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POLICY BRIEF

The Economic Risks of the American Innovation and Choice Online Act: AICOA Could Harm Consumers, Small Businesses, and Innovation

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The American Innovation and Choice Online Act (AICOA) is making a legislative comeback.[1] First introduced in 2022, the bill targets the largest American tech platforms, designated as "systemically important platforms" based on revenue and user thresholds, and it would restrict practices such as vertical integration, self-preferencing, and certain default settings.[2] Supporters argue that these restrictions will level the playing field between dominant digital platforms—including tech giants such as Microsoft, Apple, and Amazon[3]—and smaller competitors. AICOA, however, departs from traditional American antitrust legislation. Although presented as a competition measure, AICOA functions in practice as an ex ante regulatory framework with restrictions based on firm size. In doing so, AICOA practically replaces much of the case-by-case analysis that has long characterized antitrust enforcement. This policy brief argues that this shift risks harming consumer welfare, small businesses, innovation, and the United States' global competitiveness.

AICOA's comeback reflects not only renewed public and political support for regulating large digital platforms, but also the ongoing implementation of similar legislation in Europe. In 2022, a substantially similar version of AICOA was introduced in the United States but failed to reach the Senate floor for a vote.[4] The European Union, however, implemented similar legislation and passed the Digital Markets Act (DMA) on September 14, 2022.[5] Because the DMA shares several of AICOA's key features and has already been implemented, it provides a useful point of comparison for examining how AICOA-type regulations could function in practice in the United States. Throughout this policy brief, the DMA serves as a proxy for evaluating the effectiveness of AICOA-style legislation and identifying potential legal and economic concerns.

This policy brief first examines AICOA's legal structure and explains why the bill differs from existing American antitrust law. It then draws on the DMA, together with relevant economic theory and evidence, to examine the likely effects of AICOA-style legislation on consumer welfare,

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small businesses, innovation, and US competitiveness. The legal structure is examined first, since many of the bill's economic consequences originate in its departure from traditional antitrust enforcement.

A Departure from Competition Enforcement: AICOA's Legal Structure

To understand AICOA's departure from traditional antitrust enforcement, it is useful to compare its legal structure with the framework governing existing antitrust law.

Contextualizing enforcement in antitrust

AICOA differs in structure from existing American antitrust law in three distinct ways, each of which reduces legal precision when regulating traditionally anticompetitive conduct. First, because it is implemented ex ante (preemptively) rather than ex post, AICOA changes the timing of regulation. Furthermore, AICOA decreases the flexibility of enforcement and operates as a legal rule rather than a case-by-case legal standard. Lastly, AICOA changes the thresholds of enforcement by lowering prosecutorial burdens of proof and limiting options for affirmative defense. The combination of these structural changes suggests that the primary concern of AICOA is to regulate not traditionally anticompetitive conduct, but rather size as an inaccurate proxy for anticompetitive harm.

First, it is helpful to define *ex post/ex ante* and *standards/rules* as terms of regulatory analysis before applying them to understanding AICOA. Ex post policies are regulations that address anticompetitive conduct by imposing liability for harms after they have occurred.[6] As such, ex post policies introduce a time lag while providing greater legal precision because they ensure that only conduct that produces harm is regulated. Ex ante policies, on the other hand, regulate behaviors *upstream* of harm to prevent harm from occurring in the first place. While ex ante policies may produce preventative benefits, overly broad ex ante policies regulate, punish, or deter actions that may not actually produce harm.

A related distinction is between legal standards and legal rules. Legal standards broadly define goals for courts to determine legality on a case-by-case basis,[7] while legal rules rigidly outline illegal behavior like a hard speed limit. Economist Louis Kaplow frames the tradeoff between rules and standards through the timing of social costs.[8] Well-intentioned standards-based enforcement creates precision through case-sensitive analysis but introduces protracted litigation resource costs. Well-crafted rules are cheaper to enforce but require more upfront resources to ensure they are effectively designed. Since legal rules are not adjusted on a case-by-case basis, they must be carefully written up front to ensure accurate prevention of harm in a range of circumstances, without being overinclusive or underinclusive of certain behaviors.

