

ABA Antitrust Section is Wrong About the American Innovation and Choice Online Act

After years of inaction, we finally have an effective proposal in Congress to curb anticompetitive behavior and promote competition against Big Tech. The American Innovation and Choice Online Act (AICO) will give antitrust enforcers the tools they need to stop anticompetitive discrimination by the largest tech gatekeepers to open up these markets to competition. However, detractors such as the writers of a [recent letter](#) claiming to represent the ABA Antitrust Section seek to weaken the bill. If taken, their edits would actually represent a step back from existing competition enforcement, not the shot in the arm it [so desperately needs](#).

▪ **We need more than existing antitrust law to fix competition against Big Tech**

Big Tech has taken advantage of current overly narrow interpretations of antitrust law and agency inaction to build their gatekeeper power. Yet the Section's comments seek to bring AICO's language more closely in line with those same narrow doctrines. The purpose of AICO is to *strengthen* existing law, not simply restate the same narrow doctrines that failed to stop Big Tech the first time. AICO will give antitrust enforcers new tools to go beyond traditional antitrust for powerful gatekeepers: dominant digital platforms.

Congress has investigated these gatekeepers in their exhaustive [Committee Report](#). Emerging from those findings, this legislation creates new criteria for which companies should be barred from anticompetitive self-preferencing and discrimination. The new criteria is an acknowledgment that the true power of Big Tech isn't fully captured in today's market power analyses. Vertical integration, network effects, and features of the digital sphere, not just traditional market power, allow them to so reliably quash would-be competitors. AICO accurately recognizes this gatekeeper power through its targeted "covered platform" definition. The revisions proposed in AICO will streamline enforcement and provide much-needed clarity and predictability to businesses. Reverting to the antiquated changes offered by the ABA would only delay enforcement and increase billable hours for antitrust defense lawyers and economic consultants.

▪ **AICO provides the right level of detail**

It is not the proper role of Congress to legislate with the exacting specificity the Section calls for in their comments. The role of Congress is to set forth the values that should guide agencies. It is not realistic or advisable for Congress to build the degree of expertise that is needed to provide that level of specificity. Detailed explanations of exactly what type of technical changes are needed is the role of agencies and courts. That's why AICO calls on the Federal Trade Commission and Department of Justice to develop guidelines on how to operationalize and define key terms and for enforcers to bring a lawsuit to enforce the law. For comparison, Section 2 of the Sherman Act numbers only a few sentences. The interpretation of those sentences has been the ongoing project of antitrust through agency guidance and court decisions.

The Section's comments should not be incorporated into the final draft of the American Innovation and Choice Online Act. AICO is the result of years of careful study by experts, advocates, and Congress all built upon a well-developed record of competitive harms developed by Congress through its extensive investigation into this sector. AICO should be passed in its current form. Congress must seize this moment to pass legislation to reintroduce fair competition into digital platform markets.