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# ANTITRUST, SELF-PREFERENCING, AND DISPLAY OF SEARCH RESULTS: ONLINE PLATFORMS' PROPRIETARY PRODUCTS AND SERVICES CAN HELP SPEED UP CONSUMERS' PRODUCT SELECTION AND BENEFIT CONSUMERS

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On January 3, 2013, the Federal Trade Commission (“FTC”) issued a Statement that it was closing its investigation regarding allegations that Google unfairly preferences Google Shopping over third-party websites when displaying search results on google.com.<sup>1</sup> Third-party websites alleged that Google used the “Universal Search” box to prominently display Google Shopping results at or near the top of its search results page, which pushed down blue links to other websites.<sup>2</sup> Such conduct has been called “self-preferencing”<sup>3</sup> or “search bias.”<sup>4</sup>

After investigation, however, the FTC stated that Google likely *benefitted* consumers by quickly and better answering users’ search queries through the “Universal Search” box, according to evidence and data analysis on how consumers reacted to Google’s proprietary content.<sup>5</sup> The FTC explained that “[r]easonable minds may differ as to the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features.”<sup>6</sup> The FTC concluded that Google’s conduct above did not

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1. Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google’s Search Practices, FTC File No. 111-0163, at 1 (Jan. 3, 2013), [https://www.ftc.gov/system/files/documents/public\\_statements/295971/130103googlesearchstmttoftcomm.pdf](https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmttoftcomm.pdf) [<https://perma.cc/7GUV-CAJ5>] [hereinafter FTC Statement]; Jonathan Jacobson & Ada Wang, *Competition or Competitors? The Case of Self-Preferencing*, 38 ANTITRUST 13, 14 (2023).

2. FTC Statement, *supra* note 1, at 1, 3.

3. Jacobson & Wang, *supra* note 1, at 13, 14.

4. FTC Statement, *supra* note 1, at 1.

5. *Id.* at 2.

6. *Id.* at 3.

constitute a violation of Section 5 of the Federal Trade Commission Act,<sup>7</sup> which prohibits “unfair methods of competition in or affecting commerce” and “unfair or deceptive acts or practices in or affecting commerce.”<sup>8</sup>

Across the Atlantic, on the other hand, on June 27, 2017, the European Commission (“EC”) imposed a fine of around EUR 2.42 billion on Google on grounds that Google abused its dominance in the market for general search services by favorably displaying its comparison shopping service, at or near the top of the first page of search results with prominent display features, compared to competitors’ comparison shopping service.<sup>9</sup> Google Shopping and third-parties’ comparison shopping services compare offers of products made by direct online sellers or online sales platforms such as Amazon.<sup>10</sup> The EC stated that the relevant product markets in the case were “the market for general search services and the market for comparison shopping services.”<sup>11</sup> The EC also stated that Google had dominance in the market for general search services in the national markets in the European Economic Area.<sup>12</sup>

The EC then determined that Google’s self-preferencing could potentially foreclose competing comparison shopping services by directing traffic to Google’s own comparison shopping service and away from competing comparison shopping services.<sup>13</sup> The EC also determined that Google’s conduct is likely to reduce consumers’ access to relevant comparison shopping services.<sup>14</sup> On November 10, 2021, the European General Court confirmed the fine imposed by the EC.<sup>15</sup> On September 10, 2024, the European Court of Justice affirmed the General Court’s decision.<sup>16</sup>

As online platforms grow and attract more users, self-preferencing conduct by online platforms may increase.<sup>17</sup> Currently, there is much discussion and debate in the antitrust field around the globe regarding how to regulate online platforms.<sup>18</sup> In South Korea, the Korea Fair Trade Commission (“KFTC”) has

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7. *Id.*

8. 15 U.S.C. § 45 (2024).

9. Summary of Commission Decision of 27 June 2017 Relating to a Proceeding Under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740—Google Search (Shopping)), 2018 O.J. (C9/11) ¶¶ 7, 9, 13, 31 [hereinafter Summary of Commission Decision]; see also European Commission, Press Release, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service at 2, June 27, 2017.

10. Judgment of the General Court (Ninth Chamber, Extended Composition) 10 November 2021, Case T-612/17, Google LLC v. European Commission ¶ 3 [hereinafter Judgment of the General Court].

11. Summary of Commission Decision, *supra* note 9, ¶ 3.

12. *Id.* ¶ 7.

13. *Id.* ¶¶ 10, 23; D. Bruce Hoffman & Garrett D. Shinn, *Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem*, CPI ANTITRUST CHRONICLE at 4 (2021) (“The Commission did not appear to be bothered that these theories of harm depended mostly on speculation about future harms that could not be observed in the market.”).

14. Summary of Commission Decision, *supra* note 9, ¶ 24.

15. Judgment of the General Court, *supra* note 10, ¶ 704.

16. Judgment of the Court (Grand Chamber) 10 September 2024, Case C-48/22 P, Google LLC v. European Commission ¶ 271.

17. See, e.g., Judgment of the General Court, *supra* note 10, ¶ 7.

18. See *infra* Part II.

been actively challenging self-preferencing conduct for potential violations of antitrust law,<sup>19</sup> and several legislative bills have been proposed to regulate online platforms.<sup>20</sup> However, these legislative bills have raised controversy and concern not only in South Korea but also in the United States due to the potential impact of the legislative bills on global online platforms.<sup>21</sup>

