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Self-preferencing conducts of digital platforms

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INTRODUCTION

"Yesterday and today, commentators frequently have argued that competition law is ill-suited to identify, correct, and deter misconduct in fast changing markets. Agencies are said to suffer from several fundamental weaknesses. They know too little about new business models, products, and services, they intervene too slowly, and their remedies are ineffective. By this view, competition agencies peddle earnestly on bicycles in futile pursuit of industries that move with the speed of race cars"

(William E. Kovacic, "The CMA in the 2020s: a dynamic regulator for a dynamic environment", 25 February 2020, available at https://www.gov.uk/government/speeches/the-cma-in-the-2020s-a-dynamic-regulator-for-a-dynamic-environment).

In recent years, we have witnessed a major increase in the role that digital platforms play in our lives and economies. This has led to the creation of conglomerates of private wealth which have, in some instances, enormous market power. Their market power is not only economic, but often translates to other aspects of our lives as well, such as data and information.

Digital platforms and digital markets have specific features that arguably led to the creation of market power and can be conducive to leveraging, an expression of which is self-preferencing. In order to tackle leveraging conducts and self-preferencing in particular, antitrust authorities world-wide have initiated a number of antitrust investigations and introduced ex-ante regulation.

The legal and economic literature concerning self-preferencing has focused its attention on specific aspects of this conduct so far, but in the literature a comprehensive work addressing all the relevant issues concerning self-preferencing conducts is still lacking. In the course of the years, indeed, the regulation of self-preferencing conducts of digital platforms has undergone a number of waves of regulation, starting with antitrust enforcement, which was

then followed by regulatory initiatives at the international level. This, in turn, has led to issues relating to potential conflict of laws and to policy questions concerning the balance between antitrust and regulatory intervention.

The purpose of this work is to cover the relevant aspects of self-preferencing conducts and to provide a comprehensive assessment of self-preferencing conducts in digital markets, within the multi-faceted legislative framework potentially applicable to such conducts. The methodology consists in the analysis of the relevant conducts, relevant legislative provisions and economic and legal literature in order to elaborate an original interpretative solution that allows to evaluate self-preferencing conducts, in addition to providing clarity on how such conducts should be assessed.

This work addresses a number of research questions relating to self-preferencing, all aimed at providing an interpretative solution for self-preferencing conducts of digital platforms.

The first research question is whether the analysis of self-preferencing and unilateral conduct more generally should be any different in the offline and the online world. The thesis sets out the key features of digital platforms and their incentives to leverage their market power and discusses the proposals that have been put forward, relating to the fact that these characteristics of digital platforms call for a new framework for the assessment of conducts in this space.

Another research question that forms part of the underpinning of this work is the fundamental question of what is the right analytical framework for the antitrust assessment of self-preferencing. The thesis, starting from a definition of what constitutes self-preferencing, analyses the effects of these conducts and the potential legal avenues for the analysis. After setting the framework, the work applies it to three types of self-preferencing conducts: 1) self-preferencing in ranking; 2) self-preferencing through the use of competitively sensitive non-public business data; 3) self-preferencing through platform fee discrimination. In this respect, the thesis works with examples from the European case law and administrative practice, with a particular focus on the seminal *Google Shopping* case.

In light of the introduction of the Digital Markets Act, the thesis also addresses the question of how to interpret the self-preferencing provisions in the new regulation. On the back of provisions that at face value are extremely broad and do not provide any guiding principles for their interpretation and application, the thesis will try to provide some clarity and offer an original interpretative solution. In this respect, the work puts forward policy proposals on how to interpret the relevant provisions, in light of the relevant antitrust analysis and economics.

Finally, the research will consider the interplay between the different regulatory tools potentially applicable to self-preferencing, both at the European and national level. The thesis will start from an analysis of the ne bis in idem principle and will apply it to self-preferencing conducts and will then move on to analyse the policy question concerning the right balance between antitrust enforcement, regulation and other provisions in tackling self-preferencing conducts of digital platforms.

Throughout the work, the research adopts an inter-disciplinary approach by including references to the relevant work of economists. The thesis also uses a comparative methodology – when helpful to provide a proper framework for the analysis – by including references to the regulatory and antitrust initiatives in the UK and in the US, the other two leading jurisdictions together with the EU, also with a view to highlighting convergences and divergences in this space.

Chapter I provides a snapshot of antitrust enforcement in digital markets and includes a description of the main features of digital markets and of the business models of digital platforms, which often entail a leveraging component (including incentives to self-preference). This chapter also describes the regulatory responses (ex-ante and ex-post) to conducts in the digital sector.

Chapter II focuses on the antitrust assessment of self-preferencing. The chapter starts with the definition of self-preferencing and then assesses the effects of the conducts and possible legal avenues to analyse them. The framework is then applied to the leading cases concerning self-preferencing.

Chapter III considers self-preferencing from the Digital Markets Act angle and suggests policy proposals on how to interpret this provision, drawing from

learnings from past antitrust investigations in this space and the relevant economics.

Chapter IV includes an analysis of how the antitrust and regulatory aspects of self-preferencing should co-exist and of the interplay between national and European laws.

