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Gatekeeper Competition Policy

Herbert Hovenkamp

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INTRODUCTION

Antitrust policy in the United States has always had special rules for dominant firms. As Justice Scalia once observed:

> Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.[2]

Most practices other than naked horizontal agreements contain a market power requirement. For serious dominant firms – those with, say, 60% or more of a market – unilateral conduct is often subjected to scrutiny that is not applied to nondominant firms. This includes pricing, exclusive distribution, mergers, and sometimes even refusal to deal. In recent decades the Supreme Court has trimmed back on the special obligations that antitrust law imposes on dominant firms, and has gone too far.[3] Competition policy toward dominant firms needs to become more aggressive, but without taking its eye from the ball. The principal concern remains the harmful use of market power.

Most of the contraction in antitrust policy toward dominant firms has come from antitrust cases in traditional offline markets. The only Supreme Court decision addressing dominant firm antitrust liability on a digital network was *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*.[4] The Court paid nearly no attention to the fact that the refusal to deal at issue was occurring on a digital network. One result is that lower court decisions since *Trinko* have followed along, treating digital networks in largely the same way they treat ordinary commodities.[5]

Repairing the antitrust law of dominant firms would require stronger duty-to-deal rules, particularly on networks, more aggressive rules governing exclusionary pricing, shoring up the ailing FRAND system for sharing patented technology,[6] and more interventionist

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[2] Eastman Kodak Co. v. Image Tech. Svces., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting), citing 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 813 (1978).

[3] *See* Herbert Hovenkamp, *Monopolizing Digital Commerce*, 64 WM. & MARY L. REV. 1677 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963245.

[4] Verizon Communications, Inv. v. Law Offices of Curtis V. Trinko*, LLP*, 540 U.S. 398 (2004).

[5] *E.g.*, New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023); Epic Games, Inc. v. Apple, Inc., 559 F.Supp.3d 898 (N.D.Cal. 2021), *aff'd in substantial part*, 67 F.4th 946 (9th Cir. 2023); FTC v. Qualcomm, Inc., 969 F.3d 974 (9th Cir. 2020).

[6] Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORN. L. REV. 1683 (2020).

control of exclusive agreements. It would also require reform of antitrust's rule of reason so as to make it more flexible and enable plaintiffs to win meritorious cases, which they are not doing right now.[7]

Legislation considered by Congress in its 2020-2021 term would have taken a much different approach to unilateral conduct. This essay examines the most prominent of those proposals, the American Innovation and Choice Online Act (AICOA). The bill is among the most antitrust-like of the proposed legislation.[8] While the AICOA as drafted is not an "antitrust law," it would be enforceable by either the Justice Department or the FTC, and the statute borrows several definitions from the antitrust laws.[9] It also applies a "materially harm competition" standard to some of the conduct that it describes. While that articulation is a verbal antitrust novelty, it is similar to the "substantially lessen competition" standard contained in all of the substantive provisions of the Clayton Act.[10] Unlike the antitrust laws, the current version has no provision for enforcement by private parties. So while it is not technically an antitrust law, it is clearly a part of competition policy. The bill did not survive the Congressional term, but it had significant support and is highly likely to return in some form.

The principal point of departure for the AICOA is the idea that competition policy should identify particular firms as "gatekeepers" and apply heightened scrutiny to them.[11] The AICOA designates these firms believed to be gatekeepers as "covered platforms," identified by two factors, domain and size. On the first, coverage is limited to business engagement on the internet, so-called online firms.[12] For example,

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[7] *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (1999); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009). Justice Gorsuch made a similar observation in NCAA v Alston, 141 S.Ct. 2141, 2160 (2021) (plaintiffs lose nearly all rule of reason cases, mainly for failure to show significant anticompetitive effects).

[8] American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021-2022) (hereinafter AICOA).

[9] The Bipartisan Policy Center describes it as "targeting big tech companies for potential antitrust and consumer choice violations." Tom Romanoff, *The American Innovation and Choice Online Act: What it Does and What it Means*, BIPARTISAN POLICY CENTER (JAN 20. 2022), https://bipartisanpolicy.org/explainer/s2992/.

[10] *See* Herbert Hovenkamp, *The Antitrust Text*, 99 Ind. L.J. 1063 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4277914.

[11] *See* Damien Geradin & Dimitrios Katsifis, *Selecting the Right Regulatory Design for Pro-Competitive Digital Regulation: An Analysis of the EU, UK, and US Approaches* (SSRN Working Paper, March 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025419; Richard J. Gilbert, *Antitrust Reform: An Economic Perspective*, 2023 ANN. REV. ECON. 151 (2023), www.annualreviews.org/doi/pdf/10.1146/annurev-economics-082222-070822 (analyzing AICOA as gatekeeper provision); Nikolas Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths*, 23 YALE J. L. & TECH. 301, 305–06 (2021) (on AICOA as gatekeeper provision).

[12] *See* AICOA, *supra* note 7, §2 (5) (limiting definition of "covered platforms" to online firms).

although Walmart's retail business is larger than Amazon's,[13] Walmart is not covered by the statute because it does much less online business. Second, gatekeeper firms ("covered platforms") are identified by absolute firm size, not by product market share. The limitations in the latest versions of the bill were at least 50,000,000 U.S. based monthly active online users, or 100,000 active business users; or at any point within two years prior to a complaint annual sales or market capitalization greater than $550,000,000,000. That amount would be adjusted with changes in the CPI.[14] A covered platform must also be a "person" as the Clayton Act defines it, which includes nearly all corporations as well as holding companies, and also associations that are authorized by state law.[15] The Clayton Act provision does not recognize biological individuals as "persons," but they have been incorporated by implication.

The AICOA also requires that a covered firm be a "critical trading partner" for some product or service that is either offered on or directly related to an online platform.[16] The term "critical trading partner" refers to a firm with "the ability to restrict or materially impede" a business user's access to its customers or to some tool that the business user needs to serve its customers.[17] Nothing in the statute requires any showing that the covered firm's trade in a particular product under examination be dominant. For example, Amazon would very likely be designated a critical trading partner on the basis of its overall retail business. At that point its prohibitions would attach to its sale of, say, groceries, even though Amazon's share of the overall grocery market is a little over 1%.[18] The same thing would apply to Microsoft's search engine Bing. While Microsoft is large enough to be a covered platform, and very likely a critical trading partner in its Windows operating system, Bing struggles in the search engine market, with a roughly 3% market share of consumer search.[19] Microsoft's internet browser, Edge, currently has a market share of about 4.6%. as against Google Chrome's 67%.[20]

This failure to distinguish between the overall footprint of firms that operate on platforms and the market shares of their individual products largely undermines the AICOA's value as a tool for improving

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[13] *Top 100 Retailers 2022 List*, NATIONAL RETAIL FEDERATION https://nrf.com/resources/top-retailers/top-100-retailers/top-100-retailers-2022-list.
[14] AICOA, *supra* note 7, §2(5).
[15] 15 U.S.C. § 12 (2018) (defining "person" under the antitrust laws). On the meaning of this provision, *see* Herbert Hovenkamp, *The Power of Antitrust Personhood*, 25 Univ. Pa. J. Bus. L. 891 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4352061.
[16] *See* AICOA, *supra* note 7, §2(B)(III)(6).
[17] *Id*., III (6) (A,B).
[18] Alex Bitter, *CEOs from Kroger and Albertsons say they're worried about competition from Amazon, but the e-commerce giant barely makes up 1% of US grocery sales*, BUSINESS INSIDER (DEC. 1, 2022), https://www.businessinsider.com/walmart-kroger-still-top-grocer-challengers-amazon-gopuff-2022-2 (finding Amazon's market share in late 2022 to be 1.2%).
[19] *Search Engine Market Share Worldwide*, GLOBALSTATS, https://gs.statcounter.com/search-engine-market-share#monthly-202301-202401 (data for March, 2023).
[20] *Id.*

competition. It is always useful to remember as a starting position that market power attaches to products, not to firms. To be sure, a firm's overall footprint may provide opportunities for leveraging its individual products, but that would have to be established for an individual case.[21] Guesses about which platforms will be included in the group of covered platforms indicate Alphabet (Google), Amazon, Apple, Meta (Facebook), and Microsoft,[22] although there could be others and it is possible that some of these could fall off if their business declines.[23]

Most of the statute's other details are unimportant, given that it was never passed. At this writing it is hard to say what a future version might look like. Although the AICOA presents itself as a kind of quasi-antitrust law it takes a remarkably different approach in that it is a quite detailed code, not a simple mandate to avoid agreements in restraint of trade or monopolization, as the Sherman Act does. Rather, it is more like the Robinson-Patman Act, special interest legislation that was passed in 1936.[24] While also detailed and specific, the Robinson-Patman Act is much shorter than the AICOA.

