market features and strategic firm behavior, which means that

the proposed market rules are focused on the largest corporations and on online activities where these giant corporations have persistent and entrenched market power.

By narrowly targeting the fair market rules in this way, the bills are likely to have the largest consumer benefits while minimizing unintended effects. For example, the market rules do not directly cover activities where Alphabet (Google), Facebook, Amazon, Apple, and Microsoft are entrants and potentially innovating and increasing competition. More competition and innovation, whatever its source, is good for consumers. The proposed application of market rules strikes the right balance in allowing these giant corporations the freedom to compete in new lines of business while applying to activities where their market power is entrenched and persistent.

As we discuss in section 3, the bills work together and set market rules to address various structural market features and strategic firm behavior which, absent policy intervention, would mean that the covered platforms' market power and related consumer harms will persist.

These market rules will mean that it will not be business as usual for the covered online platforms and their operators. These giant corporations will no longer set rules for activities they dominate and for the critical platform infrastructure that we have all come to depend on. This will be an adjustment for these giant corporations, but one that will ultimately benefit the marketplace by returning power and choice to consumers, and enabling more diverse innovation. The proposed market rules will allow everyone, not just the giant corporations, to innovate without artificial restrictions. This effort must be pursued and seen through to completion.

1. The dominance of a few giant online platforms harms consumers

There is no denying that consumers have benefitted from the development of online services compared to a world without these services. However, the question today is whether competition among online platforms is effective and benefits consumers.

The Antitrust Subcommittee's 16-month investigation culminating in the staff report released in October 2020 documents an online marketplace dominated by a handful of giant digital platforms that increasingly control commerce and communications over the internet. It also documents the anticompetitive conduct that perpetuates this dominance and restrains effective competition.[1]

This market power limits meaningful consumer choice, allowing these giant online platforms to shape marketplaces without due care for consumers. This is at the expense of choice, innovation, and opportunity for both consumers and businesses, who increasingly depend on these platforms, as shown in Table 1 below.

Table 1: Examples of consumer harms resulting from the dominance of a few large online platforms

Consumer harm	Examples of harmful consequences
Consumers (and businesses) lack meaningful choices as these online platform services are 'must haves'	Consumers and businesses must accept terms and conditions (T&Cs) that degrade privacy and disintermediate customer relationships. *For example*, Facebook has repeatedly changed its T&Cs to collect more intrusive data on its users. Amazon's T&Cs restrict third party sellers' ability to provide after-sales service to consumers.
Consumers lose diversity of competition	Targeted advertising business models dominate, and alternative business models disappear. *For example*, Facebook acquired WhatsApp, and then changed WhatsApp's subscription and privacy-first based business model to one based on data collection.
Consumers lose diversity of innovation	Dominant corporations have a pattern of pursuing improvements to existing technologies and ways of doing business that they already dominate or that help them maintain their dominant position. *For example*, it is not possible to use Google, Amazon, and Apple's voice assistants concurrently on smartphones or smart speakers.
Consumers are locked into closed ecosystems	The lack of interoperability means consumers face higher prices and limited choice, and higher costs of switching to an alternative. *For example*, Apple restricts interoperability with iOS (the iPhone's operating system), Google with its advertising platforms, Facebook with Facebook's APIs.

[1] *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations*, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, published on 06 October 2020.

The UK's CMA, the European Commission, Germany's BNetzA, and Australia's ACCC have reached similar conclusions on giant platform market power and consumer harm and have proposed market rules to address these.[2] Consistent with this evidence, consumers across the political spectrum tell us these companies have too much power, and there's widespread support for laws to discipline platforms and reduce harms to consumers.[3]

Building on the Antitrust Subcommittee's investigation, the House Judiciary Committee recently approved three bills which are the focus of this paper. The ACCESS Act (HR 3849), the American Choice and Innovation Online Act (HR 3816), and the Platform Competition and Opportunity Act (HR 3826). We understand that the Senate is also planning to introduce these bills.

- The ACCESS Act requires the largest online platforms to offer interoperability and portability of data with appropriate privacy safeguards.
- The American Choice and Innovation Online Act requires these online platforms to refrain from discriminatory conduct; and
- The Platform Competition and Opportunity Act will require corporations that own or control one of these online platforms to justify new acquisitions over $50 million.

The bills propose to apply these market rules to address the dominance of a few giant online platforms defined as *covered platforms* in the bills. The covered platforms are identified and designated based on four criteria that are common across the three bills. These criteria are based on the sources of online platform market power, which means the proposed market rules are targeted at specific online platforms as discussed further in section 2.

Section 3 then explains how the bills work together to address covered platform market power, expanding choice and innovation while safeguarding consumer rights and privacy. Section 4 concludes.

[2] The UK's Digital Market Taskforce delivered it's advice in December 2020.
The European Commission is consulting on a new Digital Markets Act as well as the Digital Services Act.
Germany recently updated its competition law for digital ecosystems.
Australia's ACCC is conducting a digital platform service inquiry 2020-2025 and conducted a digital platform inquiry in 2019.

