

# Issue Brief

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BY: JOSH WITHROW

## Klobuchar’s “Self Preferencing” Assault on Big Tech Ignores Economics and Consumer Welfare

Few people bat an eye when their local grocery store offers a coupon for its own generic version of a name-brand product. Yet when the same is done by a tech company, it apparently becomes an antitrust issue.

Of the many claims of anti-competitive behavior levelled against select large tech platforms in the past year, one of the most specious is the condemnation of “self-preferencing” and “discrimination” among their products. This was an issue raised in the House Judiciary Committee’s [majority staff report](#) on competition in digital markets, and has since manifested itself in a pair of bicameral, bipartisan bills. The practices that “covered platforms” (essentially Amazon, Google, Apple, Facebook, and possibly Microsoft) would be prohibited from engaging in are defined quite broadly.

Rep. David Cicilline’s (D-R.I.) [H.R. 3816](#), the “American Choice and Innovation Online Act,” would outright ban conduct that:

- advantages the covered platform operator’s own products, services, or lines of business over those of another business user;
- excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator’s own products, services, or lines of business; or
- discriminates among similarly situated business users.

### Key Facts:



The House and Senate self-preferencing bills are different in approach, similar in effect. Both would break products like iPhones, Google search, and Amazon Prime.



Attempting to regulate or ban self-preferencing is conceptually flawed, tramples upon antitrust law’s guiding consumer welfare standard.



Targeting “self-preferencing” and “product discrimination” by Big Tech lacks economic justification. Both are generally beneficial to consumers.

As has been pointed out by myriad policy experts, H.R. 3816 as written would make illegal a huge number of product integrations and business practices that a majority of consumers use every day. For example, integrated search results such as Google Maps and YouTube videos showing up first in Google search results qualify as “self-preferencing” and would be banned. So too would “recommended apps” in app stores, or Amazon Prime free shipping deals being sold alongside 3rd-party products by sellers who don’t distribute through Prime. As written, the bill would likely even ban Apple from pre-loading apps on iPhones, and would prohibit the integration of Instagram feeds in Facebook.<sup>1</sup>

Meanwhile, Sen. Amy Klobuchar’s (D-MN) near-companion bill, the “American Innovation and Choice Online Act,” [S. 2992](#), softens the language so that it would be unlawful to:

- unfairly preference the covered platform operator’s own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform;
- unfairly limit the ability of another business user’s products, services, or lines of business to compete on the covered platform relative to the covered platform operator’s own products, services, or lines of business in a manner that would materially harm competition on the covered platform; or
- discriminate in the application or enforcement of the covered platform’s terms of service among similarly situated business users in a manner that may materially harm competition on the covered platform.

Supporters of the Senate bill have claimed that its approach is more reasonable than the outright bans on these practices that are levelled by the House version. In practice, however, S. 2992 would likely target most of the same services that H.R. 3816 would. Vague terms like “unfairly limit[ing]” or “materially harm[ing]” competition give antitrust enforcers enormous leeway to decide what lines of business it deems anticompetitive, with the burden of proof shifted to the covered platforms to prove via a preponderance of the evidence that their practices are justified.<sup>2</sup>

The potential penalties that the Federal Trade Commission (FTC) or Department of Justice can recoup for each violation are gargantuan (up to 15 percent of total U.S. revenue), which gives enforcers the ability to govern by raised eyebrow in instances where the tech giants are likely to decide the risk of litigation is too great even if they do not believe they are in violation of any antitrust rules. Conversely, assurances by the bill’s supporters that it would not be used to break popular services like Amazon Prime essentially rest upon the mere hope that the FTC — presently chaired by [anti-Big Tech zealot Lina Khan](#) — will not choose to pursue such enforcement.<sup>3</sup>

Both the House and Senate bills also represent a clear departure from the protection of consumer welfare as the standard for antitrust enforcement. In instances where self-preferencing or discrimination among product offerings by these platforms could be found to harm consumers via decreased prices, quality, or innovation, they could already be pursued as violations of existing antitrust laws.<sup>4</sup> In the majority of instances, however, vertical restraints such as product integration and self-preferencing have been found empirically to be pro-competitive and beneficial to consumers.<sup>5</sup>