This Article proposes that analysis of online platforms' self-preferencing in antitrust cases should consider how online platforms' proprietary products and services, including private brands, can help speed up consumers' product selection and benefit consumers. Part I explains antitrust regulation related to online platforms' self-preferencing in the United States and the European Union. Part II discusses antitrust regulation related to online platforms' self-preferencing in South Korea and focuses on proposed legislation to regulate online platforms. Part II also discusses opinions from the industry and scholars regarding the legislative bills. Part III proposes that analysis of online platforms' self-preferencing in antitrust cases should consider how online platforms' proprietary products and services, including private brands, can help speed up consumers' product selection and benefit consumers. Consumers may prefer online platforms' proprietary products and services due to reliable quality.<sup>22</sup> Also, consumers' familiarity with online platforms' proprietary products and services can make product selection easier and save time for consumers.<sup>23</sup> Even if online platforms' proprietary products and services are displayed at the top of the search results page, consumers can compare various products available on online platforms, including private brands and other brands, by scrolling through the search results pages if they wish.<sup>24</sup> The display of online platforms' proprietary products and services at the top of the search results page can provide

19. See, e.g., Korea Fair Trade Commission, Press Release: KFTC Imposes Corrective Measures on Naver for Favoring Its Own Real-Estate Search, Shopping, and Video Services Over Competitors (Oct. 7, 2020), [https://www.ftc.go.kr/viewer/synap/skin/doc.html?fn=BBS\\_202010210809414110&rs=/viewer/synap/preview/](https://www.ftc.go.kr/viewer/synap/skin/doc.html?fn=BBS_202010210809414110&rs=/viewer/synap/preview/) [<https://perma.cc/998R-TGQL>]; Korea Fair Trade Commission, Press Release: KFTC Imposes Severe Sanctions on Coupang for Consumer Deception (June 13, 2024), [https://www.ftc.go.kr/viewer/synap/skin/doc.html?fn=BBS\\_202406271014528830&rs=/viewer/synap/preview/](https://www.ftc.go.kr/viewer/synap/skin/doc.html?fn=BBS_202406271014528830&rs=/viewer/synap/preview/) [<https://perma.cc/62KL-RDZR>] [hereinafter KFTC Press Release in Coupang Case].

20. See, e.g., Legislative Bill No. 2204947 for Amendment of the Monopoly Regulation and Fair Trade Act (독점규제 및 공정거래에 관한 법률 일부개정법률안), 22nd National Assembly of the Republic of Korea (Oct. 28, 2024), available at [https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_Z2G4E1F0E1D6L1J5K3J3H0Q6O8N4O6](https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_Z2G4E1F0E1D6L1J5K3J3H0Q6O8N4O6) [<https://perma.cc/78H2-HJU7>] [hereinafter People Power Party's Legislative Bill]; Legislative Bill No. 2201430 for Enactment of the Online Platform Monopoly Regulation Act (온라인 플랫폼 독점규제에 관한 법률안), 22nd National Assembly of the Republic of Korea (July 5, 2024), available at [https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_V2D4D0C6J2I1H1D0A1Z4I5H9Q2P2J4](https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_V2D4D0C6J2I1H1D0A1Z4I5H9Q2P2J4) [<https://perma.cc/9WKX-EDQ6>] [hereinafter Democratic Party of Korea's Legislative Bill]; Jinyul Ju (주진열), *Artificial Intelligence Ecosystem and Antitrust Policy* (인공지능(AI) 생태계와 경쟁법정책), 50 J. OF KOR. COMPETITION L. 218, 264–67 (2024) (Kor.).

21. See *infra* Part II.B.

22. See *infra* Part III.

23. See *infra* Part III.

24. See Annie Soo Yeon Ahn, *Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet: The Zippo Test and Pleading of Personal Jurisdiction*, 99 MINN. L. REV. 2325, 2341–42 (2015).

consumers with a reference point for comparison with third parties' products and services.<sup>25</sup>

I. ANTITRUST REGULATION RELATED TO ONLINE PLATFORMS' SELF-PREFERENCING IN THE UNITED STATES AND THE EUROPEAN UNION

A platform provides "a place for other firms to sell their products or service."<sup>26</sup> The platform collects a fee in exchange for providing such a place for buyers and sellers to connect.<sup>27</sup> When a platform that sells multiple brands treats its own proprietary brand favorably, this has been referred to as self-preferencing.<sup>28</sup> In Part I, Section A discusses antitrust regulation related to self-preferencing in the United States. Section B discusses antitrust regulation related to self-preferencing in the European Union.

A. *Antitrust Regulation Related to Self-Preferencing in the United States*

In the United States, Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracy to monopolize.<sup>29</sup> Section 2 does not prohibit monopolies themselves, but instead it prohibits anticompetitive conduct that leads to a monopoly.<sup>30</sup> Section 5 of the Federal Trade Commission Act also states, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."<sup>31</sup> For example, in the "Google's Search Practices" case investigated by the FTC and discussed at the beginning of this Article, the FTC stated that it may challenge practices that "violate Section 5's prohibition on unfair methods of competition, and create a likelihood of significant injury to competition, including monopolization or attempted monopolization action under Section 2 of the Sherman Act."<sup>32</sup>

Professor Herbert Hovenkamp has expressed support for leaving decisions about product display to individual companies because such decisions involve making choices that reflect "seller experience," such as "choices about price, quality, performance, features, brand recognition, to name just a few."<sup>33</sup> Professor Hovenkamp explains that under current United States antitrust law,

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25. *See id.*

26. Hoffman & Shinn, *supra* note 13, at 3.

27. *Id.*

28. Herbert Hovenkamp, *Antitrust and Self-Preferencing*, 38 ANTITRUST 5, 5 (2023) ("Self-preferencing can come in many varieties, ranging from outright exclusion of competing alternatives to simple favored placement or promotion of the seller's own version.").

29. 15 U.S.C. § 2 (2024).

30. Hoffman & Shinn, *supra* note 13, at 8.

31. 15 U.S.C. § 45 (2024); *see* Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, at 1 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf) [<https://perma.cc/XYP5-DSP9>].

