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Webinar Recap: Self-preferencing - Is tech different than brick and mortar?

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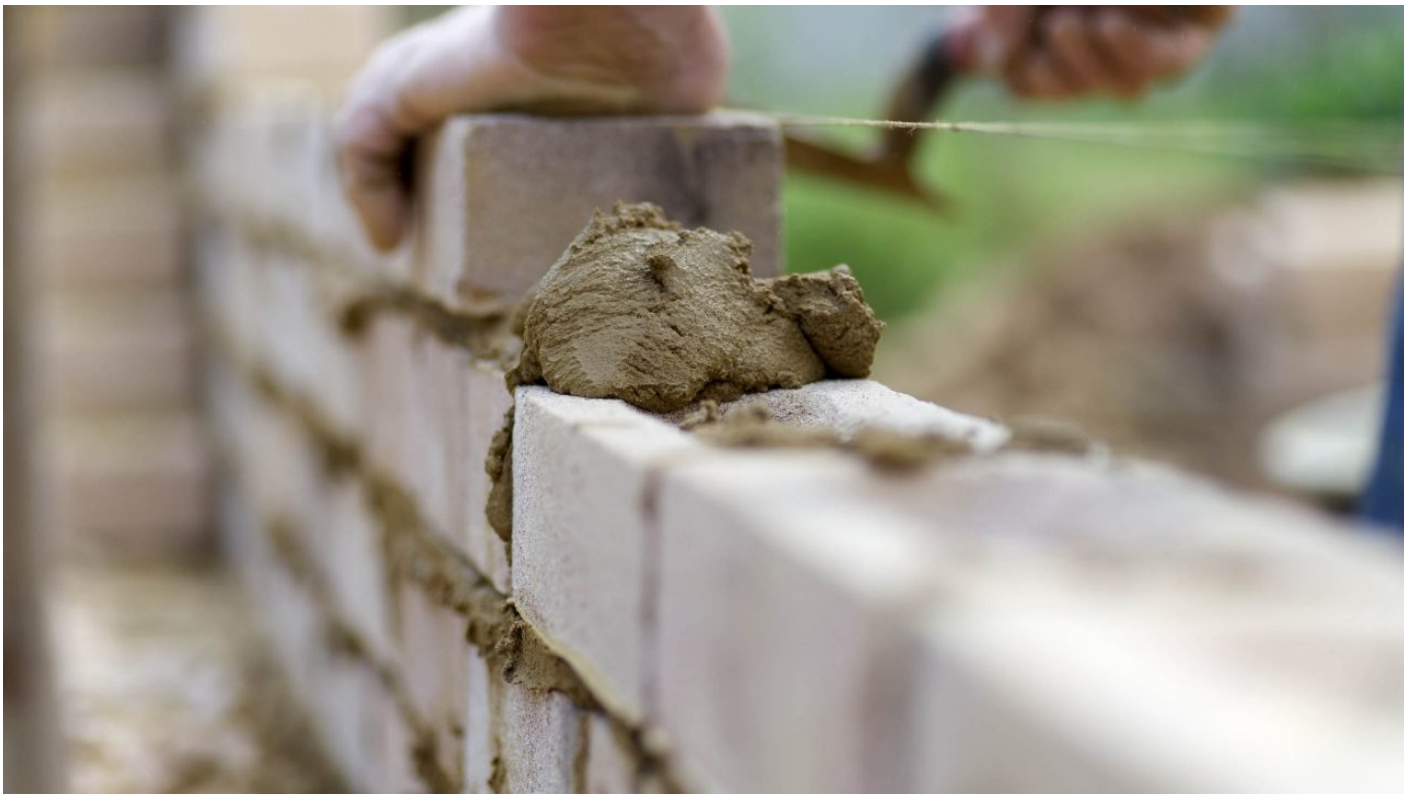

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Digital platforms often operate in what economists call “dual mode,” both operating a digital marketplace and selling their own products in that marketplace. (1) As this practice has become more common over the last few years, regulators and lawmakers in the US and abroad have become increasingly concerned that these platforms engage in self-preferencing strategies, using their positions to favor their own products over those of competitors on their platforms.

On February 9, 2023, the ABA Antitrust Law Section's Media and Technology, Pricing Conduct, and State Enforcement Committees hosted a webinar titled "Self-preferencing: Is tech different than brick-and-mortar?" The webinar explored allegations of self-preferencing, the reasons such allegations have become more common in the context of digital platforms, and the possible impacts of proposed regulations aimed to curb self-preferencing behaviors on consumers and competition. The webinar was moderated by Juliette Caminade (Analysis Group), with panelists Kevin Adam (White & Case), Adam Gitlin (Office of the Attorney General for the District of Columbia), and Christopher Knittel (Massachusetts Institute of Technology).