[3] *Platform Perceptions Consumer Attitudes On Competition and Fairness in Online Platforms*, Consumer Reports, published on 24 September 2020.

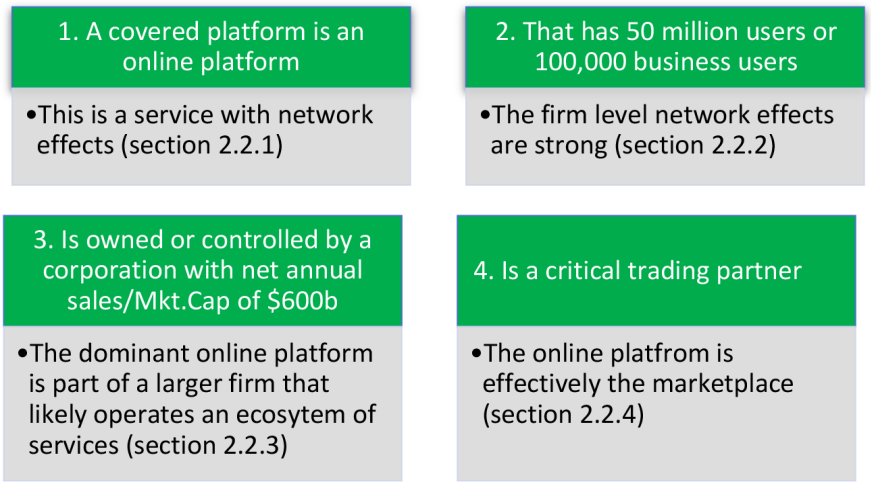
2. The bills propose targeted market rules that minimize unintended effects

2.1 Market context of the bills

It is important to keep in mind the overall market context for these bills. Many corporations operating in different sectors of the economy have some degree of market power. But if a market is competitive then this market power is temporary and can be challenged by existing suppliers in the market or potential entrants. The problem with a few giant online platforms is that their market power is persistent (not temporary), and the effects of this market power are widespread because these corporations operate across the digital ecosystem.

Moreover, structural market features and strategic firm behavior mean this market power and the related consumer harms will continue unless there is policy intervention. The structural market features include network effects, economies of scale and scope, and consumer behavior and biases like default bias. Strategic firm behavior includes building ecosystems of services to leverage and protect market power, barriers to switching, multihoming, and interoperability, and a strategy of exclusionary acquisitions.

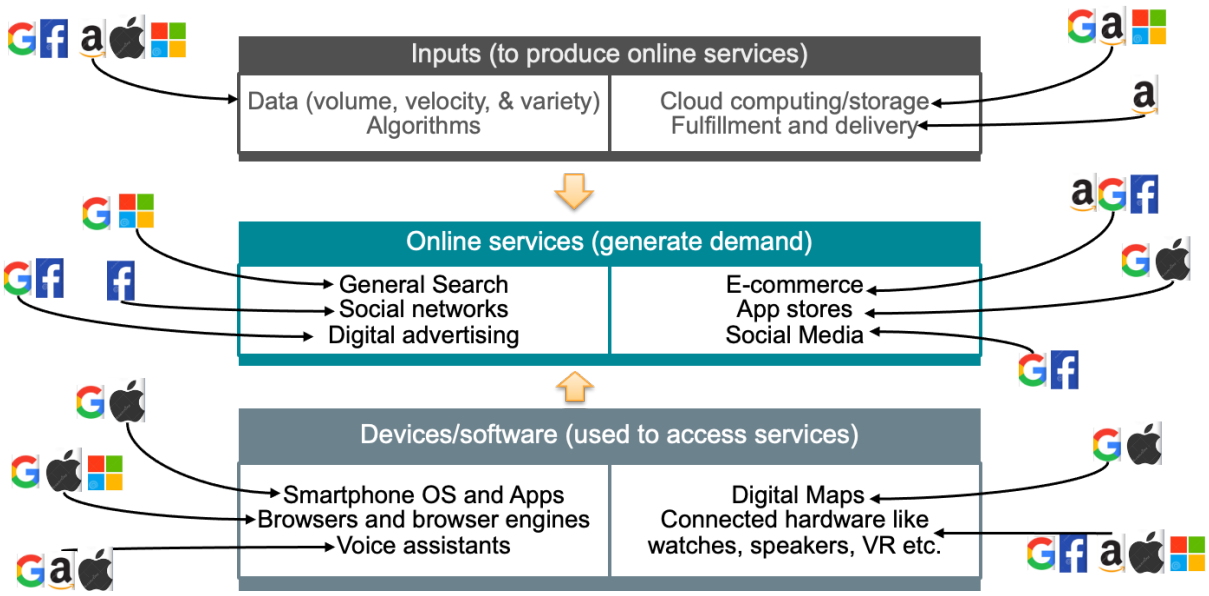
As we discuss in section 2.2, the four criteria used in the bills to identify and designate covered platforms reflects these structural market features and strategic firm behavior. This means that the proposed market rules are focused on the largest firms and on online activities where these firms have persistent and entrenched market power.