Finally, conclusions are drawn.

CHAPTER I
DIGITAL MARKETS, LEVERAGING AND REGULATION

SUMMARY: 1. A snapshot of competition enforcement in digital markets; - 2. The definition of digital platform; - 3. The key features of digital platforms; - 3.1. Economies of scale/scope and returns to scale; - 3.2. Network effects; - 3.3. Data; - 3.4. Barriers to entry and expansion; - 4. Leveraging conducts and foreclosure in digital markets; - 4.1. Vertical foreclosure and the notion of leverage; - 4.2. Specific conducts/set-up of digital platforms and leveraging; - 4.2.1. Dual mode; - 4.2.2. Envelopment; - 5. The regulation of digital markets; - 5.1. Antitrust assessment of conducts in the online and offline worlds; - 5.2. The ex-ante regulation of digital markets.

1. A snapshot of competition enforcement in digital markets

The digital economy has fundamentally changed the way business is carried out, the amount of data that is generated or stored and, more importantly, the way we live. It is estimated that the combined revenue share of Google, Apple, Facebook, Amazon, and Microsoft (GAFAM) in 2020 made it the 18th largest economy in the world, larger than major economies such as Poland, Sweden, Ireland, and Israel, with revenues at USD 736.9 billion.[1]

[1] https://projects.itforchange.net/state-of-big-tech/taxing-big-tech-policy-options-for-developing-countries/#:~:text=At%20USD%20736.9%20billion%2C%20GAFAM's,Sweden%2C%20Ireland%2C%20and%20Israel.

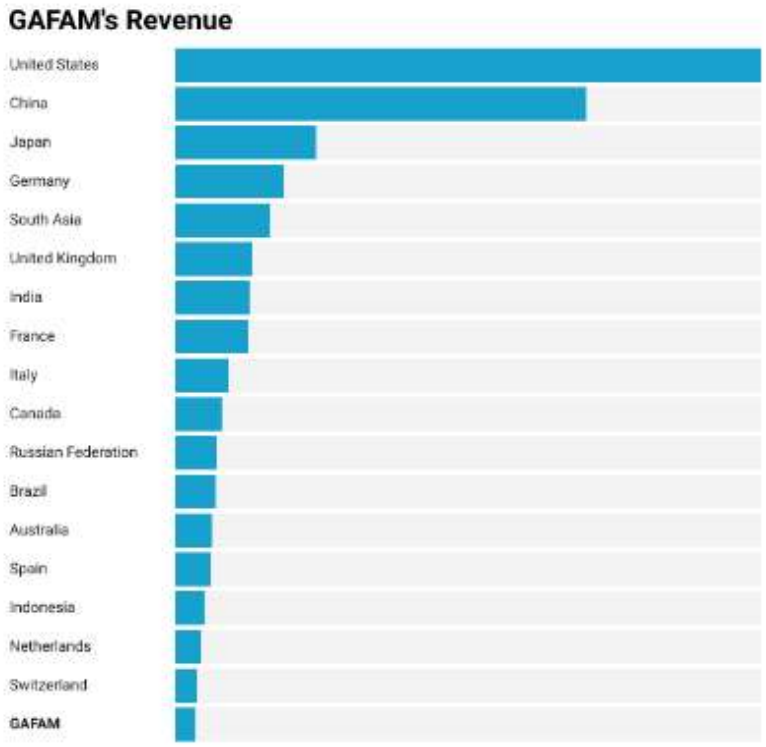

Figure 1: GAFAM's revenues compared to states. Note: Taken from Abdul Muheet Chowdhary and Sébastien Babou Diasso "Taxing Big Tech: Policy Options for Developing Countries", https://projects.itforchange.net/state-of-big-tech/taxing-big-tech-policy-options-for-developing-countries/#:~:text=At%20USD%20736.9%20billion%2C%20GAFAM's,Sweden%2C%20Ireland%2C%20and%20Israel

(2022) Tackling gatekeepers' self-preferencing practices, European Competition Journal, 18:3, p. 574.

The economic power of these digital platforms raises all sorts of issues from how to tax them, to freedom of speech and privacy-related concerns. Competition and market power concerns are no exception.

In its report 'Competition policy for the digital era' (the EU Report), the European Commission noted that "*digitisation and developments in artificial intelligence have led to the emergence of new possibilities and business models*" and that "*many of these changes have greatly benefited European citizens"*, for

instance, *"the accessibility of information has greatly increased…transacting across national borders has been facilitated…and choice has increased*".[2]

The report also acknowledges that there are apprehensions around these platforms. In particular, these few ecosystems and large platforms have become the new gateways through which people use the Internet, by which people connect and communicate with one another, and purchase goods on the Internet. Moreover, some of those platforms are embedded into ecosystems of services and, increasingly, devices that complement and integrate with one another.[3]

Of course, this new market reality brings challenges for regulation. The report acknowledges that several societal values are at stake, ranging from privacy to consumer protection to media diversity, and that a vigorous competition policy regime is needed. In light of the importance of the digital economy and the apprehension around the economic power of GAFAM, the European Commission was not the only competition authority to study in depth the characteristics of digital markets and the conducts of digital platforms. Indeed, the interest around the digital economy has sparked a number of reports and changes in the organization of competition authorities, which concerned the main jurisdictions in the world.

