Self-preferencing: regulatory approaches

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Is self-preferencing good or bad? It depends

Özlem's talk: Self-preferencing can have benefits or harms depending on the form and context

Possible benefits of self-preferencing

- May promote particular hybrid business models that may increase competition, innovation and variety
- A platform offering its own product may reduce price via lower double marginalization

Possible harms of self-preferencing

- Raising rivals costs -> increased price
- Imitation of rivals may reduce rivals' incentives to innovate
- Leveraging market power into new market?

Concerns about regulatory intervention re: self-preferencing

- Chicago school argument: if self-preferencing harms consumers, it also harms the platform
  - Behavior is to some extent self-regulating to the extent it harms consumers
- Regulatory uncertainty may reduce innovation by platform, in particular add-on services by platform monopolists, for fear that things that unlevel the playing field may be deemed illegal
- Does not address underlying market power of platform
  - Restriction of activity in one dimension could lead to harms on other dimensions
  - Unintended consequences…what we're talking about here!

Regulatory approaches can vary on a number of dimensions

- Broad vs. narrow
- Ex-ante vs. ex-post
- Specific vs. general
- Structural vs. behavioral

- Status quo ante approach in US and Europe: *broad*, *ex-ante*, and *general*.
- DMA moves to *narrow*, *ex-post* and *specific*

Question: what was wrong with the status quo?

Justifications in DMA for its approach

- Nature of core platform services mean that “market processes are often incapable of ensuring fair economic outcomes.”

- Existing antitrust laws do not adequately address this problem
  - Scope is limited to “certain instances of market power…and anticompetitive behavior”
  - Enforcement occurs *ex-post*
  - Requires extensive investigation of very complex facts on a case-by-case basis
  - Does not address “the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms.”

- Purpose of DMA is to “contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness…”
  - Complementary to Articles 101 and 102
  - Key advantage: speed

Approaches considered in US

- New legislation
  - DMA-like bans on self-preferencing
  - Structural separation of platforms from other activities
  - New specialized agency

- Status quo (or maybe beefed-up status quo?)
  - DOJ/FTC intervention under antitrust laws
  - Aggressive agencies + “whole of government” approach to competition
  - Private litigation

US legislation addressing self-preferencing: behavioral (1)

American Choice and Innovation Online Act

- Major provisions that apply to “covered platforms” (GAFA)
  - Cannot preference own products
  - Cannot limit other products ability to compete against platform operator
  - Cannot discriminate in terms of service
  - Cannot condition use of the platform on use of other products that are not unique to covered platform
  - Cannot use non-public data to compete against customers
- Affirmative defenses
  - Reasonably tailored actions to protect safety, security, privacy, or enhance functionality (burden of proof on defendant)
- Status: Voted out of committee in both Senate and House but no floor vote yet

US legislation addressing self-preferencing: behavioral (2)

Open App Markets Act

- Major provisions that apply to app stores with more than 50 million users
  - Cannot tie app store to an in-app payment system
  - Cannot require that pricing terms or conditions of sale on app store be equal to or more favorable to those offered on other app stores, or take punitive actions against them
  - Cannot prevent communications of developers with users (e.g., steering)
  - Cannot use nonpublic information from an app to compete with that app
  - Cannot limit interoperability with operating system for competing app stores
- Affirmative defenses
  - Necessary to achieve user privacy, security, safety, or to prevent unlawful infringement of IP so long as applied consistently, not pretexual, narrowly tailored (burden of proof on defendant)
- Status: Out of committee (2/3/22) in Senate, not yet in House, not yet full Senate vote

US legislation addressing self-preferencing: structural separation

Ending Platform Monopolies Act (House)

- Would prohibit "covered platforms," as designated by the DOJ or FTC, from owning lines of business that create a "conflict of interest" – an incentive and ability to advantage their own products or disadvantage competing products
- Status: Reported out of the House Committee on the Judiciary

Bust Up Big Tech Act (Senate)

- Would prohibit large online platforms in the business of offering search engines, marketplaces, or exchanges from selling, advertising, or otherwise promoting their own goods and services on their websites that compete with third party offerings
- Would also prohibit such online platforms from providing online hosting services or back-end online services to any other entity that is not owned by the platform
- Status: Not out of committee

Another approach: new specialized agency oversight

Digital Platform Commission Act

- Would create a new executive branch agency, the “Federal Digital Platform Commission,” similar to FCC or FTC, to regulate the “systemically important digital platforms” and promote access, competition, deconcentration, and consumer protection
- “The unique power and complexity of several digital platforms, combined with the absence of modern federal regulations, reinforces the need for a new federal body equipped with the authorities, tools, and expertise to regulate digital platforms to ensure their operations remain consistent, where appropriate, with the public interest.”