

# “Please, Help Yourself”: Toward a Taxonomy of Self-Preferencing

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Prohibiting companies from favoring their own products ignores all the ways it promotes competition and benefits consumers. Antitrust reforms should differentiate that pro-competitive self-preferencing from certain exclusionary practices.

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## KEY TAKEAWAYS

- Companies have been favoring their own products and services over their rivals’ for a long time—and antitrust enforcers have taken a deferential view of the practice because it has pro-competitive and pro-consumer benefits.
- Self-preferencing has only become a hot antitrust topic in the last few years because of a coordinated effort on the part of Neo-Brandeisians whose agenda is to break up large tech companies.
- Instead of a blanket ban on self-preferencing per se, antitrust enforcers should adopt a “rule of reason” approach—as courts have long done—to assess the state of competition in the context of relevant contracts.
- Enforcers need to adopt a clear taxonomy to distinguish between the pro-competitive effects of self-preferencing as a legitimate self-promotion tool and the anticompetitive effects of self-preferencing as an unjustified exclusionary tool.
- A blanket ban on self-preferencing for a few companies would harm consumers, deter innovation, and distort the competitive process.

## INTRODUCTION

Antitrust populists, in their desire to reduce the size of large companies and protect competitors—especially small businesses—rather than consumers, argue that Internet platforms should not be allowed to promote their own products and services. The critique has materialized under the new moniker of “self-preferencing.” It holds that antitrust should prohibit Internet platforms from favoring their own products and services, even if such prohibition improves consumer welfare. In addition, antitrust populists use their critique of self-preferencing to bolster their case for a structural separation of platforms (i.e., breakup) or, slightly less radically, for functional separation of the platform (i.e., requiring the platform business to be operated separately from the product sales business).

The antitrust literature acknowledges the proconsumer, procompetitive effects of self-preferencing.<sup>1</sup> Yet, despite the overwhelmingly positive effects of self-preferencing on strengthening competition, antitrust populists aim to weaponize self-preferencing to target only a few companies, while allowing self-preferencing for the rest of the economy.

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**To indiscriminately prohibit the widespread practice of self-preferencing without considering its benefits would distort competition, not reinvigorate it.**

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The latest example of such weaponization of self-preferencing by antitrust populists is provided by Sens. Amy Klobuchar (D-MN) and Chuck Grassley (R-IA). They introduced legislation in October 2021 aimed at prohibiting the practice.<sup>2</sup> However, the legislation would ban self-preferencing only for a handful of designated companies—the so-called “covered platforms,” not the thousands of brick-and-mortar sellers that daily self-preference for the benefit of consumers. Mimicking the European Commission’s Digital Markets Act prohibiting self-preferencing, Senate and the House bills would degrade consumers’ experience and undermine competition, since self-preferencing often benefits consumers and constitutes an integral part, rather than an abnormality, of the process of competition.

The vague term of “self-preferencing” includes many different practices:

- **A distributor/platform favoring its private labels over third-party products (i.e., “prominent placement”).** For instance, Amazon promotes Amazon Basics products over third-party sellers’ products, much like supermarkets promote their own private-label products.<sup>3</sup>
- **A distributor/platform favoring a complementary product from its market position (i.e., “market leveraging”).** For instance, Google made its front page customizable by users to have news clips or other content appear, even though that competes with other Internet news sites such as Flipboard.<sup>4</sup>
- **A distributor/platform requiring a complementary product in order to use the main product (i.e., “tying”).** For instance, Apple introduced the Lightning plug for iPhones to replace the micro-USB connector mostly because the Lightning could be used more effectively in the newly introduced device iPad.<sup>5</sup>
- **A distributor/platform preinstalling products and services on a device (i.e., “pre-installation”).** For instance, Microsoft Windows comes with preinstalled software, and smartphone

companies preinstall apps that compete with other companies' apps in their integrated smartphones. So, for example, the iPhone comes preinstalled with a flashlight and Windows with spell-check, even though consumers could purchase and install them from other vendors.<sup>6</sup>

- **A distribution/platform not treating business partners “neutrally” (i.e., “platform neutrality”).** For instance, digital platforms are requested to have no (financial) interest in downstream competition.<sup>7</sup> Under this requirement championed by Sen. Elizabeth Warren (D-MA), Google would be a search engine and nothing else. Amazon would be a mere platform and not an online department store. Facebook would be a social media website without messaging features, etc.

Whether it is structural separation, functional separation, or imposed neutrality, the objective is the same: to limit the size and scale of certain platforms (at the benefit of their rivals) for the sake of a nebulous concept of “platform neutrality.”<sup>8</sup> Moreover, the attack on self-preferencing—whose very name connotes suspicious activity—reflects a fear that large companies leverage their power from a market in which they are dominant to enter, and compete in a market wherein they are not dominant, even though such a leveraging technique benefits consumers with lower prices, higher quality, innovative services, etc.

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**There is no legal duty for companies to help rivals compete with them—and correspondingly, there is no legal principle allowing courts to challenge companies' business models.**

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Under U.S. law, it is legal for companies to create new products and promote them to their consumers among rival products.<sup>9</sup> Indeed, under U.S. antitrust laws, there is no duty for companies to help rivals. As Justice Scalia in the seminal case of *Trinko* made clear, the Sherman Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”<sup>10</sup> Therefore, there is no legal duty for companies to help rivals compete with them—and, correspondingly, there is no legal principle allowing courts to challenge companies' business models. But antitrust populists and their allies in Congress want to change that.

More importantly, unless companies engage in self-preferencing in an explicitly anticompetitive way—meaning intentionally limiting the ability of competitors to use their platform with anticompetitive motives—the practice usually makes consumers better off. And that, rather than some vague concern for competitors, should be the focus of antitrust policy. Consumers often prefer a platform's products over those of rivals, and if the law prevents their needs from being served, consumers are harmed by having less choice. But competition can also be harmed by the platform being prevented from challenging the market positions of entrenched incumbents. For over 150 years, large retailers have used self-preferencing strategies with their own private labels, resulting in lower prices for their products and putting price pressure on branded products.<sup>11</sup> For example, Amazon Fashion and Amazon Pharmacy aggressively compete on price with established clothing brands and pricey pharmacists.<sup>12</sup>

Nobel-prize winner Jean Tirole believes there currently is no “silver bullet” for antitrust authorities to consider the procompetitive from the anticompetitive effects of self-preferencing practices.<sup>13</sup> This report develops a taxonomy of self-preferencing practices so that antitrust

enforcers can distinguish between those that benefit consumers and those that may harm consumers. The taxonomy differentiates self-preferencing as a self-promotion tool from self-preferencing as an overt exclusionary tool—and there is no need for legislation overall to address the latter problem. Vigilant antitrust enforcement suffices in preventing anticompetitive conduct and eliminates needing to resort to radical proposals such as breaking up the companies or regulating them as public utilities.

## **HOW SELF-PREFERENCING HAS GAINED ANTITRUST PROMINENCE**

On both sides of the Atlantic, two series of facts have recently brought self-preferencing to the fore of antitrust debates, especially by well-known digital companies.

First, the European Union was the first to put self-preferencing in antitrust enforcement. The EU fined Google in 2017 for self-preferencing its own products on its Google Shopping services.<sup>14</sup> The EU's General Court is expected to rule on Google's fine challenge on November 10, 2021. The EU also fined Google in 2018 for favoring its own Chrome browser and search app in its Google Android smartphones.<sup>15</sup> Both decisions, and others, contributed to a growing movement in Europe against self-preferencing, especially in the digital industry. Of course, it doesn't hurt that the companies whose sales would be limited are largely American.

Second, in 2016, Open Markets Institute director Barry Lynn and then fellow researcher Lina Khan encouraged Sen. Warren to come out with a plan to break up “big tech.”<sup>16</sup> The next year, Khan published the “Amazon's Antitrust Paradox,” where she accused, among other things, Amazon of self-favoring its products over third-party products and thereby unfairly competing and necessitating a structural separation of the platform.<sup>17</sup> In 2019, she published another article both advocating for the “separation of platforms and commerce” through breakups and praising Democratic presidential candidate Sen. Warren for suggesting the breakup of companies and regulating them as “platform utilities” to avoid self-preferential treatments. Now chair of the Federal Trade Commission (FTC), Khan outlined her antitrust vision in which she wants to focus on “structural incentives that enable unlawful conduct—be it certain conflicts of interest, business models, or structural dominance.”<sup>18</sup> In other words, through a coordinated effort from anticorporate Neo-Brandeisians, self-preferencing has rapidly come to the fore as a new antitrust concern.

## **WHY SELF-PREFERENCING IS A COMMON BUSINESS PRACTICE**

Self-preferencing is a long-standing and common business practice consisting of leveraging capabilities to promote one's own complementary products and services. It is indeed a “common and self-fulfilling phenomenon,” wrote Michael A. Salinger.<sup>19</sup> Moreover, self-preferencing covers a wide range of commonly accepted business practices. In that respect, the notion is problematic as a potential antitrust violation—and is the reason antitrust enforcement generally warrants a deferential approach toward “common business practices.”<sup>20</sup> Such an approach is commonsensical, as long-standing common business practices cannot be anticompetitive practices, unless antitrust enforcers are keen to prohibit the very fundamentals of the competitive process.