The AICOA misidentifies the sources of harmful market power by being both under- and over-inclusive. It is underinclusive to the extent that it applies only to online commerce and only to firms that meet its size thresholds. It is overinclusive in that it applies to products and services over which the seller has little or no market power. As a result, its substantive requirements are egregiously mistargeted. A far better approach would be changes to the antitrust law of monopolization as well as relaxing of the current harsh summary judgment rules against plaintiffs.[25]

This brief essay focuses on three important elements of the AICOA: 1) its limitation to online markets, creating "gatekeeper" status for online firms but disregarding traditional offline firms 2) its identification of gatekeepers to be subjected to this treatment on the basis of absolute firm size rather than product market power; and 3) its aggressive substantive rules for gatekeepers, while ignoring everyone else.

I. LIMITATION TO ONLINE MARKETS

The AICOA's coverage is limited to online platforms, which are defined as a "website, online or mobile application, operating system,

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[21] *See* discussion *infra*, accompanying notes 87-94.

[22] *See* Romanoff, *supra* note 8, https://bipartisanpolicy.org/explainer/s2992/.

[23] *See*, *e.g*., Lauren Feiner, *Facebook market cap falls below $600 billion – which could actually help it dodge new antitrust scrutiny*, CNBC (Feb. 8, 2022), https://www.cnbc.com/2022/02/08/facebook-market-cap-under-600-billion-threshold-for-antitrust-bills.html (noting that FB's market cap dropped below the trigger level).

[24] 15 U.S.C. §13 (2018). *See* Herbert Hovenkamp, *Can the Robinson-Patman Act be Salvaged*, PROMARKET (Oct. 13, 2022), https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged/.

[25] On antitrust summary judgment, *see* 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 308 (5th ed. 2021).

digital assistant, or online service."[26] In addition, an online platform must have the capability to enable user-generated content or interact with other content, to facilitate transactions, or to enable search.[27]

Internet markets are immensely important in our economy. The percentage of retail commerce that comes from online sales is roughly 13%-15%. It peaked during the high point of covid and has since declined a bit. So whether that number is a stable equilibrium is unclear, although high rates of technological change also suggest that it is not.[28] In any event, overall economic growth in the digital economy has been much faster than growth overall, perhaps as much as 4 to 1.[29] One disturbing thing about the AICOA is that it targets for harsh treatment a portion of the United States economy that is one of its best performers.

Whenever enforcement resources are limited, as they always are, it is important that they be spent in the right place. For antitrust policy, that would be markets and products that exhibit stagnant growth, stable market shares, lack of new entry, signs of oligopoly or widespread price fixing, or lack of innovation.[30] Focusing on the internet economy appears to be a bad choice on every score. The AICOA approach selects for specialized, aggressive enforcement a portion of the economy that is working better than most.

The cost of disseminating information is lower on the internet.[31] This has several consequences. One is elevated concerns about both

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[26] *See AICOA*, *supra* note 7, §(2)(9).

[27] *Id.* Specifically, these are defined as a capability that

(A) enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform;

(B) facilitates the offering, sale, purchase, payment, or shipping of products or services, including software applications, between and among consumers or businesses not controlled by the platform operator; or

(C) enables user searches or queries that access or display a large volume of information.

[28] Matthew Zane, *What Percentage of Retail Sales are Online?*, ZIPPIA (Jan. 12, 2023), https://www.zippia.com/advice/what-percentage-of-retail-sales-are-online/#:~:text=14.8%25%20of%20retail%20sales%20are,dip%20of%2013.2%25%20in%202021.

[29] *See* BUREAU ECON. STAT., Jessica R. Nicholson, *New Digital Economy Estimates* (2020), https://www.bea.gov/system/files/2020-08/New-Digital-Economy-Estimates-August-2020.pdf (estimating annual digital economy growth as 6.8%, against 1.7% for overall economy).

[30] For good perspective, *see* William E. Kovacic, *Keeping Score: Improving the Positive Foundations for Antitrust Policy*, 23 UNIV. PA. J. BUS. L. 49 (2020) (on history of using antitrust to pursue oligopolistic industries); David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, 2 INNOV. POL'Y & THE ECONOMY 1 (2002). On the particular relevance of innovation, *see* RICHARD J. GILBERT, INNOVATION MATTERS: COMPETITION POLICY FOR THE HIGH TECHNOLOGY ECONOMY 139–218 (2020).

[31] *See, e.g.*, Elitsa R. Banalieva & Charles Dhanaraj, *Internalization Theory for the Digital Economy*, 50 J. INT'L BUS. STUD. 1372 (2019), https://link.springer.com/article/10.1057/s41267-019-00243-7#Sec15; Elizabeth J. Altman, Frank Nagle, & Michael Tushman, *Innovating Without Information Constraints: Organizations, Communities, and Innovation When Information Costs Approach Zero*, *in* THE OXFORD HANDBOOK OF CREATIVITY, INNOVATION, AND ENTREPRENEURSHIP 353 (Christina Shalley, Michael A. Hitt, & Jing Zhou, eds. 2015).

privacy and misinformation. While fraud and other forms of theft occur on all markets, there does not appear to be evidence that it is more common or more serious on online markets. In any event, it is hardly clear that lower information costs is a *competition* problem, although it can certainly be a problem for other areas such as privacy, decency, child welfare, consumer protection, or financial fraud.

Reduced information costs also make it easier for businesses to provide and customers to seek out alternatives. This suggests greater rather than less competition. Two important ingredients in market power vis-à-vis consumers are search costs and switching costs. A search cost is the cost of obtaining useful information about options. A switching cost is the cost of abandoning one investment and moving to an alternative.

Here online commerce seems to be competitively superior on both counts.[32] Searching and switching are both easier and broader in online markets than on conventional markets.[33] Customers can travel from one site to another with a mouse click. As a result, depending on a consumer's location, the variety of sellers that are available online can be much greater than the variety that the brick-and-mortar world realistically permits.[34] Price and product comparison can often be accomplished at little cost and almost instantly. In general, new entry by small firms appears to be easier in digital markets, particularly for online-only entrants.[35]

High switching costs can help a firm (or cartel) preserve monopoly because the high customer cost of switching away inclines them to stay where they are. Monopoly is not realistically possible if buyers can costly and quickly substitute to a different product. Multiproduct sellers may sell different products for which switching costs vary. For example, ownership of a Kindle reader may incline customers to stick with Amazon's *e*book format rather than switching elsewhere. By contrast, the fact that someone purchased dish detergent last month from a large online seller very likely has little bearing on where he will purchase it today.

For many products the internet makes available a variety of choices that traditional markets cannot match, particularly traditional markets located in more isolated communities. One way that sellers can optimize

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[32] *See* Brian Ratchford, et al., *Online and Offline Retailing: What we Know and Directions for Future Research*, 98 J. RETAILING 152 (2022) (lower search and distribution costs give online sellers and advantage over traditional sellers).

[33] *See* Catherine Tucker, *Digital Data, Platforms and the Usual [Antitrust] suspects: Network Effects, Switching Costs, Essential Facility*, 54 REV. INDUS. ORG. 683 (2019) (no evidence of higher switching costs online).

[34] Elena Argentesi, et al, *Merger Policy in Digital Markets: An Ex Post Assessment*, 17 J. COMPETITION L. & ECON. 95 (2020) ("The low (or nil) usage costs and switching costs that characterize digital markets make consumers more willing to try other products, thereby reducing the incumbency advantage").

