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5 Thoughts on the Senate's Proposed Platform Self-Preferencing Ban
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A bipartisan group of senators unveiled legislation today that would dramatically curtail the ability of online platforms to "self-preference" their own services—for example, when Apple pre-installs its own Weather or Podcasts apps on the iPhone, giving it an advantage that independent apps don't have. The measure accompanies a House bill that included similar provisions, with some changes.

1. The Senate bill closely resembles the House version, and the small improvements will probably not amount to much in practice.

The major substantive changes we have seen between the House bill and the Senate version are:

1. Violations in Section 2(a) have been modified to refer only to conduct that "unfairly" preferences, limits, or discriminates between the platform's products and others, and that "materially harm[s] competition on the covered platform," rather than banning *all* preferencing, limits, or discrimination.
2. The evidentiary burden required throughout the bill has been changed from "clear and convincing" to a "preponderance of evidence" (in other words, greater than 50%).
3. An affirmative defense has been added to permit a platform to escape liability if it can establish that challenged conduct that "was narrowly tailored, was nonpretextual, and was necessary to… maintain or enhance the core functionality of the covered platform."
4. The minimum market capitalization for "covered platforms" has been lowered from $600 billion to $550 billion.
5. The Senate bill would assess fines of 15% of revenues from the period during which the conduct occurred, in contrast with the House bill, which set fines equal to the greater of either 15% of prior-year revenues or 30% of revenues from the period during which the conduct occurred.
6. Unlike the House bill, the Senate bill does not create a private right of action. Only the U.S. Justice Department (DOJ), Federal Trade Commission (FTC), and state attorneys-generals could bring enforcement actions on the basis of the bill.

Item one here certainly mitigates the most extreme risks of the House bill, which was drafted, bizarrely, to ban *all* "preferencing" or "discrimination" by platforms. If that were made law, it could literally have broken much of the Internet. The softened language reduces that risk somewhat.

However, Section 2(b), which lists types of conduct that would presumptively establish a violation under Section 2(a), is largely unchanged. As outlined here, this would amount to a broad ban on a wide swath of beneficial conduct. And "unfair" and "material" are notoriously slippery concepts. As a practical matter, their inclusion here may not significantly alter the course of enforcement under the Senate legislation from what would ensue under the House version.

Item three, which allows challenged conduct to be defended if it is "necessary to… maintain or enhance the core functionality of the covered platform," may also protect some conduct. But because the bill requires companies to prove that challenged conduct is not only beneficial, but *necessary* to realize those benefits, it effectively implements a "guilty until proven innocent" standard that is likely to prove impossible to meet. The threat of permanent injunctions and enormous fines will mean that, in many cases, companies simply won't be able to justify the expense of endeavoring to improve even the "core functionality" of their platforms in any way that could trigger the bill's liability provisions. Thus, again, as a practical matter, the difference between the Senate and House bills may be only superficial.

The effect of this will likely be to diminish product innovation in these areas, because companies could not know in advance whether the benefits of doing so would be worth the legal risk. We have previously highlighted existing conduct that may be lost if a bill like this passes, such as pre-installation of apps or embedding maps and other "rich" results in boxes on search engine results pages. But the biggest loss may be things we don't even know about yet, that just never happen because the reward from experimentation is not worth the risk of being found to be "discriminating" against a competitor.

We dove into the House bill in Breaking Down the American Choice and Innovation Online Act and Breaking Down House Democrats' Forthcoming Competition Bills.