Under these categories of regulations, existing antitrust law generally operates as an ex post standard. Section 2 of the Sherman Act prohibits certain unilateral firm conduct when monopoly

power is demonstrated ex post.[9] Under this system, monopoly power is assessed through case-by-case analysis of specific market conditions, allowing the system to recognize that relevant market power thresholds often differ across markets and industries.[10] This standards-based approach prioritizes legal precision over enforcement efficiency.

AICOA as an ex ante rule

AICOA replaces the monopoly power standard with bright-line ex ante rules that target "systemically important platforms" defined by arbitrary profit and user-count cutoffs, which do not recognize case-specific differences in market structure and dynamics among such platforms.[11] While such a rule may be easier to enforce, it sacrifices legal precision in identifying anticompetitive conduct because business size does not necessarily imply market power.

AICOA's structure reflects a framework of ex ante rules through two pathways of regulation. The first pathway, the material harm pathway, under section 3(a)(1), prohibits behaviors only if the government can show material harm to competition.[12] This pathway includes actions such as broad self-preferencing by platforms. In such cases, firms may offer affirmative defenses only by arguing that their conduct is necessary for consumer protection or legal compliance, and they must establish those defenses by clear and convincing evidence.

The material harm pathway's limits on affirmative defenses reinforce AICOA's structure as an ex ante rule. Companies cannot defend their conduct by demonstrating net benefits to competition—a significant departure from traditional antitrust enforcement[13] of unilateral conduct under section 2 of the Sherman Act,[14] which allows companies to offer procompetitive justifications for their conduct. Instead, the material harm pathway permits only consumer safety and legal compliance defenses, which firms must establish by clear and convincing evidence. This evidentiary standard is higher than the current preponderance of the evidence standard for affirmative defenses involving unilateral conduct under section 2, making ex post standards-based adjudication more difficult in practice.

AICOA's second regulatory pathway, the presumptive prohibition pathway, under sections 3(a)(2)–(7), mandates behaviors such as default screens, and prohibits others such as tying, by treating the prohibited conduct as per se illegal for targeted "systemically important platforms."[15] The government can prosecute these behaviors without showing material harm to competition. Furthermore, companies bear the burden of showing, by a preponderance of the evidence, that their conduct causes no material harm to competition.

The per se bans of this pathway further emphasize that AICOA functions as a set of ex ante rules because anticompetitive effects are presumed and firms can defend themselves only if they demonstrate that no material harm to competition occurs. Moreover, as under the the material harm pathway, companies are not allowed to offer procompetitive justifications for their presumptively illegal behavior.

Importantly, along both pathways of regulation, the bill's "material harm to competition" legal test lacks precedent and will thus increase litigation uncertainty around many common or experimental business practices. The bill defines material harm to competition as a low threshold for harm, referring to "any actual or reasonable risk of lessening of competition or impairing the competitive process that is more than a de minimis amount."[16] The low threshold for harm presented by the legal test "material harm to competition" only solidifies both AICOA pathways as inflexible rules, even though they appear to provide case-by-case flexibility.

For the first pathway, AICOA appears to introduce flexibility by placing the burden of proof on the government to demonstrate the anticompetitive effects of systemic platform conduct. The government, however, only needs to prove "material harm to competition," a threshold of harm much lower than under existing antitrust laws,[17] making the prohibition function more like a rule than a case-dependent standard. Furthermore, under the second pathway, the unusually low bar of harm presented by the legal test of "material harm to competition" makes it substantially more difficult for companies to defend conduct banned per se under AICOA as posing no material harm to competition.