In 2019, the European Commission commissioned the above-mentioned report "Competition policy for the digital era". In the same year, the UK government also commissioned a report, the "Expert Panel Report – Unlocking Digital Competition" (the Furman Report), which was released in March 2019.[4] This report was then followed in the UK by the Competition and Markets Authority's (CMA) "Online platforms and digital advertising market study", release in July 2020 and which also had the purpose of analysing the digital economy.[5]

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[2]Directorate-General for Competition (European Commission) and others, *Competition Policy for the Digital Era* (Publications Office of the European Union 2019) <https://data.europa.eu/doi/10.2763/407537> accessed 3 May 2024., p. 12.

[3] Ibid., p. 13.

[4] Jason Furman and others, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (2019) 27 UK government publication, HM Treasury.

[5] The CMA market study is available here: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study

Still in 2019, the Stigler Center in the United States released the "Final Report and Policy Brief of the Digital Platforms Committee" on September 16, 2019 (Stigler Report).[6] The Stigler Report was produced by an independent and non-partisan committee, which was composed of more than 30 highly-respected academics, policymakers, and experts and spent over a year studying the impact of digital platforms on the economy and antitrust laws; data protection; the political system; and the news media industry.

In October 2020, in the United States, the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law produced a report,[7] which followed a series of hearings with the principal stakeholders on the state of digital competition.

In addition to the reports produced in the main jurisdictions, digital markets sparked the interest of a number of other competition authorities in the world, which also produced reports on this subject matter expressing their views on the potential competition concerns raised by digital markets and taking a position on their enforcement priorities in this space.[8]

The reports were then followed swiftly by a number of antitrust investigations across the main jurisdictions in the world, so much that the digital economy has been at the top of the agenda of antitrust authorities in the world for

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[6] The Stigler Report is available here: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf

[7] The report of the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law is available here: https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

[8] See Australian Competition and Consumer Commission, 'Digital Platforms Inquiry' <https://apo.org.au/node/250026> accessed 3 May 2024.; Matthias Dolenc, 'Proposition Paper Digitalisation and Competition Law' (Austrian Federal Competition Authority 202AD).; Pierre Barthelmé, Martijn Snoep and Jacques Steenbergen, 'Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities on Challenges Faced by Competition Authorities in a Digital World'.; French Competition Authority, 'Contribution to the Debate on Competition Policy and Digital Challenges' (2020) <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf> accessed 3 May 2024.; German Commission 'Competition Law 4.0', 'A New Competition Framework for the Digital Economy' (2019) <https://www.gidaperakendecileri.org/wp-content/uploads/2021/06/a-new-competition-framework.pdf> accessed 3 May 2024.; Nordic competition authorities, 'Digital platforms and the potential changes to competition law at the European level' (2020) <https://www.kfst.dk/analyser/kfst/publikationer/dansk/2020/20200928-digital-platforms-and-the-potential-changes-to-competition-law/> accessed 3 May 2024.; Swedish Competition Authority, 'Risk for Competition Problems on Swedish Digital Markets' <https://www.konkurrensverket.se/en/news/risk-for-competition-problems-on-swedish-digital-markets/> accessed 3 May 2024.

years. In the EU, indeed, all the GAFAM have faced several antitrust investigations all aimed at further scrutinizing the concerns that can arise in digital markets.

Google has been at the centre of several complaints by competitors, of which three resulted in formal charges: *Google Shopping*, *Android* and *Google AdSense* with fines totalling an amount of over €8 billion. Moreover, the EU Commission is currently investigating Google's potential anti-competitive behaviour in the Adtech space and the number of cases at the national level is countless.

Apple is facing two formal antitrust investigations into Apple's App Store rules and its Apple Pay payment system at the EU level. At the national level other authorities have also looked into Apple's practices and opened investigations to further probe them accordingly.

Facebook is undergoing investigations concerning Facebook's Marketplace and online display advertising in the EU. In Germany, the Federal Cartel Office (Bundeskartellamt) had held that Facebook's practice of combining user data from several sources without the users' consent was in breach of competition law. The European Court of Justice has, in this respect, recently handed down a seminal judgment concerning the interplay between the EU General Data Protection Regulation (GDPR) and competition law, with far-reaching implications for the personalised use of consumers' personal data for targeted advertising by social media platforms. The European Court of Justice has indeed ruled that competition authorities of a Member State can investigate and sanction an infringement of the GDPR, when this is a result of dominant companies exploiting their dominance.[9]

Amazon has been subject to antitrust investigations in the EU for its Buy Box and for the conditions relating to the Prime service and other national competition authorities in the EU member states are looking into Amazon's practices in various respects.

Microsoft has been less in the eyes of competition authorities in the EU in recent years compared to the other big tech companies but it has still been at the

[9] *Meta Platforms Inc and Others v Bundeskartellamt [2023] ECJ Case C-252/21.*

centre of the spectacular prohibitions of its merger with Activision in the UK and several antitrust authorities are conducting market studies concerning potential competition concerns in the cloud sector, where Microsoft is one of the main players in a highly concentrated market.