The four criteria are well defined, and clearly set out the conditions that need to be met for an online platform to be designated a covered online platform. If a corporation does not meet the market capitalization (or net sales) and user thresholds, then it is clearly not within the scope of the market rules' applicability. This provides certainty for firms' business and investment decisions.

The criteria also avoid the need to define markets, which would not be an effective approach for these firms. This is because the largest firms operate across the digital ecosystem. They control the key common supply side inputs required to produce online services, the online services and platforms that generate demand (garner consumer attention), and the devices and software that consumers and businesses use to access the online services. This is illustrated in Figure 1 below.

Figure 1: Google, Apple, Facebook, Amazon, and Microsoft operate across the digital ecosystem



Note: This figure does not include all activities of these firms. For example, it does not include manufacturing supply side capabilities (like Apple's M1 chip), physical retail presence, financial, media, and other services.

This presence across the digital ecosystem is why the effects of the dominance of these firms in any one market have the potential to have widespread effects across the value chain and beyond. As the UK's Competition Market Authority states:[4]

> *Finally, formal market definition also encourages a narrow approach in which each product or service is allocated to a specific market making it difficult to consider important interactions within an ecosystem of products. This makes formal market definition particularly ill-suited to digital markets where firms may have developed complex ecosystems of interrelated products.*

The definition of covered platforms based on the four criteria captures these complex market dynamics and focuses on intervention where it is required.

2.2 The definition of covered online platforms focuses intervention where it is required

2.2.1 A covered platform is an online platform

An online platform is defined in the bills to include a website, online application, operating system, digital assistant, or online service that:[5]

> *(a) enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform;*

[4] Para 34, *Online platforms and digital advertising Market study final report, Appendix B: The SMS regime: designating SMS firms*, CMA UK, published on 1 July 2020.
[5] *Section 5 Definition, Para 12* of the ACCESS Act (HR 3849). The same definition is used in the American Choice and Innovation Online Act (HR 3816) and the Platform Competition and Opportunity Act (HR 3826).

(b) facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform; or
(c) enables user searches or queries that access or display a large volume of information.

In each of these cases, the online platform connects different users to each other – consumers to consumers, consumers to businesses, and/or businesses to businesses. The value of the online platform increases with the number of connections it enables, and these network effects mean that the higher the number of users an online platform has, the more attractive the service becomes to other users.

For example, the more users Facebook has, the more attractive it becomes to other users as well as to businesses who would like to advertise to these users. The higher the number of sellers on Amazon, the more attractive it becomes to consumers, and vice versa. The higher the number of consumers using iOS or Android, the more attractive it becomes for App Developers to develop apps for that ecosystem.

2.2.2 The covered platform has 50 million users or 100,000 business users

The combination of network effects and a high existing user base means that the covered platform is in a strong market position.[6] It is more easily able to attract new users given its existing base due to network effects, and its existing users don't want to leave the service given the large number of connections they have (or users they serve) on the platform.

For example, if a consumer stops using Facebook and switches to an alternative service, she loses connections to her friends on Facebook unless they all decide simultaneously to switch to the alternative service.

Without adequate interoperability, these network effects mean that it is easier for the big platform to keep getting bigger, and difficult for a smaller platform to grow and compete with the larger platform. For online platforms like social media, operating systems, or digital advertising, where one or two companies effectively control the entire market and set market rules, the combination of network effects and refusal to interconnect (or limited interoperability) raises entry barriers and allows these companies to continue to dominate the market.

Network effects are an inherent characteristic of these markets; the lack of interoperability is not. It is a market rule imposed by dominant online platforms to maintain their dominance. As discussed in section 3, the ACCESS Act (HR 3849) addresses this by mandating portability and interoperability with appropriate privacy safeguards.

2.2.3 The covered platform is owned or controlled by a company with net annual sales or a market capitalization of over $600 billion

This criterion has the effect of focusing the proposed market rules on the largest firms that own or control dominant online platforms. These include Alphabet, Microsoft, Facebook,

[6] The high number of users an online platform must have before it can be designated a covered online platform also captures that online or digital technologies are material in the provision of the service. So, for example, a physical retail store with a small online presence should not be covered by the proposed market rules.

Apple, and Amazon – each of these companies had a market capitalization of well over the $600 billion threshold as of September 2021.

These high valuations reflect, among other factors, the dominance and market power that these firms have. These firms:

- Dominate some online activities via online platforms that can be used to provide multiple services;
- Control and operate complementary activities and technologies across the digital ecosystem (see Figure 1).

This power and control help further cement and grow the firms' dominant market positions as:

i. The ecosystem presence acts as a barrier to entry and provides the ability to leverage market power across different activities, resulting in widespread effects of dominance.
ii. The ability to exploit scale and scope economies across various services characterized by network effects creates a feedback loop which helps cement the market position of the giant platforms, independent of innovations and product improvements.
iii. The revenues and profit margins from dominant activities allow these companies to acquire companies as an exclusionary strategy.