32. FTC Statement, *supra* note 1, at 2.

33. Hovenkamp, *supra* note 28, at 10.

self-preferencing is prohibited only when a company has market power in a specific good or service and such company's preferential treatment of its own good or service results in anticompetitive harm.<sup>34</sup> Other scholars have elaborated that cases where self-preferencing can harm competition and consumers include (1) when a platform anticompetitively maintains its monopoly in the platform market by "eliminating nascent threats to *that monopoly*" and (2) when a platform engages in self-preferencing to "monopolize a downstream market."<sup>35</sup>

Given the current legal landscape in the United States regarding self-preferencing above, some of the proposed legislation to regulate online platforms surprisingly depart from requiring market power.<sup>36</sup> For example, in the legislative bill sponsored by Senator Amy Klobuchar (D-MN) for the American Innovation and Choice Online Act, "covered platforms" subject to regulation are designated based on the platform's large size rather than the platform's market share in a specific product.<sup>37</sup> The legislative bill was introduced and debated in the 117th Session of Congress but did not pass, and it has been resubmitted in the 118th Session of Congress.<sup>38</sup>

#### B. *Antitrust Regulation Related to Self-Preferencing in the European Union*

Article 102 of the Treaty on the Functioning of the European Union ("TFEU") prohibits abuse of dominant position.<sup>39</sup> For example, in the "Google Search (Shopping)" case investigated by the EC and discussed earlier in this Article, the EC challenged Google's conduct under Article 102 of the TFEU.<sup>40</sup> The Digital Markets Act ("DMA") also regulates online platforms.<sup>41</sup> The DMA first sets a standard for determining "gatekeeper" companies that provide "core platform services," such as online intermediation services, search engines, and social networking services.<sup>42</sup> Article 6(5) of the DMA then states, "[t]he gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar

34. *Id.* at 5, 7.

35. Hoffman & Shinn, *supra* note 13, at 8–9.

36. See Hovenkamp, *supra* note 28, at 5, 7.

37. American Innovation and Choice Online Act, S. 2033, 118th Congress § 2(a)(5) (1st Sess. 2023); *see also* American Innovation and Choice Online Act, S.2992, 117th Congress (2nd Sess. 2022); Hovenkamp, *supra* note 28, at 9.

38. Hovenkamp, *supra* note 28, at 8; *see* American Innovation and Choice Online Act, S. 2033, 118th Congress (1st Sess. 2023).

39. Article 102 (ex Article 82 TEC), Consolidated version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions—Title VII: Common Rules on Competition, Taxation and Approximation of Laws, Official Journal 115, 09/05/2008 P. 0089-0089.

40. Commission Decision of June 27, 2017 Relating to Proceedings Under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740—Google Search (Shopping)) at art. 1.

41. *See* Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directive (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

42. *Id.* art. 2(1) (defining gatekeeper); *id.* art. 2(2) (defining core platform service).

services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.”<sup>43</sup>

However, scholars have noted that it is not clear what constitutes “neutral” rankings or recommendations in specific circumstances.<sup>44</sup> Scholars have also pointed out that there may be many appropriate reasons why a platform’s algorithms may rank its own proprietary products or services higher than competitors’ products or services.<sup>45</sup> For example, the platform’s proprietary products or services “can be cheaper, have vertically differentiated features that consumers value (e.g., priority shipping), or have horizontally differentiated features that are preferred by consumers.”<sup>46</sup>

## II. ANTITRUST REGULATION RELATED TO ONLINE PLATFORMS’ SELF-PREFERENCING IN SOUTH KOREA

Part II discusses antitrust regulation related to online platforms’ self-preferencing in South Korea. Section A describes proposed legislation in South Korea to regulate online platforms. Section B provides opinions from the industry and scholars regarding the legislative bills. Concerns have been raised not only in South Korea but also in the United States due to the potential impact of the legislative bills on global online platforms.<sup>47</sup>

### A. Legislative Bills in South Korea on Regulation of Online Platforms

In South Korea, the Monopoly Regulation and Fair Trade Act (“MRFTA”) prohibits abuse of market dominance.<sup>48</sup> The MRFTA provides that, excluding a business operator with annual revenue or purchase amount less than KRW 8 billion in a specific transaction sector, a business operator is presumed to be a market-dominant business operator (1) if the market share of one business operator in a specific transaction sector is 50% or more or (2) if the sum of the market shares of three or fewer business operators in a specific transaction sector is 75% or more, in which case a business operator with less than 10% market share is excluded.<sup>49</sup> Under the MRFTA, the KFTC may impose remedial measures<sup>50</sup> and a penalty surcharge of up to 6% of the relevant revenue from the violation period for abuse of market dominance.<sup>51</sup> The KFTC has brought

43. *Id.* art. 6(5).

44. Guillaume Duquesne, et al., *What Constitutes Self-Preferencing and Its Proliferation in Digital Markets*, GSR at 11 (Oct. 23, 2024), available at <https://globalcompetitionreview.com/guide/digital-markets-guide/fourth-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets> [https://perma.cc/UN3G-T2JW].

45. *Id.*

46. *Id.*

47. *See infra* Part II.B.

48. Monopoly Regulation and Fair Trade Act, Act No. 20712, art. 5 (2025) (S. Kor.).

49. *Id.* art. 6.

50. *Id.* art. 7.