Even though cloud has not been included in the list of "core platform services" in the Digital Markets Act, it is one of the segments of the digital economy that has generated the greatest deal of attention from competition authorities recently and it is certainly extremely high in the enforcement priorities of antitrust authorities both in the EU and in the UK. The analysis of the ongoing and recent investigations into cloud in the EU and in the UK shows that the Office of Communications in the UK (Ofcom) has recently referred the cloud market to the CMA for further investigation, an informal investigation of the European Commission is taking place, and the French Competition Authority (FCA) has published its opinion on the cloud sector. Moreover, the German Bundeskartellamt is currently investigating Microsoft's market power across digital markets, including cloud services and has already determined Amazon's paramount significance for competition across markets, considering it a leading provider of cloud computing services. Further, potential competition concerns in cloud have been analysed by other national competition authorities in Europe recently and the European Commission has dealt with other complaints in the same space.

The below table summarizes the ongoing and recent investigations into cloud in the EU and in the UK.[10]

Table 1: Summary of EU/UK investigations into cloud

Case	Key issues/findings	Status/outcome
Cloud services market	• The CNMC has found that these services are a pillar for the digital transformation	• The market study is still ongoing. The CNMC has opened a consultation to

[10] Given that cloud gaming is a very specific and different sector within cloud, this has been excluded from the scope of the analysis.

Case	Key issues/findings	Status/outcome
study, Spain[11] (start date: 2023)	process and for business competitiveness, as they allow for data to be processed, stored and managed remotely. • The CNMC has identified several challenges from a competition point of view: among others, the tendency towards concentration and the difficulty in switching providers.	receive feedback from market participants until 21 June 2024.
Cloud services market study, United Kingdom Ofcom[12] (end date: 2023)	• Ofcom's market study has highlighted that the cloud services market is highly concentrated with the two leading providers of cloud infrastructure services in the UK - Amazon Web Services (AWS) and Microsoft - holding a combined market share of 70-80%. Google is their closest competitor with a share of 5-10%.[13] • Ofcom's final report found that the features of the market give cause for competition concerns, such as egress fees, technical restrictions on interoperability and committed spend discounts and that there are indications this is already causing harm, with evidence of cloud customers facing significant price increases when they come to renew their contracts. • In light of the above, Ofcom referred the cloud	• Ofcom formally launched the market study in October 2022. • Ofcom has published its final findings and made a market investigation reference to the Competition and Markets Authority. • The CMA has started a market investigation and has issued an issues statement.[14] • The statutory deadline for the CMA proceeding is 4 April 2025.

[11] *Cloud services market study*, CNMC market study of 23 November 2023.
[12] *Cloud services market study*, Ofcom market study of 6 October 2022.
[13] See https://www.ofcom.org.uk/__data/assets/pdf_file/0027/269127/Cloud-services-market-study-final-report.pdf
[14] See https://assets.publishing.service.gov.uk/media/652e958b6972600014ccf9f6/Issues_statement__updated.pdf

Case	Key issues/findings	Status/outcome
	infrastructure market to the Competition and Markets Authority to carry out a market investigation.	
Microsoft (informal CISPE investigation), EC (start date: 2023)	• The key issue raised by complainants is that Microsoft may be abusing its access to business-sensitive information belonging to cloud firms it has commercial dealings with, and then leverages such confidential information to compete with cloud-service providers on the market.[15]	• The investigation follows complaints from several cloud vendors, including Cloud Infrastructure Services Providers in Europe (CISPE), which were brought in 2022. • As of now, it appears from public sources that the investigation conducted by the EC remains in an informal stage and the EC is due to make a decision about initiating a formal investigation, after careful consideration of the evidence.
***Ex officio* proceeding on Cloud computing, FCA[16]** (end date: 2023)	• The French Competition Authority considered the positions and competitive advantages of the various players involved in this sector and noted that several large players could hold significant competitive advantages.[17] • The FCA found that the cloud market is prone to anticompetitive practices which could take the form of: (i) abuses of dominant position., *e.g.* technical obstacles to customer migration or to the use	• The FCA started proceedings *ex officio* on 27 January 2022, in order to issue an opinion to analyse competition conditions in the cloud computing sector. • The FCA issued a separate but related opinion on certain provisions of the draft law to secure and regulate the digital space, in May 2023.[18] • The FCA published its final opinion on 30 June 2023.

[15]See https://cispe.cloud/executive-summary-of-cispe-complaint-against-microsoft/; https://petri.com/eu-antitrust-probe-microsoft-azure/

[16] *Ex officio proceeding on Cloud computing*, French Competition Authority proceeding *ex officio* of 27 January 2022.