Policing bigness rather than competition

The problem with AICOA's ex ante rule-based approach is that it disregards careful attention to traditional harms to competition. Under current antitrust law, unilateral harm to competition occurs when companies acquire or maintain a monopoly by using market power through exclusionary or unreasonable methods. Operating a natural monopoly is not automatically illegal or punishable.[18] AICOA effectively bans large companies from certain classes of business conduct by assuming that these behaviors will constitute exclusionary competitive harms in all applicable markets ex ante, even though the effects of such conduct tend to differ ex post, owing to the differing conditions and dynamics within covered markets. This sacrifices precise identification and targeting of anticompetitive harms in favor of broad-stroke preemptive regulations that punish or deter even conduct that benefits consumers and competition. As described by lawyer and jurist Frank H. Easterbrook, such imprecise ex ante regulation could cause irreparable harm to business and economic welfare, possibly perpetuated by judicial mistakes under the umbrella of AICOA.[19]

AICOA's rule-based structure further deprioritizes precision relative to traditional antitrust standards. While carefully structured rules minimize overinclusiveness of conduct not relevant to the targeted harm, AICOA's rule structure is not tailored to target truly anticompetitive conduct.[20] The rule distinction derived from revenue and user-base thresholds for covered structurally important platforms ignores the fact that size does not necessarily imply anticompetitive market power. Furthermore, AICOA handcuffs precise standards-based enforcement of traditionally anticompetitive conduct by establishing an unusually low threshold for demonstrating material harm to competition and intentionally limiting the available affirmative defenses. Even ignoring the wider harm that broad ex ante rules cause through the stifling of market innovation and other

consumer-welfare-related externalities,[21] AICOA's ex ante rules hurt competition because they disregard precise targeting of traditional anticompetitive harms.

AICOA's disregard for precise enforcement of anticompetitive harm may in fact indicate a departure from traditional market-power-based competitive regulation altogether. Although the bill will be enforced by the agencies "in the same manner" as the antitrust statutes,[22] its specific constraints on large platforms irrespective of whether those platforms genuinely possess market power represent a regulation of bigness rather than anticompetitive conduct. We will spend the rest of this piece outlining how a shift toward size as a regulatory focus rather than true anticompetitive conduct will also harm small businesses, consumers, innovation, and the economy at large.

AICOA Can Reduce Consumer Welfare

The primary justification posited for AICOA is that it promotes consumer welfare.[23] This is a variant of the traditional concern about monopolies that charge prices above the market-clearing level because they are the sole providers of a specific good or service. Under traditional antitrust law, whether such pricing practices constitute anticompetitive conduct would be determined on a case-by-case basis, not through a rigid rule. AICOA seems to imply a "big equals bad" argument. This rule, however, does not simply protect consumers from monopoly pricing but can actually harm consumer welfare in some unique ways.

First, since AICOA targets vertically integrated entities that self-preference, it risks undermining the prevention of double marginalization, or the need to earn profits at multiple stages of the production chain, an inefficiency that can result in higher-cost or lower-quality goods, services, or user experiences.[24] For instance, consider Amazon Basics. Currently, if a person were to browse Amazon.com, they would see a section entitled Basics and may see Amazon's in-house product line at the top of search results for a specific product. Of course, prioritizing its own products may benefit Amazon through more sales. Prioritizing its own products also benefits consumers, however, since store brands that are associated with self-preferencing tend to be priced lower than competing products. The average person shopping for towels, power cords, or other everyday essentials probably does not care about the brand name, since those kinds of items are basic commodities, so the lower price is attractive.

Lower prices for in-house brands are possible precisely because Amazon.com and Amazon Basics share the same parent organization, so their profit margins are also shared. Conversely, if another supplier were to sell an item on Amazon's platform, it would need to secure a profit margin for its business, and Amazon would need to obtain a separate profit margin for providing its e-commerce platform. This means that in order to be profitable, outside sellers will demand higher prices for products that cost the same to produce.