51. *Id.* art. 8.

enforcement actions against online platforms based on the MRFTA for abuse of market dominance and unfair trade practices.<sup>52</sup> There is debate on whether further legislation is needed to increase regulation of online platforms.<sup>53</sup>

On October 21, 2022, the KFTC issued a press release stating that it plans to address monopoly issues on online platforms.<sup>54</sup> In the press release, the KFTC listed major types of conduct by online platforms that may raise antitrust law issues: self-preferencing, tying, restriction on multi-homing, and most-favored-nations clause.<sup>55</sup> The KFTC explained that “self-preferencing” is the direct or indirect favorable treatment of an online platform’s own products or services on its platform compared to a competitor’s products or services.<sup>56</sup> “Tying” is tying an online platform’s service and a different product or service so that they are provided together in a transaction.<sup>57</sup> “Restriction on multi-homing” is directly or indirectly interfering with an online platform users’ use of competing online platforms.<sup>58</sup> The “most-favored-nations clause” requires companies that do business on an online platform to provide prices and transaction terms that are equivalent or favorable compared to prices and transaction terms used when providing products or services through other distribution means.<sup>59</sup>

Next, the KFTC explained that the anticompetitive effect of self-preferencing and tying is leveraging monopoly power in the online platform market to monopolize a related market.<sup>60</sup> The KFTC stated that the anticompetitive conduct of restriction on multi-homing and most-favored nations clause is maintaining or increasing monopoly power in the online platform market.<sup>61</sup> On January 12, 2023, the KFTC announced that it prepared the Guidelines for Examining Abuse of Market-Dominant Position by Online Platform Business Entities as part of its measures to address monopoly issues on online platforms.<sup>62</sup>

On December 19, 2023, the KFTC announced its plan to pursue enactment of the Platform Competition Promotion Act (“PCPA”) to regulate online platforms.<sup>63</sup> The KFTC stated that the new PCPA would designate certain key platforms that have the power to sway the platform market as “dominant

52. *Id.* art. 45; *see supra* note 19.

53. *See infra* Part II.B.

54. Korea Fair Trade Commission (공정거래위원회), Press Release: Promoting Competition in the Monopolistic Online Platform Market (보도: 독과점 온라인 플랫폼 시장의 경쟁촉진방안 추진), Oct. 21, 2022.

55. *Id.* at 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Korea Fair Trade Commission (공정거래위원회), Press Release: Preparation and Enforcement of the Guidelines for Examining Abuse of Market-Dominant Position by Online Platform Business Entities (온라인 플랫폼 독과점 심사지침 제정, 시행), Jan. 12, 2023.

63. Korea Fair Trade Commission (공정거래위원회), Promoting a Platform Policy that Protects People’s Livelihoods (민생 살리는 플랫폼 독과점 정책 추진), at 2, Dec. 19, 2023.

platforms.”<sup>64</sup> The KFTC also stated that the PCPA would prohibit anticompetitive conduct, including self-preferencing.<sup>65</sup>

Lawmakers proposed several legislative bills consistent with the KFTC’s plan.<sup>66</sup> For example, on July 5, 2024, Nam-geun Kim from the Democratic Party of Korea proposed the legislative bill for the enactment of the Online Platform Monopoly Regulation Act (Bill Number 2201430), sponsored and co-sponsored by 44 lawmakers (“Democratic Party of Korea’s Legislative Bill”).<sup>67</sup> The following box contains translated excerpts from the Democratic Party of Korea’s Legislative Bill.

Excerpts from the Democratic Party of Korea’s  
Legislative Bill No. 2201430 for  
Enactment of the Online Platform Monopoly Regulation Act<sup>68</sup>

Chapter 2: Designation of Market Dominant Online Platform Business Operator

Article 5 (Report of Online Platform Service)

(1) An online platform business operator whose average market capitalization of issued stocks or the fair market value equivalent thereto is KRW 15 trillion or more must report to the Fair Trade Commission an online platform service it provides that satisfies all of the following conditions. In this case, if there is an important change in the reported matters, a report of the change must be submitted.

1. The average annual revenue from providing online platform service for the three preceding fiscal years is KRW 3 trillion or more.
2. Based on the three preceding fiscal years, the number of domestic online platform users (excluding online platform user business operators who used an online platform service by entering into a contract with an online platform business operator) is 10 million or more per month on average or the number of domestic online platform user business operators who used an online platform service by entering into a contract with an online platform business operator is 50,000 or more per month on average.

Article 6 (Designation and Removal of Designation of Dominant Platform Business Operator, Etc.)

64. *Id.*

65. *Id.*

66. Ji-hyun Kim (김지현), *Plan to Enact Law Within the Year for Online Platform Regulation* (온라인 플랫폼 규제, 연내 법 만든다), LAW TIMES (Nov. 20, 2024), <https://www.lawtimes.co.kr/news/203054> [<https://perma.cc/5R5P-7WKU>] (listing legislative bills proposed by different lawmakers for online platform regulation).

67. Democratic Party of Korea’s Legislative Bill, *supra* note 20.

68. *Id.*



(1) The Fair Trade Commission shall, within 60 days from the date of receipt of the report pursuant to Article 5(1), designate an online platform business operator providing an online platform service that satisfies all of the following conditions (hereinafter referred to as “Market-Dominant Platform Service”) as a market-dominant online platform business operator; provided however, this shall not apply if the online platform business operator proves by submitting material with substantial grounds that the online platform service in question does not satisfy one of the following conditions.

1. The online platform service has substantial influence on the domestic market.
2. The online platform service serves as a main gateway for online platform user business operators to reach consumers.
3. The online platform service is in a solid and sustainable position so that access to consumers is restricted without the online platform service, or the online platform service is expected to be in such a position in the near future.

### Chapter 3: Obligations of Market-Dominant Online Platform Business Operator

#### Article 8 (Prohibition of Self-Preferencing)

A dominant platform business operator shall not, without justifiable reason, abuse its market dominant position by treating its product or service more favorably than the product or service of online platform user business operators through its Market Dominant Platform Service by any of the following acts.

1. Giving preferential treatment to one’s own product or service in terms of display that significantly influences the judgment of online platform users, such as the sorting of search results on one’s own Market-Dominant Platform Service
2. Using non-public information generated or collected in the course of use of the Market-Dominant Platform Service by online platform user business operators to provide its own product or service that competes with the online platform user operator’s product or service
3. Other acts comparable to those in subparagraphs 1 and 2, as prescribed by Presidential Decree

#### Article 13 (Presumption of Restriction of Competition)

If a dominant platform business operator commits an act falling under Articles 8 to 12, it is presumed that there is an act that substantially restricts competition (meaning an act that substantially restricts competition as defined in Article 2, Subparagraph 5 of the Monopoly Regulation and Fair

Trade Act); provided however, this shall not apply if the dominant platform business operator objectively proves that any of the following cases applies.