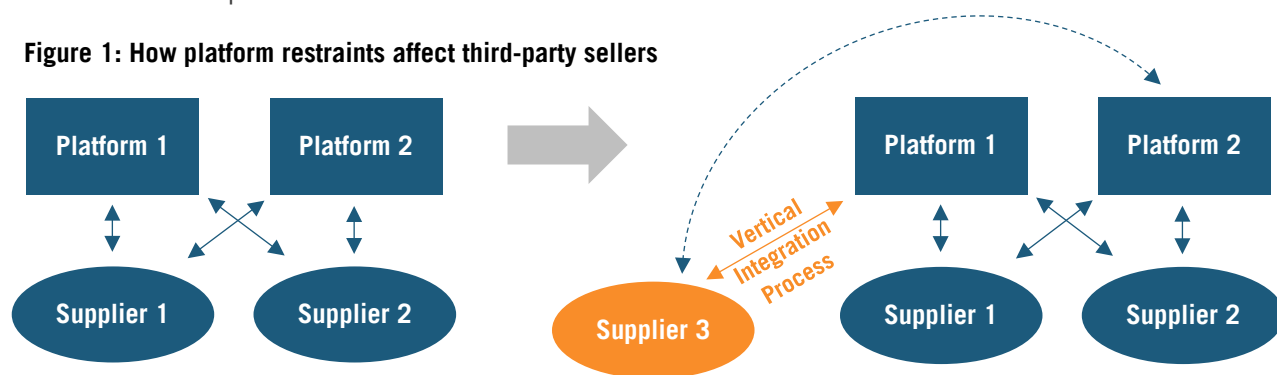
For a company to promote its products and services represents a trivial fact. Not to do so would frustrate the very essence of a company's corporate interests and could potentially engage managers' liability.<sup>21</sup> But self-preferencing refers to a more specific concern than general self-

promotion. It refers to a company's ability to leverage its market power by vertically promoting its products and services. In other words, a company self-prefers its products and services on the higher or lower part of its distribution channel.

### Vertical Restraints and Self-Preferencing

To illustrate self-preferencing, let's assume that two distributors of products and services compete as platform to reach end users. Both compete against one another and welcome third-party suppliers onto their platforms as distributions channels for competing products or services. But let's assume one of the platforms acquires or creates a product that is similar to products that third-party sellers are offering on their platform. Would the platform now favor its own products over those of its competitors? If so, then to what extent would this practice amount to anticompetitive conduct wherein third-party sellers could no longer compete on their merits? Figure 1 illustrates this vertical integration process and the potential incentives for a distributor to favor its own products.

**Figure 1: How platform restraints affect third-party sellers**



Having acquired or created Supplier 3, Platform 1 may now be incentivized to treat Suppliers 1 and 2 less favorably. In other words, Platform 1 may self-favor Supplier 3 at the expense of the level playing field between all three suppliers, thereby undermining competition on the merits. Also, the privileged relationship between Platform 1 and Supplier 3 may prevent Platform 2 from dealing with Supplier 3 due to the presence of exclusivity deals between Platform 1 and Supplier 3, as represented by the dotted line in figure 1.

However, an extensive theoretical and empirical body of economic literature on vertical integration contradicts this intuition of vertical foreclosure.<sup>22</sup> Vertical integration is the essence of entrepreneurial activity. In contrast, market transactions are the essence of the price mechanism: The choice between transacting or integrating depends on costs and benefits at stake, as Nobel Prize-winner Ronald Coase seminally explained as early as 1937.<sup>23</sup>

Downstream competition (i.e., competition among distributors) is not the only concern for companies. Upstream competition (i.e., competition among suppliers) may prevent a company from undermining the attractiveness and competitiveness of its platform at the benefit of another company's platform. Questions about potential vertical foreclosure shed many doubts about the alleged anticompetitive effects of vertical foreclosure, even by a so-called "monopolist." Indeed, Fumagalli, Motta, and Calcagno argued:

And even if an incumbent is truly a monopolist over the upstream input, a number of follow-on questions arise: do downstream rivals have a "right" to be granted access to that

input? If so, on what terms? Would final consumers be better off following external intervention (for example, by a regulator or a competition authority) that tinkers with the incumbent’s conduct? What would be the effect on the incentives of the incumbent (and possibly of firms in other industries) to keep investing and/or innovating, following an intervention which obliges the incumbent to given access to an input which may well be the product of its investments or business acumen?<sup>24</sup>

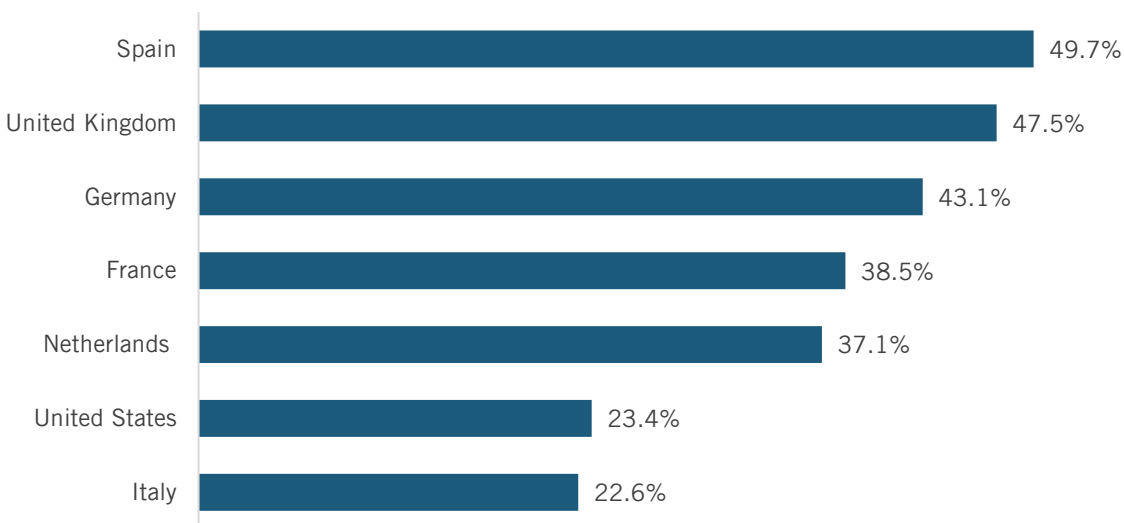
Thus, antitrust laws do not prohibit per se common business practices leading to vertical restraints (or integration).<sup>25</sup> The evolution of antitrust enforcement has gradually addressed the antitrust “misconception” of vertical integration, as Robert Bork himself described before being instrumental in its evolution.<sup>26</sup>

### Self-Preferencing as Common Business Practice

What type of self-preferencing practice triggers concerns by antitrust populists? It appears that self-preferencing of its products (i.e., private labels or suggested services) by a platform at the expense of downstream rivals has become the bone of contention. And yet, self-preferencing is common business practice, as it pertains to the very essence of the corporation operating in the marketplace.<sup>27</sup> Supermarkets were the first platform to self-prefer their products over third-party sellers. Thus, self-preferencing as a distribution strategy is a widespread, common business practice for retailers that resort to private labels. As one organization wrote, “Private label products encompass all merchandise sold under a retailer’s brand. That brand can be the retailer’s name or a name created exclusively by that retailer. In some cases, a retailer may belong to a wholesale group that owns the brands that are available to only the members of the group.”<sup>28</sup>

Do private labels contribute to innovation, or are they merely imitators? Although imitation always contributes to innovation, private labels went from being imitators in the 1980s to becoming today’s retail market disruptors.<sup>29</sup> Be that as it may, the share of private-label brands in retail markets remains large—even more so retail markets located outside the United States—as figure 2 demonstrates:

**Figure 2: Private label brands’ percentage of sales in retail markets<sup>30</sup>**



Private labels offer many advantages to consumers, which is why they have gained market share. For example, private labels offer lower prices, increase consumer loyalty, and spur innovation by imitation.<sup>31</sup> Indeed, as research finds, “When consumers are making decisions about the purchase of private labels brands, the image of the store, as well as the retailer’s corporate reputation play determinant roles. Interestingly, corporate reputation exerted greater influence on private label image, while store image exerted a greater impact on private label quality perception.”<sup>32</sup>

Consequently, should a company’s reputation deplete, consumers will no longer be interested in its private label’s products. Thus, the ability of the company—even when dominant in a market—to extract monopolistic rents is seriously hampered by the high level of reputation it must sustain. In other words, downstream competition between products remains vibrant thanks to the vibrancy of upstream competition. To illustrate, should Google offer a less-competitive search engine, consumers may question the attractiveness of its ancillary services such as Google Shopping or Google Maps and switch to Amazon or Apple Maps, for instance. Therefore, self-preferencing works only in a competitive environment wherein the company offers quality, price-effective products, or services. Otherwise, consumers would vote with their feet and choose upstream or downstream rivals. Indeed, self-preferencing works as an advertising tool designed for self-promotion, which works only to the extent that rivals do not offer substantially better alternatives.

