

# Proposed Merger Moratoriums in Big Tech and Antitrust Laws

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By Carl W. Hittinger and Jeanne-Michele Mariani

While Capitol Hill has been quite busy with other things, the House investigation into Big Tech and potential antitrust violations is still alive. On Nov. 13, House lawmaker Rep. David Cicilline, who has been leading the investigation into tech competition, suggested a new tactic to prevent major Silicon Valley firms from making acquisitions – a merger moratorium until the federal government’s top two antitrust enforcers are finished with their own probes into the tech sector.

Cicilline, who chairs the House Antitrust Subcommittee and who has been spearheading a congressional review of possible anti-competitive conduct in tech, pressed both Justice Department Antitrust Chief Makan Delrahim and Federal Trade Commission Chairman Joe Simons on whether they’d support a “merger moratorium for dominant platforms” while they investigate industry giants. Cicilline further suggested that any big tech deals that cannot be immediately shown to promote competition should be put on hold. “In this context where there is significant harm being imposed upon consumers, it seems like something worth considering,” he said.

Delrahim, however pushed back on the novel idea, arguing that there is “a lot that can be done short of a merger moratorium.” Imposing a moratorium on mergers by platform tech companies while they are under investigation would neither be advisable nor in the Department of Justice’s power, Delrahim went on to say at the Nov. 13 hearing. Delrahim’s quick rejection of the idea of a merger moratorium aligns with what he has been saying since he took the helm of the Justice Department’s antitrust division – that big isn’t necessarily bad – even as he oversees investigations into major tech giants. Earlier this year, [we wrote an article](#) dealing with this exact concept, that is, whether big necessarily equates to bad (we argued that it does not).

At the Nov. 13 hearing, Simons said that the FTC is already reviewing consummated tech mergers as part of its own enforcement efforts but did not comment on the prospects of a moratorium. Later, on Nov. 18, Simons did say that

the enforcers at the commission were taking a “fresh look” at the standard used to bring an antitrust violation against a major tech company. The normal standard used by the FTC, the consumer welfare standard, looks at whether a merger or anticompetitive conduct, like price-fixing, creates a direct harm to the consumers, and if this happens it can raise antitrust issues. Some critics of that standard argue that it does not work in situations when the service or product being offered is given to consumers at no cost. The FTC has stated they would look again at the standard to see if there were other “alternatives” to it, but no concrete action has been taken to that end as of yet. And, of course, changing the way antitrust violations are looked at would surely cause some pushback unto itself. While the FTC commented that they plan to make merger commentary a joint effort between the FTC and the DOJ, there has been no statement as to what this means or will look like. And again, Simons on behalf of the FTC stopped short of making any pronouncements regarding a moratorium.

For many, merger moratoriums can be considered a nuclear option due to their lasting effects on a market. Some argue implementing one is pro-competitive as the moratorium halts all potentially anticompetitive mergers until a full investigation can be done into the companies that are proposing the deals. In this way, the government avoids approving a merger that may cause future antitrust violations. It also ensures, the argument goes, that smaller players in a particular industry are not unfairly squeezed out of the market. Of course, on the other hand, others argue that moratoriums without a court-ordered injunction can stifle innovation in a particular industry, particularly if the investigation drags on, as they slow down acquisitions that might lead to better consumer experience in the long run.

Most recently, Congress has tried to enact a merger moratorium in the agriculture industry. In the past 30 years, the top four firms in cattle slaughter, pork packing, corn processing and seed production are alleged to control between 60% and 85% of their markets. A large part of

that is due to a trend of corporate consolidation through multibillion-dollar mergers. The Booker-Pocan bill, originally introduced by Sen. Corey Booker and Rep. Mark Pocan, would put a strategic pause on merger combinations of over \$160 million in sales or assets and establish a commission to study the impacts of consolidation in the food and agricultural sectors on farmers, rural communities, workers and consumers. The commission would also recommend any necessary changes to federal antitrust statutes or other laws and regulations to restore a fair and competitive agricultural marketplace.

While the bill was introduced and referred to the subcommittee on antitrust, commercial, and administrative law last June, no further action has been taken on it and there is no indication that any action will take place on it anytime soon. Given that Big Tech is arguably much more complex to understand when it comes to antitrust violations than the agriculture industry, it is likely that a merger moratorium would move even slower than the one proposed by Booker and Pocan. Of course, with a presidential primary coming up, and with Big Tech already a potential hot topic, a moratorium could gain some traction from those candidates looking to take a hard-line stance, but whether that will translate into concrete action – or whether it will even be considered a good thing politically or economically – remains to be seen.

For now, those who are skeptical of Silicon Valley seem to be looking for the government to take any action, even if proposed solutions are controversial. They argue that the DOJ has shirked its responsibility in this arena as its last major investigation was back in 2001. Since then no other large-scale Big Tech antitrust investigations have taken place. While there are too many variables at play to make any thoughtful predictions, the answer may simply lie with the next upcoming presidential administration. Stayed tuned.

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