1. In cases where actual competition is not restricted or there is no concern that it will be restricted
2. In cases where it is necessary to achieve compliance with other laws, protection and safety of information of online platform users, maintenance of a core function of a large-scale online platform service, and other equivalent purpose prescribed by Presidential Decree and where it is difficult to achieve the purpose by other means

#### Article 15 (Duty to Disclose)

In order to protect the rights and interests of online platform users, a dominant platform business operator shall disclose the following matters regarding Market-Dominant Platform Service as prescribed by Presidential Decree, such as by posting on its website.

...

3. Bases and display standards for search rankings, exposure rankings, and other major display items that affect the judgment of online platform users.

#### Chapter 5: Investigation of Violations and Administrative Measures, Etc.

#### Article 26 (Penalty Surcharge)

(1) The Fair Trade Commission may impose a penalty surcharge not exceeding 10/100 of the revenue amount as prescribed by Presidential Decree on a dominant platform business operator that violates Articles 8 to 12.

However, on September 9, 2024, the KFTC announced a change to its plan.<sup>69</sup> The KFTC stated in a press release that, instead of enacting a new law, it plans to pursue amendment of the existing MRFTA to regulate dominant platforms with “overwhelming market influence.”<sup>70</sup> The KFTC further stated that the amended MRFTA will prohibit anticompetitive conduct related to self-preferencing, tying, restriction of multi-homing, and most-favored-nations clauses in areas such as intermediation, search, video, Social Network Service,

69. Korea Fair Trade Commission, Press Release: Legislative Approaches to Promote Competition in E-Commerce Platform Markets, at 2, Sept. 9, 2024.

70. *Id.* In the press release, the KFTC stated that it would promote competition by pursuing amendment of the MRFTA and that it would protect those in an inferior bargaining position in transactions between platforms and vendors by pursuing amendment of the Act on Fair Transactions in Large Retail Business. *Id.*

Operating system, and advertisement.<sup>71</sup> Notably, although the KFTC initially planned to designate specific platforms as dominant platforms in advance (referred to as *ex ante* designation), after considering opinions from the industry and experts, the KFTC stated that it had changed its plan so that it would determine whether a company is a dominant platform *after* a violation occurs (referred to as *ex post* approach).<sup>72</sup>

In line with the change in the KFTC's plan, on October 28, 2024, Min-kuk Kang from the People Power Party proposed a legislative bill for amendment of the MRFTA (Bill Number 2204947), sponsored and co-sponsored by 12 lawmakers ("People Power Party's Legislative Bill").<sup>73</sup> The People Power Party's Legislative Bill states that a dominant online platform business operator may not engage in self-preferencing, tying, restriction on multi-homing, or most-favored nations clause without justifiable reason,<sup>74</sup> and it states that the dominant online platform business operator must prove the existence of such a justifiable reason.<sup>75</sup> The People Power Party's Legislative Bill also sets forth when such a justifiable reason will be deemed to exist.<sup>76</sup> Article 8-3 of the People Power Party's Legislative Bill sets forth a standard for when a company is presumed to be a "dominant online platform business operator."<sup>77</sup> The following box contains translated excerpts from the People Power Party's Legislative Bill.

<p style="text-align: center;">Excerpts from the People Power Party's Legislative Bill No. 2204947 for Amendment of the Monopoly Regulation and Fair Trade Act<sup>78</sup></p> <p>Chapter 2-2: Promotion of Competition in the Online Platform Market</p> <p>Article 8-2 (Prohibited Acts of Dominant Online Platform Business Operator)</p> <p>(1) A dominant online platform business operator shall not engage in any of the following acts without justifiable reason.</p> <p>1. Treating one's own product or service (including product or service of affiliates and business operators with interests as determined by Presidential Decree; hereinafter the same shall apply) more favorably than the product or service of other business operators on one's own online platform service.</p>
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71. *Id.*

72. *Id.*; see Dong-jun Yeo (여동준), *Will the Platform Law to Prevent Abusive Conduct Become Ineffective? Ex Ante Designation Has Been Changed to Ex Post Approach* (갑질 방지용 플랫폼법 용두사미 그치나... '사전지정' 빠지고 '사후추정'), NEWSIS (Sept. 10, 2024), [https://www.newsis.com/view/NISX20240909\\_0002881569](https://www.newsis.com/view/NISX20240909_0002881569) [<https://perma.cc/3BL9-LURN>].

73. People Power Party's Legislative Bill, *supra* note 20.

74. *Id.* art. 8-2(1).

75. *Id.* art. 8-2(2).

76. *Id.* art. 8-2(3).

77. *Id.* art. 8-3.

78. People Power Party's Legislative Bill, *supra* note 20.

...

(2) A dominant online platform business operator must prove that there is a justifiable reason for the prohibited act in paragraph (1).

(3) If a dominant online platform business operator proves any of the following, the prohibited act in paragraph (1) is deemed to have a justifiable reason.

1. In cases where there is no restriction of competition or where the effect of increase in consumer welfare is greater than the harm from restriction of competition and it is difficult to achieve such effect through other methods and it is not limited to reducing the internal costs of the business operator but can contribute to increasing the efficiency of the national economy as a whole and it is clearly proven that there is a high probability that such effect will occur
2. In cases where it is necessary to protect and secure information, maintain a core function of an online platform service, etc., and it is difficult to achieve this through other methods

#### Article 8-3 (Presumption of Dominant Online Platform Business Operator)

(1) A business operator falling under any of the following subparagraphs in a certain online platform service sector shall be presumed to be a dominant online platform business operator with respect to the relevant service; provided however, this shall not apply if the revenue (meaning the combined revenue of affiliated companies) of all online platform service provided by the business operator and product or service directly or indirectly related thereto is less than KRW 3 trillion.