All of this means that without policy intervention, the market will not self-correct. Consumer harms and distortions of competition, investment decisions, and innovation incentives throughout the digital ecosystem will continue. As explained in section 3, the non-discrimination and interoperability provisions of the American Choice and Innovation Online Act (HR 3816) and the Platform Competition and Opportunity Act (HR 3826) address these issues.

(i) Ecosystem presence as barrier to entry and ability to leverage market power

The operation of complementary services across the digital ecosystem protects dominant market positions because:

- users may prefer and consume multiple complementary services together, and these firms can persuade consumers to stay within their ecosystems by maximizing interoperability and complementary functionality among their own services but not for competing complementary services; and
- these complementary services could otherwise act as entry points for potential competitors.

This means a smaller competing service provider would need to compete across multiple services, not just one service, to attract consumers to switch.

For example:

- An Apple iPhone user may also be using an Apple Watch, iCloud, Apple speakers, Apple Music, etc. A smartwatch competitor has two options. Offer its own smartphone and smartwatch cluster of services that a consumer would prefer to the iPhone and Apple Watch cluster, or hope that Apple allows a competing smartwatch

to have the same level of integration and interoperability with iOS as the Apple Watch does.
- Facebook's 'Portal' range of video calling devices has built-in functionality for using Facebook Messenger and WhatsApp, generating demand for these services and further locking in existing users. Similarly with Google Assistant on Google's smart speakers, Siri on Apple's smart speakers, and Alexa on Amazon Echo devices; they allow each of these companies to direct consumer traffic and attention to their services like search, music, and shopping.

The largest firms can also leverage their market power from the dominant activity to other activities and markets. The levers to do this include self-preferencing in search results and recommendation engines, contractual restrictions, access to non-public commercially sensitive data, and the use of default positions. The House Report presents evidence of many instances of such conduct.[7]

Examples include:

- Google using its dominance in general search to give its own vertical services like Google shopping prominent placing, and contractual restrictions in Android licensing agreements with smartphone manufacturers to preinstall Google Apps and give them prominent placement.
- Amazon using its dominance in e-commerce to push its Fulfillment by Amazon (FBA) service; restricting sellers from generally contacting their customers; requiring most-favored-nation (MFN) clauses or similar price parity provisions that prevent competitors from offering discounts to attract customers; and using third-party seller data to develop its own private label products and compete with the third party seller.
- Apple using its dominance in iOS to give its own services and devices preferential access to APIs and iPhone functionality.
- Facebook using its dominance in social media to expand into other services and imposing restrictions on use of application programming interfaces (APIs) by potential competitors.
- Etc.

(ii) The ability to exploit scale and scope economies for services with network effects

The ability to spread common input costs across different services and a high number of users (scale and scope economies), in combination with network effects, creates a feedback loop which helps cement the market position of the giant platforms, independent of innovations and product improvements, as shown in Figure 2. This means smaller firms, which do not have the same scale or scope of operations, will find it difficult to compete.

For example, Facebook, Amazon, and Google can use all the different online services they provide to collect and pool consumer data, and then use common computing power and algorithms to analyze these data to target digital advertising and make personalized recommendations. Competitors without access to the same volume, velocity, and variety of data, and with fewer services and users to spread their costs across, will be at a disadvantage.

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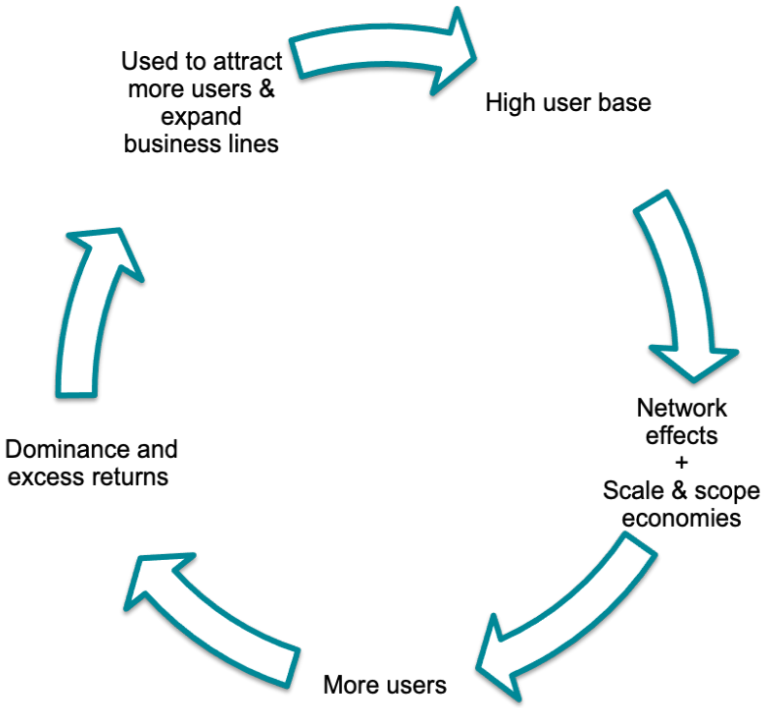
[7] *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations*, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, published on 06 October 2020.