[35] SIMON KINGSNORTH, DIGITAL MARKETING STRATEGY: AN INTEGRATED APPROACH TO ONLINE MARKETING 14 (2022).

is by offering both a traditional brick-and-mortar presence and having an online store. That can maximize their business across both offline-preferring and online-preferring customers.[36] Dual provision provides advantages to firms such as Walmart, who have both a traditional and an online presence.[37] On casual observation, one thing that seems to be retarding this is path dependence, or the reluctance of firms with a major traditional presence to make aggressive investments in online business. For example, the April, 2023, bankruptcy filing of domestic retailer Bed, Bath & Beyond has been blamed on unenthusiastic investment in its online store.[38]

One development in computer and internet function that has lowered switching costs is the migration of network access from individual devices to the internet itself. For example, at the time of the government's lawsuit against Microsoft in the late 1990s, switching costs for computer operating systems were relatively high. Microsoft's Windows OS was specific to particular devices. Indeed, that litigation described the domain as "Intel compatible" or "Intel-based systems," because Intel was the dominant provider of the chip architecture that ran Microsoft Windows.[39] Microsoft was able to take advantage of high switching costs for Windows by engaging in various practices that also raised switching costs for its Internet Explorer browser by linking the two.

To the extent that the locus of networks has migrated to the cloud, however, programs are less device specific and switching costs are lower.[40] While the level of hardware specificity between operating systems and particular devices can be relatively high, the operating system itself is much less consequential today. Most of the networks that people access are available across all or at least a wide range of devices and operating systems, and switching costs are comparatively lower. A few bottlenecks continue to exist. One that is currently the subject of litigation is Apple's lock on its Appstore and Google's lock on Google Play for most Android devices.[41]

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[36] *See* Ratchford, *Online and Offline Retailing*, *supra* note 31.

[37] *See Walmart.com*. Others include Macys.com, Kohls.com, Target.com, Nordstrom.com., Bedbathandbeyond.com, blackanddecker.com, Cuisinart.com, and many more.

[38] *See* David Yaffe-Bellany, *Bed Bath & Beyond Files for Bankruptcy*, N.Y. TIMES (Apr. 23, 2023), https://www.nytimes.com/2023/04/23/business/bed-bath-beyond-bankruptcy.html.

[39] *E.g.*, United States v. Microsoft Corp., 253 F.3d 34, 52 (D.C. Cir. 2001); United States v. Microsoft Corp., 84 F.Supp.2d 3, 107 (D.D.C. 1999). In 2005 Apple switched to Intel chips for its desktop/laptops. *See* Luke Dormehl, *Today in Apple History: Apple chooses Intel over PowerPC*, CULT OF MAC (June 6, 2024), https://www.cultofmac.com/484394/apple-intel-over-powerpc/.

[40] *See* Catherine Tucker, *Network Effects and Market Power*, 32 ANTITRUST 72 (2018).

[41] *E.g.*, *Epic Games*, 67 F.4th 946, (9th Cir. 2023) (declining to find antitrust violation); DEP'T OF COM., COMPETITION IN THE MOBILE APPLICATION ECOSYSTEM (Feb. 2023), https://www.ntia.gov/sites/default/files/publications/mobileappecosystemreport.pdf?_ga=2.84811728.813216929.1677623123-2030698341.1675111518: Friso Bostoen & Daniel Mandrescu, *Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores*, 16 EUROPEAN COMPETITION J. 431 (2020).

While more studies need to be done, there is little reason today for thinking that the exercise of market power is more common or more harmful on online markets than on traditional markets.[42] Internet and traditional markets exhibit differing degrees of competition depending on the product, including some monopoly.[43] Online firms are more likely to be networked, and successful networking can contribute to large firm size, and thus to increased concentration.[44] It can also result in better products, reduced costs, or broader access. Further, bigger networks do not necessarily indicate more monopoly in specific product markets, for networks can be operated collaboratively by multiple firms.[45]

Networking can be a source of power because networked markets appeal to a wider group of customers and can also have lower costs. In addition to that are direct and indirect network effects that can make networks appealing.

Another factor that limits the monopoly power of networks is product differentiation, or diversification in network features and experiences, or other offerings. For example, Facebook, Instagram, Twitter, LinkedIn, TikTok, Reddit, and others are all social networking sites that are subject to both direct and indirect network effects. Within a site, they become more valuable as the number of users increases. They are not natural monopolies or winner-take-all platforms, however, because they are significantly differentiated from one another in both structure and features. As a result, users are not indifferent among them, and many choose a smaller platform (e.g., Twitter) over a large one (e.g., Facebook).[46] The same thing can be said of countless newspapers and other periodicals and dating sites, virtually all of which are networks that operate mainly or exclusively online.[47]

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[42] For good discussions of the issue, *see* Hal R. Varian, *Recent Trends in Concentration, Competition, and Entry*, 82 ANTITRUST L.J. 807 (2019); Dinesh K. Gauri et al., *Evolution of Retail Formats: Past, Present, and Future*, 97 J. RETAILING 42 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3894200; Brian Ratchford et al., *Online and Offline Retailing: What we Know and Directions for Future Research*, 98 J. RETAILING 152 (2022).

[43] *See* Emilio Calvano and Michele Polo, *Market Power, Competition and Innovation in Digital Markets: A Survey*, 54 INFO. ECON. & POL'Y Mar. 2021, https://www.sciencedirect.com/science/article/abs/pii/S0167624519301994 (inconclusive).

[44] *See* Ulrich Dolata, *Apple, Amazon, Google, Facebook, Microsoft: Market Concentration* (Univ. Stuttgart Inst. Soc. Sci., Working Paper, Discussion Paper No. 2017-01, 2017), https://www.econstor.eu/bitstream/10419/152249/1/880328606.pdf.

[45] *See* discussion *infra*, accompanying notes 47–49; Herbert Hovenkamp, *Antitrust Interoperability Remedies*, 123 COL. L. REV. F.1 (2023).

[46] *See Most popular social networks worldwide as of April 2024, by number of monthly active users*, STATISTA, https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (as of Jan, 2023, FB had just over 3 billion users to Twitter's 611 million).

[47] *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1995–98 (2021) (winner-take-all status unlikely in two-sided platforms such as dating sites, newspapers, or periodicals, where product differentiation is extensive).

When using antitrust law to pursue something like networks it is always critical to keep in mind that the same things that give networks market power also explains why they are so appealing. They enable information exchanges or other transactions among very large numbers of users, something that is generally more costly and less effective on traditional markets.

While some networks dominate their markets, not every network is dominated by a single firm. For example, the telephone network dominates the market for electronic voice communications, but it is owned and operated by thousands of firms of various sizes and that function in some portion of the network. The same thing is true of email, a network of hundreds of providers, who are also compatible with one another.

When network dominance does occur, competition policy can provide several alternative remedies that are superior to those offered by the AICOA. One is injunctions against unreasonable exclusive agreements, including tying and exclusive dealing. Another is antitrust remedies that make their operation more collaborative rather than dominated.[48] A third is compelled interoperability or data portability,[49] and a fourth is elimination of any restraints on product differentiation.[50] While the federal courts clearly have the power to order these as remedies, they are of course limited in that they can only do so after an antitrust violation has been found. They could also be imposed by legislation.

With these realities, the best approach for antitrust policy is some expansion of duties to deal that take network operational obligations more seriously. But these rules should apply to every firm that has substantial market power in a particular networked product or service, not to a subset that is identified by absolute firm size, and then without regard to power in a particular product. Here, the AICOA's approach is both underinclusive as to firms and overinclusive as to products.