1. If all of the following conditions are met
  - A. The market share of an online platform business operator is 60/100 or more in each of the three preceding fiscal years.
  - B. The monthly average of the number of domestic active platform users for each of the three preceding fiscal years is 10 million or more and equivalent to or exceeds the number prescribed by Presidential Decree.
2. If all of the following conditions are met
  - A. The sum of the market shares of three or fewer online platform business operators is 85/100 or more for each of the three preceding fiscal years; provided however, in this case, an online platform business operator with a market share of less than 20/100 is excluded
  - B. The monthly average of the number of domestic active platform users for each of the three preceding fiscal years is 20 million or more and is equivalent to or exceeds the number prescribed by Presidential Decree.

#### Article 8-6 (Penalty Surcharge)

If a dominant online platform business operator violates Article 8-2(1), the

Fair Trade Commission may impose a penalty surcharge not exceeding the amount calculated by multiplying the revenue amount prescribed by Presidential Decree by 8/100. However, in case where there is no revenue amount, etc., a penalty surcharge not exceeding KRW 3 billion may be imposed.

There has been much controversy regarding the legislative bills above in South Korea on regulation of online platforms.<sup>79</sup> The following Section B discusses opinions from the industry and scholars regarding the legislative bills.

*B. Opinions from the Industry and Scholars Regarding Legislative Bills in South Korea on Regulation of Online Platforms*

There is much ongoing debate in South Korea on regulating online platforms.<sup>80</sup> Even the People Power Party's Legislative Bill and the Democratic Party of Korea's Legislative Bill, both of which seek to regulate online platforms, differ significantly.<sup>81</sup> For example, according to the People Power Party's Legislative Bill, the KFTC would determine whether a company is a dominant online platform business operator after a violation occurs.<sup>82</sup> On the other hand, according to the Democratic Party of Korea's Legislative Bill, the KFTC would designate dominant online platform business operators in advance of any violation and impose obligations such as the duty to disclose "bases and display standards for search rankings, exposure rankings, and other major display items that affect the judgment of online platform users."<sup>83</sup>

Another difference between the two legislative bills is that, according to the People Power Party's Legislative Bill, the determination of whether a company constitutes a dominant online platform business operator would be based on

79. See *infra* Part II.B.

80. On the contrary, compared to regulation of self-preferencing, regulation of dark patterns on online platforms has not been subject to much controversy because such regulation of dark patterns clearly benefits consumers. Korea Fair Trade Commission (공정거래위원회), Press Release: Proposed Amendments to the Act on the Consumer Protection in Electronic Commerce and the Framework Act on Consumers Pass National Assembly Plenary Session (보도: 전자상거래법 개정안 및 소비자기본법 개정안 국회 본회의 통과), at 1, Jan. 25, 2024 (stating that the Act on the Consumer Protection in Electronic Commerce has been amended to require prior consent from consumers when increasing regular payment amounts or converting free services to paid services and to prohibit interfering with consumers' cancellation of purchases or withdrawal from membership without justifiable reason). However, potential regulation of online platforms' self-preferencing has raised concerns from the industry and scholars because some self-preferencing does not harm competition and can benefit consumers. See, e.g., Jong-hwa Han (한종화), *Ruling and Opposition Parties Have Different Ideas About Platform Regulation, and a Clash Is Expected in the Regular Session* (여야, 플랫폼 규제법 '동상이몽' ... 정기국회서 충돌 예고), YONHAP INFOMAX (Sept. 12, 2024), <https://news.einfomax.co.kr/news/articleView.html?idxno=4324845> [<https://perma.cc/EHC8-WM34>]; U.S. Chamber of Commerce, *U.S. Chamber of Commerce on Korea's New Online Platform Regulations* (Dec. 17, 2024), <https://www.uschamber.com/international/u-s-chamber-of-commerce-on-koreas-new-online-platform-regulations> [<https://perma.cc/8Q6A-YZXN>].

81. Han, *supra* note 80.

82. *Id.*; see People Power Party's Legislative Bill, *supra* note 20, art. 8-3.

83. Democratic Party of Korea's Legislative Bill, *supra* note 20, art. 5, 6, 15.

revenue and market share.<sup>84</sup> On the other hand, according to the Democratic Party of Korea's Legislative Bill, the determination of a dominant online platform business operator would be based on market capitalization, revenue, and number of users, without a market share requirement.<sup>85</sup> The KFTC reportedly switched from pursuing *ex ante* designation of dominant online platform operators to the *ex post* approach due to concerns from the industry that excessive regulation may restrict innovation.<sup>86</sup>

Ki Jeong Han, the Chair of the KFTC, stated that the KFTC received opinions from the industry that regulation of online platforms should take into consideration the rare ecosystem in South Korea—where not only global Big Tech platforms but also South Korea's domestic platforms such as Naver and Kakao compete.<sup>87</sup> Professor Dae-Sik Hong and Professor Bong-Eui Lee also stated that excessive regulation of online platforms may restrict the innovation and growth of domestic platforms.<sup>88</sup> The legislative bills in South Korea also seek to place the burden on dominant online platform business operators to prove that their self-preferencing conduct is not anticompetitive.<sup>89</sup> However, Professor Jinyul Ju has stated that the KFTC should bear the burden of proving that self-preferencing, tying, restriction on multi-homing, and most-favored-nations clause are anticompetitive; Professor Ju stated that excessive regulation may restrict the development of South Korea's AI ecosystem.<sup>90</sup>

