

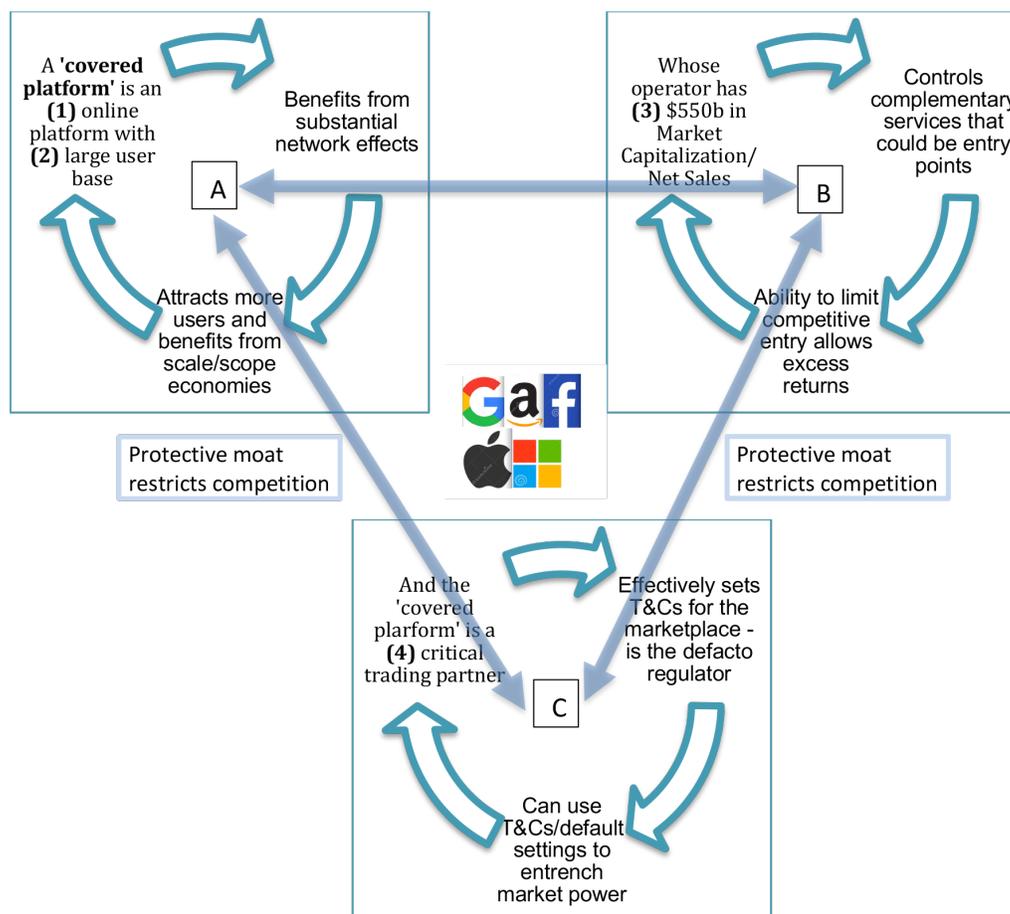
A Primer on the American Innovation and Choice Online Act (AICO) – Setting Fair Market Rules for Giant Online Platforms

[S. 2992 / H.R. 3816](#)

Recommendation – Support

TABLE OF CONTENTS	PAGE
AICO's four criteria designating covered platforms capture complex sources of market power to target intervention where required	2
Section 3(a) sets fair market rules which will mean more competition, innovation, and choices for consumers	3
The fair market rules apply to some activities, not entire companies, when there is material harm to competition	5
And affirmative defenses in Section 3(b), and proposed enforcement safeguard against unintended effects	5
Recommendation – Support	5

AICO's four criteria designating covered platforms capture complex sources of market power to target intervention where required



Note: (1) S.2992: § 2(a)(5) & (9); (2) S.2992: § 2(a)(5);

(3) S.2992: § 2(a)(5); (4) S.2992: § 2(a)(5) & (6)

References are to updated version of S.2992 released by Senator Klobuchar on 25 May 2022

The Protective moat formed by the interaction of **A (network effects)**, **B (ecosystem of services)**, and **C (must have or must deal nature of services)** means the market power of a 'covered platform' is persistent (not temporary) reflecting high and non-transitory barriers to effective competition. Effective competition would require large scale entry that could impose appreciable competitive constraints.

Addressing this market power requires pro-competitive policy intervention. And given the complex and widespread market interactions which are the source of market power, a systemic approach setting fair market rules as proposed by AICO is appropriate. A case-by-case piecemeal approach based solely on antitrust enforcement will be ineffective, coming after the fact, and certainly not timely.