The extent of competition *between* online and traditional sellers must also be considered. The extent to which online sales compete with traditional sales varies enormously, depending heavily on the nature of the product. Further, the area suffers from lack of systematic studies that provide good evidence of changes in market share. For ebooks, video and music streaming or downloaded software, the internet is almost by definition the entire market. On the other hand, the percentage of groceries purchased online stood at 9.5% in 2020.[51] That same source predicts that it could reach 20.5% by 2026. The reasons for the projection are not specified, but a simple linear progression from current

[48] *Id.* at 2021–32.
[49] *See* Hovenkamp, *supra* note 44, at 3.
[50] *See* Erik Hovenkamp, *Restraints on Platform Differentiation*, 25 YALE J. L. & TECH. 271 (2023).
[51] Lisa Ross, *US Online Grocery Shopping – Statistics and Trends [Infographic]*, INVESP (Aug. 17, 2023), https://www.invespcro.com/blog/us-online-grocery-shopping/.

growth trends very likely overstates future growth. There is some evidence that growth has already levelled off.[52]

For other products or services online markets are at a distinct disadvantage or do not function at all. For example, you can schedule a massage on the internet, but the actual massage has to be live. Online visits to physicians (telehealth) are small but growing, but dentists and chiropractors do very little business online. In some markets, such as automobile sales, internet sales have made significant inroads against traditional dealership networks. For home sales, online sites such as *realtor.com* have moved heavily into territory once dominated by the realtor-controlled multiple listing service.[53] Here, however, the websites are used mainly for reducing search costs, not for making deals. While only an informal study has been done, it appears that few real estate transactions are entirely online.[54]

Identifying market power in online markets can be difficult, although not necessarily more difficult than identifying it in offline markets. To date, the litigation has relied mainly on traditional computations of market share, often taken from widely accessible data that records usage in real time. Online transactions are nearly always recorded. Many of the products have measurable market shares, costs, and the other indicia that the tools for estimating market power require. Intuitively, Alphabet has a great deal of power in search, an exclusively online product where its Google Search holds a 90+% market share.[55] Alphabet's Android operating system for small devices has a somewhat smaller but probably dominant share worldwide.[56] In the United States it is actually second to Apple's iOS for the iPhone.[57] Those numbers, taken from *statcounter.com*,[58] are not necessarily the ones that would determine a relevant market in an antitrust case, but they are a good starting point. The government has used such measures in litigation

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[52] *See* Marian Zboraj, *Why Has Online Grocery Plateaued*, PROGRESSIVE GROCER (July 20, 2022), https://progressivegrocer.com/why-has-online-grocery-plateaued (describing a survey showing a drop from 2021 to 2022).

[53] *See* REALTOR, https://www.realtor.com/.

[54] *See* Liz Dominguez, *2020 Profile of Home Buyers and Sellers: Real Estate Trends Have Changed Due to COVID*, RISMEDIA (Nov. 14, 2020), https://www.rismedia.com/2020/11/14/real-estate-trends-changed-covid/ (based on 2020 data, as many as 97% of buyers did online searching, but 88% used a broker for the actual purchase; an unspecified few purchased a home without seeing it in person).

[55] *See Search Engine Market Share Worldwide – September 2024*, GLOBALSTATS https://gs.statcounter.com/search-engine-market-share (90.01 % for Google Search).

[56] *See Mobile Operating Market Share Worldwide – September 2024*, GLOBALSTATS, https://gs.statcounter.com/os-market-share/mobile/worldwide (Roughly 72% worldwide for Android, vs. 28% for Apple).

[57] *Mobile Operating System Market Share United States of America – September 2024*, GLOBALSTATS, https://gs.statcounter.com/os-market-share/mobile/united-states-of-america (showing Android with a U.S. market share of roughly 42%, and the Apple iOS with a share of 57%).

[58] *See also Comscore.com*, which measures the size of digital audiences.

against tech platforms.[59] According to a recent complaint Google also has significant market power in its advertising services.[60] The question of Meta's monopoly power in Facebook is currently being litigated, but it is a possibility.[61] For its part, Amazon sells many traditional tactile products, such as toasters, trousers and blouses, chainsaws, AAA batteries, and groceries. For each of these market shares should be relatively easy to compute for both online sales and total sales.

Whether online sales should be regarded as a market unto themselves is a question of fact, and the answer varies from one product to another. Intuitively, online grocery sales compete intensely with offline sales and the latter seem to limit the exercise of market power; as a result they should be put together. By contrast, the availability of streaming has created an enormous and growing advantage in sales of digital media, making it more likely that for most audio, video, and software content online sales are a market unto themselves.[62]

As far as competition policy is concerned, there is no obvious reason for placing closer scrutiny on online sellers than on traditional sellers, and some reason for doing the opposite. Monopoly in individual products is a clear possibility in both offline and online markets. For online products, likely examples are consumer search, operating system ties, digital advertising, ebooks, and perhaps some others. But that hardly suggests that monopoly is more prevalent in the internet market overall than in offline markets. Both competition policy and innovation are best served by seeking out and disciplining these sources of monopoly, not by blanket rules that constrict everything, even where significant harm to competition has not been shown.

While closer scrutiny and harsher rules for the overall business of large internet firms generally do not benefit consumers, one group that they clearly benefit are traditional sellers for whom online markets have been a substantial, even devastating, threat. The market shares given above suggest the degree of threat. At one extreme – streaming of digital audio and video content – traditional brick-and-mortar retailers have been virtually wiped out. The move to digital streaming has been devastating for main street retailers, but in this market the prominent online streamers, such as Amazon, Netflix, or Spotify are only agents. Further, the streaming market is itself at least moderately competitive.[63]

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[59] *See, e.g.*, FTC v. Facebook, Inc., 581 F.Supp.3d 34, 46–50 (D.D.C. 2022) (measuring output in terms of monthly average users (MAUs) or daily average users (DAUs)). .

[60] United States v. Google, No. 1:23-cv-00108, 2024 U.S. Dist. LEXIS 138798 (E.D. Va., Aug. 5, 2024). *See* U.S. and Plaintiff States v. Google LLC [2023], DEP'T JUST. ANTITRUST DIV., https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc-2023(Justice Dept. webpage devoted to complaint).

[61] *See* FTC v. Facebook, 581 F.Supp.3d 34 (D.D.C. 2022) (sustaining complaint).

[62] *See* Mark J. Perry, *Animated Chart of the Day: Recorded Music Sales by Format Share, 1973 to 2022*, AMER. ENTER. INST. (Sept. 23, 2022), https://www.aei.org/carpe-diem/animated-chart-of-the-day-recorded-music-sales-by-format-share-1973-to-2022/ (the time sweep chart showing that as of 2022 84.2% of video sales were by streaming).

[63] For example, music streamers include YouTube, Spotify, Amazon Music, Pandora, SiriusXM, Apple Music, iHeartRadio, and others. *See* Nick Routley, *Ranked: The Top*

For its part, Amazon is not the dominant firm in either music streaming[64] or digital video streaming.[65] It does have a dominant share of ebooks, although traditional books remain a significant portion of this market.[66] At the other extreme – face-to-face personal services such as massage or dental services – the impact of online business has been negligible.
In sum, examination of the competitive situation in online and traditional offline markets hardly suggests that online markets overall should receive more aggressive treatment. The cost-benefit tradeoff of intervening in highly innovative markets is almost certainly less favorable than that of intervention in stagnant markets that are showing little progress. While antitrust rules do need to be made more aggressive in some areas, targeting internet commerce in general without regard to proof of injury in specific markets is not the way to go about it.

II. IDENTIFYING GATEKEEPERS BY ABSOLUTE SIZE

Market power describes specific products, not firms. The concept of market power refers to a firm's power to profit by controlling the price of a grouping of goods that are close substitutes for one another.[67] While it is not always technically the best approach, market power is most commonly inferred from a substantial share of a properly defined relevant market of close substitutes.[68] If a firm sells multiple products its market power can vary considerably among them. For example,

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Online Music Servies in the U.S. by Monthly Users, VISUAL CAPITALIST (Feb. 3, 2023), https://www.visualcapitalist.com/top-online-music-services-us/ (data from early 2023). Market share numbers from 2022 suggest Spotify=30%, Apple=14%, Amazon=13%. *See* Mark Mulligan, *Music subscription services market shares 2022*, MIDIA (Nov. 2022), https://midiaresearch.com/blog/music-subscriber-market-shares-2022.