### **Box 1: Self-Preferencing and the “Chain Store Wars”**

Private brands emerged in the first part of the last century with the rise of supermarkets and chain stores such as A&P, which competed aggressively against local small retailers for the benefit of consumers. Like today, populists vehemently criticized the allegedly cutthroat competition chain stores generated for the benefit of consumers because they sided with small-business interests (and in many cases were funded by those interests). In *Big Is Beautiful*, Atkinson and Lind noted that:

chain stores threatened local monopolies of general stores and drugstores owned by local elites, particularly in rural areas. A&P, the nation’s largest retail chain, was demonized by populists in the 1920s and 1930s in the same way that Walmart and other “big box” stores were vilified by populist in the 1990s and 2000s for putting out of business “Main Street” stores.<sup>33</sup>

Nevertheless, antitrust populists successfully mobilized Congress against the competition chain stores instilled when it passed the Robinson-Patman Act in 1936. This act limited price competition exerted by efficient chain stores at the expense of less-efficient small businesses. Thus, the act harmed consumers but protected inefficient competitors, as antitrust populists so desired. This is why groups such as the NAACP and various consumer groups opposed legislation banning or making it more difficult for chain stores to compete.

During this period, Congress pressed the FTC to gather more information, often hoping to obtain data to justify discriminatory legislation. Indeed, the FTC completed at least eight reports to Congress on the topic of chain stores. One such 1932 report on private brands notes, “A large



proportion of retail chain organizations, particularly the larger ones, are strong advocates of private-brand merchandise. Those favoring such brands give some 20 different reasons for their development and use. Perhaps the most important claim made is that private brands enable the chain store to give the consumer better values.<sup>34</sup>

Should we, today, harm consumers and protect inefficient rivals—particularly large companies unable to offer lower prices with private brands—with a ban on self-preferencing? Atkinson and Lind reminded us that “after World War II, retail chains and supermarkets became such a familiar feature of the new suburban middle-class lifestyle that the once passionate crusade against chain stores faded from memory.”<sup>35</sup> It would be unfortunate if antitrust populists succeeded in a new crusade against private labels in particular and self-preferencing in general. They would then have succeeded in erasing from the collective memory the anticompetitive effects of the prohibition of private labels’ competition and their benefits to consumers. Current antitrust enforcement needs to foster, not undermine, such price competition.

Antitrust policy has traditionally treated private brands positively, given their procompetitive effects.<sup>36</sup> However, few experts have called for antitrust prosecutions of private labels despite their procompetitive effects.<sup>37</sup> More generally, the COVID-19 pandemic has further increased the widespread popularity of private labels by consumers.<sup>38</sup> And with it, self-preferencing becomes relentlessly and enthusiastically the norm of the average shopper. As self-preferencing is already a common business practice “offline,” self-preferencing of adjacent products and services is also unsurprisingly common online. Regulators chastising online platforms often claim that what is illegal offline should also be illegal online. With the antitrust techlash against self-preferencing, what is legal offline becomes prosecuted when conducted online.

Since private labels are widespread throughout the world, and given that retailers may offer “prominent placements” for their private labels over brand labels, should it not be legitimate to infer that self-preferencing as a distribution strategy is a common business practice that should not be the source of antitrust prohibitions?<sup>39</sup>

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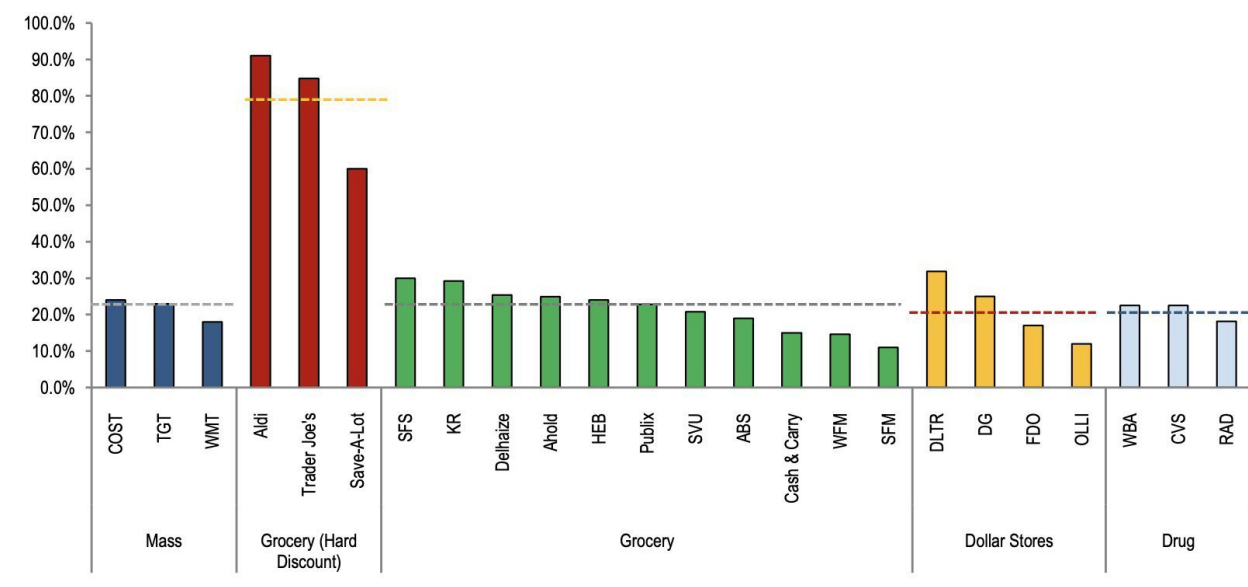
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Suppose self-preferencing Amazon Basics products became per se prohibited while Walmart’s apparel brands could enjoy a self-preferential treatment from its parent company. Would that foster fair competition with a stronger level playing field? And what about the unfairness this would cause due to the exemption of any antitrust scrutiny of China’s Alibaba? The animosity against Amazon’s alleged self-preferencing ignores how important private brands are for Amazon’s rivals. Indeed, private brands represent approximately a little more than 1 percent of Amazon’s sales. In comparison, the average private label penetration by retailers tends to be approximately 20 percent, as figure 3 illustrates:



**Figure 3: Private label penetration by retailer<sup>40</sup>**



Suppose self-preferencing of iTunes in Apple’s iPhones were considered to be illegal self-preferencing, therefore mandating Apple either to stop pre-installing iTunes on iPhones or to also pre-install, say, Spotify. Would that create a stronger and fairer competition when Apple’s iPhones compete with, say, Google’s Pixel Phones and Huawei’s smartphones? To discretionarily prohibit such a common business practice as self-preferencing (i.e., forcing some companies to vertically disintegrate their products while allowing others to keep integrating them) represents the sheer frustration of a fair competitive process.

It is economic injustice made legal, and economic merits made dishonorable.

### Antitrust and Vertical Restraints

Common business practices need protection from the law, as they contribute to the fair, competitive process. To illustrate, it is common practice for franchisors to require franchisees to comply with certain geographical limitations or brand-building requirements. For example, it would be absurd to allow multiple Starbucks coffees in the same street or allow McFlurries to be produced differently across different McDonald’s locations. This is referred to as “full-line forcing” in antitrust jurisprudence and is particularly well accepted in franchise settings given the scale and scope of the economies these vertical restraints generate.<sup>41</sup> Vertical restrictions allow for brand creation and reputation and enable firms to reap scale economies.

Consequently, in the 1960s, antitrust moved away from a per se prohibition of nonprice vertical restraints, such as the tying and bundling of products, as long as they are common business practices—meaning they contribute to normal competition or competition on the merits.<sup>42</sup> Since the 1980s, courts have applied a rule of reason to tying, hence prohibiting only unreasonable tying as suggested by the economic literature.<sup>43</sup> Nothing can justify applying a per se prohibition to tying: A rule of reason is commanded here as in every other instance in antitrust enforcement.<sup>44</sup> Tying products together, such as selling an electronic device and its compatible charger, is often procompetitive.<sup>45</sup>

More generally, antitrust aptly moved away from considering leveraging as an anticompetitive practice. For example, Areeda and Turner wrote as early as 1978 in a prominent antitrust textbook:

There is a maximum monopoly profit to be earned from the eventual sale of an end product ... Unless there are diseconomies of integration, monopolization of a second stage would not ordinarily lead to higher prices or lower output ... Vertical integration by a monopolist can lead to lower prices, higher output, and other economic benefits where the second stage had previously been monopolized or otherwise characterized by non-competitive performance.<sup>46</sup>

Also, products that are sold as “single products” enjoy an antitrust exemption.<sup>47</sup> For instance, right and left shoes are typically tied together and sold as single products, thereby not leading to antitrust prosecutions for shoe sellers.

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**Nothing can justify applying a per se prohibition to tying: A rule of reason is commanded here as in every other instance of antitrust enforcement.**

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Applied to self-preferencing in digital platforms, could it, for instance, be argued that Google search engine and Google map results or Google shopping results are “single products”—namely, the products of online search? Could it be argued that searching online by typing or by voice command or image are part of “single products,” thereby leading to exemptions from antitrust prosecutions, Google search engine, Google Voice Search, and Google Lenses? Alternatively, should these products not be considered single products, could antitrust enforcers convincingly argue that Google self-favors Google Voice Search and Google Lenses in Google search engine since they have argued that Google self-favored Google Shopping? The antitrust prosecution of self-preferencing focuses on defining the market and how companies can develop ancillary products to improve their business activity—innovative companies self-favor complementarities between services and products they create. Antitrust should reward product and service innovation.