[17]See https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2023-09/23a08_EN.pdf

[18]See https://www.autoritedelaconcurrence.fr/en/press-release/cloud-computing-autorite-de-la-concurrence-issues-opinion-certain-provisions-draft

Case	Key issues/findings	Status/outcome
	of several cloud providers and/or business practices (e.g. contractual constraints and/or pricing practices) that create barriers to entry and to expansion; (ii) cartels, *e.g.* stronger partnerships between cloud service providers or between cloud service providers and integrators, specific interoperability agreements between certain players; (iii) concentrations, *e.g.* merger strategies of cloud players engaging in killer acquisitions.	
Examination of Microsoft's significance for competition across markets, Bundeskartellamt[19] (start date: 2023)	• The Bundeskartellamt has initiated a proceeding against Microsoft to examine whether the company is of paramount significance for competition across markets, on the basis of its new powers under Section 19a German Competition Act.[20] • With reference to cloud, the Bundeskartellamt mentioned *"a strong increase in the importance of the cloud services Azure and OneDrive, which are often linked to other Microsoft applications"*.	• The Bundeskartellamt initiated the proceeding in March 2023 and it is still ongoing.
Microsoft (settlemen	• The complaint was focused on the higher costs of buying and	• French cloud computing services provider

[19] *Examination of Microsoft's significance for competition across markets*, Bundeskartellamt proceeding of 28 March 2023.
[20] See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_03_2023_Microsoft.html

Case	Key issues/findings	Status/outcome
t), EC (end date: 2023)	running Microsoft software in clouds other than Azure, and technical adjustments needed to run some programs on competitors' clouds.[21] • Microsoft's settlement introduced changes to its licensing practices.	OVHcloud, Italian cloud service provider Aruba and a Danish association of cloud service providers had complained to the EC about Microsoft's cloud practices and licensing deals in 2021. • Microsoft settled antitrust complaints in 2023 but CISPE was not part of the settlement.
Microsoft (Nextcloud complaint), EC (start date: 2021 – no indication that the EC has initiated a proceeding or of any other developments)	• Nextcloud formally complained to the EC about Microsoft's alleged abuse of market dominance by pre-installing its OneDrive cloud storage service with Windows.[22] • According to Nextcloud, this action prevented competition in the cloud storage market by limiting users' options.	• The complaint was brought by Nextcloud in 2021 and, from desktop research, there is no evidence that the EC has initiated a proceeding or of any other developments.
Market Study Cloud services, Dutch Competition Authority[23] (end date: 2022)	• The Dutch Competition Authority (ACM) identified risks in this market related to: (i) switching barriers; (ii) poor interoperability; and (iii) increasing consolidation.[24] • In particular, the ACM noted that: (i) switching barriers exist	• The study found that it is difficult for companies to switch cloud service providers or combine cloud services from different providers. • Based on its findings, the ACM has recommended further amendments to the proposed Data Act.[25]

[21] See https://www.theregister.com/2023/03/30/microsoft_euro_complaints/
[22] See https://www.theregister.com/2021/11/29/onedrive_antitrust/
[23] *Market Study Cloud services*, Authority for Consumers & Markets market study of 18 May 2021.
[24] See https://www.acm.nl/en/publications/acm-amendments-data-act-necessary-promoting-competition-among-cloud-providers; https://www.acm.nl/system/files/documents/public-market-study-cloud-services.pdf

Case	Key issues/findings	Status/outcome
	in this market as there are insufficient suitable alternatives for the cloud services and, even when there are, data cannot always be transferred properly and/or uncertainties exist around the financial consequences of switching; (ii) providers that are active on multiple layers of the cloud are most attractive to new users, given that cloud services from different providers are not always interoperable; (iii) increasing consolidation gives rise to the risk that users become increasingly dependent on a few vertically integrated cloud providers.	
Examination of Amazon's significance for competition across markets, Bundeskartellamt[26] (end date: 2022)	• The Bundeskartellamt found that the company is of paramount significance for competition across markets, on the basis of its new powers under Section 19a German Competition Act.[27] • The Bundeskartellamt described Amazon as the leading provider of cloud computing services (generating a large proportion of its corporate profits through	• The Bundeskartellamt concluded the proceeding in 2022. • Amazon has appealed the decision and, to the best of knowledge, judicial review is still ongoing.

[25] See https://www.acm.nl/system/files/documents/proposal-to-enhance-the-draft-data-act.pdf
[26] *Examination of Amazon's significance for competition across markets*, Bundeskartellamt proceeding of 18 May 2021.
[27] See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/06_07_2022_Amazon.html

Case	Key issues/findings	Status/outcome
	its Amazon Web Services (AWS) business).	

Across the Atlantic, the situation is not different in any respect, with a number of investigations launched against GAFAM by the Antitrust Division of the Department of Justice and the Federal Trade Commission and a number of lawsuits pending at the federal level and in several states.

The number of antitrust investigations in the digital space has led the major jurisdictions in the world to come to the conclusion that competition law was not sufficient to deal with the increased market power in this sector, which had become entrenched and extremely pervasive, and that regulation was therefore needed.