[64] *See* Jon Porter, *Streaming music report sheds light on battle between Spotify, Amazon, Apple, and Google*, VERGE (Jan. 20, 2022, 8:28 AM), https://www.theverge.com/2022/1/20/22892939/music-streaming-services-market-share-q2-2021-spotify-apple-amazon-tencent-youtube (2022 numbers showing spotify with 31% of the market, Apple with 15%, Amazon with 13%, and several others).

[65] *See* Erik Gruenwedel, *JustWatch: Netflix Third-Quarter Market Share Remains Tops Among U.S. Streamers, Despite Sub Losses*, MEDIA PLAY NEWS (Oct. 11, 2022), https://www.mediaplaynews.com/justwatch-netflix-third-quarter-market-share-remains-tops-among-u-s-streamers-despite-sub-losses/ (showing Netflix with 21%, Amazon Prime with 19%, HBO Max 15%, Disney+ 15%, and others in late 2022).

[66] Danny McLoughlin, *Amazon Kindle, E-Book, and Kindle Unlimited Statistics,* WORDSRATED ((Nov. 10, 2022), https://wordsrated.com/amazon-kindle-e-book-and-kindle-unlimited-statistics/ (showing Amazon's ebook share at 67%, although ebooks make up only 36% of the number of books sold and 19% of revenue in the entire book market in late 2022).

[67] For any particular product market power is technically measured by a formula relating a firm's price to its marginal cost, through devices such as the Lerner Index. *See* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICES § 3.1 (6th ed. 2020).

[68] *Id.*, §§3.2-3.6.

Microsoft has a dominant position in its Windows operating system,[69] but a very small position in its Bing search engine.[70] Alphabet has a dominant share in consumer search but is a distant second to Apple as an email client.[71]

Categorical use of the term "gatekeeper" to describe these firms is misplaced. A "gatekeeper" is someone with the ability to control entry or passage, and that is not a function of absolute size but rather of size in relation to the *passageway*, as well as user ability to switch away. A few antitrust decisions have used the term, but in relation to dominance over some avenue of commerce, not to absolute size.[72] In other legal situations it refers to such things as a court's largely exclusive control over the admissibility of evidence.[73] In the nineteenth century it was used to describe officials who monitored toll roads or other forms of passage with restricted access.[74] In online markets, Google Search might be a gatekeeper, but that is driven by its large (90+%) market share, not by parent company Alphabet's large size. Microsoft is a larger firm (measured by market cap),[75] but its search engine Bing, with less than 3%, is not a gatekeeper over anything.

In a small market, relatively small firms can be dominant. For example, Aspen Skiing was found to be a monopolist even though it operated a few downhill slopes and a lodge in Aspen, Colorado, which was found to be the market.[76] By contrast, DuPont was found not to be a monopolist in a well-known case involving cellophane, even though DuPont was many times larger.[77] It also made many products other than cellophane.[78]

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[69] *See* Desktop Operating System Market Share Worldwide – September 2024, GLOBALSTATS, https://gs.statcounter.com/os-market-share/desktop/worldwide (Microsoft has 73.31 % share of desktop/laptop OS).

[70] *See* GLOBALSTATS, *supra* note 18 (Microsoft Bing has less than 3% share of the search engine market).

[71] *See Most Used Email Clients Worldwide in* 2024, OBERLO (Gmail=30.7%; Apple Mail=53.7%; all others are much smaller) (last visited April 9, 2023).

[72] *E.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 435 (7th Cir. 2020) (defendant's elimination of its only competitor in advertising sales made it a gatekeeper); Lifewatch Services, Inc. v. Highmark, Inc., 902 F.3d 323, 339 (3d Cir. 2018) (health insurers are gatekeepers for medical devices that are sold only upon insurers' approval).

[73] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (judge's "gatekeeping role" in determining admissibility of evidence may prevent some expert testimony from reaching the jury).

[74] *E.g.*, Neil, Moore & Co. v. State of Ohio, 44 U.S. (3 How.) 720, 722 (1845) (gate keeper of toll road); MacKay v. Dillon, 45 U.S. (4 How.) 421, 432 (1846) (referring to employees controlling entry into a commons intended to enclose livestock as "gate-keepers").

[75] *Largest Tech Companies by Market Cap*, COMPANIES MARKET CAP, https://companiesmarketcap.com/tech/largest-tech-companies-by-market-cap/.

[76] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (finding that Aspen Skiing was a dominant firm in the market for downhill skiing services in Aspen, Colorado).

[77] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (market found to include all flexible packaging materials, including wax paper, plain wrapping paper, and others).

[78] *E.g.*, *id.* (fabrics and finishes for automobiles); FTC v. E.I. Du Pont De Nemours & Co., 729 F.2d 128 (2d Cir. 1984) (ethyl antiknock gasoline additive).

Pursuing "bigness" of firms as a goal for competition policy might be useful if our purpose is to protect smaller firms who may have higher costs or do less innovating. It does not work, however, if our goal is to protect consumers, with their interest in high output, low prices, and high quality and innovation. In order to get market output down or prices up, a firm must either dominate the market for that particular product or else collude with rivals who make the same or a similar product.

Justice Brandeis understood this idea already in the 1930s. He dismissed the government's complaint against a patent cross-licensing arrangement that included Standard Oil and several other large firms. They were engaging in joint development of large scale gasoline refining using a "cracking" method that required substantial scale.[79] Justice Brandeis noted that the government did not even attempt to show that the joint venture reduced market output. Further, that was unlikely because with an aggregate market share of 26% of an undifferentiated product, it could not effectively do so.[80] The Progressive Justice Brandeis, a lifelong opponent of big firms, realized that even a joint venture of very large firms did not violate the Sherman Act unless the members' aggregate market share was substantial enough to limit market production. Given that they were not fixing prices, and their principal activity was joint development of a new technology, the complaint should be dismissed.[81]

The same thing is true today. For example, grocery-leader Walmart, with its 20+ percent market share,[82] may be able to charge lower prices than other grocers, but it will not be able to force overall grocery prices higher by means of unilateral conduct. By contrast, Jane's Foods, a hypothetical single-store grocer in Crested Butte, Colorado, might pull that off. Her store is in an isolated mountain town of 1500 people where there are few alternatives. Customers might pay her monopoly prices rather than drive many miles to the closest alternative.

The AICOA process of selecting covered platforms by size rather than market share seems to be based on the premise that its goal is to protect the competitors of covered platforms from more aggressive sellers, not to protect the consumer interest in low prices and high quality. That is particularly true when there are no serious impediments to consumer ability either to switch to other online sellers or else to shop

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79 Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 165–66 (1931).

80 *Id.* at 176–77:

No monopoly, or restriction of competition, in the production of either ordinary or cracked gasoline has been proved. The output of cracked gasoline in the years in question was about 26 per cent. of the total gasoline production. Ordinary or straight run gasoline is indistinguishable from cracked gasoline and the two are either mixed or sold interchangeably. Under these circumstances the primary defendants could not effectively control the supply….

81 *Id.* at 175–76.

82 *See* Danny Sheridan, *August 16: Grocery Market Share, Q1 2022*, FACT OF THE DAY 1 (Aug. 1, 2022) https://www.factoftheday1.com/p/august-16-grocery-market-share-q1 (Aug., 2022) (showing Walmart's market share as 21.3%).

offline. The extent to which either of these exists is a question of fact, but the absolute size of the provider has almost nothing to do with it.

Identifying enforcement targets by firm size rather than product dominance would not make much difference if the individual products of very large online firms had no competitors. None of the designated gatekeepers under the AICOA fall into that category, and their various products have different market shares. Alphabet (Google) and Microsoft are both likely covered platforms. As noted previously, Alphabet's search engine, Google Search, has a market share exceeding 90%.[83] Microsoft, a larger firm than Google,[84] also has a search engine, Bing, whose market share is about 3% and a Browser, Edge, with a market share under 5%.[85] Microsoft's search engine and browser both appear to be subject to AICOA's restrictions on self-preferencing, however. As another example, Walmart with its 21.3% market share is the largest retail grocer in the United States. Amazon, together with its subsidiary Whole Foods, controls about 2.4% of grocery sales, even when combining both online sales and its subsidiary Whole Foods' traditional store sales.[86] Nevertheless, Amazon's online sales would be covered by the AICOA's self-preferencing rules, while Walmart's would not be because most of its sales are through traditional brick-and-mortar stores. While Amazon is a very large seller, its sales are divided up among 12,000,000 products. If you add in all of the products that can be purchased on Amazon Marketplace through third party sellers that number swells to 353,000,000.[87] For many of these, Amazon's individual market shares are modest or even trivial. For others, such as ebooks, they are quite substantial.