Against the backdrop that self-preferencing is a “monopoly leveraging” practice, self-preferencing is a leveraging strategy that generates even fewer restraints than tying does. For example, consumers are not bound to purchase a tied product with the main product. Instead, companies can provide consumers with a range of products and services without any requirements or prerequisites.

Self-preferencing differs from tying and bundling in the sense that it does not impose requirements between complements. For instance, whereas the tying of printers and ink requires one to purchase compatible ink with a printer, the self-preferencing by a merchant platform of its private-label products does not require consumers to purchase them. They can freely choose, say, not to purchase Amazon Basics products on Amazon’s platform. Thus, self-preferencing’s restraints preserve the freedom of consumers to shop irrespective of the identity of the platform or distributor.

Furthermore, self-preferencing differs from exclusivity arrangements and refusals to deal. Self-preferencing precludes third-party sellers from operating on the platform; in contrast, refusals to

deal imply an explicit ban or termination of third-party sellers on the platforms. Thus, exclusive dealings have procompetitive effects.<sup>48</sup> Nevertheless, neither practice corresponds to the contemporary antitrust concern of self-preferencing by online platforms. These platforms welcome and even encourage third-party sellers to operate on their platforms. Otherwise, the attractiveness of these platforms, from the perspective of consumers, would be reduced.

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**The antitrust prosecution of self-preferencing pares down to defining the market. Innovative companies self-favor adjacent services and products they create. Thus, antitrust laws should reward innovative adjacent offerings of new products and services.**

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Consequently, self-preferencing is a common business practice that often illustrates product diversification and innovations and constitutes an additional source of competitive constraint in distribution channels. Correspondingly, antitrust should adopt a rule of reason, a deferential approach toward an overwhelmingly procompetitive practice. And yet, antitrust laws have recently started to prosecute self-preferencing practices ex nihilo without guiding principles. This is the reason we need some limiting principles for self-preferencing.<sup>49</sup>

## **TOWARD A USEFUL ANTITRUST DISTINCTION: TWO TYPES OF SELF-PREFERENCING**

Self-preferencing often has procompetitive effects. Nevertheless, a rule of reason, rather than per se prohibitions, should apply. More precisely, policymakers need to differentiate between self-preferencing as a self-promotion tool and self-preferencing as an overt exclusionary tool, as the former type of self-preferencing generates proconsumer effects. Moreover, it often results from user preferences, hence warranting a deferential treatment from antitrust enforcement; however, the latter type of self-preferencing warrants more antitrust scrutiny.

Indeed, every self-preferencing strategy irremediably contributes to raising rivals' costs (RRC).<sup>50</sup> The RRC theory of antitrust is both controversial and arguably inappropriate. As Hovenkamp wrote, "Probably the most common practice that raises rivals' costs is output expansions that force a rival to reduce its output, thus depriving it of scale economies, or that force a rival to engage in a more aggressive promotion in order to compete ... But such practices are the heart of competition, even though they make a rival's effort more costly."<sup>51</sup>

It pares down to an implicit duty for a company to care for (if not help) its rivals, and an implication for antitrust regulators to change antitrust laws to protect competitors rather than favor consumers. As a result, the antitrust literature has largely set aside the RRC theory.<sup>52</sup> Scheffman and Higgins advocate for a "serious limitation of the RRC analysis" since "it does not provide guidance on how to distinguish cost-raising strategies from 'competition on the merits,' or pro-competitive strategies that shift business from rivals."<sup>53</sup>

The increase of rivals' costs cannot be a legitimate ground for antitrust prosecution, or else competition on the merits would be undermined rather than preserved. Instead, self-preferencing practices need to be addressed by antitrust enforcers that have the ability to tell apart proconsumer, procompetitive self-preferencing practices from potentially anticompetitive self-

preferencing practices. The “silver bullet,” as Tirole put it, is yet to be shot. In the next part, we delineate how to decipher what a rule of reason to self-preferencing would resemble.

### **Self-Preferencing as Self-Promotion**

Self-preferencing practices are divided between self-preferencing as a legitimate self-promotion tool that fosters consumers’ interests and self-preferencing as questionable exclusionary practices that may warrant antitrust scrutiny.

“Self-preferencing as self-promotion” refers to the creation by a company of a product or service on an adjacent market and the use of the primary market to promote this new product or service. Absent tying or bundling requirements, self-promotion of a product on the secondary market and the primary market constitutes a legitimate marketing mean: It fosters a new product’s adoption, thereby incentivizing its creation in the first place. It also increases consumer choice and can create competitive pressures on other providers to increase quality or reduce prices.

Irrespective of a company’s size, the self-promotion of its product on a market in which it intends to disrupt incumbents generates procompetitive, pro-innovative effects. Without technological and forced tying, self-promotion is a procompetitive leveraging practice. To illustrate, when Amazon uses Amazon Prime to self-promote its video streaming platform (i.e., Amazon Video), it legitimately promotes an adjacent product from its online department store, where it does not hold market dominance but rather challenges established video streaming incumbents. Self-promotion as a source of disruption represents competition on the merits, hence benefiting consumers.

We see the same dynamic in search platforms. When search websites identify results as self-placed, rather than as organic search results, consumers gain valuable information that helps them make the best choices. Moreover, the clear and nonconfusing labeling of search results as advertising slots does not distort competition on the merits of the organic search results. On the contrary, it may foster competition in the advertising market. Likewise, operating systems or devices come preloaded with a company’s applications, which gives consumers more choices, not fewer.

Consequently, self-promotion is conducive to procompetitive and pro-innovative effects. Accordingly, antitrust enforcement should apply a rule of reason and incentivize, rather than deter, such a self-preferencing practice.

### **Active Exclusion or Demotion**

Self-preferencing can have anticompetitive effects if it results in active exclusionary practices otherwise not justified but for anticompetitive reasons. More precisely, this takes place whenever the active exclusion takes either of these forms:

1. **Exclusion of a specifically named competitor:** When a company names a competitor and treats that competitor differently from other competitors without objective justification, the active exclusion or demotion may generate anticompetitive effects that constitute a violation of antitrust laws. Absent objective justifications such as quality standards, the active exclusion or demotion of a named competitor without similar treatment imposed to other competitors could constitute an anticompetitive practice subject to a rule of reason.

2. **Active inoperability:** When two products or services are interoperable, and a company takes active steps to render them no longer interoperable in order to exclude efficient rivals, such active steps toward lack of interoperability may constitute anticompetitive practices subject to a rule of reason. The mere inoperability of products and services without active steps by a company cannot constitute an exclusionary practice but rather only an unfortunate and inevitable development of rival technologies. Gilbert aptly wrote that “even if failure to support interoperability is not an antitrust violation, a requirement to support interoperability is a valid remedy for anticompetitive conduct.”<sup>54</sup>

These two instances are potential cases wherein the self-preferencing practice may lead to an unfair exclusionary practice dedicated to thwarting competition and innovation. Accordingly, absent procompetitive justifications, antitrust enforcement may prohibit these practices and remedy them with interoperability, nondiscriminatory proposals.

Expanding the prohibition of self-preferencing beyond these two instances may undermine competition and innovation rather than speculatively bolster them. Indeed, the fair leveraging of market power to conquer new markets and secure market positions strengthens, rather than undermines, competition.

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**To expand the prohibition of self-preferencing beyond instances of named exclusion and active inoperability may undermine competition and innovation more than it bolsters them.**

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## THE REGULATORY FRAMEWORK OF SELF-PREFERENCING

The current antitrust treatment of self-preferencing suggests excessive interventionism with the risk of creating false positives due to disregarding the procompetitive effects of self-preferencing. Indeed, antitrust enforcers have recently endorsed a more aggressive stance against the commonness of self-preferencing, especially in the digital sector, since this sector generates excessively widespread media attention.<sup>55</sup>

How does the law approach self-preferencing? Definitions of self-preferencing such as the ability of “a firm to unilaterally distort the relationships between dependent firms and customers to monopolize a market, fortify its dominance, destroy a competitor, or leverage into a new market” are not useful.<sup>56</sup> Antitrust laws do not prohibit leveraging market power, especially for nonmonopolistic advantage in adjacent, second markets. The case of *Spectrum Sports* illustrates the inadequacy of the leverage theory in light of antitrust laws. The court ruled that “[Section 2 of the Sherman Act] makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that [Section 2] might be applied to as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in ‘unfair’ or ‘predatory’ tactics.”<sup>57</sup>

The question is not whether a company leverages its market power from one market to another—a natural practice inherent, not abnormal, to the competitive process—but rather whether it will become a “monopolist” in the second market. Self-preferencing its products to challenge incumbents in a second market, irrespective of its position in the first market, enhances competitive rivalry and presumably yields considerable procompetitive effects.

To illustrate, when Google uses its search engine’s market position to enter into the market for shopping-comparison websites with Google Shopping, it intends to compete with large incumbents in the market for such websites. Thus, to prohibit such nonmonopolistic advantage in the second market as the *Google Shopping* decision did in the European Union results in the thwarting of the competitive process rather than the preservation of it.<sup>58</sup>

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All contracts “distort” the relationship between a firm and its business partners because they inherently tie some businesses together and not others. Thus, unless the prohibition of self-preferencing would become tantamount to the prohibition of every contract by any large company willing to leverage its competitive positions, self-preferencing needs a workable definition that ensures that the prohibited practices preserve rather than undermine the competitive process.