<sup>1</sup> Kovacevich, Adam. “New House Bills Would Ban These 15 Tech Conveniences that Consumer Love.” *Medium*, June 9, 2021. Retrieved from: <https://medium.com/chamber-of-progress/new-house-bills-would-ban-these-15-tech-conveniences-that-consumers-love-f55289701ae8>

<sup>2</sup> For more on why S. 2992 is not functionally that different from H.R. 3186, see Sam Bowman and Geoff Manne, “5 Thoughts on the Senate’s Proposed Platform Self-Preferencing Ban,” <https://truthonthemarket.com/2021/10/14/5-thoughts-on-the-senates-proposed-platform-self-preferencing-ban/>

<sup>3</sup> For a detailed breakdown of why Amazon’s Prime shipping services could not comply with S. 2992 if enforced, see Matt Schruers, “How Proposed Legislation Would Break Digital Services: the Prime Example,” *Project DisCo*, Nov. 1, 2021. <https://www.project-disco.org/competition/110121-how-proposed-legislation-would-break-digital-services-the-prime-example/> and Adam Kovacevich, “A Closer Look: How Senator Klobuchar’s Bill Would Ban Amazon Prime,” *Medium*, Nov. 2, 2021. <https://medium.com/chamber-of-progress/a-closer-look-how-senator-klobuchars-bill-would-ban-amazon-prime-aa57dd5d22c0>

<sup>4</sup> Lyons, Daniel. “House antitrust bill embraces unjustified presumption against vertical integration.” *American Enterprise Institute*, June 21, 2021. Retrieved from: <https://www.aei.org/technology-and-innovation/house-antitrust-bill-embraces-unjustified-presumption-against-vertical-integration/>

<sup>5</sup> Edwards, Lindsey, and Wright, Josh. “The Death of Antitrust Safe Harbors: Causes and Consequences,” *George Mason Law Review*, 23:5, 2016. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2850651](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850651)

Eliminating entire categories of product integrations and offerings for a handful of carefully selected tech companies merely because they have reached an arbitrarily chosen size and user base would represent a major shift towards the use of antitrust to assault “bigness” for its own sake. That type of arbitrary broadening of the scope of antitrust across the entire economy (“from cat food to caskets,” as Senator Klobuchar would say) would have consequences far beyond the tech industry.

From the perspective of rational antitrust enforcement – that is, directed by economic evidence for the purpose of preserving consumer welfare – these bills are flawed not only in execution but at the conceptual level in a number of key respects.

### **They’re not supported by economic evidence**

Citing many examples from recent economic literature, Geoff Manne of the International Center on Law and Economics writes that self-preferencing by large tech companies does not harm innovation. Both self-preferencing and discrimination with respect to access to these platforms are part of how companies like Google, Apple, or Amazon profit from and optimize the consumer experience on the platforms they have invested heavily to build.

In Manne’s words, “...while constraints on complementors’ access and use may look restrictive compared to an imaginary world without any restrictions, in such a world the platform would not be built in the first place.”<sup>6</sup> The millions of small sellers, advertisers, and app developers who profit from the ability to cheaply access the large audiences these platforms have built will, along with consumers, be the ones who suffer if the platforms are forced to increase their prices to compensate for the lines of business these bills would ban.<sup>7</sup>

### **There is no justification for targeting online platforms vs. physical retail**

Competition for physical retail shelf space is incredibly fierce, and every retailer necessarily exercises its own discretion with respect to what third-party products can occupy that space. The idea that Amazon engaging in the same practices is somehow different is especially absurd given that the distinction between physical and online retail is increasingly becoming imaginary.<sup>8</sup>

Similarly, physical retailers routinely exploit market opportunities to offer and advertise generically branded products, usually somewhat more cheaply than their rivals — a practice that would certainly be illegal for Amazon under either of these bills (and for any other online retailer that grows large enough to meet the “covered platform” definition).

