Insight

Technology and Telecommunications Policy in the Executive Order on "Promoting Competition in the American Economy"

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Executive Summary

- President Biden's executive order on "Promoting Competition in the American Economy" is largely based on presumptions about the harm of big business and the nature of concentration in many sectors of the economy, notably technology and telecommunications.
- Elements of the executive order focused on mergers and limiting how companies use data are based on misguided presumptions about the interactions between large and small businesses, and they are likely to diminish benefits to consumers rather than improve consumer welfare.
- In addition to elements related directly to antitrust reform, the executive order seeks to frame other technology and telecommunications policy issues, including reinstating net neutrality and shifting toward a federal "right to repair" policy, in terms of competition, even though this understanding of the issues is misleading.

Introduction

On July 9, 2021, President Biden signed an executive order (EO) aimed at increasing oversight for an array of different industries, including notable portions directed at the technology and telecommunications industries. The EO targets a vast array of sectors that the administration deems overly concentrated, encourages agencies to strengthen their antitrust enforcement efforts, and requests that they introduce new regulations that would reestablish net neutrality and a "right to repair" mandate.

The EO is being introduced as the administration expresses concerns about concentration in some highly successful industries, including technology. It argues that these requirements will bolster competition by strengthening antitrust action against the bigger players in these markets, thus aiding small businesses and consumers, and represents the latest proposed changes to competition policy amid debates about the need for antitrust reform. Unfortunately, however, many of the requirements in the executive order make changes that are likely to harm consumers and result in less dynamic markets and innovation.

The Executive Order Relies on a "Big is Bad" Premise

The preamble of the EO fact sheet makes its rationale very clear: The administration is worried about corporate consolidation and believes that increasing market concentration is leading to less competition, harming consumers. Due to this increasing concentration, consumers are being presented with less choice, which then translates into higher prices for the goods they are consuming and lower wages for the jobs they are working. The administration claims that price mark-ups have tripled, while wages have fallen 17 percent, costing the median American household around $5,000 per year.

The Biden Administration, along with policymakers on both sides of the aisle, have expressed concerns over market concentration and price increases, but these critiques of the market fall apart under scrutiny. According to a study from the Information Technology and Innovation Foundation (ITIF), Census data indicate that "just 4 percent of U.S. industries are highly concentrated," while 45 percent have become less concentrated since 2002. Another report by ITIF also questions the allegations of markup increases, claiming that most of the studies used to back these claims present various methodological mistakes, which lead to overestimating the magnitude. Additionally, the report notes that in the few industries where markups have increased, they have not been excessive and are actually a result of higher competition.

Hindsight Is Not Always 20/20

One of the EO's most question-raising measures is its call to antitrust agencies to increase merger scrutiny, especially by suggesting they may challenge not only pending or new mergers but also past mergers that were not previously challenged. This measure is likely related to concerns that some industries, including the technology industry, have become "kill zones," where large companies acquire smaller, innovative companies in order to shut competition down before it can disrupt their market position. Advocates of stronger merger scrutiny claim that the prevalence of mergers disincentivizes investors from funding a startup aiming to compete with bigger players and deters innovators from challenging existing giants.

This argument provides an extremely limited vision of the dynamics and the benefits of mergers for both big and small players, but, more important, for consumers. For entrepreneurs and innovators, mergers and acquisitions provide an exit option when the lack of financial resources, marketing power, regulatory burdens, or a desire for expansion becomes a barrier for further growth. Merging or being acquired allows these innovators to receive compensation for their idea and can result in teams that may be able combine talents more easily. Mergers also allow those innovators who desire to move on and start another innovative product to do so with valuable seed capital from a prior acquisition. For their part, big companies receive valuable talent and product improvements. But it is not just the businesses that benefit from mergers and acquisitions. Consumers benefit from having access to better products and services that could possibly not exist had the merger not taken place. The focus of merger analysis should remain on the impact on consumer welfare, not on a belief that a certain number of competitors determined by policymakers rather than the market is ideal.

The reasoning for allowing challenge of past mergers often focuses on whether mergers such as Instagram and Facebook or Google and DoubleClick received the appropriate scrutiny. But focusing on past unchallenged mergers could also impact future, consumer-benefitting mergers by deterring risky acquisitions harming small developers in the process. The counterfactual of how a company would have evolved without a merger is often difficult to know and will have to rely on multiple assumptions that would be difficult to prove with any empirical evidence.

Protecting Consumers from the "Harm" of Generic products and Other Data Restrictions

As with the recent antitrust reform bills introduced in the House of Representatives, the EO seeks to limit the use of data by "Big Tech" in developing their own products. The purported purpose of such a proposal is to protect small businesses from being harmed by a larger player copying their product. But it is important to remember that antitrust is designed to protect consumers and promote consumer welfare, not artificially protect other competitors from those in the market whose product consumers prefer.

This proposal seeks to prevent large players (particularly large tech companies) from offering the same products they allow third party sellers to offer if they use certain data they collect from sales. For example, this rule would prevent Amazon from offering AmazonBasics batteries and men's dress shirts. It also could prevent Apple from offering a notes app if it allowed Evernote to list its app in the App Store. But these practices largely promote rather than decrease consumer welfare. For example, developing a store brand or generic product from knowledge of what is popular with shoppers is far more common in traditional retailers such as CVS or Costco than in these online giants. Even with the data they may have about sales or in a product listing, large players are still not privy to the details that go into making a product or the costs associated with every element of manufacturing and distribution if they choose to make their own version. The current system allows retailers and tech companies to offer consumers a choice between a name-brand product and an own-brand generic and thus allows consumers to choose which best serves their preferences and view of value.