Figure 2: The feedback loop



(iii) Acquisitions to entrench dominant positions

The revenues and profit margins from dominant activities allow these companies to acquire companies as an exclusionary strategy. The acquisitions of WhatsApp and Instagram by Facebook are the clearest examples of this strategy, as discussed and evidenced in the FTC's case against Facebook.[8]

Overall, since 2000, Google, Amazon, Facebook, Apple, and Microsoft have acquired over 800 businesses.[9] These acquisitions have involved both firms related to these companies' original business as well as new lines of business, as shown in this data visualization by the Washington Post.[10] These acquisitions suggest a history of acquiring innovative challengers to co-opt threats to dominance and to raise entry barriers while benefiting from substantial network effects.

2.2.4 The covered platform is a critical trading partner

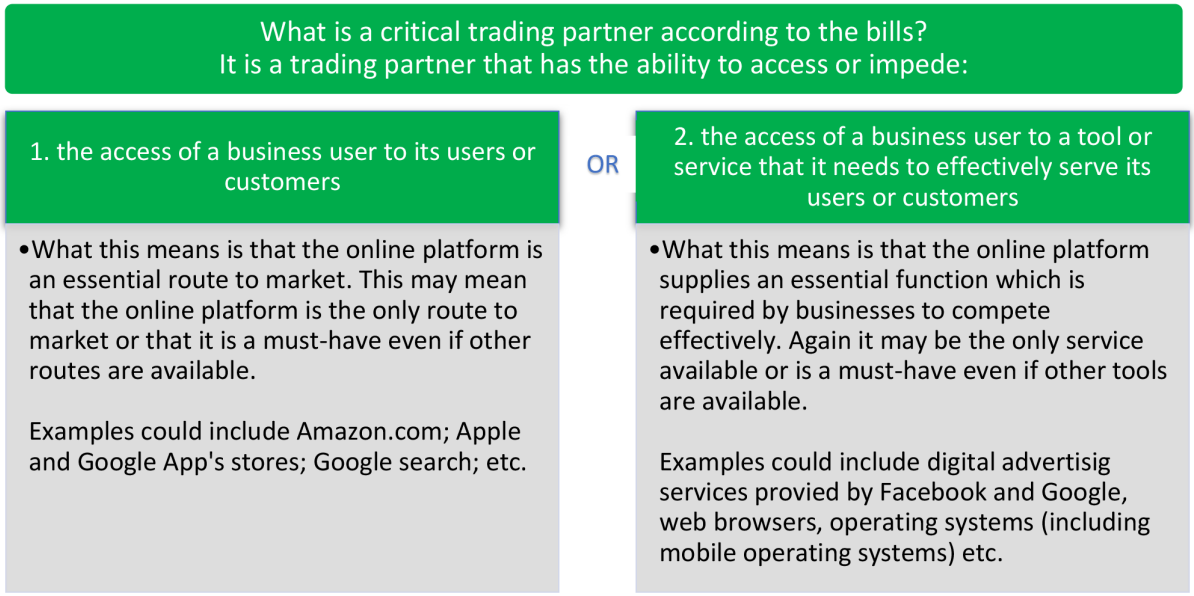
This criterion (see below) further narrows the scope of application of the proposed market rules, as it means that the rules would apply only to online platforms that have effectively become the marketplace. The criterion also captures the asymmetric bargaining power that

[8] https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush

[9] Kwoka, John E. and Valletti, Tommaso M., Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms (November 24, 2020). Industrial and Corporate Change, Available at SSRN: https://ssrn.com/abstract=3736613 or http://dx.doi.org/10.2139/ssrn.3736613

[10] Washington Post, *How Big Tech got so big: Hundreds of acquisitions*, published on April 21, 2021(https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/)

giant online platforms enjoy, and their ability to set market rules to entrench their dominant market positions at the expense of consumers and businesses.



Note: The FTC and the courts will decide how this criterion is interpreted and implemented in particular situations.

It is the fact that these online platforms are an essential route to market or supply an essential business tool without any good outside options that give the online platforms the upper hand in any bargaining to set market rules (absent intervention).