### **They subvert due process of law**

There is nothing currently stopping antitrust enforcers from going after these tech giants for these self-preferencing behaviors *if* they can provide compelling evidence that consumers are being made worse off with respect to prices, quality, or innovation in the markets the platforms operate in. These bills simply shift the burden of proof to the companies, creating a presumption of anticompetitive intent that assumes harm where none may exist. With the exception of certain narrowly defined practices that have been proscribed as *per se* anticompetitive and thus illegal, the burden of proof that an antitrust violation has occurred should always fall upon the government.<sup>9</sup>

<sup>6</sup> Manne, Geoff. “Against the vertical discrimination presumption.” *Concurrences*, May 2020. Retrieved from: <https://laweconcenter.org/wp-content/uploads/2020/05/Manne-Against-the-vertical-discrimination-presumption-2020.pdf>

<sup>7</sup> Huddleston, Jennifer. “Consumers and Small Businesses Would Be the Ones Punished by the New Senate Antitrust Proposal.” *NetChoice*, Oct. 19, 2021. Retrieved from: <https://netchoice.org/consumers-and-small-businesses-would-be-the-ones-punished-by-new-senate-antitrust-proposal/>

<sup>8</sup> Lilly, Zach. “Retail is Everywhere: A look into the current state of retail,” *NetChoice*, November 2021. Retrieved from: <https://netchoice.org/wp-content/uploads/2021/11/Retail-Version-5.pdf>

<sup>9</sup> Withrow, Josh. “The Burden of Proof for Increased Merger Enforcement Should Fall Upon the Government.” *National Taxpayers Union Foundation*, November 3, 2021. Retrieved from: <https://www.ntu.org/foundation/detail/the-burden-of-proof-for-increased-merger-enforcement-should-fall-upon-the-government>

## They invite wasteful rent-seeking by rivals

If S. 2992 became law, there would likely be no shortage of rivals to the “covered platforms” eager to file complaints against “unfair” self-preferencing or product discrimination. From the perspective of a rent-seeking competitor, tying a larger rival up in an FTC investigation could be an effective means of weakening the covered platform by diverting resources to legal battles that might otherwise be employed towards providing better products and services. The resources dedicated towards compliance and litigation, however, represent a deadweight loss to consumers and the economy.<sup>10</sup>

## Importing EU-style competition policy will harm US tech competitiveness abroad

Whether consciously or not, the supporters of these proposals are advancing the goals of European Union antitrust enforcement, which has increasingly focused on siphoning revenue from successful, U.S. based tech companies to compensate for their own relatively sluggish growth and innovation.<sup>11</sup> The EU approach tends towards a more invasive, regulatory use of antitrust that focuses on how a company’s practices affect the welfare of its competitors rather than that of consumers.

Ironically, it’s often this very same regulatory disposition that leaves EU countries needing to live off the fat of more innovative foreign companies. It’s no coincidence that the majority of the world’s largest and most innovative tech companies are headquartered in the U.S., while relatively few are found in Europe. U.S. competition law embraces disruptive innovation and doesn’t discourage companies like Google, Apple, Facebook, or Amazon — or the new innovators who will eventually displace them — from growing to their potential.<sup>12</sup> Attacking our leading companies for what amounts to being too successful will divert their resources away from investing in R&D and compromise our global leadership in emerging technologies against rivals such as China.<sup>13</sup>

## About the Author

*Josh Withrow is the Director of Technology Policy for National Taxpayers Union Foundation.*

<sup>10</sup> Dorsey, Elyse et. al. “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-seeking.” *Competition Policy International Antitrust Chronicle*, April 2018. Retrieved from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3165192](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165192)

<sup>11</sup> Schneider, Henrique. “European Union Antitrust Policy in the Digital Era.” *CEI Issue Analysis*, 2020, No. 8. Retrieved from: <https://cei.org/wp-content/uploads/2020/10/eu-antitrust-paper.pdf>; and Portuese, Aurelien. “Please, Help Yourself: Toward a Taxonomy of Self-Preferencing.” *ITIF*, October 2021. Retrieved from: <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing>

<sup>12</sup> “Europe’s history explains why it will never produce a Google.” *The Economist*, Oct. 13, 2018. <https://www.economist.com/europe/2018/10/13/europes-history-explains-why-it-will-never-produce-a-google>

<sup>13</sup> Coats, Dan. “Congress shouldn’t help China surpass the U.S. in technology leadership.” *Washington Post*, Oct. 4, 2021. <https://www.washingtonpost.com/opinions/2021/10/04/dan-coats-congress-tech-bills-china-threat/>



2022 National Taxpayers Union Foundation  
122 C Street NW, Suite 650, Washington, DC 20001  
[ntuf@ntu.org](mailto:ntuf@ntu.org)