The fact that outside suppliers sell at a higher price is not inherently bad, but preventing or deterring the provision of lower-cost alternatives is. When ascertaining consumer welfare, economists

often focus primarily on the prices of individual goods. An important and often overlooked aspect of consumer welfare, however, is the set of goods consumers can select from.[25] By trying to curtail the potential profits of platforms like Amazon by prohibiting self-preferencing, AICOA harms consumers both by reducing the choices available to them and by keeping prices higher because firms must earn profits at multiple stages of the supply chain.

The second way that AICOA harms consumers is by singling out large firms even if they are the most efficient producers given their ability to lower total production costs through greater economies of scale. Under self-preferencing in cases like Amazon Basics, AICOA supporters are concerned about the platform's ability to increase its own profits. In this case, they worry about larger online platforms holding quasi-monopolies due to a lack of competitive threats from small competitors. The notion that market concentration and business size can emerge from lowering costs of production originates with economist Harold Demsetz.[26] The work of economist Sam Peltzman[27] and legal scholar Robert Bork[28] also demonstrate many cases in which larger firms are more efficient producers. Any legislation that targets concentration in a particular market may thus undermine the efficiency of these firms even though they benefit consumers and drive competition.

If larger firms are the most efficient providers of goods and services—whether online shopping, browsing, computers, or phones—it is hard to see how such regulation benefits consumers. Reducing the efficiency that made Apple, Google, Amazon, or similar companies appealing to consumers would deprive consumers of the best online platform options.

How Integrated Platforms Support Small Businesses

AICOA not only threatens to reduce consumer welfare but could also severely harm small businesses. These effects undermine rather than uphold the goal of this kind of legislation: allowing small businesses to compete more vigorously against large ones. There are several examples of cases in which small businesses actually depend on platforms that would be subject to AICOA. Even before examining those cases, however, it is important to note that businesses do not typically compete with the tech platforms themselves. A local motel is not directly competing with the Google Maps platform, and small app developers are not trying to take over the Google Play Store. For free platform services such as Google Maps, AICOA proponents argue that prohibiting activities such as self-preferencing will help alternative platforms compete, and thereby help small businesses by increasing their options. But when small businesses rely on self-preferencing and the vertical integration of services to expand their reach and credibility, AICOA's self-preferencing restrictions undermine the very services small businesses seek.

Small hotels, restaurants, and local retailers rely heavily on integrated search, maps, and review tools because those tools reduce the search costs that otherwise prevent consumers from finding unfamiliar businesses. In order to comply with the DMA, Google changed certain search

results in Europe by reducing clickable map functionality and changing hotel-search features because Google was no longer allowed to integrate Google Hotel Ads with Google Maps. Google subsequently reported that direct booking clicks for hotels, airlines, and small retailers fell by as much as 30 percent after its initial compliance changes.[29] This matters because direct discovery is especially valuable for independent hotels. When a consumer searches for a hotel and immediately sees its location, reviews, price, and direct booking link inside Google Search or Maps, the platform allows the hotel to benefit from the reputation and trust in an established brand, which lesser-known and smaller hotels could not cheaply build on their own. Evidence from the hotel sector suggests that DMA-style search changes may have shifted traffic away from direct hotel discovery and toward intermediary services. A study of the Google Maps change found a similar friction effect: After Google removed clickable maps and direct links to Google Maps for EU users, searches for "maps" and "google maps" increased by more than 21 percent. The change, however, did not meaningfully increase traffic to rival mapping services.[30] This indicates that restrictions on platform integration imposed by the DMA and proposed under AICOA will not simply open competition. Instead, they may raise consumer search costs and weaken the low-cost discovery channels that small businesses rely on to compete against larger, more established chains.