### **Self-Preferencing in European Antitrust**

In Europe, traditional antitrust enforcement has largely accepted the procompetitive effects of self-preferencing in particular, and vertical integration in general. This is because the ability to discriminate vertically is part of the competitive process rather than something that violates it. Nevertheless, two cases involving Microsoft in 2007 and 2009 signaled European enforcers and judges not being keen to review the quality of tied products to ensure that self-preferential treatments were not anticompetitive.<sup>59</sup> Also, the European Commission requested the German utility company E.ON to stop favoring its production affiliate through preferential purchases in the energy industry.<sup>60</sup>

However, more recent cases applied to digital markets reveal a more aggressive approach toward self-preferencing. Indeed, following the *Google Shopping* decision of 2017, self-preferencing as such has become, at least according to the European Commission, a separate antitrust violation.<sup>61</sup> European Commission’s vice president Margrethe Vestager’s focus on prohibiting self-preferencing mainly concerns large American tech companies such as Google and Amazon.<sup>62</sup>

The *Google Shopping* decision and the prohibition of self-preferencing it suggests are misguided for two main reasons. First, it ignores the business model from which Google competes against its rivals. The ad-funded business model requires reliance on self-promoted advertising slots on a freely accessible search engine, or else the search engine becomes financially nonviable and technological investments for its improvements may slow down. Second, the decision ignores the upstream competition. Google competes not only with downstream rivals (e.g., Yelp, Tripadvisor, etc.), but also with upstream rivals (e.g., Amazon, Alibaba, Etsy, Walmart, etc.). The EU’s decision blatantly ignores this competition taking place at the platform level.

The decision by the European Commission erroneously considers that Google Shopping is a dominant player as a “comparison shopping service.”<sup>63</sup> Thus, it does not compete with Amazon, which is a merchant platform on which users are awkwardly said not to have “recourse to the product search functionality of Amazon to compare offers from different sellers.”<sup>64</sup> Such a misleadingly, narrow definition of relevant markets to make Google Shopping look like a monopolist undermines the antitrust analysis’s accuracy in the *Google Shopping* decision.<sup>65</sup>

Furthermore, the decision, contrary to consumer experience, concludes that “there is also limited substitutability between comparison shopping services and merchant platforms, such as Amazon Marketplace, and eBay Marketplaces.”<sup>66</sup> To not consider the fact that consumers shop alternatively on Google Shopping, Amazon, eBay, or even Alibaba, thus creating competitive rivalry among those businesses, reveals the disconnect between the decision and the reality of competition. Consequently, these errors about the alleged anticompetitive effects of Google’s self-preferencing practice render the nondiscrimination requirements imposed in this decision unconvincing remedies.

The self-preferencing at stake in the *Google Shopping* decision is instrumental in exerting competitive constraints against competing platforms such as Amazon, Alibaba, and others. When self-preferencing reinforces competition, it is hard to conclude that it does not have procompetitive effects or that the anticompetitive effects are greater than its procompetitive effects. Consumers benefit from increased competition between online shopping-comparison websites and functionalities. Self-preferencing aimed at disrupting existing incumbents by new entrants (however big they are) yield procompetitive effects contrary to the findings of the *Google Shopping* decision.

Also, the European Commission opportunistically launched investigations against Amazon because Vestager wanted to “ensure that the dual role platforms with market power, such as Amazon, do not distort competition ... The conditions of competition on the Amazon platform must also be fair. Its rules should not artificially favour Amazon’s own retail offers or advantage the offers of retailers using Amazon’s logistics and delivery services.”<sup>67</sup>

To suggest that Amazon should be blind on whether its third-party sellers use its ancillary services, or else the competition on the platform is not “fair,” amounts to treating Amazon as a public utility whereby the platform cannot offer services and rebates whenever third-party sellers use those services. Ultimately, it is equivalent to a price regulation mechanism, since the price for third-party sellers to operate on the platform ought to be the same irrespective of the bundle of services these sellers use. Thus, the prohibition of any price discrimination amounts to price regulation by European antitrust officials of the Amazon platform. Here is where the prohibition of self-preferencing becomes both economically intrusive and damaging for consumers and economically unfair as online and offline rivals (e.g., Alibaba, Walmart, Etsy, Target) are not be subject to such stringent price controls.

Now the European Commission wants, only for a handful of online platforms (designated as “gatekeepers”), to make self-preferencing per se illegal. Indeed, the Digital Markets Act proposed by the European Commission in December 2020 is radical in its approach.<sup>68</sup> Gatekeepers must “refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third-party and apply fair and non-discriminatory conditions to such ranking.”<sup>69</sup> Self-preferencing would be per se illegal under the Digital Markets Act’s Article 6, just like any “discrimination” of a third party.<sup>70</sup> Therefore, this prohibition would lead the designated gatekeepers to be de facto regulated as public utilities vis-à-vis any third-party partner. Both the ability of these gatekeepers to compete and innovate will inevitably be hurt at the expense of both consumers and a fair competitive process concerning their rivals.<sup>71</sup>



## Self-Preferencing in U.S. Antitrust

In the United States, antitrust agencies have so far approached self-preferencing in a more deferential way.<sup>72</sup> For instance, the court of appeals in the *Microsoft* case rejected the view that Microsoft monopolized the market for Internet browsers because such an adjacent market to the market for personal computers did not exist. And the court considered that even though such a market could exist, Microsoft had not monopolized the browser market.<sup>73</sup> Thus, in today's language, self-preferencing cannot lead to antitrust prosecutions unless the blamed company has monopolized the second, adjacent market. Monopolization of the first, primary market does not suffice as a violation of antitrust laws.

The more-deferential treatment of U.S. antitrust toward self-preferencing is also illustrated with the treatment of search self-preferencing. Before the European Commission fined Google in 2017 for self-preferencing practices, the FTC settled a similar case in 2013.<sup>74</sup> Although the FTC investigations covered a broader array of concerns, as they revolved around an allegation of search bias that favored Google's "categories of content such as shopping or travel," the approach of the FTC toward self-preferencing dramatically differed from the EU's approach. Indeed, the FTC correctly framed the relevant question to ask when it comes to allegations of self-preferencing (here, algorithmic changes to promote one's own content and to demote rivals' content):

A key issue for the Commission was to determine whether Google changed its search results primarily to exclude actual or potential competitors and inhibit the competitive process, or on the other hand, to improve the quality of its search product and the overall user experience.... The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose.<sup>75</sup>

In other words, while Europe wanted to prohibit steps by Google to gain market share in adjacent markets as a way to protect competitors, the FTC focused on whether both the action was designed to harm its competitors and it improved the consumer experience. The FTC concluded that Google's product improvements (i.e., changes of algorithms) enhanced consumer experience and were not designed to harm competitors.

The FTC clearly grasped the main implication of the self-preferencing prohibition that rivals wanted the agency to impose on Google, including search neutrality requirements, despite the considerable intrusiveness on the proprietary product design such requirements would imply:

Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers. Reasonable minds may differ on the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features. And reasonable search algorithms may differ as to how best to rank any given website. Challenging Google's product design decisions in this case would require the Commission—or a court—to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence.<sup>76</sup>

After Google's 2013 settlement, the implicit and dystopian concept of search neutrality was dead.<sup>77</sup> However, it resurrected soon after, with a change of tone recently taking place in Neo-Brandeisian literature. For instance, Lina Khan wrote in 2018 that "if gatekeeper power gives platforms the ability to extort, leveraging power gives platforms the incentive to discriminate in favor of their goods, services, and applications over those offered by other businesses," explicitly citing the EU *Google Shopping* decision of 2017 as a source of inspiration for U.S. antitrust reforms.<sup>78</sup>

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**Unless antitrust laws turn large companies with diversified products and that operate both downstream and upstream in a public utility to avoid so-called self-preferencing or conflicts of interest, antitrust enforcement needs to adopt a reasonable approach toward self-preferencing.**

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If search neutrality is not the answer, do U.S. antitrust laws enjoin a general "neutrality" principle by a vertically integrated company concerning its downstream rivals so that it can be treated as a quasi-public utility?<sup>79</sup> Since the refusal-to-deal law does not apply to self-preferencing cases, there cannot be a duty to deal imposed on the platform. Indeed, the platform is already dealing with its downstream rivals. Consequently, antitrust enforcers cannot turn the platform into a "virtual public utility," as Herbert Hovenkamp referred to, when enforcers impose a duty to deal with companies.<sup>80</sup>

Therefore, the Neo-Brandeisian argument to unbundle platforms from commerce because of self-preferencing proves to be unconvincing. Self-preferencing is not equivalent to a refusal to deal, and the remedy for the latter cannot be imposed on the former. Thus, unless antitrust laws turn large companies with diversified products and that operate both downstream and upstream in a public utility to avoid so-called self-preferencing or conflicts of interest, U.S. antitrust enforcement needs to adopt a reasonable, moderate approach whereby a rule of the reason may tell apart the procompetitive self-preferencing from the anticompetitive self-preferencing practices.