The EU, a global frontrunner in the regulation of digital markets, has paved the way for the regulation of digital markets with the introduction of the Digital Markets Act, coupled with the Digital Services Act.[28] The US has followed suit with the American Innovation and Choice Online Act and the Open App

[28] See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, USA 2020) <https://books.google.com/books?hl=en&lr=&id=mZXHDwAAQBAJ&oi=fnd&pg=PP1&dq=Anu+Bradford,+%E2%80%9CThe+Brussels+Effect:+How+the+European+Union+Rules+the+World%E2%80%9D&ots=D_-hBUYVEJ&sig=2reDuQtB_9EmNDYl7o_kNM8ViQA> accessed 24 April 2024, where the author argues that the EU today is assuming the role of a global regulatory hegemon. This phenomenon is called "the Brussels Effect". According to Bradford, indeed, companies operating on a global scale tend to comply with the strictest standards in light of the need to expand their operations worldwide, as the companies' production or conduct is non-divisible. Today, the strictest standards are set by the EU that has both the regulatory capacity as well as the political will to generate stringent rules. In light of the position assumed, the EU therefore acts as a regulation *maker* instead of a regulation *taker* when it regulates inelastic targets (the expression resembles the difference between price makers and price takers that is often used in micro-economics to explain the difference between the different market structures in terms of elasticity of demand and the role of undertakings therein). Bradford opposes the role of the EU to that of the United States and China. The EU exports regulation, while the US exports technology and China exports infrastructures. Of the three jurisdictions, the author analyses the different approach to regulation that is described as rights-driven in the EU, as market-driven in the US and as State-driven in China. In light of the role of the EU in the context of global regulation, Bradford argues that today's regulation in the world is rights-driven because of the role assumed by the EU and that this regulatory hegemony affects various fields, including competition law and digital regulation. In effect, the analysis of the pattern of regulation of digital markets worldwide seems to reflect this dynamic given that the EU has certainly taken the lead on the regulation of digital platforms. See also Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023), page 367.

Markets Act, which are clearly inspired by the regulatory initiatives in the EU. In the UK, digital regulations aimed at contrasting the market power of GAFAM have also been proposed with the UK Digital Markets, Competition and Consumers Bill having now passed the final stage of the Royal Assent.

At the same time, even at the level of the EU member states regulatory initiatives have flourished and several Member States have introduced digital regulations or are in the processing of introducing it. For instance, Germany has introduced Section 19a in the German Competition Act which applies to platforms that are of "paramount significance for competition across markets". In Italy, the Competition Law Decree has granted further powers to the Italian Competition Authority to ensure that the markets for online intermediation, search engines, and social network are fair and contestable.

The introduction of these regulations relating to digital markets and the increasing number of investigations in the digital sector has also led to some structural changes within competition authorities, with the set-up of *ad hoc* units or taskforces.

In the EU, the Directorate General for Competition has established a Digital Markets Act task force which will include a staff of 80 people and will be composed not only by lawyers and economists, but also other professionals such as computer scientists and data scientists.[29] The Digital Markets Act task force will work together with the Directorate General for Communications to enforce the new regulation. Commissioner Vestager has also announced in September 2022 that the European Commission was in the process of establishing a chief technology office.[30] In the United Kingdom, a Digital Markets Unit (DMU) has been established within the Competition and Markets Authority (CMA). While the DMU is still working on a non-statutory basis, it is involved in the consultations on the Digital Markets, Competition and Consumers Bill. Under the Bill, the DMU will designate the companies that have 'strategic market status',

[29] Many commentators have questioned (and rightly so) whether the European Commission will have the sufficient resources to implement the Digital Markets Act, given that the implementation task will likely require significant resources. See https://theplatformlaw.blog/2022/10/12/the-dma-has-been-published-now-the-real-challenges-start/

[30] 'Remarks of Chair Lina M. Khan' (Federal Trade Commission 2022) <https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf> accessed 4 May 2024.

which will be the companies in scope under the new Bill.[31] In the United States, the FTC has also acknowledged the challenges presented by the regulation of digital markets and has been operating a permanent Technology Enforcement Division since October 2019.[32] The Competition Bureau in Canada has also set up a Digital Enforcement and Intelligence Branch (called CANARI - Competition through Analytics, Research and Intelligence) at the end of 2021. In Australia, the ACCC now has a specialist Digital Platforms Branch that conducts further work related to digital platforms.

From all of the above it is clear that digital markets have had a remarkable influence on competition law and policy. The reason behind it is that digital markets are perceived to have unique features that call for heightened antitrust scrutiny and GAFAM engage in behaviours that can have particularly harmful consequences on the market.

2. The definition of digital platform (hints)

There is no clear-cut definition of digital platforms in the relevant legislative documents. [33] As a result, commentators have tried to propose different

[31] See https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

[32] See https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division.

[33] Some indications, though, can be found in certain Communications of the European Commission. The COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Digitising European Industry Reaping the full benefits of a Digital Single Market 2016 provided that "*Platforms here are to be understood as multi-sided market gateways creating value by enabling interactions between several groups of economic actors. Among others, platform building requires the development of reference architectures and their gradual implementation, testing and validation in evolving ecosystems that trigger broad value creation*" COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A European agenda for the collaborative economy 2016 addressed the concept of "collaborative economy", which "*refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms')".* The COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Online Platforms and the Digital

definitions of digital platforms that are capable of adequately capturing their salient features, which can be grouped into three main categories.[34]

The first tentative definition refers to digital platform as a way to provide a certain type of service (the so called service model). According to this definition, digital platforms are defined as "*a set of digital services and are not directly tied to specific companies*".[35] This definition was for instance adopted by the OECD Model Reporting Rules for Digital Platforms,[36] where digital platforms are defined as "*any software, including a website or a part thereof and applications, including mobile applications, accessible by users and allowing sellers to be connected to other users for the provision of relevant services, directly or indirectly, to such users*".