As a result, Amazon may have the power to engage in anticompetitive unilateral conduct with respect to its ebooks, or perhaps by tying ebooks in some fashion to its Kindle reader technology. That is highly unlikely for millions of other products that Amazon sells in competition with both online and traditional retailers. Intelligent competition policy would seek out those situations in which competitive harm is plausible and then watch them carefully while largely ignoring the others or examining them only upon credible complaint.

One argument for scrutinizing firms rather than products is that a focus on market power over individual products may overlook situations where power is exercised by leveraging across two or more products or

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83 *See* GLOBALSTATS, *supra* note 18, https://gs.statcounter.com/search-engine-market-share.

84 Measured by market cap. *See* Daniel Liberto, *Biggest Companies in the World by Market Cap*, INVESTOPEDIA (Oct. 16, 2024) https://www.investopedia.com/biggest-companies-in-the-world-by-market-cap-5212784#:~:text=As%20of%202022%2C%20Apple%2C%20Saudi,companies%20in%20the%20world%20today.

85 *See* GLOBALSTATS, *supra* note 18, https://gs.statcounter.com/search-engine-market-share .

86 Sheridan, *supra* note 81 (showing Amazon with 1.3% of groceries and Whole Foods with 1.1%, for a total of 2.4%).

87 Andrew Buck, *Amazon Stats – How Many Packages Does Amazon Deliver a Day?*, (Dec. 20, 2022), https://landingcube.com/amazon-statistics/.

services. For example, Alphabet makes Google Search the default search engine on Android phones. It also makes Gmail the default email app, and its Google's Chrome browser is the default browser on many Android phones. Since Alphabet owns all of these products is it possible that it is obtaining some kind of leverage or comparative advantage by linking them together? Very likely, yes, although the potency of default status varies from one situation to another.[88]

For example, many of the claims in the government's case against Microsoft two decades ago were that Microsoft was using Windows as a fulcrum to lever up its position in the browser market, benefitting its own product Internet Explorer.[89] These are possibilities, but that is precisely where antitrust law should be kicking in. It should do so, however, by searching out specific anticompetitive consequences, as it did in the *Microsoft* litigation.

When a firm uses one of its products to promote sales of a second product the effects can sort out in two different ways. One possibility is "leverage," and the other is scope. Leverage occurs when a firm is able to exercise market power in one product in order to reap potentially harmful advantages in a second market. Apple's control of the iOS and its Appstore might be one situation, as might Alphabet's control of both Android and Google Search.

But the other thing that can accrue from a firm's position in two or more markets is economies of scope – that is, cost savings or product improvements that result from combinations of the two. The two effects can be confused. What they have in common is that both can injure rivals. As a result, competitor groups have campaigned against them without regard to the difference.

For example, the National Association of Ice Industries, representing firms that delivered ice to homes in the early part of the twentieth century, once campaigned for rules that would prevent delivery trucks from delivering both ice and ice cream on their routes.[90] Multiproduct delivery certainly benefitted the sales of firms that sold both products, but it did to because delivering the two together was cheaper than requiring separate trucks for each. An analogous example is the FTC's advisory that use of "backhaul" allowances violated the Robinson-Patman Act. "Backhaul" allowances were price allowances made to larger firms with their own trucks as compensation for carrying

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[88] *See* Francesco Decarolis, Muxin Li, & Filippo Paternollo, *The Role of Default Settings in Online Searches*, VOX EU, CENTRE FOR ECONOMIC POLICY RESEARCH (Mar. 13, 2023), https://cepr.org/voxeu/columns/role-default-settings-online-searches.

[89] *See* Microsoft, 253 F.3d at 52. *See also* ANDREW I. GAVIL & HARRY FIRST, THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY (2014); Robert A. Levy, *Microsoft and the Browser Wars*, 31 CONN. L. REV. 1321 (1999).

[90] Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 NYU J. LEGIS. PUB. POL'Y 705 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121866. The Federal Trade Commission noted the issue in a 1925 Report. *See* FED. TRADE COMM'N, REPORT ON OPEN-PRICE TRADE ASSOCIATIONS 306 (1925).

goods on their return trip.[91] Because smaller buyers without their own trucks could not take advantage of these, they resulted in an effective price "discrimination" under the RPA. The FTC's solution was to force the trucks to return home empty. Yet another example is tying for cost reduction or quality control. For example, "blanket" licensing of copyrighted works in large bundles can be much cheaper than single licensing.[92] But one must control many copyrights in order to do it. Or a hospital might tie its own anesthesiologist to its surgeries in order to control quality or minimize legal liability.[93]

For a firm to operate in two markets is not *inherently* harmful. Harm may sometimes occur, but it would have to be shown. Nevertheless, United States antitrust law is underdeterrent in this area. An important difference between the United States law of dominant firms and that of some other jurisdictions, including the EU, is that the United States expresses the concern as monopolization or attempt to monopolize, while EU expresses it as abuse of a dominant position. The issue becomes important in just the circumstances where AICOA has its bite. Under §2 of the Sherman Act a firm with a dominant position in one product can cause harm in a product market only by threatening monopoly in the second market.[94] By contrast, European Article 102 of TFEU permits a finding of abuse of a dominant position when a firm that dominates a market is able to cause harm in a second product or market, even if no monopoly is being threatened in the second market.[95]

The advantages of an "abuse of dominance" approach over a self-preferencing approach are several.[96] First, it looks at market power in the way that market power should be examined, which is identifying particular products or services in which the exercise of such power is threatened. Second, embodied in abuse of dominance is an approach that is better suited to networked markets, which are more heavily dependent on collaboration among firms of all sizes.

Abuse of dominance has greater bite than the current Sherman Act approach to dominance because it enables antitrust to pursue dominant firm conduct that causes injury in secondary markets even when the acquisition of monopoly in those markets is unlikely. It is also preferable to the AICOA's approach, however, because it requires a showing of actual competitive harm.

III. GATEKEEPER DUTIES AND ANTITRUST SELF-PREFERENCING RULES

[91] FTC Advisory Opinion 147, 16 C.F.R. §15.147 (1980). *See* Marius Schwartz, The Perverse Effects of the Robinson-Patman Act, 31 Antitrust Bull. 733, 749 (1986).
[92] Broadcast Music v. CBS, Inc., 441 U.S. 1, 8 (1979).
[93] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984).
[94] *See* Hovenkamp, *supra* note 2, at 1681, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963245.
[95] *Id.* at 1718–19.
[96] *Id.* at 1718–21.

Under the AICOA, once a firm has been designated as a covered platform its conduct is policed by prohibitions on "self-preferencing," as well as a per se anti-tying rules and some other obligations.[97]

Reduced to its competition policy core, limitations on self preferencing are a duty imposed on firms acting unilaterally to deal with competitors or perhaps other business firms even if they are not competitors.[98] The duty to deal as antitrust currently recognizes it is very narrow. First, it applies only to monopolists and even then imposes dealing obligations only rarely.[99] This reflects a well established belief that each firm ordinarily makes its own choices about what to sell. Competition and business choice determine when one firm will sell someone else's goods and how. For example, Sony cannot compel Walmart to stock and sell Sony products, although Walmart may certainly do so if the two can agree. Should it make a difference if the seller is Amazon, which is an online firm?