The legislative bills in South Korea to regulate online platforms have also raised concerns regarding international trade.<sup>91</sup> On December 17, 2024, Charles

84. People Power Party's Legislative Bill, *supra* note 20, art. 8-3.

85. Democratic Party of Korea's Legislative Bill, *supra* note 20, art. 5, 6.

86. Han, *supra* note 80.

87. *Id.*

88. Sae-sam Lee (이세샘) & Seo-young Jeong (정서영), *Concerns that Foreign Companies Will Take Over the Market While the Platform Law Catches Domestic Companies* (플랫폼법이 국내기업 잡는 사이 외국업체가 시장 점령 우려), DONG-A ILBO (Jan. 2, 2024), <https://www.donga.com/news/Economy/article/all/20240101/122858546/1> [<https://perma.cc/B7ZA-KQ4S>]; Young-wook Lee (이영욱) & Eun-san Kwak (곽은산), Discussion on Online Platform Law Resumes Amidst Concerns Over Trade Friction (통상 마찰 우려 속 '온플법' 논의 다시 시작), MAEIL BUSINESS NEWSPAPER (Dec. 18, 2024), <https://www.mk.co.kr/news/it/11198044> [<https://perma.cc/XZ3W-XV3W>].

89. People Power Party's Legislative Bill, *supra* note 20, art. 8-2(2); Democratic Party of Korea's Legislative Bill, *supra* note 20, art. 13; *see also* Jae-hyun Park (박재현) & Soo-jung Im (임수정), *Putting a Brake on Violations by Giant Platforms and Identifying Dominant Business Operators After the Fact* ('플랫폼 공룡' 반칙 제동한다... 지배적 사업자 '사후 추정'), YONHAPNEWS (Sept. 9, 2024), <https://www.yna.co.kr/view/AKR20240909085500002> [<https://perma.cc/V72C-949K>].

90. Jinyul Ju, *supra* note 20, at 271; *see also* Seong-ki, Hwang (황성기), *Constitutional Considerations on Online Platform Regulation* (온라인 플랫폼 규제에 관한 헌법적 단상), HERALD CORPORATION (Sept. 5, 2024), <https://biz.heraldcorp.com/article/3468488> [<https://perma.cc/5JHM-TQ3G>] (stating that the KFTC should bear the burden of proving anticompetitive conduct). *See generally* Poom Jang (장품), *Limitations of Platform Self-Preferencing Regulation Theory and Practical Issues* (플랫폼 자사우대(Self-Preferencing) 규제이론의 한계와 실무상 쟁점), 50 JOURNAL OF KOREAN COMPETITION LAW 121, 152 (2024) (stating that conduct remedies prohibiting self-preferencing can create confusion in practice due to the difficulty of distinguishing between self-preferencing that is allowed and self-preferencing that is prohibited).

91. U.S. Chamber of Commerce, *supra* note 80; United States Senate Committee on Finance, Hearing to Consider the Anticipated Nomination of Jamieson Greer, of Maryland, to be United States Trade Representative, with the rank of Ambassador Extraordinary and Plenipotentiary, at 15 (Feb. 6, 2025) (question from Senator

Freeman, the Senior Vice President for Asia at the U.S. Chamber of Commerce, a business association advocacy group, expressed concerns that the legislative bills in South Korea to regulate online platforms may target specific companies while leaving out their competitors; he stated that the government's micromanagement of the economy could result in violation of international trade commitments.<sup>92</sup> In addition, on September 27, 2024, Congresswoman Carol Miller (R-WV) introduced a bill to have the United States Trade Representative ("USTR") report to Congress in case a legislative bill in South Korea imposes discriminatory business restrictions; the USTR would report to Congress on the impact to online platforms in the United States, whether there is a violation of a trade agreement, and the impact to commerce in the United States.<sup>93</sup> The bill would also have the USTR take "measures to protect United States commerce abroad," including a "dispute initiated under the terms of the World Trade Organization's Dispute Settlement Understanding," an "investigation under the authorities of section 301 of the Trade Act of 1974," a "dispute under the provisions of the United States-Korea Free Trade Agreement," and an "agreement with South Korea to mitigate all impacts of the law or regulation."<sup>94</sup> As seen above, attempts to regulate online platforms have been met with objections from the industry and scholars that increased regulation may hinder the innovation and growth of companies. The next section discusses factors to consider when analyzing online platforms' self-preferencing because such conduct can benefit consumers.

### III. ONLINE PLATFORMS' PROPRIETARY PRODUCTS AND SERVICES CAN HELP SPEED UP CONSUMERS' PRODUCT SELECTION THROUGH RELIABLE QUALITY AND FAMILIARITY

Part III proposes that analysis of online platforms' self-preferencing in antitrust cases should consider how online platforms' proprietary products and services, including private brands, can help speed up consumers' product selection and benefit consumers. There are many reasons why consumers may like proprietary products and services of online platforms and retailers. Such proprietary products and services include "private brands," also referred to as "private labels" or "store brands."<sup>95</sup> Private brands often offer lower prices to

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Cantwell), [https://www.finance.senate.gov/imo/media/doc/responses\\_to\\_questions\\_for\\_the\\_record\\_to\\_jamie\\_son\\_greer.pdf](https://www.finance.senate.gov/imo/media/doc/responses_to_questions_for_the_record_to_jamie_son_greer.pdf) [https://perma.cc/5G5Z-KHVG]. See generally Annie Soo Yeon Ahn, *Extraterritorial Application of Antitrust Law, International Comity, and Scope of Remedies: Considering the Nature of the Product and Service in Addition to the Effect in the Relevant Market*, 46 HASTINGS INT'L & COMP. L. REV. 165, 171 (2023) (proposing that "the nature of the product and service, including the importance to the country's industry and consumers and the level of government regulation, should be closely considered for analyzing international comity and deciding the scope of remedies in antitrust cases").