A second approach is the so called technological approach to the definition of digital platforms, according to which "*a digital platform is a complex system of technologies, computer programs, and computer equipment and devices that provides a set of service capabilities on the basis of which many different products can be developed and deployed*".[37]

Finally, a third approach is to consider the digital platforms as an infrastructure for the interaction of various participants. By this view, digital platforms are ecosystems, where an ecosystem is "*a group of complementary goods and services that form a set that can be consumed by the end user and can create a "closed" effect for the user within the ecosystem, with the result that the person who controls the ecosystem wins. The ecosystem is often based on the*

Single Market Opportunities and Challenges for Europe 2016 refers to online platforms as "*as online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy*".

[34] Elina L Sidorenko, 'Definition of "Digital Platforms"' in Maxim I Inozemtsev, Elina L Sidorenko and Zarina I Khisamova (eds), *The Platform Economy: Designing a Supranational Legal Framework* (Springer Nature 2022) <https://doi.org/10.1007/978-981-19-3242-7_6> accessed 24 April 2024.

[35] Lina M Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973.

[36] See 'Model Rules for Reporting by Platform Operators with Respect to Sellers in the Sharing and Gig Economy - OECD' <https://www.oecd.org/tax/exchange-of-tax-information/model-rules-for-reporting-by-platform-operators-with-respect-to-sellers-in-the-sharing-and-gig-economy.htm> accessed 24 April 2024.

[37] See Sidorenko (n 34).

platform, but is not limited to it and reflects not a technical aspect (mediation between different participants) but intra-organizational relationships".[38]

In this thesis, it is submitted that the key features described below determine the place of the platform in modern economics and law. Hence, the definition of digital platform for the purposes of our analysis should be a broad one which applies to all instances when an undertaking connects multiple agents on different sides of the market (multi-sidedness) and has the characteristics further explained below.

3. The key features of digital platforms

3.1. Economies of scale/scope and returns to scale

The extreme returns to scale and the presence of economies of scope have been identified in the EU Report as key characteristics of digital markets. In addition to that, digital markets are also characterized by large economies of scale.

Economies of scale are present when the total cost of producing two quantities of a given product (the product being X) is lower if one single firm instead of two separate firms produce it. Economies of scale are mathematically represented by the below function, where TC is the total cost of production and Q_1 and Q_2 are the two quantities of the given good X:

$$TC\ ((Q_1 + Q_2)\ X) < TC\ (Q_1X) + TC(Q_2X)$$

Therefore, the relation that it is relevant when considering economies of scale is the relationship between the dimension of scale and the average production cost. Due to the existence of economies of scale, even in traditional industries, as the dimension of the undertaking increases average production costs will decrease.

Returns to scale instead refer to the relationship between the inputs used to produce a given good and the output. Increasing returns to scale exist when an increase in the input from Q to Q_1 leads to an increase in the output from P to P_1

[38] *Ibidem*.

which is greater than the increase from Q to Q_1.[39] This is represented visually below:

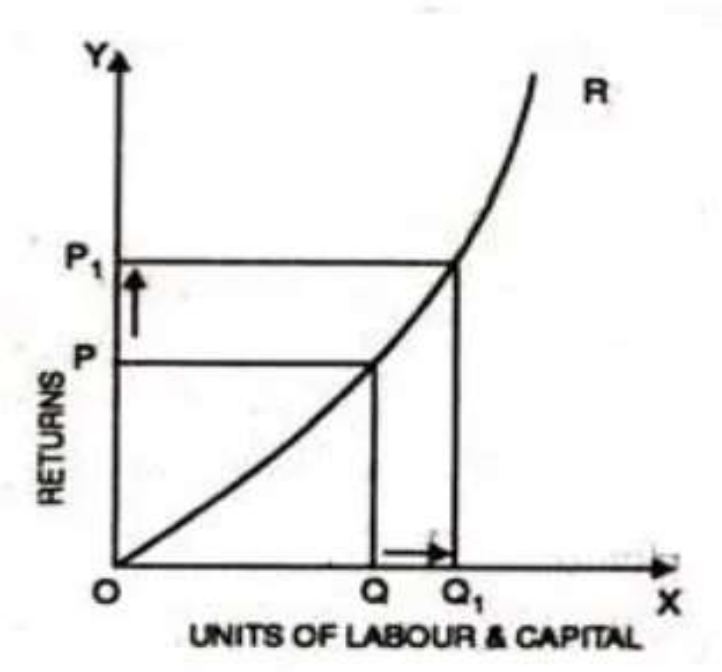

Figure 2: Increasing returns to scale. Note: taken from https://theintactone.com/2019/10/19/be-u3-topic-4-return-to-scale/