Further, if a firm has no duty to sell someone else's goods at all, does it make sense to apply rules about self-preferencing when it does choose to sell other's products?[100] If a firm is forbidden from self-preferencing its own goods it might choose not to deal in the goods of others at all. This was one of the unforeseen consequences of the Robinson-Patman Act: sellers forbidden from price discriminating between larger and smaller customers simply dropped the smaller customers altogether.[101]

Legal limitations on self-preferencing are not new to American law. They actually originated in patent law, where the concern was that patentees might use licensing arrangements to tie up sales "beyond the scope" of the patent. Already in 1850 the Supreme Court refused to enforce a requirement imposed by the patentee of a commercial wood planing machine that users must use only its own cutter blades, which wore out and had to be replaced frequently.[102] It did the same thing in 1894 for a patentee's requirement that users of its patented toilet paper dispenser purchase its own toilet paper exclusively.[103]

In 1912 the Supreme Court relaxed this requirement, permitting A.B. Dick, a manufacturer of office equipment, to insist that users of its

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[97] *See* AICOA, *supra* note 7, § 3(1).

[98] *See* Erik Hovenkamp, *The Duty to Deal in the Age of Big Tech*., 131 Yale L.J. 1483 (2022).

[99] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (recognizing a narrow duty where the parties had a previous, voluntary dealing arrangement and the defendant withdrew from it without an adequate explanation); Verizon Communications, Inv. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (refusing to impose a duty).

[100] Erik Hovenkamp, *Duty to Deal*, *supra* note 97 at 1536–37.

[101] *See* Hovenkamp, *supra* note 23, https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged/.

[102] Wilson v. Simpson, 50 U.S. (9. How.) 109 (1850).

[103] Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U.S. 425 (1894). *See also* Aiken v. Manchester Print Works, 1 F.Cas. 245, 247 (D.N.H. 1854) (refusing to enforce requirement that users of a patent knitting machine use only the patentee's replaceable knitting needles). Other cases are discussed in Herbert Hovenkamp, *Antitrust and the Design of Production*, 103 CORN. L. REV. 1155 (2018).

patented mimeograph machine purchase its single-use paper, stencils and ink from the patentee as well.[104] Congress then responded with the first self-preferencing statute, which was located in the antitrust laws rather than the Patent Act. Section 3 of the Clayton Act, passed in 1914, made it unlawful for the seller of a good, "whether patented or unpatented," to sell that good on the condition that the buyer not deal with a competitor for the purchase of other goods.[105]

After the Clayton Act became law the courts immediately reversed course, applying antitrust law as well as patent law. In the 1917 *Motion Picture Patents* case the Supreme Court condemned a patentee's restriction on its patented film projector that users could use it only with its own films.[106] Since that time both antitrust tying law and the patent law of exhaustion[107] or repair rights[108] have limited the extent to which firms could compel purchase of their own complementary products. The 1988 Patent Misuse Reform Act partially reversed course once again, limiting patent act enforcement of ties to situations where the patentee had market power in the patented product.[109] In its decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, the Supreme Court extended the statute to antitrust liability, holding that market power in tying cases could no longer be inferred from the mere existence of a tie.[110] As a result, the self-preferencing rules imposed by the antitrust law of tying arrangements are limited to situations where the defendant has market power in the tying product.

Today a well developed case law of tying serves to enforce self-preferencing rules under antitrust, but patent law still intervenes as well, particularly when a patentee attempts to enforce self-preferencing rules about complementary products.[111] Two important limitations distinguish this existing law from self-preferencing proposals such as those contained in the AICOA.

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[104] Henry v. A.B. Dick Co., 224 U.S. 1 (1912).

[105] 15 U.S.C. § 14 (2018).

[106] Motion Picture Pat.Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). *See also* Carbice Corp. of Am. V. Am. Patents Dev. Corp., 283 U.S. 27 (1931) (unlawful for seller of patented ice box to insist that users purchase only its own dry ice).

[107] E.g., Impression Prods., Inc. v. Lexmark Int'l, 581 U.S. 360 (2017) (sale of patent printer exhausted manufacturer's rights in the patent, so that it could not rely on patent law to insist that users purchase only its own toner cartridges).

[108] Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961) (third-party replacement of canvas portion of a "ragtop" convertible was a permissible "repair" of a patented product, not an impermissible "reconstruction").

[109] 35 U.S.C. § 271(d) (5) (2018) limiting the scope of unenforceable patent ties to situations where the patentee:

conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

[110] 537 U.S. 28 (2006).

[111] *E.g.*, *Impression Prods*., *supra*.

The first limitation is that existing law contains a requirement of competitive harm. That is, while self-preferencing is reachable under the antitrust law of exclusive dealing or tying, that law requires a showing of market power in the primary product and "foreclosure," or exclusion, in the secondary product. The Patent Act, as noted above, requires market power in the primary product, although it says nothing about harm in the tied product market.[112]

These limitations are essential to prevent tying law in particular from lapsing into overreaching nonsense. With a little lawyerly creativity, every combination of two products or of a design or distribution choice can be characterized as tying. For that reason §3 of the Clayton Act condemns only ties whose effects "may be substantially to lessen competition or create a monopoly.[113] Today the Sherman Act reaches ties as well. Section 1 requires that they be in "restraint of trade," which generally requires a reduction in market output, and §2 requires a showing of monopolization or attempt to monopolize. The power and foreclosure requirements serve to identify ties that are realistically capable of causing anticompetitive exclusion.

Many ties occur in competitively structured markets where some inconvenience to excluded rivals might be possible, but not harm to competition.[114] The separate foreclosure requirement is important because even when a tying product monopolist ties, no harm occurs if the tied product is competitive. For example, even assuming that Amazon is a monopolist, it has to make some choices among the dozens of producers of the various commodities that it sells.

The second limitation on tying law is that it requires actual tying, or "conditioning" of the sale of one product on the sale of another. The term "self-preferencing" reaches more broadly to include situations where a firm favors one product in some way falling short of a tie. For example, if Amazon places its Amazon Basics brand toaster at the top of any result in a customer search for "toasters," that might constitute self-preferencing. It would not be tying, however, assuming that customers were free to skip Amazon's designated first choice and click down to Cuisinart, Proctor Silex, or some other brand that they prefer. The problem is even more severe when there are a large number of differentiated versions of a product. For example, the United States has

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[112] 35 U.S.C. § 271(d)(5).

[113] 15 U.S.C. § 14 (2018). On early applications to tying and exclusive dealing, see Hovenkamp, *The Antitrust Text*, supra note 9 .

[114] E.g., A.I. Root Co. v. Computer/Dynamics, 806 F.2d 673, 675–77 (6th Cir. 1986) (lawful for computer manufacturer with 3% market share to require purchasers of its software to take its hardware as well); JBL Enterp. V. Jhirmack Enterp., 698 F.2d 1011 (9th Cir. 1983) (restrictions imposed by hair products manufacturer requiring salons to use its product exclusively lawful on a market share of less than 5%); Town Sound and Custom Tops, inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir. 1992) (Chrysler's requirement that dealers install only its own automobile sound systems in new vehicles to the exclusion of plaintiff's system lawful where the defendant's market share was 10%-12%). Numerous decisions are discussed in 10 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW Ch. 17C (4th ed. 2019).

approximately 184 producers of kitchen cutting boards.[115] Amazon sells several of them, ranging from premium hardwood boards that can sell for $80 or more[116] to less than $3.[117]

That raises some important questions. Do we need stricter regulation of self-preferencing than tying or exclusive dealing law already provides? Self-preferencing is an essential tool of competition, which has never imposed a requirement that people must sell other people's merchandise. Second, how little credit must we give to consumers' ability to choose? Amazon's customers can switch from one Amazon product to another with a mouse click. With almost no more difficulty they can switch from Amazon to a different internet seller.

The common law often went to the opposite extreme, making it unlawful for producers to sell anything other than their own products.[118] Today, multiproduct sellers select among many brands and chose both whether to sell them and how to price and display them based on considerations such as price, customer perception of quality, or rate of turnover. They can be expected to make whatever choice is most profitable. In the vast majority of cases there is nothing even presumptively harmful to competition. Sony has no general expectation that either Wal-Mart or Amazon must sell its products, although they could certainly agree to do that.