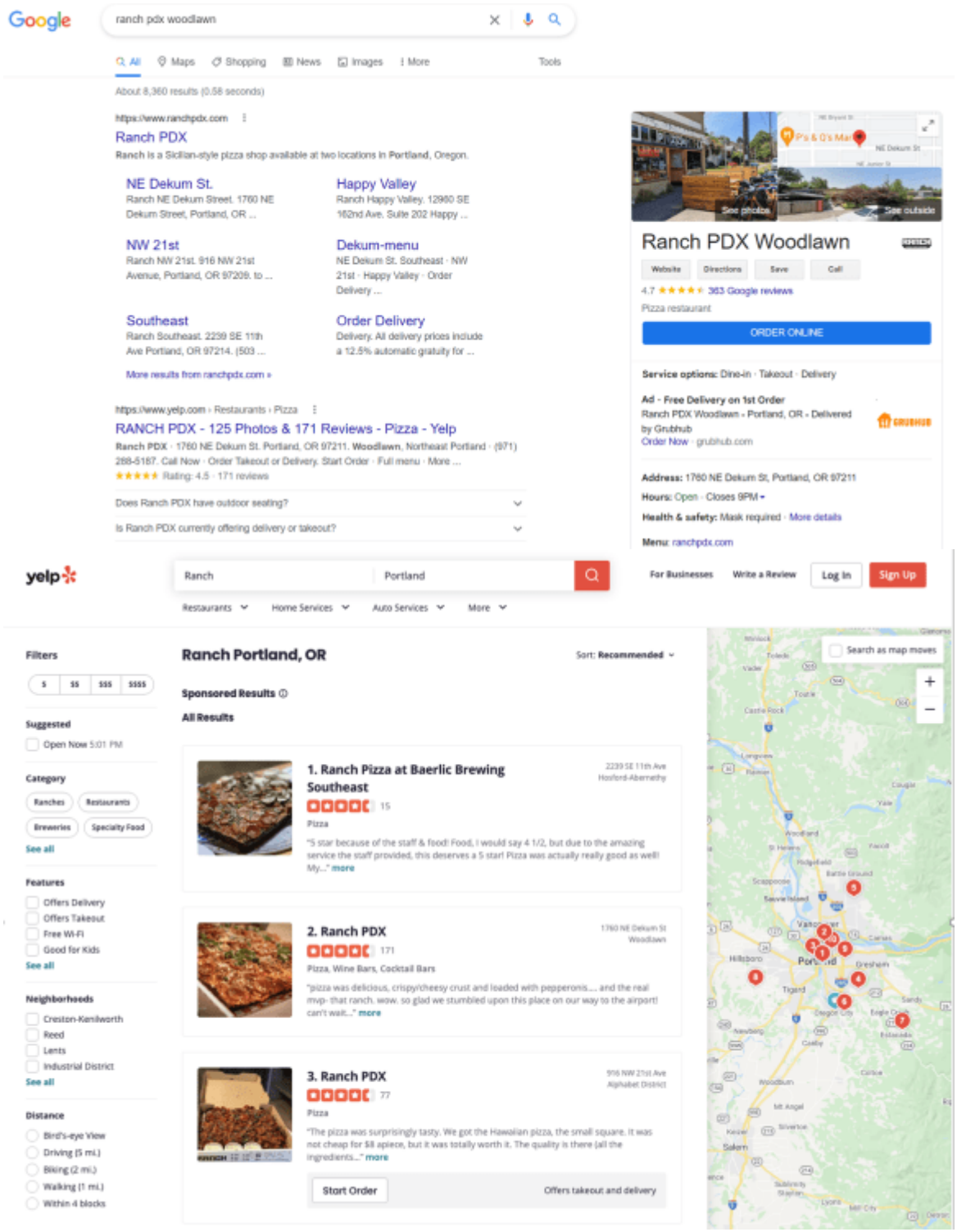
2. The prohibition on "unfair self-preferencing" is vague and expansive and will make Google, Amazon, Facebook, and Apple's products worse. Consumers don't want digital platforms to be dumb pipes, or to act like a telephone network or sewer system. The Internet is filled with a superabundance of information and options, as well as a host of malicious actors. Good digital platforms act as middlemen, sorting information in useful ways and taking on some of the risk that exists when, inevitably, we end up doing business with untrustworthy actors.