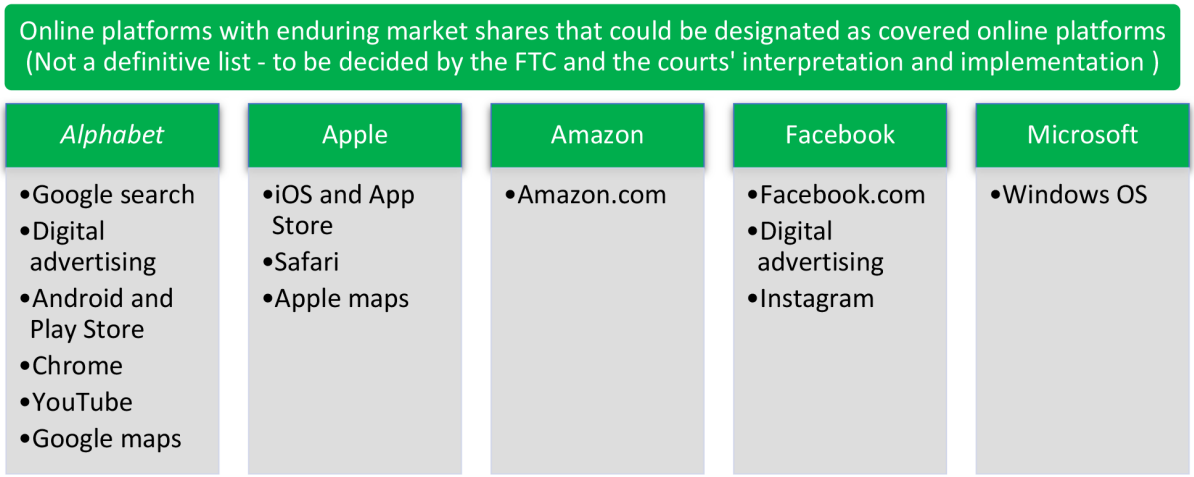
This follows from the seminal work by Nash in 1950 which considers bilateral bargaining between a buyer and seller, each with some market power.[11] Nash shows that under relatively simple assumptions, the players will maximize the difference between the payoffs of reaching an agreement and the payoffs of not reaching an agreement. As such, the value to the parties of agreement relative to non-agreement determines the bargaining power and hence the division of any surplus (or joint value) created by reaching an agreement.

In the current situation the potential loss following non-agreement to any one business that depends on the online platform is large and existential but is likely to be immaterial for the covered platform as defined in the bills.

2.3 The ability of covered platform operators to compete on the merits is not affected

The proposed market rules under the ACCESS Act (HR 3849) and the American Choice and Innovation Online Act (HR 3816) will apply only to the largest firms and only for those online activities where market power is entrenched and persistent, as shown below.

[11] Nash, Jr., J.F. (1950), 'The Bargaining Problem,' *Econometrica*,**18**:2, pp. 155–162.



These are online platforms which do not and are unlikely to face meaningful competition. Without the proposed market rules, the covered online platforms' market power and ability to set their own discriminatory market rules will continue to harm consumers and innovators. By applying the proposed fair market rules to the largest platforms, the bills are also likely to create the largest consumer benefits.

This also means that the proposed market rules will not apply to each giant firm's entire digital ecosystem of services. In particular, the market rules will not directly cover activities where these giant firms are entrants and are potentially innovating and increasing competition. More competition and innovation, whatever its source, is good for consumers. The proposed application of the market rules strikes the right balance in allowing the covered platform operators the freedom to compete in new lines of business while applying to activities where their market power is entrenched and persistent. The bills also include additional provisions to mitigate any unintended effects, as discussed in the next section.

3. The bills set fair market rules to address online market power while safeguarding security and consumers privacy

The ACCESS Act (HR 3849) and the American Choice and Innovation Online Act (HR 3816) set market rules to address current barriers that limit consumer choice, and the Platform Competition and Opportunity Act (HR 3826) ensures that consumers have meaningful choices (alternatives) in the future. These bills also include various safeguards to mitigate unintended effects, and provisions to protect consumer rights and privacy, as discussed below.

3.1 The ACCESS Act (HR 3849)

3.1.1 What the Act does

ACCESS mandates portability of user data to and interoperability with competing or potentially competing services. The rules apply to designated covered online platforms, as discussed in section 2.2 above, not to all the online activities of covered platform operators like Alphabet, Facebook, Amazon, Apple, Amazon, and Microsoft.

Portability means that users have the right to transfer their data from one service to another. The Act requires that the covered platform operator maintains transparent third party interfaces like APIs and that data are structured in a commonly used machine-readable format. These provisions should help ensure that portability is a practical tool that is effective and easy to use.

For example, the portability provisions would allow a user to transfer her own data like photos and videos, or a contact list from Facebook, to a competing service provider. This may make it easier to reestablish her personal network on the new service if her connections also switch to the new service. It would also, for example, allow consumers to transfer their data more easily between iOS and Android, and allow businesses to move their advertising campaign data from, say, Google's digital advertising servers to a competing digital advertising server.

Interoperability means competitors and potential competitors could interact with the covered platform on key aspects of the service. Again, to make this a practical tool that is effective and easy to use, the Act requires that the covered platform maintain transparent third-party interfaces like APIs to facilitate and maintain interoperability, and that it publish detailed documentation on these interfaces.

For example, this would allow a consumer to start using an alternative to Facebook and still continue interacting with her friends and family who remain on Facebook and decide not to switch to the new service.

By mandating portability and interoperability, ACCESS would incentivize users to try and switch to new services. This will reduce barriers to switching and would enable more competition. And it will give consumers the tools to keep and control their own valuable content and data.