92. U.S. Chamber of Commerce, *supra* note 80.

93. United States-Republic of Korea Digital Trade Enforcement Act, H.R.9876, 118th Cong. § 4 (2024).

94. *Id.* § 5.

95. See Marshall Hargrave, *Private Brand: Also Known as Store Brand, Meaning and Examples*, INVESTOPEdia, <https://www.investopedia.com/terms/p/private-brand.asp> (last visited Apr. 5, 2025) [https://perma.cc/Y98X-HV4W].

consumers than famous name brands.<sup>96</sup> Also, using private brands allows online platforms and retailers to control their brand image and create consumer loyalty to the brand while expanding their product line through third-party or contract manufacturers to provide consumers with a greater variety of products.<sup>97</sup>

Consumers may also prefer online platforms' proprietary products and services due to reliable quality. For online platforms and retailers, selling their private brands can mean a better margin than selling other name brands.<sup>98</sup> Since online platforms and retailers may be left holding inventory that did not sell,<sup>99</sup> they are likely to be careful about the products included in their private brands.<sup>100</sup> Therefore, online platforms' and retailers' proprietary products and services can offer consumers products that are not only lower in price but also reliable in quality.<sup>101</sup> The display of private brands at the top of the search results page on online platforms can help consumers save time because consumers may be able to quickly locate products that are likely to be competitive in price and reliable in quality.<sup>102</sup>

Also, consumers' familiarity with online platforms' proprietary products and services can make product selection easier and save time for consumers.<sup>103</sup> Suppose a consumer is not looking for a specific brand item and can choose between several brands. In that case, it can take time to compare the different products offered, including the price, quality, ingredients, and other consumer reviews. Furthermore, suppose a consumer likes an online platform's private

96. *Id.*; Private Label Manufacturers Association, *Store Brands: The Smarter Choice*, STORE BRAND FACTS, [https://plma.com/about\\_industry/store\\_brand\\_facts](https://plma.com/about_industry/store_brand_facts) (last visited Apr. 5, 2025) [<https://perma.cc/UQ2G-CWPT>] (stating that "using average cost per unit, in a store wide price comparison between store brands and national brands, it is estimated that U.S. consumers save more than \$40 billion a year on grocery and household purchases by opting for the store brand over the national brand version"); Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, PROMARKET (Apr. 10, 2023), <https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model/> [<https://perma.cc/K2BE-85MZ>] ("Consumers are generally best off when market output is high, prices are low, quality is high, and innovation is unrestrained.").

97. Hargrave, *supra* note 95.

98. *Id.*

99. *Id.*

100. *See id.*

101. Private Label Manufacturers Association, *Store Brands: The Smarter Choice*, STORE BRAND FACTS, [https://plma.com/about\\_industry/store\\_brand\\_facts](https://plma.com/about_industry/store_brand_facts) (last visited Apr. 5, 2025) [<https://perma.cc/GH5S-66DS>].

102. Recently, the KFTC raised concerns that when an online platform's proprietary product is artificially displayed at the top of the search results page, third-party sellers on the online platform might be disincentivized from lowering their prices because this will not necessarily bring them to the top of the search results page, and the online platform has no need to lower its price because its product is likely to be displayed at the top of the search results page. KFTC Press Release in Coupang Case, *supra* note 19, at 3–4. However, e-commerce platform Coupang has reported results from a market research firm survey that many consumers responded that they purchase private brand products on an online platform due to good quality compared to price. Coupang, *Coupang PB Small and Medium Manufacturers Surpass Large Companies in Popularity* . . . "A Series of Success Stories from the Ground Up" (쿠팡 PB 중소 제조사, 대기업 인기 뛰어 넘어 . . . "팬팡 성공사례 줄이어"), COUPANG NEWSROOM (July 7, 2023), <https://news.coupang.com/archives/29217/> [<https://perma.cc/M2L3-2GQB>] (reporting that market research firm Research & Research conducted a survey of 1,000 people aged 20 to 59 in South Korea in April 2023 related to private brand products in online shopping malls and that 75.7% of those surveyed responded that the reason for purchasing private brand products is good quality compared to price).

103. *See supra* note 102.



brand for one product. In that case, the consumer might be inclined to pick the same private brand when purchasing a different product because the consumer is familiar with the brand and expects a certain level of price and quality.<sup>104</sup> This familiarity with the brand can narrow down the products from which the consumer can choose and save the consumer time when shopping.

Even if online platforms' proprietary products and services are displayed at the top of the search results page, consumers can compare various products available on online platforms, including private brands and other brands, by scrolling through the search results pages.<sup>105</sup> An online platform's private brand is likely a competitive option and can provide consumers with a good reference point for comparison with third parties' products and services.<sup>106</sup> A good reference point can save consumers time compared to reviewing and comparing products starting from scratch and without a reference point, especially if many sellers are offering the product.<sup>107</sup> Even if a consumer does not select the online platform's private brand, placing the online platform's private brand at the top of the search results page can give the consumer a competitive product with which to compare other options.<sup>108</sup>

#### CONCLUSION

This Article proposes that analysis of online platforms' self-preferencing in antitrust cases should take into consideration how online platforms' proprietary products and services, including private brands, can help speed up consumers' product selection and benefit consumers. Consumers may prefer online platforms' proprietary products and services due to reliable quality. Also, consumers' familiarity with online platforms' proprietary products and services can make product selection easier and save time for consumers. Even if online platforms' proprietary products and services are displayed at the top of the search results page, consumers can compare various products available on online platforms, including private brands and other brands, by scrolling through the search results pages. The display of online platforms' proprietary products and services at the top of the search results page can provide consumers with a reference point for comparison with third parties' products and services.

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104. See Hargrave, *supra* note 95.

105. See Ahn, *supra* note 24, at 2341–42.

106. See *id.*

107. See *id.*

108. See *supra* Part III.