The self-preferencing obligations imposed by AICOA are aggressive and far reaching for covered platforms, but they do not do anything to change the status quo with respect to traditional markets as well as the thousands of internet sellers who are not designated as

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[115] *Cutting Boards Suppliers*, THOMAS https://www.thomasnet.com/products/cutting-boards-5902002-1.html (listing 120 general manufacturers, 60 customer manufacturers, and an additional 78 distributors).

[116] *E.g.*, *Made in USA Black Walnut Wood Cutting Board by Virginia Boys Kitchens - Butcher Block Wooden Carving Board with Juice Well made from Sustainable Hardwood (17x11)*, AMAZON, https://www.amazon.com/Walnut-Cutting-Virginia-Boys-Kitchens/dp/B00PMF383O/ref=sr_1_10?crid=2P4060LKBYGK9&keywords=hardwood+cutting+board&qid=1678987982&sprefix=hardwood+cutting+board%2Caps%2C68&sr=8-10&ufe=app_do%3Aamzn1.fos.18ed3cb5-28d5-4975-8bc7-93deae8f9840 ($85.00).

[117] *E.g.*, *Flexible Plastic Cutting Board Mats, Colored Mats With Food Icons, Gripped Back, Cutting board Set of 4 (1)*, AMAZON, https://www.amazon.com/Carrollar-Flexible-Non-Porous-Anti-skid-Dishwasher/dp/B07V28JKFQ/ref=sr_1_31?crid=1C0D6C6PSQTF9&keywords=cheap%2Bplastic%2Bcutting%2Bboard&qid=1678988097&sprefix=cheap%2Bplastic%2Bcutting%2Bboard%2Caps%2C67&sr=8-31&th=1 ($6.99 for a set of four).

[118] *See* An Act Against Regulating Forestallers and Engrossers, 5 & 6 Edw. VI, ch. 14 (1552). *See also* Wendell Herbruck, *Forestalling, Regrating and Engrossing*, 27 MICH. L. REV. 365, 378–80 (1929) (discussing common law back to middle ages). For a lengthy description of such laws dating back to the Middle Ages, see Cornelius Walford, *Early Law and Custom in Great Britain Regarding Food*, 8 TRANSACTIONS ROY. HIST. SOC. 70 (1880). Such laws were enforced in the United States as late as 1911. *See* City of York v. Hatterer, 48 Pa. Super. 216, 217–18 (condemning defendant who purchased onions from another with the intent to sell them in her own stand).

gatekeepers. This will certainly tilt the playing field in ways that are difficult to foresee.[119]

The AICOA does specify that in order to be a covered platform the platform itself, although not its individual products, must be a "critical trading partner," which it defines as a person with the ability to "restrict or materially impede" a business user's access to customers or to the tools that it needs to access customers.[120] It then makes it a violation to "unfairly preference the covered platform operator's own products, services, or lines of business… in a manner that would materially harm competition on the covered platform."[121]

The phrase "materially harm competition" is important, and could limit overreaching, depending on how it is defined. Unfortunately, the bill itself does not provide a definition. If competition is defined in an economically sensible way to refer to reduced market output and higher prices, then the statute might end up limiting its reach to conduct posing a realistic threat of competitive harm. If it means something else, such as merely injuring a rival or placing it at a disadvantage on that particular platform as opposed to the market as a whole, then it could end up doing a great deal of harm.

One important difference between this provision and the equivalent provision in the Clayton Act, which is "substantially lessen competition," is that the Clayton Act phrase is preceded by the prophylactic qualifier "where the effect may be."[122] As a result, while the Clayton Act provision has been interpreted to be concerned with "probabilities,"[123] the AICOA provision requires an actual showing of materially lessening competition.

If the AICOA is redrafted, this provision more than any other needs clarification, or perhaps even omission to the extent that existing antitrust rules are adequate. Is its principal purpose to protect competitors, without regard for market output, prices, innovation or other indicia of consumer harm? Or is the statute intended to promote the antitrust function of ensuring that markets are competitive?

The AICOA also applies its proscription to tying arrangements, but without the requirement of materially harming competition. This, effectively per se, prohibition would make it unlawful to

condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or

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[119]*See* Erik Hovenkamp, *Big Tech 'Self-Preferencing' Bills May Hurt – Not Help – Antitrust Reform* STIGLER CENTER, PROMARKET (June 8, 2022), https://www.promarket.org/2022/06/08/big-tech-self-preferencing-bills-may-hurt-not-help-antitrust-reform/.

[120]AICOA, *supra* note 7, § 2 (3)(6).

[121] *Id.*, § 3(a).

[122] *E.g.,* 15 U.S.C. §14 (2018) (preventing tying and exclusive dealing "where the effect … may be to substantially lessen competition…."). *See* Hovenkamp, *The Antitrust Text*, *supra* note 9.

[123] Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) ("Congress used the words ' may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties.")

services offered by the covered platform operator that are not part of or intrinsic to the covered platform itself….[124]

Unlike the Patent Act provision previously discussed,[125] it is not limited to patented product and contains no market power or foreclosure requirement. Once a platform is defined as covered, it applies to all products and services offered on that platform, whether or not the seller has any market power in them or the tie forecloses anyone. Even during the heyday of the per se tying rule, the courts articulated a requirement of market power in the tying product.

The AICOA rule reverts to a time when tying arrangements were considered to be so inherently anticompetitive that they should be governed by a per se rule.[126] That time has long since gone, and today strict condemnation for tying is exceptional.[127] This is doubly true on internet commerce, where networking and standard setting are common and joint provision is often necessary in order to guarantee that products will work properly. Unlike the Clayton Act's tying provision,[128] the AICOA does not explicitly prohibit conditional discounts or rebates. It is also silent on the question of "tech ties," or tying achieved by product design rather than agreement. For example, if Amazon sold ebooks in a format that worked only with its Kindle brand of readers, would that be a violation? If it sold a computer system with monitor and speakers at a discount, would that violate the AICOA?

The AICOA has other provisions that govern conduct but without the "materially harm competition" qualifier. One would make it unlawful for a covered platform to "restrict, impede, or unreasonably delay" access or interoperability between a third party business user and the products or services of the platform that are sold in competition with it.[129] While the language is hardly clear, it could be read as a restatement of the self-preferencing rule but without any requirement of competitive harm.

Another section refers to search functionality, and prohibits a covered platform from ranking search results favoring its own products or services over those of rivals.[130] Implementation is vague. It might kick in, however, if a Google search for videos ranked the videos on YouTube, another Alphabet asset, high than video from rival sites. It might also prevent Amazon from giving top placement to its own AmazonBasics brand.

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[124] AICOA, *supra* note 7, § 2(b).

[125] 35 U.S.C. § 271(d)(5); *see* discussion *supra*, accompanying notes 108–09.

[126] Standard Oil Co. of California v. United States, 337 U.S. 293, 305 (1949) ("Tying agreements serve hardly any purpose beyond the suppression of competition").

[127] *E.g.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (not unlawful for hospital to tie surgery and anesthesiological services). On tying generally, *see* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, Ch. 10 (6th ed. 2020).

[128] 15 U.S.C. § 14 (2018).

[129] AICOA, *supra* note 7, § 3(a)(4).

[130] *Id*., § 3(a)(9).

Finally, the bill provides a range of affirmative defenses, with the burden of proof on the defendant to show either that the "material harm to competition" has not or is not likely to occur, or else that the conduct is necessary to protect safety or privacy or ensure functionality.[131] Cost savings is not stated to be an allowable defense.

CONCLUSION

AICOA was a bill that deserved to die. While some of its consequences are uncertain, others are just plain bad. The issue certainly remains alive, however, and will almost certainly be considered again by Congress. When it does so, the "gatekeeper" approach to competition policy should be abandoned. It is too narrow because it ignores the conduct of firms that are not designated as gatekeepers, including offline sellers who are not included no matter what their size. It is too broad because it overreaches, perhaps egregiously, to condemn competitively harmless conduct by firms defined as gatekeepers.

None of this is to suggest that antitrust policy is just fine as it as. Underenforcement is a serious problem, but it is one that is best remedied using tools that are better suited to identifying the exercise of market power and true competitive harm rather than tilting at windmills.

[131] *Id*., § 3(b).