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BLOG

American Innovation and Choice Online Act

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Congress is currently considering the American Innovation and Choice Online Act (AICO), which will enhance the antitrust regulations of certain online platforms.[1] If enacted, AICO would prohibit certain covered online platforms from favoring their own products or services when doing so "would materially harm competition."[2]

AICO is one of several antitrust bills under consideration by Congress. Winston has created an antitrust legislative tracker to monitor the progress of federal and certain state bills pending in the current legislative session. Like many of the antitrust reform measures introduced this session, AICO enjoys bipartisan backing. In January, the Senate Judiciary Committee voted to advance AICO, S. 2992, by a 16–6 vote, with the backing of big names from both parties.[3] Congressmembers across the political spectrum have sponsored the House version, H.R. 3816, which was voted out of committee in June 2021.[4]

While the practicalities of enforcement and the corresponding real-world effects of AICO on business operations are still unknown, this post serves as a summary of its intended goals.

Applicability

AICO applies to "online platforms," which the bill defines as a "website, online or mobile application, operating system, digital assistant, or online service" that (A) enables a user to generate or interact with content on the platform, (B) facilitates e-commerce among consumers or third-party businesses, or (C) enables user searches that display a large volume of information.

However, AICO does not cover all online platforms. Rather, the bill focuses on large-scale platforms of a certain size —a metric that depends on the number of active users on the platform, its annual sales within a set period of time, and its market cap.[5]

Enforcement

Under AICO, the Federal Trade Commission (FTC), Department of Justice (DOJ), and state attorneys general have enforcement power.[6] These antitrust agencies will have the authority to pursue civil penalties and injunctions against so-called "covered platforms" in federal court. AICO prohibits unfair and discriminatory self-preferencing that undermines competition and deters investment and innovation in areas with dominant gatekeepers. The bill is focused on preserving opportunities to compete for smaller firms against major entities exerting dominance over digital commercial platforms.[7]

To add a layer of complexity, AICO does not create a complete ban on self-preferencing. While self-preferencing creates an advantage for a platform vertically integrated into adjacent product markets, for conduct to be considered "unlawful" and/or discriminatory, it must do more than give a platform a competitive edge. Instead, the self-preferencing must "materially harm competition."[8] In particular, the law is aimed at practices such as:

- Discriminating against businesses listing their products on platforms engaging in self-preferencing,
- Using nonpublic data collected from users' spending activity to inform a platform's own sales and pricing practices,
- Restricting third-party sellers' access to consumer data,
- Restricting third-party sellers' ability to control default settings that are designed to direct consumers to the platform's own products, and
- Including search or platform-functionality features that allow the platform to favor its own products over those of third-party sellers.

AICO also creates several affirmative defenses for companies accused of engaging in unlawful self-preferencing. A covered platform's conduct may be permissible if it was narrowly tailored, non-pretextual, and reasonably necessary to (a) prevent a violation of, or comply with, federal or state law; (b) protect safety, user privacy, the security of nonpublic data, or the security of the covered platform; or (c) maintain or substantially enhance the core functionality of the covered platform. However, AICO does not provide detail on the contours of these affirmative defenses, and thus, their interpretation is likely to become a key issue in subsequent litigation.

If found to have engaged in unlawful and discriminatory self-preferencing, the online platform at issue will have to pay a civil penalty. Although AICO does not specify the amount, the bill provides guidelines, stating that the amount will be one that is "sufficient to deter violations of [the AICO], but not greater than 10% of the total United States revenue of the person for the period of time the violation occurred."[9]

Impact

If AICO is enacted, self-preferencing will be subject to heightened scrutiny moving forward. While AICO does not create an outright ban on self-preferencing, the proposed legislation amends the relevant legal standard for proving an antitrust violation. In relevant portion, the bill states that

"*It shall be unlawful for a person operating a covered platform in or affecting commerce to engage in conduct,* ***as demonstrated by a preponderance of the evidence****, that would [preference its own products, etc.]. (Emphasis added).*