The panelists discussed the current regulatory landscape of self-preferencing, some of the main reasons that self-preferencing by digital platforms has raised antitrust concerns, and the potential effects of those regulations.

Overview of Self-Preferencing Behaviors

Dr. Caminade first noted that self-preferencing is an umbrella term that covers a host of different behaviors and discussed three common types of these behaviors that have raised regulatory concerns:

- Self-preferencing data usage: When digital platforms introduce new products, it is sometimes alleged that they do so based on some of the data gathered from a given marketplace. Those new products then compete with those of third-party sellers on the platform. Dr. Caminade pointed out that one example of these allegations are those levied against Amazon in the US and Europe, accusing the company of introducing products under its private label based on marketplace data from interactions between buyers and third-party sellers. [2]

- Self-preferencing in ranking and display: These allegations involve digital platforms rank or display their own products more prominently than those of third-party sellers in search results, for example. Dr. Caminade cited the European Commission's 2017 fine levied against Google for this type of behavior in search results on Google Shopping. [3]

- Self-preferencing platform fees: These allegations target platforms charging different fees for third-party products compared to those offered by the platforms. For instance, Spotify filed a complaint with the European Commission in 2019 that Apple was charging third-party developers a commission that it was not charging its own music app. [4]

Overview of the regulatory landscape of self-preferencing

Mr. Adam kicked off the conversation by providing an overview of regulations targeting self-preferencing in the US and Europe. In the US, the Open App Markets Act [5], a proposed bill designed to regulate mobile apps, and the American Innovation and Choice Online Act (AICOA), [6] a proposed bill aimed to regulate large technology companies, are both being revisited after failing to pass last year, despite some degree of bipartisan support. The AICOA would prohibit certain self-preferencing practices, such as conditioning access to a platform on purchases of the platform's other services, ranking a platform's own products more favorably, and self-preferencing data usage. However, Mr. Adam noted, the AICOA only applies to technology companies of a certain size, requirements, such that it would essentially only apply to the very few largest technology companies.

Separately, the EU's Digital Markets Act (DMA) [7] passed last year, and regulations associated with it will begin to be applied in May. The DMA, similar to the AICOA, prohibits self-preferencing practices like ranking a platform's own products or services higher, using nonpublic data generated by a platform, and requiring use of a platform's payment services. Mr. Adam noted that the UK and Germany have also made additional efforts to address self-preferencing. The UK recently established the Digital Markets Unit, [8] which is expected to soon require large tech companies to comply with regulations that restrict self-preferencing practices. Germany revised its competition rules in 2021 [9] to prohibit large tech companies from presenting their own products or services more favorably than those of third parties on the platform.

Mr. Adam continued by noting that so-called self-preferencing is not a new behavior, nor is it a behavior exclusive to digital platforms. For instance, grocery stores sell their own private label products, and cable networks often give the most favorable advertisement spots to their own ads. Mr. Adam noted that US courts have yet to define what behavior constitutes self-preferencing, and that these practices seem to fall outside of the threshold of behaviors that courts have established as unlawful under established antitrust principles. Mr. Adam opined that US courts' rule of reason analysis for violations of Section 2 of the Sherman Act is already equipped to deal with alleged self-preferencing, even though he does not consider self-preferencing behaviors a Section 2 violation. This is because Section 2 violations typically require a demonstration of monopoly power, but discussions about self-preferencing by digital platforms have proceeded without regard to market power. Further, self-preferencing typically does not result in foreclosure, a key characteristic of almost all other established anticompetitive practices. Mr. Adam additionally noted that US antitrust laws do not obligate entities to treat all competitors equally, and that there has been no showing that self-preferencing harms consumers thus far.

Mr. Gitlin responded that US case law does, in fact, make it clear that self-preferencing practices could violate Sections 1 and 2 of the Sherman Act. For example, in 2001, the D.C.