The same logic applies to small app developers, who depend on the App Store not merely as a payment processor but as a trusted distribution, security, review, and discovery layer. The European Commission argues that the DMA gives developers more options, including alternative app stores, web distribution, steering to outside offers, and alternative payment systems.[31] But for small developers, more formal choices can also mean more fragmentation, compliance work, payment complexity, fraud risk, and consumer hesitation. The trust problem is especially important because small app publishers do not usually have household names. Small publishers borrow credibility from the App Store's curation, payment system, fraud prevention, ratings, and review infrastructure. Apple reports that the App Store prevented more than $9 billion in fraudulent transactions over five years, including more than $2 billion in 2024 alone,[32] which supports the argument that centralized app-store trust and security services create value for users and legitimate small developers whose products consumers may otherwise be reluctant to try. Startups listing apps on covered platforms could thus face greater complexity, higher costs, longer time-to-market, and greater security burdens because AICOA would similarly disrupt the integrated platform tools on which startups rely.[33]

In microeconomics, there are complements and supplements to production. AICOA would appear to treat small businesses as supplements to the covered platforms and would aim to give them an advantage by allowing smaller firms, but not the larger ones, to pursue certain business strategies. Unfortunately, the DMA experience shows that this is not how it would likely play out in practice. Small businesses are more comparable to complements in production, since they rely on the large platforms to market themselves and host their products and services. They compete with other app developers through these platforms, not against the platforms themselves.

Platforms such as Google Search, Google Maps, Chrome, Android, iOS, and the App Store reduce transaction costs by helping consumers find, evaluate, trust, and purchase from unfamiliar firms. Economist George J. Stigler's classic theory of information explains why this matters: Search itself is costly, so institutions that reduce the time and uncertainty involved in finding sellers can improve market efficiency.[34] Review systems are a concrete example of that trust function. A study of Yelp found that a one-star rating increase caused a 5 to 9 percent increase in revenue, and the effect was driven by independent restaurants rather than chains, suggesting that online reviews substitute for traditional brand reputation.[35] That is why AICOA-style restrictions on self-preferencing, defaults, and vertical integration could unintentionally harm the very small businesses that the restrictions are meant to help. National Bureau of Economic Research (NBER) studies on digital welfare reinforce the scale of this issue, estimating that free digital goods such as Google Search, Google Maps, YouTube, and other widely used services generate more than $2.5 trillion in annual consumer welfare across the countries studied.[36] The DMA experience is thus a warning for AICOA: Breaking or weakening platform integration may raise transaction costs, shift traffic toward intermediaries, and reduce the trust infrastructure that lets small firms compete with larger incumbents.

AICOA'S Likely Effects on Innovation

AICOA is also likely to harm small businesses by undermining innovation. Economists Joseph A. Schumpeter and Kenneth Arrow offer competing theories on whether larger or smaller firms tend to be more innovative.[37] Schumpeter's argument is that incumbent firms are more innovative across the board. Arrow theorizes that the greater efficiency of larger firms may be due to acquisitions. Startups or smaller firms may be more innovative in idea generation while lacking the resources needed to bring their innovations to market. Thus, one of the strongest incentives for small businesses to be innovative is the possibility of their eventual acquisition by another, larger company.

If, however, vertical integration attracts regulatory scrutiny or punishment, larger companies are less likely to make vertical acquisitions. And if the odds of being acquired are reduced, then there is less incentive for smaller companies to be innovative. In an environment free from regulations like AICOA or the DMA that discourage, prevent, impose costs on, or limit the ability to leverage vertical integration, an equilibrium could be reached that supports innovation for both small and large firms. Since these forms of regulation are rigid ex ante rules, however, they may push markets away from the balance that best supports innovation across the board.[38]

AICOA's purported goal is to limit the types of business strategies that large firms are allowed to pursue, with the theoretical goal of allowing smaller firms to be more competitive and innovative on their own. Since the DMA has been applied in the EU for approximately three years,[39] it provides a proxy for the likely effects of AICOA-type regulation on large and small firms. As it turns out, empirical research suggests that the DMA may be harming both larger and smaller firms. If

accurate, this research would support the proposition that it is undermining innovation, whether one favors Schumpeter's or Arrow's perspective.