3.1.2 Safeguards to ensure security and consumer privacy

The ACCESS Act has several measures to ensure that security and consumer privacy are not degraded as a result of mandating portability and interoperability.

First, it is the user who controls when her data can be transferred to another business, or if another business can access her data via interoperability. Indeed, the user's *affirmative consent* is required – a term that is carefully defined in the Act. This is to ensure that the covered online platform and its competitor or potential competitor disclose all the relevant information to the user in a format that is accessible, assessable, and actionable. For example, a preselected default option does not count as affirmative consent.

Second, all parties, both the covered platform and its competitor or potential competitor, need to follow appropriate *privacy and security protocols* to safeguard data. The competing or potentially competing businesses' access can be terminated both by the FTC and by the covered platform to safeguard user privacy and security. *Data minimization* principles also apply to the interoperability interfaces, which means data collection for both parties (the covered platform and its competitors) is restricted to what is necessary to maintain interoperability of services, nothing more.

3.1.3 Provisions to tailor rules to different covered platform businesses

The types of services provided by the potential covered platforms owned or controlled by Facebook, Amazon, Google, Apple, and Microsoft will be different (see section 2.2). This means that portability and interoperability for these services will also need to function differently. *For example*, interoperability for users of Facebook.com will be different from interoperability for businesses using Google's digital advertising services.

The ACCESS Act takes this into account and includes the establishment of specific privacy, security, portability, and interoperability parameters for each covered platform and its competitors or potential competitors. It asks the FTC to establish a separate technical committee for each covered platform that includes representatives from both the covered platform and its competitors to help establish practical standards. These standards should:[12]

> *(1) seek to reduce or eliminate network effects that limit competition with the covered platform;*
>
> *(2) establish data security and privacy protections for data portability and interoperability;*
>
> *(3) prevent fraudulent, malicious, or abusive activity by a competing business or a potential competing business; and*
>
> *4) establish reasonable thresholds related to the frequency, nature, and volume of requests by a competing business or a potential competing business to access resources maintained by the covered platform…*

These guidelines do not imply that all aspects of a covered online platform need to be interoperable with competitors or potential competitors. It is only those aspects of the service that will help reduce or eliminate network effects that limit competition with the covered

[12] *Section 7 Technical Committee, subsection (c) General Responsibilities* of the ACCESS Act (HR 3849).

platform that need to be interoperable. Both the covered platform and its competitors can continue to differentiate and innovate on other aspects of their service.

For example, in the case of Facebook this could mean interoperability on accessing connections and cross-posting but not on viewing and engaging with content. Both Facebook and its competitors could then differentiate and innovate on how to present information to their users and develop different tools for how users engage with content on their platforms.

3.2 The American Choice and Innovation Online Act (HR 3816)

3.2.1 What the Act does

The American Choice and Innovation Online Act prohibits discriminatory conduct. The Act sets out three general non-discrimination requirements that prohibit self-preferencing, exclusionary conduct, and discrimination among businesses. The Act also sets out specific non-discrimination requirements such as:[13]

- prohibiting the covered platform from restricting or impeding a business user from accessing or interoperating with the covered platform, or conditioning access on purchasing other services;
- rules on how data are used – including non-public data and a business user's customer data; and
- allowing users to change default options and uninstall software.

These rules apply to activities in connection with the operation of the designated covered platforms, as discussed in section 2.2 above, not to all the online activities of covered platform operators like Alphabet, Facebook, Amazon, Apple, Amazon, and Microsoft.

The rules should mean covered online platforms will not be able to distort consumer choice and competition by unfairly advantaging their services, and should make it easier for consumers to tailor services by changing default options and uninstalling software.

The interoperability provisions should also help ameliorate the scale and scope disadvantages that smaller single product or service firms have compared to larger multi-product firms. This will enable consumers to integrate and use the smaller single product firm's service with the covered platform's services more efficiently. The rules will help break down the closed product and service ecosystems that many of us find ourselves trapped in today.

3.2.2 Safeguards to mitigate unintended effects

As discussed in section 2.2 above, the proposed market rules will not apply to each firm's entire digital ecosystem of services. In particular, the market rules will not directly cover activities where these giant firms are entrants and potentially innovating and increasing competition.

[13] *Section 2 Unlawful Discriminatory Conduct, subsection (b) Other Discriminatory Conduct* of the American Choice and Innovation Online Act (HR 3816).

For example, Apple's moves to build its own search service or even Apple Music should not be directly covered by the proposed market rules. Similarly, Google's cloud computing service and Amazon's Fire operating system should not be covered.

Additionally, the bills provide firms the protection of an affirmative defense for activities that are covered by the proposed market rules. If the firm can show that its current way of doing business would not harm competition and consumers, then these business practices do not violate the proposed market rules. Hence the ability of firms to compete on the merits - i.e., without exploiting their dominant market position - remains intact.