The recent Klobuchar-Grassley bill prohibiting self-preferencing for a few companies takes direct inspiration from the European's Digital Markets Act. Unfortunately, it would generate similar unintended consequences at the expense of both consumers and fair competition.<sup>81</sup>

Any reasonable approach toward self-preferencing would apply a rule of reason to a largely procompetitive practice and would tell apart self-preferencing as a procompetitive self-promotion tool from the few instances when self-preferencing can turn into an anticompetitive, exclusionary technique. In that regard, we can draw a dividing line between self-promotion and active exclusion concerning competitive effects as self-preferencing practices.

## Box 2: The Klobuchar-Grassley Bill Prohibiting Covered Platforms From Self-Preferencing

Senators Amy Klobuchar (D-MN) and Chuck Grassley (R-IA) recently introduced the “American Innovation and Choice Online Act,” which would prohibit “covered platforms” from favoring their own products, services, or lines of business over those of other businesses in a manner that would “materially harm competition on the covered platform.”<sup>82</sup> The bill takes direct inspiration from the European Commission’s Digital Markets Act, which regulates Internet “gatekeepers.”

The few companies that the Klobuchar-Grassley bill defines as “covered platforms” would be unable to promote their own private-label products on their platforms—for instance, Amazon would be prohibited from promoting its Amazon Basics products—even if the “promotion” is the result of consumer behavior. Yet competing companies that are not deemed to be “covered platforms”—such as Walmart and Alibaba—would be free to continue promoting their respective private-label brands. When regulators treat similar rivals dissimilarly like this, they skew playing fields rather than promoting fair competition.

The bill also prohibits the platforms from unfairly limiting third-party sellers’ products, services, or lines of business from competing with the covered platform operator’s own offerings “in a manner that would materially harm competition on the covered platform.” Therefore, any disadvantage for third-party sellers caused by the platform’s choices or innovations would be prohibited. For instance, the Klobuchar-Grassley bill would preclude Apple from preinstalling a free app on iPhones if consumers used to pay for it, because it would inevitably “limit the ability of another business user’s products, services, or lines of business to compete” on the App store.

Like the European Commission’s Digital Markets Act, the Klobuchar-Grassley bill defines “covered platforms” in a way that subjects just a few very large online platforms to regulation. For instance, Section 4(B) defines “covered platforms” as online platforms having at least 50 million U.S.-based monthly active users, or at least 100,000 U.S.-based monthly active business users. Covered platforms also must be online platforms owned or controlled by an entity with U.S. net annual sales or a market capitalization greater than \$550 billion. The last requirement to meet the definition is that online platforms must be a “critical trading partner”—which is defined as “a person that has the ability to restrict or materially impede the access of (A) a business user to its users or customers; or (B) a business user to a tool or service that it needs to effectively serve its users or customers.”

This narrow designation of “covered platforms” follows a very static approach to competition, targeting large U.S. tech platforms according to a “big is bad” rationale, which would have the unintended consequence of harming small businesses operating in these digital ecosystems, and harming consumers by making fewer products and services available at greater cost. The bill would distort competition, since it would only apply to large U.S. tech platforms and explicitly exempt both foreign rivals such as Alibaba and TikTok, and domestic offline incumbents such as Walmart and Target. Overall, it would allow traditional suppliers to enjoy more profitable businesses at consumers’ expense by removing the competitive constraints and pressure to innovate that online platforms exert.

## CONCLUSION

The United States faces a critical turning point when it comes to antitrust law. It can continue the current system wherein it generally allows companies, even those with considerable market share, to self-preference (while not allowing active degradation of competitors), or it can go down the EU path that seeks to protect businesses, especially small firms, from competition, even if the result is a degraded consumer experience. A general, per se prohibition of self-preferencing, as proposed in the European Commission's Digital Markets Act, would generate considerable costs and unintended consequences. Accordingly, the United States should refrain from instituting such an approach with bills such as the Klobuchar-Grassley bill and its House counterpart (Customer Non-Discrimination Act / Equality Act). Indeed, antitrust bills that aim to prohibit self-preferencing without thoughtful analysis and only for a handful of companies will likely do more harm than good. They are likely to undermine rather than strengthen competition on the merits and make consumers' experiences worse.<sup>83</sup>

One cannot overstate the implications of the radical choice of prohibiting procompetitive self-preferencing. Unfortunately, several forces in the U.S. government seek to go down the EU path: some progressive Democrats because they despise large corporations and want a fundamentally restructured economy; some Republicans because they have let their anger toward social media sites purportedly being biased against conservative speech influence their views on antitrust; and many other elected officials simply because there is so much generated noise about the problems of "big tech."

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**A general, per se prohibition of self-preferencing, as proposed in the European Commission's Digital Markets Act, would generate considerable costs and unintended consequences. Therefore, the United States should refrain from importing such approaches with bills such as Klobuchar and Grassley's.**

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Policymakers need to tread carefully in this matter because going down the road of severely limiting self-preferencing would mean going down a road that will be hard to return from. This is a road that prioritizes protecting economic redistribution over economic growth; a road that protects some business interests over consumer interests. Finally, such a road would give carte blanche power to the government to hamper the U.S. innovation economy to benefit foreign competitors.

Today's antitrust enforcers and lawmakers need to refrain from prohibiting the historically beneficial practice of self-preferencing. Indeed, imagine if antitrust officials in the 1930s and 1940s succumbed to the generated controversy over the so-called "chain store wars." American consumers would not have benefitted from the low prices and abundance created by the rise of supermarkets and department stores. The race to efficiency led chain stores to pass on benefits to consumers at the expense of inefficient, small, less-innovative shops. To prohibit online a revolution that benefits users could only harm American consumers for the sake of protecting rent-seeking competitors willing to get through the law what they cannot get from the market. Anyone who cares about American living standards and consumer welfare should vociferously oppose such a vision that slows down competition and innovation through the prohibition of self-preferencing initially and the breakup of companies subsequently. This Neo-Brandeisian perspective jettisons American competitiveness and innovation.<sup>84</sup>

They can start by differentiating between self-preferencing and rival exclusion and commit to seeing the former as a procompetitive, proconsumer business practice that helps companies diversify their portfolios, enter new markets, challenge incumbents, and disseminate innovation through a process of imitation and disruption, which unequivocally benefits consumers. In addition, self-preferencing often is a substitute for marketing expenses, so prohibiting self-preferencing would squelch these procompetitive and pro-innovative effects.

Consequently, antitrust officials are well advised to focus on exclusionary practices only and not undermine the procompetitive effects of self-preferencing, or else the distortion of the competitive process may chill innovation at the expense of consumer benefits.

## About the Author

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## ENDNOTES

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  23. The economic rationale for vertical integration has seminally been provided by Ronald H. Coase, *The Nature of the Firm*, *Economica*, Vol.4 (16) (1937): 386–405, <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-0335.1937.tb00002.x> (where Coase explains the nature of the firm by scrutinizing on “why one integrating force (the entrepreneur) should be substituted for another integrating force (the price mechanism).”).
  24. Chiara Fumagalli, Massimo Motta, and Claudio Calcagno, *Exclusionary Practices. The Economics of Monopolisation and Abuse of Dominance*, (New York: Cambridge University Press, 2018), 467.
  25. Daniel D. Sokol, “The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason, and Per Se Illegality,” *Antitrust Law Journal*, Vol.79 (2014): 1003–1016, <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1561&context=facultypub>.
  26. Robert H. Bork, “Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception,” *University of Chicago Law Review*, Vol.22 (1954): 157–201, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2870&context=uclrev> (arguing, “A comparison of the law and the economics of vertical integration makes it clear that the two bear little resemblance. If the law in this area is to be concerned with the kind of competition with which economists are familiar, the concept of vertical integration will have to be abandoned as an analytical tool.”).
  27. Aurelien Portuese, “The Antitrust Prohibition of Favoritism, or the Imposition of Corporate Selflessness,” *Truthonthemarket.com*, December 16, 2020, <https://truthonthemarket.com/2020/12/16/the-antitrust-prohibition-of-favoritism-or-the-imposition-of-corporate-selflessness/> (arguing, “Self-preferencing is to listings what the default setting is to operating systems. They both are ways to market one’s own products (i.e., alternative to marketing toward end-consumers).”).
  28. Private Label Manufacturers, *2021 International Private Label Yearbook* (2021), <https://www.plmainternational.com/industry-news/private-label-today>.