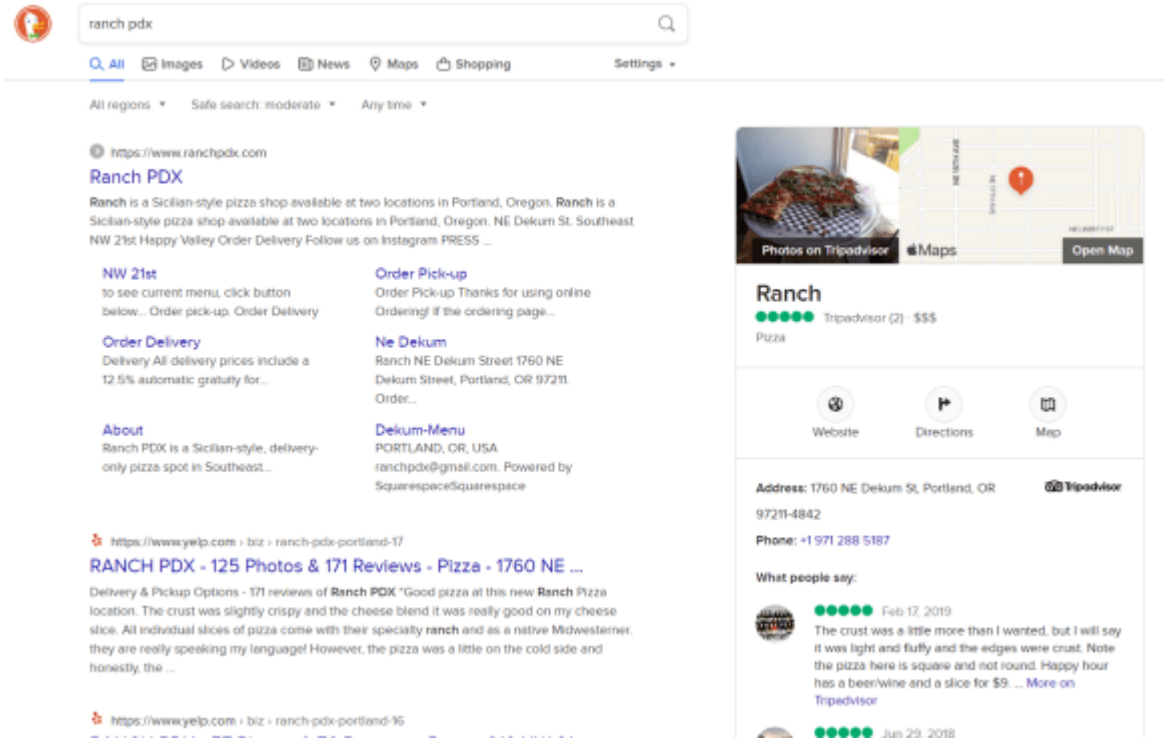
When users have the choice, they tend to prefer platforms that do quite a bit of "discrimination"—that is, favoring some sellers over others, or offering their own related products or services through the platform. Most people prefer Amazon to eBay because eBay is chaotic and riskier to use.

Competitors that decry self-preferencing by the largest platforms—integrating two different products with each other, like putting a maps box showing only the search engine's own maps on a search engine results page—argue that the conduct is enabled only by a

platform's market dominance and does not benefit consumers.

Yet these companies often do *exactly the same thing* in their own products, regardless of whether they have market power. Yelp includes a map on its search results page, not just restaurant listings. DuckDuckGo does the same. If these companies offer these features, it is presumably because they think their users want such results. It seems perfectly plausible that Google does the same because it thinks its users—literally the *same* users, in most cases—also want them.





Fundamentally, and as we discuss in *Against the Vertical Disrcimination Presumption*, there is simply no sound basis to enact such a bill (even in a slightly improved version):

> The notion that self-preferencing by platforms is harmful to innovation is entirely speculative. Moreover, it is flatly contrary to a range of studies showing that the opposite is likely true. In reality, platform competition is more complicated than simple theories of vertical discrimination would have it, and there is certainly no basis for a presumption of harm.

We discussed self-preferencing further in Platform Self-Preferencing Can Be Good for Consumers and Even Competitors, and showed that platform "discrimination" is often what consumers want from digital platforms in On the Origin of Platforms: An Evolutionary Perspective.

3. The bill massively empowers an FTC that seems intent to use antitrust to achieve political goals. The House bill would enable competitors to pepper covered platforms with frivolous lawsuits. The bill's sponsors presumably hope that removing the private right of action will help to avoid that. But the bill still leaves intact a much more serious risk to the rule of law: the bill's provisions are so broad that federal antitrust regulators will have enormous discretion over which cases they take.