Of course, this is not the first time concerns have arisen about big business squashing smaller businesses through offering lower prices or new consumer-friendly options. Innovation in retail has often been met with concern from competitors but has ultimately benefited consumers. This can be seen throughout history, from the rise of self-service grocery stores to today's quick deliveries and drive-up pickup options. In an effort to protect competitors, consumers may lose out on the benefits of cheaper products or more efficient options.

The EO also seeks to regulate the use of data in other ways including encouraging the Federal Trade Commission (FTC) to establish rules related to data accumulation and consumer privacy. These actions are particularly targeted at the "free" products offered by tech companies. The FTC already serves as the consumer protection regulator for issues related to data privacy and data breach. In the past, it has been able to offer a flexible framework that allows a range of privacy preferences while also acting in those cases where there has been a demonstrable harm. Clearly rules could be helpful, but the agency should ensure that such rules are tied to actual harms and not merely based on a belief that privacy should always trump other benefits. An overly regulatory approach could be particularly burdensome on smaller companies and could also deter innovative and beneficial uses of data in a range of industries.

The EO includes data-related provisions in its overall approach to competition, but policymakers should be cautious of using antitrust as a tool to address data protection or privacy policy. In Europe, competition-policy agencies are also often involved in data regulation as well; antitrust action such as breaking up companies, however, can also lessen data privacy and result in companies engaging in different, and perhaps less targeted, data collection. Smaller, separate companies may have to collect more data or sell more advertising to support themselves without a larger parent company, or they may have to charge a higher fee to users for more privacy-sensitive options. Additionally, as the General Data Protection Regulation illustrates, stringent data privacy regulations can further cement the market position of large players who can more easily afford costly compliance and exacerbate concerns about concentration.

Net Neutrality as a Competition Issue?

In addition to its changes to competition policy, the EO also seeks to reframe other technology and telecommunications policy issues as competition issues. These policy changes include the return of net neutrality requirements that proponents have claimed are needed to increase connectivity, privacy, and affordability while preventing current internet service providers (ISPs) from blocking or slowing down certain content. Over three years after the Restoring Internet Freedom Order removed the Title II classification of ISPs and ended net neutrality requirements, the hyperbolic predictions from celebrities and politicians that the internet as we know it would end without net neutrality have failed to come true. Instead, private investment continues and during the COVID-19 pandemic the system withstood its greatest stress test without the need to downgrade content, as happened in Europe.

Much of the debate around the underlying issues of net neutrality remains the same as before it was first enacted, albeit with more evidence of the success of the internet without it, and its return is likely to be subject once again to contentious debate. Framing net neutrality as a competition issue seems to misunderstand even what proponents allege as its policy purpose. Net neutrality requirements or Title II reclassification place more regulatory requirements on ISPs, which may make it harder for smaller ISPs to compete in the market. Such regulatory burdens could be particularly detrimental to further progress in providing connectivity in rural areas, where these small providers may be able to serve otherwise unserved communities, ultimately slowing progress in bridging the digital divide.

As with other tech policy issues such as data privacy and content moderation, disputes about how to solve potential concerns about ISPs and bridge the digital divide are better handled through targeted solutions that require careful analysis rather than framed as part of a debate over competition.

A Federal Right to Repair?

The last technology policy issue makes it into the competition policy executive order laundry list is encouraging FTC action around the “right to repair,” which is the idea that once an individual purchases an item, the owner should be able to repair or modify the device with access to information and replacement parts from a variety of sources and providers and not just the original manufacturer. Such policies impact not only technology devices such as iPhones, but also cars and tractors.

Particularly in rural states, individuals may struggle with access to the original provider or authorized repair shops, making it difficult to fix devices in a timely manner. Some companies such as Apple, John Deere, and Dyson have opposed these policies on the grounds that modified devices or those that are poorly repaired could jeopardize perception of their brand or result in harm to those who are trying to do repairs themselves without proper training. There are also concerns about the impact such policies could have on intellectual property, but in most cases existing laws would continue to provide the needed protection in that regard.

“Right to repair” legislation has been gaining traction on a state level for several years now. Such a policy can be beneficial to consumers by providing more accessible options and can provide opportunities for entrepreneurs to expand their business and offer new services for popular products. Still, intellectual property should be protected and there should be clarification around the liability for modified products or unauthorized repairs. Hopefully, the right balance can be struck to allow this policy to be innovation-supporting while still addressing the legitimate concerns around safety and intellectual property. The FTC is now set to consider this topic at its next open meeting on July 21.

Conclusion

President Biden’s EO is the latest in the ongoing policy debate about the direction of competition policy in the United States. In pursuing this end, it seeks to insert government regulation into many sectors of the economy. While it claims to focus on consumers and small businesses, many of its provisions would raise prices or make it more difficult to enter markets due to its increased regulations. Instead of seeking to dramatically change antitrust policy, the current focus on consumer welfare should remain and other policy concerns should be addressed through targeted reforms.