29. On the growth-enhancing effects of imitation as innovation driver, see Philippe Aghion et al., “Competition, Imitation and Growth with Step-by-Step Innovation,” *Review of Economic Studies*, Vol.68, (2001): 467–492, <https://www.jstor.org/stable/2695893> (where the authors find that “a little imitation is almost always growth-enhancing”).
30. Private Label Manufacturers, 2021 International Private Label Yearbook (2021), <https://plma.com/sites/default/files/files/2021-05/plma2021yearbook2.pdf> and <https://www.plmainternational.com/industry-news/private-label-today>.
31. Gizem Hökelekli, Lien Lamey, and Frank Verboven, “Private Label Line Proliferation and Private Label Tier Pricing: A New Dimension of Competition Between Private Labels and National Brands,” *Journal of Retailing and Consumer Services*, Vol.36 (2017): 39–52, <https://www.sciencedirect.com/science/article/abs/pii/S0969698916302806>; Tolga Akcura, Ian Clark Sinapuelas, and Hui-Ming Deanna Wang, “Effects of Multiplier Private Labels on Marketing National Brands,” *Journal of Product & Brand Management* (2019), <https://doi.org/10.1108/JPBM-10-2017-1623>; Magnus Hultman et al., “Private Label Competition: The Perspective of Swedish Branded Good Manufacturers,” *Management Research News*, Vol.31(2), (2008), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.847.4910&rep=rep1&type=pdf>; Sanjeevni Gangwani, Meenu Mathur, and Sana Shahab, “Influence of consumer perceptions of private label brands on store loyalty—evidence from Indian retailing,” *Cogent Business & Management*, Vol.7 (2020): 1–19, <https://www.tandfonline.com/doi/pdf/10.1080/23311975.2020.1751905> (demonstrating that “retailers wishing to boost loyalty to their store should formulate appropriate private label brand strategies so as to solicit favourable perceptions towards their store’s private label offerings.”); Stephen J. Hock and Shumeet Banerji, “When Do Private Labels Succeed?” *MIT Sloan Management Review*, Summer 1993, <https://sloanreview.mit.edu/article/when-do-private-labels-succeed/>.
32. See for instance, Cristiana Calvo Porral and Mark F. Lang, “Private Labels. The Role of manufacturer identification, brand loyalty and image on purchase intention,” *British Food Journal*, Vol.117 (2015), <https://www.emerald.com/insight/content/doi/10.1108/BFJ-06-2014-0216/full/html>.
33. Robert D. Atkinson and Michael Lind, *Big Is Beautiful: Debunking the Myth of Small Business*, (Cambridge, MA: MIT Press, 2018): 170–171.
34. Federal Trade Commission, “Chain Stores. Chin-Store Private Brands,” xiii, September 26, 1932, No 142, [https://books.google.co.uk/books?id=CbzRjSQphzEC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.co.uk/books?id=CbzRjSQphzEC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).
35. Robert D. Atkinson and Michael Lind, *Big Is Beautiful: Debunking the Myth of Small Business*, (Cambridge, MA: MIT Press, 2018): 170–171.
36. Roger D. Blair and Yoram C. Peles, “Private Brands and Antitrust Policy,” *UCLA Law Review*, Vol.25 (1977): 46–69, <https://heinonline.org/HOL/P?h=hein.journals/uclalr25&i=62>.
37. Ariel Ezrachi, “Unchallenged Market Power? The Tale of Supermarkets, Private Labels, and Competition Law,” *World Competition*, Vol.33(2), (2010): 257–274, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1524718](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524718).
38. For instance, in the U.S., the year 2020 saw an 11.6 percent increase of consumption of private labels’ products in proportion of the retail market. See Private Label Manufacturers, 2021 International Private Label Yearbook (2021), <https://www.plmainternational.com/industry-news/private-label-today>.
39. Aurelien Portuese, “European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust,” *Global Antitrust Institute’s Report on the Digital Economy*, 597–651, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733715](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733715) (arguing at 607–608 that the European Commission’s theory of harm in this self-preferencing decision was “elusive and unconvincing.”).

40. Tanay Jaipuria, Private Labels and Antitrust, June 14, 2021, <https://tanay.substack.com/p/private-labels-and-antitrust>.
41. See, for instance, *Southern Card & Novelty, v. Lawson Mardon Label*, 138 F.3d 869 (11th Cir. 1998).
42. See, specifically for tying, *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) (where the court carved out an exception for the goodwill defense of the procompetitive effects of tying) departing from *Times-Picayune Publ'g. Co. v. United States*, 345 U.S. 594 (1953). More generally, any vertical price and nonprice restraints were made unlawful per se irrespective of the procompetitive effects of such restraints. See for instance *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) overruled by *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) overruled by *Cont'l T.V. v. GTE Sylvania, Inc.*, 433 U.S. 366 (1977); *Times-Picayune Publ'g. Co. v. United States*, 345 U.S. 594 (1953); *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984) (dicta reaffirming per se tying rule).
43. *Jefferson Parish Hosp. Dist. No2 v. Hyde*, 466 U.S. 2 (1984) (where the courts stated at 466 that "Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.").
44. See, for instance, Herbert Hovenkamp, *Principles of Antitrust*. 2nd Edition, (St. Paul: Minnesota, West Academic Publishing, 2021): 422 (who notes that "the antitrust world would be a much better place if tis per se rule were jettisoned and tying practices subjected to rule of reason treatment. Tying is not even arguably in the category of highly suspicious restraints for which the per se rule is reserved."); See also Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation" (ITIF, June 2021), <https://itif.org/publications/2021/06/14/principles-dynamic-antitrust-competing-through-innovation> ("The rule of reason must be generalized and applied in antitrust cases to comply with both rule of law principles and in-depth legal and economic analysis.").
45. For an early treatment of tying, see Ward Bowman, "Tying Arrangements and the Leverage Problem," *Yale Law Journal*, Vol.64 (1957): 19–36, [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5242&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5242&context=fss_papers); See also Keith N. Hylton and Michael Salinger, "Tying Law and Policy: A Decision-Theoretic Approach," *Antitrust Law Journal*, Vol.69 (2001): 469–529, <https://www.jstor.org/stable/40843526>.
46. Phillip Areeda and Donald F. Turner, *Antitrust Law: An Analysis Of Antitrust Principles And Their Application*, (NY, Little Brown Company: 1978): 198.
47. See, on the antitrust exemption of "single products," *Automatic Radio Mfg. Co. v Ford Motor Co.*, 242 F. Supp. 852; 857 (D. Mass. 1965) (rejecting argument that Ford dashboards and car radios were separate products); *Montgomery County Association of Realtors, Inc. v. Realty Photo Master Corp.*, 993 F. 2d 1538 (Table), 1993-1 Trade Cases (CCH) P70, 239, 1993 WL 169046 (4th Cir., May 20, 1993) (holding that real estate specification and picture of house constitute a single product); *Falkner Advertising Assoc., Inc. v Nissan Motor Corp. in U.S.A*, 905 F.2d 769 (1990).
48. Chiara Fumagalli, Massimo Motta, and Claudio Calcagno, *Exclusionary Practices. The Economics of Monopolisation and Abuse of Dominance*, (New York: Cambridge University Press, 2018), 273–312.
49. Pablo Ibanez Colomo, "Self-Preferencing: Yet Another Epithet in Need of Limiting Principles," *World Competition*, Vol.43(4) (2020): 417–446, <https://kluwerlawonline.com/journalIssue/World+Competition/43.4/19601>.
50. This theory can be traced back to Aaron Director and Edward H. Levi, "Law and the Future: Trade Regulation," *Northwestern University Law Review*, Vol.51 (1956): 281–296, [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5416&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5416&context=journal_articles) ("Its monopoly over the supplies is not increased through its monopoly over the outlets, unless it can be said that the restrictions on the outlets impose greater costs on potential competitors than they do