Circuit decided not to allow Microsoft to prohibit computer manufacturers from excluding Internet Explorer or to provide tools to software vendors that were only usable with Windows and not Java. [10] Mr. Gitlin noted that while others may opine that the *Trinko* [11] and *LinkLine* [12] cases support the notion that self-preferencing is always permissible because entities have no obligation to help their competitors, this interpretation may be incorrect, as both cases occurred in heavily regulated industries and were addressing compulsory relationships created by statute. Mr. Gitlin pointed out that the Supreme Court indicated that plaintiffs could still make viable cases, despite *Trinko*, in its decision not to review the Seventh Circuit's 2020 *Comcast v. Viamedia* decision. [13]

Finally, Mr. Gitlin emphasized the concern that potential plaintiffs are not bringing self-preferencing cases in the US because they do not want to risk their business partnerships with big tech firms and because they feel it would be too difficult to make showings that meet rule of reason requirements. Therefore, he said, some in Congress may be attempting to address these concerns with legislation that may make self-preferencing closer to a strict liability violation of US antitrust laws.

Prof. Knittel closed this discussion by sharing that, from an economist's perspective, self-preferencing may be either pro-competitive or anticompetitive, depending on the context. Consequently, self-preferencing regulations adopted in contexts where the practices are pro-competitive and benefit consumers could end up harming both consumers and platforms.

Is Tech Different than Brick-and-Mortar? Why or why not?

The conversation then transitioned to a comparison of self-preferencing by digital platforms and traditional brick-and-mortar companies. Prof. Knittel first noted that private labels have long existed and companies, such as Costco, rely on data from transactions involving third-party products to design and introduce their own products. Therefore, the critical question is what makes digital platforms different from traditional industries. Prof. Knittel suggested that the focus should be on whether these platforms have an incentive to behave anticompetitively, and proposed one potential measure of this incentive: the share of a company's profits originating from operating its platform compared to the share of profits originating from the sales of its own products.

Mr. Gitlin then proposed three differentiating features of digital platforms that may help explain the increased regulatory focus on their self-preferencing behaviors. First, some have argued that these platforms play an essential role as hubs of communication and

information and, similar to major telecommunication networks in the past, are industries with high entry costs. As a result, digital platforms should be considered essential utilities, and, as such, act as neutral arbiters. Second, the extent of data to which digital platforms have access and the information that can be ascertained from that data about consumers and their spending habits, may be much larger than the data available to traditional brick-and-mortar stores. Third, the algorithms digital platforms use to rank products and services are opaque and could be leveraged by platforms to increase their own market power. In addition, platforms' algorithms are proprietary and may raise additional barriers of entry in digital markets, further increasing the platforms' market power.

Mr. Adam and Prof. Knittel noted that there may be unintended consequences if digital platforms were required to act as neutral arbiters, as is the case for certain essential utilities. For example, Mr. Adam pointed out that while digital platforms tend to be quite innovative, many essential utilities operate in industries characterized by low levels of innovation. Similarly, Prof. Knittel flagged that digital platforms offer highly differentiated products while essential utilities, such as water, electricity, or gas, offer homogenous products. Therefore, treating digital platforms similarly to traditional utilities may reduce incentives to innovate and generate product diversity.

In addition, Mr. Adam noted that the key question regulators should answer is whether the resulting landscape would actually be more competitive, with lower prices and better products. Given the complexity of digital ecosystems, it is possible that consumers may not be better off if platforms are required to act as neutral arbiters, especially if platforms decide to adjust their business models in response to new legislation. This complexity may help explain courts' reluctance to second guess these companies' decisions.

Mr. Gitlin recognized the validity of these concerns and agreed with the importance of preserving digital platforms' incentives to innovate in any proposed legislation. However, Mr. Gitlin also pointed out that digital platforms have become dominant players in their markets, and self-preferencing is another tool they can leverage to maintain their dominant market positions. In addition, Mr. Gitlin noted that these platforms have demonstrated the ability to adjust their behaviors when faced with changes in the regulatory landscape in the past. Therefore, to the extent that self-preferencing legislation could reduce incumbents' hold on a market and increase choices for consumers, these regulatory changes may benefit consumers without compromising innovation incentives.

Prof. Knittel closed this discussion by noting a key feature of digital platforms: in most cases, the main source of revenue for an onlinemarketplace stems from the interactions between sellers and buyers on its platform, as opposed to the sales of their own products. If that's the case, online marketplaces would not engage in self-preferencing behaviors if such conduct would make its platform less valuable to consumers, as reducing the value of the platform

itself would benefit competing and new entrant platforms. Thus, it is possible that platforms self-preference because consumers prefer the platforms' products compared to those of third-party sellers. For example, a recent economics paper shows that Amazon consumers are worse off when products are displayed randomly, as opposed to displayed based on Amazon's algorithm. (14) However, Prof. Knittel noted that more research is necessary to understand the impact of regulating self-preferencing behaviors by digital platforms.