For example, pre-installing apps on smartphones or providing one-day delivery service are services that benefit consumers, and these can continue if they are delivered without exploiting dominant market positions. Potential solutions could be to introduce measures that give consumers the ability to easily choose, install, and use alternative default apps. For one-day delivery services, it could be the ability of marketplace sellers to use alternative delivery fulfillment services (other than, say, Amazon's on the Amazon marketplace) and not be punished in search and buy recommendations results for doing so.

3.2.3 Provisions to tailor rules to different covered platform businesses

The types of services provided by the potentially covered online platforms owned or controlled by Facebook, Amazon, Google, Apple, and Microsoft will be different (see section 2.2). This means that there will be nuances as to how the American Choice and Innovation Online Act applies to different covered online platforms, and the Act takes this into account in two broad ways.

First, the Act requires the FTC and DOJ Antitrust Division to jointly issue and update guidelines outlining policies and practices related to the enforcement of the Act. These should be detailed guidelines setting out clearly what the Act means for each of the designated covered platforms.

Second, as mentioned above, the Act sets out specific non-discrimination requirements, some of which are targeted at specific types of online activities where such conduct is prevalent. These include, for example, the prohibition on restricting or impeding covered platform users from uninstalling software applications or changing defaults, and self-preferencing in search or ranking functions on a covered platform.

3.3 The Platform Competition and Opportunity Act (HR 3826)

3.3.1 What the Act does

The Platform Competition and Opportunity Act will require corporations that own or control a designated covered platform i.e., a covered platform operator to justify new acquisitions over $50 million. The covered platform operator can do this by showing that the acquisition is not of an actual or potential competitor of the covered online platform operator, and that the acquisition would not further entrench the covered platform operator's market power.

This Act will apply to all the activities of a covered platform operator. For example, it will apply to Alphabet not just Google search, Apple not just its iOS platform, Facebook Inc. not just Facebook.com, Amazon Inc. not just Amazon.com, and Microsoft not just its Windows operating system.

The Act will make it more likely that consumers have access to competing diverse innovative services that challenge the covered platform operator's way of doing business. Any future acquisitions by these giant corporations will face robust scrutiny, and challenge wherever warranted, to protect competition in online marketplaces.

3.3.2 Safeguards to mitigate unintended effects

The Act includes two safeguards to mitigate unintended effects.

First, the objective of the bill is to target acquisitions when used as an exclusionary strategy. This is much more likely to be the case for big acquisitions like Facebook's acquisition of WhatsApp and Instagram, Google's acquisition of DoubleClick and Waze, Amazon's acquisition of Zappos and Whole Foods, Apple's acquisition of Beats and Intel's smartphone modem business, and Microsoft's acquisition of Skype and LinkedIn, etc.

The $50 million floor ensures that while these types of bigger future acquisitions will be covered and undergo additional scrutiny, smaller acquisitions under $50 million will not face the new higher level of scrutiny. This will help provide easier access for smaller start-ups to these giant firms' capital, and will not affect the exit route for entrepreneurs to potentially be bought out by one of these giant firms.

Second, it is important to note that even the bigger acquisitions are not flatly prohibited under the act. A $50 million-plus acquisition can go ahead if it is not an acquisition of an actual or potential competitor of the covered online platform operator, and would not further entrench the covered platform operator's market power, as set out in the Act.

4 It Is vital that we implement and enforce these market rules to address covered platform market power

Alphabet, Amazon, Apple, and Facebook are among the most powerful companies in the world today, not only because they've bested the marketplace, but because they've *become* the marketplace. These companies are neither rule takers nor price takers, meaning they face few if any competitive or regulatory constraints.

The ACCESS Act, the American Choice and Innovation Online Act (*Choice Act*), and the Platform Competition and Opportunity Act (*Competition Act*) work together and set market rules to address various structural market features and strategic firm behavior which, absent policy intervention, would mean that covered platforms' market power and related consumer harms will persist.

Structural market features	Addressed by (not an exhaustive list)
Network effects	Interoperability with competing services, under *ACCESS Act*
Economies of scale and scope	Interoperability with complementary services, under *Choice Act*
Consumer behavior/biases like default bias	Default choice does not constitute consent, under *ACCESS* Act

(Abusive) strategic firm behavior	Addressed by (not an exhaustive list)
Building ecosystem of services to leverage and protect market position	Non-discrimination and interoperability with complementary services, under *Choice Act*
Barriers to switching, multihoming, and interoperability	Detailed rules and guidance on how portability and interoperability should be implemented, under *ACCESS Act*
Acquisitions of (nascent) competitors	Requirement that the largest firms show that big acquisitions will not harm competition, under *Competition Act*
Barriers to effective and informed consumer decision making	Detailed rules and guidance on disclosure and how these should be presented to consumers, in *ACCESS Act*

It will not be business as usual for the covered online platforms and their operators. These corporations will no longer set rules for activities they dominate and for the critical platform infrastructure that we have all come to depend on. This will be an adjustment for these companies, but one that will ultimately benefit the marketplace by returning power and choice to consumers, and enabling more diverse innovation. The proposed market rules will allow everyone, not just the giant corporations, to innovate without artificial restrictions. It must be pursued and seen through to completion.