This means that whoever is running the FTC and DOJ will be able to threaten covered platforms with a broad array of lawsuits, potentially to influence or control their conduct in other, unrelated areas. While some supporters of the bill regard this as a positive, most antitrust watchers would greet this power with much greater skepticism. Fundamentally,

both bills grant antitrust enforcers wildly broad powers to pursue goals unrelated to competition. FTC Chair Lina Khan has, for example, argued that "the dispersion of political and economic control" ought to be antitrust's goal. Commissioner Rebecca Kelly-Slaughter has argued that antitrust should be "antiracist".

Whatever the desirability of these goals, the broad discretionary authority the bills confer on the antitrust agencies means that individual commissioners may have significantly greater scope to pursue the goals that *they* believe to be right, rather than Congress.

See discussions of this point at What Lina Khan's Appointment Means for the House Antitrust Bills, Republicans Should Tread Carefully as They Consider 'Solutions' to Big Tech, The Illiberal Vision of Neo-Brandeisian Antitrust, and Alden Abbott's discussion of FTC Antitrust Enforcement and the Rule of Law.

4. The bill adopts European principles of competition regulation. These are, to put it mildly, not obviously conducive to the sort of innovation and business growth that Americans may expect. Europe has no tech giants of its own, a condition that shows little sign of changing. Apple, alone, is worth as much as the top 30 companies in Germany's DAX index, and the top 40 in France's CAC index. Landmark European competition cases have seen Google fined for embedding Shopping results in the Search page—not because it hurt consumers, but because it hurt competing price–comparison websites.

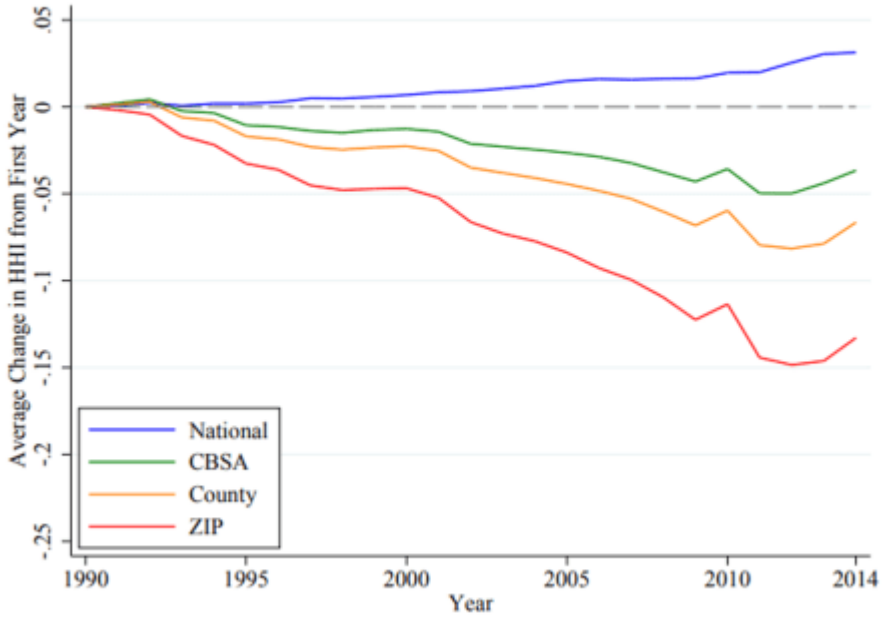
A fundamental difference between American and European competition regimes is that the U.S. system is far more friendly to businesses that obtain dominant market positions because they have offered better products more cheaply. Under the American system, successful businesses are normally given broad scope to charge high prices and refuse to deal with competitors. This helps to increase the rewards and incentive to innovate and invest in order to obtain that strong market position. The European model is far more burdensome.

The Senate bill adopts a European approach to refusals to deal—the same approach that led the European Commission to fine Microsoft for including Windows Media Player with Windows—and applies it across Big Tech broadly. Adopting this kind of approach may end up undermining elements of U.S. law that support innovation and growth.

For more, see How US and EU Competition Law Differ.