Potential Impact of Proposed Regulations

The panelists concluded the conversation by discussing the effect of proposed regulations. Mr. Adam expressed concern that the AICOA defines the platforms it regulates by size, instead of by market power, in a properly defined market. The AICOA would, therefore, regulate tech companies, even if they lack market power and are unable to influence pricing or exclude competition, in a way that would harm competition. He argued that a law that only targets specific companies – rather than practices which actually cause harmful effects – suggests that self-preferencing is not anticompetitive in and of itself. Rather, the AICOA and related bills appear to be way for the US legislature to "look tough" on big tech. Mr. Adam also observed that some of the language used in the AICOA (such as "preference," "unreasonably delay," "impede," and "materially harm competition"), is not well defined and could pose interpretation challenges for courts and may lead to inconsistent case law.

Prof. Knittel's primary concern was the risk of establishing regulations without conducting sufficient research on the effect of self-preferencing practices. He emphasized that economists are already aware that self-preferencing regulations will have heterogeneous effects depending on the product. He also notedthe importance of taking this product heterogeneity into consideration when designing regulations.

Mr. Gitlin noted that any concerns about vagueness in proposed legislation would be at least partly addressed by accompanying guidelines, just as has those that have been provided in connection with other antitrust legislation. He also pointed out that the current proposed legislation does not focus on market power, and may not do so because Congress and US government agencies have not been satisfied with how market power analysis has addressed self-preferencing concerns in courts so far. Mr. Gitlin emphasized that the proposed regulations attempt to prevent practices that may not be anticompetitive today, but could become anticompetitive tomorrow.

Endnotes

1. *See, e.g.*, Andrei Hagiu, Tat-How Teh, and Julian Wright, *Should Platforms Be Allowed to Sell on Their Own Marketplaces?,* 53 (2) RAND J. ECON, 297-327 (Summer 2022).

2. Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL STR. J. (April 23, 2020), www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

3. AT.39740, Google Search (Shopping), Official Journal of the European Union C 9 (2017).

4. Consumers and Innovators Win on a Level Playing Field, SPOTIFY (March 13, 2019), https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/.

5. Open App Markets Act of 2021, S. 2710, 117th Cong. (2021).

6. American Innovation and Choice Online Act of 2021, S. 2992, 117th Cong. (2021).

7. Commission Directive, 2022/1925 O.J. (L 265) 1-66.

8. Digital Markets Unit, UK Competition and Markets Authority (Jul. 20, 2021), https://www.gov.uk/government/collections/digital-markets-unit.

9. Tilman Kuhn, Lars Petersen, and Tobias Pesch, New Competition Law in Germany – 10th amendment to German Act against Restraints of Competition passed (Jan. 20, 2021), https://www.whitecase.com/insight-alert/new-competition-law-germany-10th-amendment-german-act-against-restraints-competition.

10. *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).

11. *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

12. *Pac. Bell Tel. Co. v. LinkLine Communs., Inc.*, 555 U.S. 438 (2009).

13. *Comcast Corp. v. Viamedia, Inc.*, 141 S. Ct. 892 (2020).

14. H. Tai Lam, *Platform Search Design and Market Power*, Working paper, (2022).

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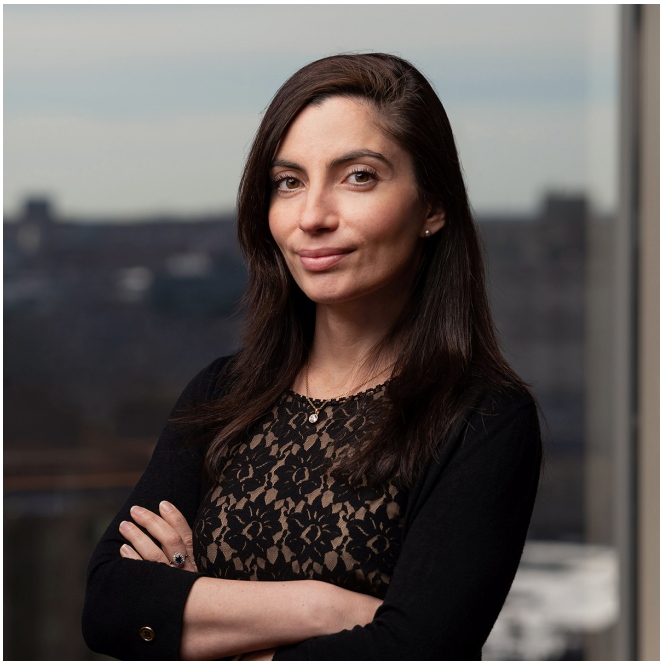

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