Section 3(a) sets fair market rules which will mean more competition, innovation, and choices for consumers

Section 3(a) addresses conduct on the covered platform		Some examples of harmful conduct that would be addressed by AICO	How these might be addressed under AICO
General restrictions	Specific restrictions*		
S.2992: § 3(a)(1) Self-preferencing own product, services, or lines of business on the covered platform when it materially harms competition.	S.2992: § 3(a)(5) Conditioning access to, or visibility on, the covered platform to purchase of other services from the covered platform operator which is not part of or intrinsic to the covered platform.	A seller using Amazon's fulfillment service (Prime) getting better placement in product search results compared to sellers that don't for no objective reason.	Prime: Amazon continues to offer Prime but ensures that all sellers irrespective of whether they use Amazon's own fulfillment service are ranked objectively in product search results. Consumers see better results that meet their requirements and budget. Competition to fulfill orders is passed on as lower prices.
	S.2992: § 3(a)(6) Using non-public business user data collected on the covered platform to compete with business user on the covered platform.	Amazon using non-public data to compete with sellers using its marketplace. This undermines seller incentives to innovate and bring new products to market which means consumers miss out on new and innovative products and services.	Amazon basics: Amazon continues to develop and sell its Amazon basics and other private-label products, but it cannot use confidential third-party data to do so.
	S.2992: § 3(a)(9) Using search results, rankings, or other user interfaces on the covered platform to self-preference.	Google preferencing its own verticals like shopping or maps and disadvantaging specialized search providers . Consumers see fewer relevant choices and potentially competing services find it difficult to grow their user base.	Google maps: Google's search results no longer preference Google maps without an objective justification such as a user explicitly stating a preference for Google maps. This spurs Google to continue to improve and develop its mapping service.

* Do not apply if shown there is no material harm to competition

Note: References are to updated version of S.2992 released by Senator Klobuchar on 25 May 2022

Table continued next page.

Table continued

Section 3(a) addresses conduct on the covered platform		Some examples of harmful conduct that would be addressed by AICO	How these might be addressed under AICO
General restrictions	Specific restrictions*		
S.2992: § 3(a)(2) Limiting ability to compete on the covered platform relative to own products when it materially harms competition.	S.2992: § 3(a)(4) Degrading competing businesses' interoperability with the covered platform compared to own products or services except when this leads to a cybersecurity risk.	Apple restricting competing Apple Pay services or Facebook degrading access to APIs for services that might pose a competitive threat and collecting more data on users .	Apple continues to provide Apple Pay but there is more mobile wallet competition, innovation, and choice for consumers. It becomes easier for competitors to challenge Facebook and we get a more diverse online ecosystem in which personally targeted advertising business models do not dominate.
	S.2992: § 3(a)(7) Stopping business users from accessing and porting data generated by the business users' own activity on the covered platform.	Apple's in-app payment rules restrict data that app developers have on their own users like transaction or payment data and this also handicaps competitors that directly compete with Apple, like Spotify .	Better data on their own users allows app developers to improve their services and use targeted special offers and promotions to win users. Consumers benefit from more innovation and better pricing terms.
	S.2992: § 3(a)(8) Stopping users from uninstalling preinstalled applications or changing defaults on the covered platform unless necessary for security or functioning of the platform.	Users generally do not change preinstalled defaults because of inertia and/or it is difficult to do or just not possible . For example, on Apple's iOS, users can only change defaults for two of all the Apple apps that come pre-installed on iOS devices (web browser and email app).	Apple continues to pre-install apps on iPhones but make it possible and easier for users to change more default options. This allows consumers to experiment and benefit from new services and allows competing services to grow and gain scale.
S.2992: § 3(a)(3) Discriminating in the application of the terms and conditions of the covered platform when it materially harms competition.		Google giving Facebook better access to its advertising network or Apple bending its App Store rules and lowering commissions for Amazon's video service or the billions Apple receives from Google to set Google search as the default search engine.	The biggest platforms are dissuaded from reaching cozy accommodations and start competing more aggressively. Smaller companies also compete on a level playing field. This leads to more innovation and choice for consumers.

* Do not apply if shown there is no material harm to competition

The fair market rules apply to some activities, not entire companies, when there is material harm to competition

Some potential online activities where companies have persistent market power, and which could be designated covered platforms					
For Alphabet	For Apple	For Amazon	For Facebook	For Microsoft	Others
Google search & search advertising Android / Play Store	iOS/ App Store	Amazon.com	Facebook Blue, Instagram, & social media advertising	Windows OS	Tik-Tok and other companies (US or foreign) covered if meet criteria of covered platform

Note: Suggestive list, covered platform designation to be decided by the FTC/DoJ.

And affirmative defenses in Section 3(b), and proposed enforcement safeguard against unintended effects

Affirmative defenses safeguard against unintended effects	Proposed enforcement will help clarify scope and application
<p>S.2992:§ 3(b) (1) explicitly states that covered platforms remain free to take actions to protect user privacy, security or maintain/improve functionality.</p> <p>S.2992 § 3(b) (2) includes no material harm to competition as an affirmative defense which means a covered platform is free to compete on the merits.</p>	<p>S.2992:§ 3(c): Only the FTC, DoJ and state AGs can bring enforcement cases.</p> <p>S.2992:§ 4(a) and 4(c): require the FTC and DoJ to publish detailed enforcement guidelines within 270 days of enactment after a public comment period.</p> <p>S.2992:§ 7: Provides a year for companies to adapt and innovate to comply.</p>

Note: References are to updated version of S.2992 released by Senator Klobuchar on 25 May 2022

Recommendation – Support

Market rules need to be fair and give everyone and all ideas an equal opportunity to flourish. This is not the case today - the rules of the road are mostly set by a handful of large online platforms driven by profits.

AICO narrowly targets policy intervention and proposes fair market rules which will enable more competition in online marketplaces and incentivize companies big and small to innovate to better meet consumer needs and increase choices.

Consumer Reports supports American Innovation and Choice Online Act- S. 2992 / H.R. 3816.