Specifically, a landmark empirical report by digital markets and competition experts Carmelo Cennamo, Tobias Kretschmer, Ioanna Constantiou, and Eliana Garcés indicates that larger gatekeeper firms suffered direct economic harm due to the DMA.[40] The study quantifies the macro-level efficiency losses that occurred after the DMA forced gatekeepers to decouple services, stop data cross-use, and degrade integrated features. The scholars find that the reduction of large-firm platform efficiency could cost downstream European businesses up to €114 billion in lost revenues (a 0.64 percent reduction in total turnover) due to diminished ad personalization, broken ecosystem integrations, and higher transaction costs.

In particular, the authors find that European small and medium enterprises (SMEs) are losing their capacity to scale and innovate because they depend on large firms' efficiency. Their research highlights that downstream European companies (such as local retailers, hotels, and app developers) rely on the smooth, data-optimized systems of large platforms to find customers and market efficiently. When those platform features are degraded, smaller European businesses face higher customer acquisition costs and diminished productivity. Instead of reinvesting profits into product innovation or hiring, those businesses are forced to divert cash flow to cover the transaction costs and inefficiencies created by broken digital optimization.

While far from definitive, this recent research is consistent with the concern that AICOA- and DMA-style limits on integrated platforms may simply maintain or even worsen small firms' innovation-efficiency disadvantage. AICOA's supporters should consider this potential adverse result, since innovation is one of the most important factors in economic growth. If the balance is shifted, especially if it shifts away from smaller businesses, then the disadvantages resulting from lost innovation could well outweigh any other benefits that small businesses might receive.

AICOA's potential harms to innovation do not exist in a vacuum. They are significant because they may threaten US global competitiveness. By comparison, although its full effects are still being realized, the EU's DMA has shown several signs of harming EU competitiveness by constraining innovation.

In the 2024 Draghi Report, largely accepted as a guiding vision by the EU,[41] former European Central Bank President Mario Draghi described a lack of technological innovation and investment as key competitiveness problems for the EU.[42] The DMA worsened these geopolitical concerns and undermined innovation by introducing large regulatory compliance costs for covered firms[43] and by delaying the introduction of new AI products and services into the European economy that could benefit European small businesses and consumers.[44] Instead of increasing the speed of innovation, the DMA created a multibillion-dollar DMA services market devoted to regulatory compliance rather than economic growth.[45]

Because US global competitiveness relies on technological innovation,[46] AICOA could threaten the US innovation environment by imposing DMA-like regulatory burdens and costs without specifically targeting anticompetitive behavior. Additionally, ex ante rule frameworks like the DMA and AICOA are more likely to become outdated in the current technological environment, since their hard-and-fast rules are more difficult to adapt to rapidly changing fields of AI and other technological innovation than ex post standards.[47] After all, high-tech sectors, such as digital platform services, are typically characterized by "frequent innovation, short life cycles, and noticeable dynamic competition."[48] AICOA would thus likely harm consumers and small businesses while hampering US growth and global competitiveness.

Conclusion

AICOA would undermine current traditional antitrust regulation and its own stated goals while harming economic growth, innovation, and the small businesses and consumers it is intended to protect. It would function as a set of ex ante rules that fail to accurately target anticompetitive conduct involving market power. Instead, by singling out large firms and entire categories of practices whose effects on competition vary by circumstance, rather than targeting demonstrably anticompetitive conduct, the act would adversely affect consumers, small businesses, innovation, and global competitiveness.

More precise and efficient enforcement of anticompetitive conduct under the current antitrust statutes would be preferable to AICOA for achieving antitrust goals. Small businesses and consumers can be protected through diligent agency enforcement that accounts for innovation and procompetitive justifications while remaining focused on promoting competition, innovation, and consumer welfare.

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