In a typical federal antitrust case, the vast majority of allegations of illegal anti-competitive conduct are subject to a rule-of-reason burden-shifting analysis, in which a defendant has a chance to justify its conduct as necessary after a plaintiff's prima facie showing of anti-competitive effect. However, this bill has the potential to drastically alter the litigation process by merely requiring a plaintiff to show *by a preponderance of the evidence* that the defendant engaged in any act from the enumerated list of ten acts.[10] And while AICO specifically itemizes affirmative defenses, as discussed above, the current phrasing of those defense suggests narrow applicability. Further, this legislation creates entirely novel legal obligations from its enumerated list—obligations that have not been cemented as binding by any relevant case law. For example, the bill makes it unlawful for a platform owner to "unreasonably

delay" the capacity of a business user to access or interoperate with the same platform. To date, there is no federal antitrust precedent that formally cements this obligation as legally binding.

In particular, major tech firms with marketing platforms will be subject to increased compliance liability through this legislation. In certain aspects, the bill formalizes current trends of regulatory agency enforcement. The Assistant Attorney General of the DOJ's Antitrust Division recently signaled the department's goals of revising merger guidelines and expanding enforcement targeting oligopolistic behavior.[11]

Proponents of the legislation contend that AICO limits the scope of enforcement to self-preferencing practices that harm competition, and therefore that AICO aims to preserve the utility and efficiency of marketplace platforms while ensuring that third-party sellers can effectively compete. Of course, the real effect of AICO is yet unknown and will likely be tested for years to come, but the strategic response to defend against AICO may not be materially different from other antitrust cases. Firms should be prepared to defend against enforcement by arguing that AICO does not apply to them, that their actions do not materially harm competition, or that their conduct falls under one of the ten affirmative defenses provided by the bill, and it will be up to the courts to address these defenses. While the law will have immediate impact upon passage, the defense playbook may remain the same, and enforcers may continue to face difficulty moving the needle in light of existing and well-established antitrust precedent.

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[1] American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021); American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021). While not identical, the two versions of the bill are very similar. Citations herein are to the Senate version.

[2] S. 2992 §§ 3(a)(1)–(3).

[3] The bill's sponsors include Senators Amy Klobuchar [D-MN], Chuck Grassley [R-IA], and Josh Hawley [R-MO].

[4] The bill's sponsors in the House include Ilhan Omar [D-MN] and Madison Cawthorn [R-NC], among many others.

[5] S. 2992 § 5.

[6] *Id.* § 4(a).

[7] To a certain degree, AICO confirms and strengthens emerging trends in antitrust jurisprudence to preserve smaller firms' ability to compete, by restraining unilateral conduct of dominant firms. For further analysis of this issue, see review by Winston & Strawn attorney Susannah Torpey, *The Unilateral Conduct Gap Sacrificing Interoperability and Innovation*, Competition Pol'y Int'l (Jun. 15, 2021) available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2021/06/3-The-Unilateral-Conduct-Gap-Sacrificing-Interoperability-and-Innovation-By-Susannah-P.-Torpey-Dillon-Kellerman.pdf.

[8] S. 2992 §§ 3(a)(1)–(8).

[9] *Id.* § 3(c)(6)(B).

[10] That list includes: (1) preferencing its own products/services, (2) limiting the ability of the products/services of another business to compete, (3) discriminating in the application or enforcement of the terms of service of the platform, (4) materially restricting interoperability, (5) conditioning access to the platform or preferred status or placement on the platform on the purchase or use of other products or services offered by the platform operator that are not part of or intrinsic to the platform, (6) using nonpublic data obtained from the platform to foreclose competition, (7) materially restricting or impeding a business user from accessing data generated on the platform, (8) materially restricting platform users from uninstalling preinstalled software applications or changing default settings to steer services to themselves, (9) treating products/services more favorably than those of another business, and (10) retaliating against another business that alleges the platform owner's violation of relevant state or federal law.

[11] Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium, Department of Justice (Sep. 13, 2022), available at: https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust.

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