- on the monopoly company itself.”); See also Thomas G. Kattenmaker and Steven C. Salop, “Anticompetitive Exclusion: Raising’s Rivals’ Costs to Achieve Power over Price,” *The Yale Law Journal*, Vol.92 (2), (1986): 209–293, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7043&context=yjlj> (who advocate for a “two-step analysis to estimate the likelihood of anticompetitive effects. First, one should ask whether the conduct of the challenged firm unavoidably and significantly increases the costs of its competitors. If so, one then should ask whether raising rivals’ costs enables the excluding firm to exercise monopoly power—that is, to raise its price above the competitive level. In other words, we inquire into injury to competition as well as injury to competitors.”).
51. Herbert Hovenkamp, *Principles of Antitrust*. 2nd Edition, (St Paul, MN: West Academic Publishing, 2017), 313 (adding that “only few judicial decisions have explicitly invoked the literature on RRC in condemning alleged monopolization.”).
  52. David T. Scheffman and Richard S. Higgins, “Twenty Years of Raising Rivals’ Costs: History, Assessment, and Future,” *George Mason Law Review*, Vol.12 (2003): 371–387, [http://www.georgemasonlawreview.org/wp-content/uploads/2014/03/12-2\\_Scheffman-Higgins.pdf](http://www.georgemasonlawreview.org/wp-content/uploads/2014/03/12-2_Scheffman-Higgins.pdf) (noting that “a fair assessment of the debate has been that for most of the cases they discuss, the Krattenmaker and Salop’s interpretations are not proved.... Many commentators have been very skeptical about the viability of RRC-type cases.”).
  53. *Ibid.*, 378.
  54. Richard J. Gilbert, *Innovation Matters. Competition Policy for the High-Technology Economy*, (Cambridge, MA:MIT Press, 2020), 180.
  55. Pablo Ibanez Colomo, “Self-Preferencing: Yet Another Epithet in Need of Limiting Principles,” *World Competition*, Vol.43(4) (2020): 417–446, <https://kluwerlawonline.com/journalIssue/World+Competition/43.4/19601> (“pending self-preferencing cases suggest that there is a tendency by stakeholders to set a lower threshold and equate a competitive disadvantage with anticompetitive effects and by suggesting that the plausibility of harm suffices to establish a prohibition.”).
  56. Daniel A. Hanley, “How Self-Preferencing Can Violate Section 2 of The Sherman Act,” *CPI Antitrust Chronicle*, June 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3868896](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868896).
  57. *Spectrum Sports v McQuillan*, 506 U.S. 447, 459, 113 S. Ct. 884, 892 (1993), on remand, 23 F. 3d 1531 (9th Cir. 1994), confirmed in *Verizon Communications Inc. v. Law Office of Curtis V Trinko, LLP*, 540 U.S. 398, 414, 124 S. Ct. 572 , 883 n.4 (2004) (where the Court stated, “The Court of Appeals also thought that respondent’s complaint might state a claim under a ‘monopoly leveraging’ theory ... We disagree. To the extent that Court of Appeals dispenses with a requirement that there be a ‘dangerous probability of success’ in monopolizing a second market, it erred.”).
  58. Case AT.39740, Google Search (Shopping), June 27, 2017, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf); See also Aurelien Portuese, “When Demotion is Competition: Algorithmic Antitrust Illustrated,” *Concurrences*, N°2-2018, 26-2, [https://www.concurrences.com/IMG/pdf/03.concurrences\\_2-2018\\_on-topic\\_google\\_shopping.pdf](https://www.concurrences.com/IMG/pdf/03.concurrences_2-2018_on-topic_google_shopping.pdf).
  59. See Microsoft I — Microsoft (Case COMP/C-3/37.792) Commission Decision of 24 May 2004, paras 947–951; and Case T-201/04 Microsoft Corp v Commission, EU:T:2007:289 (hereinafter, ‘Microsoft I’), para 1038 — and Microsoft II — Microsoft (tying) (Case COMP/C-3/39.530) Commission Decision of 16 December 2009 (hereinafter, ‘Microsoft II’), para 40.
  60. Commission Decision, COM/39.388, German Electricity Wholesale Market (E.ON), November 26, 2008.
  61. Case AT.39740, Google Search (Shopping), June 27, 2017, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf); See also Aurelien Portuese, “When Demotion is Competition: Algorithmic Antitrust Illustrated,” *Concurrences*,

- N°2-2018, 26-2, [https://www.concurrences.com/IMG/pdf/03.concurrences\\_2-2018\\_on-topic\\_google\\_shopping.pdf](https://www.concurrences.com/IMG/pdf/03.concurrences_2-2018_on-topic_google_shopping.pdf) (noting that “complete search neutrality with Google giving ‘equal treatment’ with absent algorithm-manipulated search results as requested by the Commission decision would resemble... Yellow Pages listings!”); See also Aurelien Portuese, “Fine is Only One Click Away,” *European Competition and Regulatory Review*, (2017): 1–6, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3003953](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3003953) (arguing, “Considering Google’s search engine as an essential facility is both economically wrong and competitively flawed.”).
62. Silvia Amaro, “EU’s Vestager hints Big Tech will have to end ‘self-preferencing’ under new competition rules,” *CNBC*, December 4, 2020, <https://www.cnbc.com/2020/12/04/eu-vestager-hints-big-tech-will-have-to-end-self-preferencing.html> (about the prohibition of self-preferencing in the proposed Digital Markets Act).
  63. Case AT.39740, *Google Search (Shopping)*, June 27, 2017, para.216, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).
  64. *Ibid.*
  65. Nicolas Petit, “EU engaged in antitrust gerrymandering against Google,” *The Hill*, July 31, 2018, <https://thehill.com/opinion/technology/399742-eu-engaged-in-antitrust-gerrymandering-against-google> (regarding the other Google Android decision where relevant markets were defined also excessively narrowly).
  66. Case AT.39740, *Google Search (Shopping)*, June 27, 2017, para.216, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).
  67. European Commission, “Antitrust: Commission sends Statement of Objection to Amazon for the use of non-public independent seller data and opens second investigations into its e-commerce business practices,” November 10, 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077) (also noting that “the Commission will investigate whether the criteria that Amazon sets to select the winner of the ‘Buy Box’ and to enable sellers to offer products to Prime users, under Amazon’s Prime loyalty programme, lead to preferential treatment of Amazon’s retail business or of the sellers that use Amazon’s logistics and delivery services.”).
  68. Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>; See Aurelien Portuese, “The Digital Markets Act: European Precautionary Antitrust” (ITIF, May 2021), <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>; Aurelien Portuese, “The Digital Markets Act: Precaution over Innovation,” *Epicenter*, June 1, 2021, <http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf>.
  69. Article 6(d) of the Digital Markets Act.
  70. Frederic Marty, “Competition and Regulatory Challenges in Digital Markets: How to Tackle the Issue of Self-Preferencing?” GREDEG Working Paper Series No 2021-20, 17, <http://www.gredeg.cnrs.fr/Working-Papers/GREDEG-WP-2021-20.pdf> (“the logic behind Article 6 of the DMA is that of a general prohibition against discrimination affecting third parties. The panel [of economic experts] therefore proposes to place self-preferencing on the list of blacklisted practices and thus to prohibit it per se.”).
  71. Aurelien Portuese, “The Digital Markets Act: European Precautionary Antitrust” (ITIF, May 2021), <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>; Aurelien Portuese, “The Digital Markets Act: Precaution over Innovation,” *Epicenter*, June 1, 2021, <http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf>.
  72. See, for instance, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (“So long as we allow a firm to compete in several fields, we must expect it to seek the competitive



- advantages of its broad-based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.”); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 373, 375-76 (7th Cir. 1986) (holding that the sole provider of telex services did not violate section 2 of the Sherman Act when it told its sales staff to stop showing a list of outside vendors to its subscribers and adjusted its commissions to encourage them to sell more of the firm's own terminals).
73. *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C.Cir. 2001).
  74. Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc., FTC File number 111-0163; January 3, 2013, [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf).
  75. *Ibid.*
  76. *Ibid.*
  77. Daniel A. Crane, “After Search Neutrality: Drawing a Line Between Promotion and Demotion,” *Journal of Law and Policy for the Information Society*, Vol.9 (2014): 397–406, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1925&context=articles> (“Search neutrality was stillborn as a principle of U.S. antitrust law on January 3, 2013. That search neutrality as a broad principle has failed in the United States does not mean that Google (or, in the future, other dominant search engines) are free from antitrust scrutiny for the design and management of their search engines.”); Daniel A. Crane, “Search Neutrality as an Antitrust Principle,” *George Mason Law Review*, Vol.19 (2012): 1199–1209, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1126&context=articles> (“Whatever the merits of the net neutrality argument, a general principle of search neutrality would pose a serious threat to the organic growth of Internet search.”).
  78. Lina M. Khan, “Sources of Tech Platform Power,” *Georgetown Law Technology Review*, Vol.2 (2018): 325–334, 329, <https://georgetownlawtechreview.org/sources-of-tech-platform-power/GLTR-07-2018/> (“common carriage has been a traditional tool for maintaining the benefits of network monopoly while preventing the private firms who manage this monopoly from exploiting their power. Mandating nondiscriminatory access in the form of common carriage has also been applied to inns, ports, stockyards, and grain elevators, to name a few.”).
  79. See, for instance, Marina Lao, “Search, Essential Facilities, and the Antitrust Duty to Deal,” *Northwestern Journal of Technology and Intellectual Property*, Vol.11(5), (2013): 275–320, [https://www.law.northwestern.edu/research-faculty/clbe/events/Internet/documents/lao\\_search\\_nwjotip.pdf](https://www.law.northwestern.edu/research-faculty/clbe/events/Internet/documents/lao_search_nwjotip.pdf) (“Seeking the competitive advantages inherent in vertical integration—which is what preferential treatment of one's own property in search results is about—is usually not unlawful under antitrust law. The core issue that I will address in this article is whether the antitrust duty to deal and the essential facilities doctrine, nevertheless, provide an antitrust basis for prohibiting this practice, as some have suggested. I conclude that they do not.”).
  80. Herbert Hovenkamp, *Principles of Antitrust*, 2nd Edition, (St. Paul: Minnesota, West Academic Publishing, 2021): 288 (who adds that “antitrust, it should be recalled, is designed to be a market alternative to price regulation, not merely price regulation by another name.”).
  81. Amy Klobuchar, “Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech,” October 14, 2021, <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=3AD365BE-A67E-40BB-908A-C8570FF29600>.
  82. American Innovation and Choice Online Act of 2021, S.2992, 117th Cong. (2021). The House companion bill is American Choice and Innovation Online Act of 2021, H.R. 3816, 117th Cong. (2021).

83. Aurelien Portuese, “The House’s Antitrust Legislative Package: An Innovation Perspective” (ITIF August 2021), <https://itif.org/publications/2021/08/02/houses-antitrust-legislative-package-innovation-perspective>.
84. Robert D. Atkinson, “Antitrust Can Hurt U.S. Competitiveness,” *The Wall Street Journal*, July 5, 2021, <https://www.wsj.com/articles/antitrust-can-hurt-u-s-competitiveness-11625520340> (“the U.S. is grappling with two contradictory goals: competing with China in advanced technology industries and ramping up antitrust enforcement against leading U.S. tech companies.”).