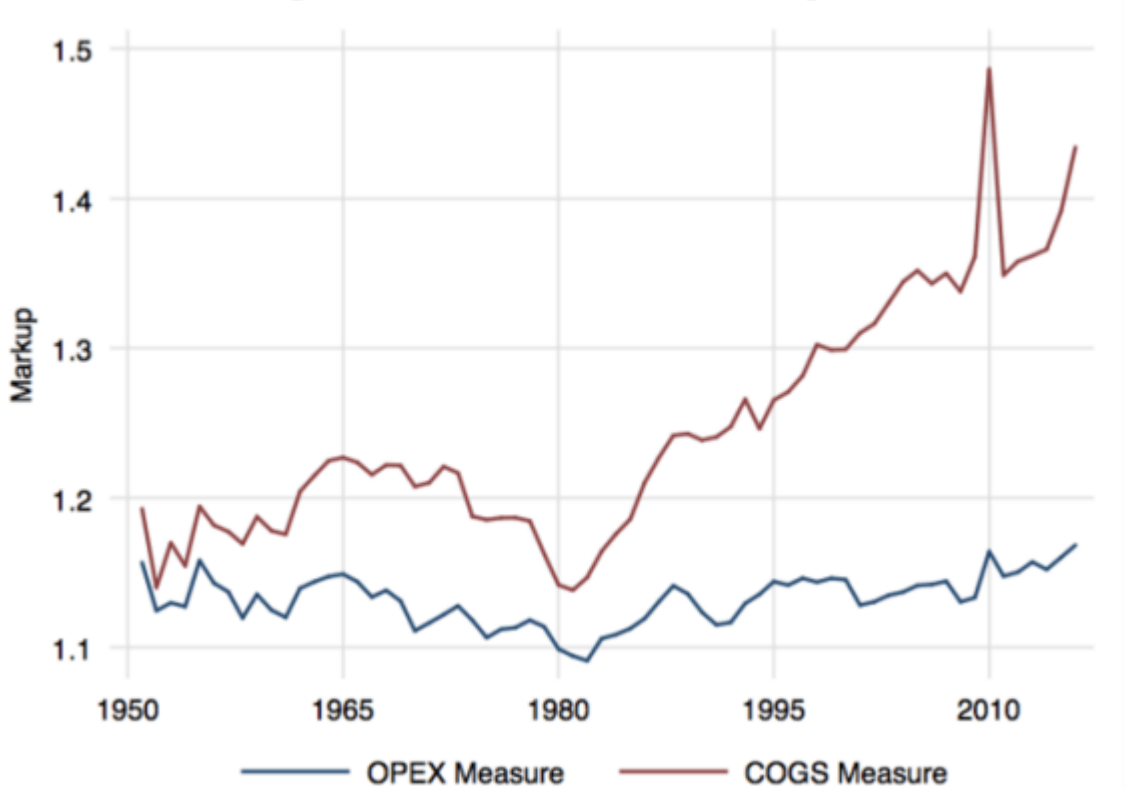
5. The proposals are based on a misunderstanding of the state of competition in the American economy, and of antitrust enforcement. It is widely believed that the U.S. economy has seen diminished competition. This is mistaken, particularly with respect to digital markets. Apparent rises in market concentration and profit margins disappear when we look more closely: local-level concentration is falling even as national-level concentration is rising, driven by more efficient chains setting up more stores in areas that were previously served by only one or two firms.

Fact 1: Diverging National and Local Concentration Trends



And markup rises [largely disappear after accounting] for fixed costs like R&D and marketing.

Figure 2: COGS vs. OPEX Markups



Where profits are rising, in areas like manufacturing, it appears to be mainly [driven by increased productivity], not higher prices. Real prices [have not risen in line with markups]. Where profitability has increased, it has been mainly driven by falling costs.

Nor have the number of antitrust cases brought by federal antitrust agencies fallen. The likelihood of a merger being challenged more than doubled between 1979 and 2017. And there is little reason to believe that the deterrent effect of antitrust has weakened. Many critics of Big Tech have decided that there must be a problem and have worked backwards from that conclusion, selecting whatever evidence supports it and ignoring the evidence that does not. The consequence of such motivated reasoning is bills like this.

See Geoff's April 2020 written testimony to the House Judiciary Investigation Into Competition in Digital Markets here.

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