Economies of scope manifest themselves as the total cost of production of a range of products is lower when they are produced together rather than produced separately. Therefore, as the undertaking produces goods together the average production costs of those goods will decrease. Economies of scope are mathematically represented by the below function, where: ES (economies of scope) is the percentage cost saving when goods are produced together, $C(q_a)$ and $C(q_b)$ are the costs of producing quantity q_a and q_b of a good separately, $C(q_a+q_b)$ is the cost of producing quantities q_a and qb together.

$$Economies\ of\ scope\ (ES) = (C(q_a) + C(q_b) - C(q_a+q_b)) / C(q_a+q_b)$$

[39] Diminishing returns to scale, on the contrary, exist when the increase in the input from Q to Q_1 leads to an increase in the output from P to P_1 which is smaller than the increase from Q to Q_1. When there are constant returns to scale an increase in the input from Q to Q_1 leads to an increase in the output from P to P_1 which is the same as the increase from Q to Q_1.

The most recent reports on digital markets build on the traditional definitions of these concepts and explain how they apply in digital markets.

According to the EU Report, extreme returns to scale exist when the cost of production of digital services is much less than proportional to the number of customers served.

The report also notes that returns to scale are not novel as such (the example provided is that bigger factories or retailers are often more efficient than smaller ones), but this characteristic is extremely pronounced in digital markets and it can result in a significant competitive advantage for incumbents.

This is so, the Furman Report explains, because in traditional markets economies of scale have most typically been linked with physical production. Therefore, the scope for such efficiencies was constrained by location and transport costs. In digital markets, geographical barriers and constraints are broadly irrelevant and therefore economies of scale produce their effects on a global rather than national or regional scale.

According to the EU Report, the presence of strong "economies of scope" is a consequence of the extreme returns to scale and of other characteristics of digital markets, which favour the development of ecosystems and give incumbents a strong competitive advantage, making large incumbent digital players very difficult to dislodge.

All of the main input of the digital economy indeed, once created, can be transmitted to a large number of people at very low cost. This is true for information or for a search engine or mapping service that has been developed and is running, which can usually serve fairly cheaply hundreds of thousands of users once it is set-up. Therefore, the costs rise much more slowly than the number of users.

The EU Report also underlines the fact that economies of scale have an important impact on entry, in that no firm, unless it can benefit from a much superior and cheaper technology, would want to enter a market dominated by an incumbent, even when the incumbent is making large profits. This is due to increasing returns to scale, by virtue of which competition between two firms

producing the same product will not allow them to cover their costs. Indeed, were they to cover their (total) costs, they would have to price above the cost of serving an additional consumer (the marginal cost) and each of them would find it profitable to lower their price to steal the other's clients.

According to the EU Report, the existence of large economies of scale also explains the rise of free services (the so called zero-price markets). The EU Report in particular cites evidence that consumers are attracted by a zero price in that there is an upward discontinuity in demand when the price reaches zero. In digital markets, where both returns to scale and the attraction of free are strong enough, a firm who must choose whether to charge for its service or distribute it at zero price, deriving its income from advertising will choose to distribute the good at zero price.

The Furman Report also underlines that there are features of digital markets that allow companies to reduced costs, or increase service quality, by operating simultaneously across multiple adjacent markets. These economies of scope can be derived through use of existing customer and supplier relationships, branding, sharing of technical expertise, and possibly most importantly, the sharing and merging of consumer data.

According to The Furman Report, these strong economies of scope are one of the reasons why GAFAM have been able to successfully build ecosystems across several adjacent markets.

3.2. Network effects

The European Commission has dealt with network effects in the past both in merger and antitrust cases.

The Commission in particular first considered the relevance of network effects in the *Microsoft* cases. In particular, the Commission with reference to the client PC operating systems market, the work group server operating systems market and the media player noted that "*a position of market strength achieved in a market characterised by network effects – such as the media player market – is sustainable, as once the network effects work in favour of a company which has*

gained a decisive momentum, they will amount to entry barriers for potential competitors".[40]

The Commission analysed network effects also in *Google Android* where it found that smart mobile device operating systems with a large user base are considered more attractive by app developers;[41] in *Google AdSense* where the Commission found that the success of an online search advertising service depends on the number of advertisers that a potential entrant can attract and on the reach and performance of the underlying general search service;[42] in the *Google Shopping* decision where the Commission noted the positive feedback effects between the two sides of the general search services/online search advertising platform, including direct and indirect network effects on the general search side.[43]

So far as merger cases are concerned, the Commission noted in *Facebook/WhatsApp* that network effects may give raise to competition concerns if they allow the merged entity to foreclose competitors and make more difficult for competing providers to enter the market or expand their customer base;[44] in *Microsoft/Linkedin* the Commission was concerned that network effects could potentially strengthen the foreclosure of actual or potential competing providers of professional social networking services and the Commission found that these concerns were not mitigated by multi-homing or by the entry of potential new

[40] Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 — Microsoft) (notified under document number C(2004) 900) (Text with EEA relevance) 2004 (OJ L), paragraph 980.

[41] Summary of Commission Decision of 18 July 2018 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.40099 — Google Android) (notified under document C(2018) 4761) (Only the English text is authentic)2019/C 402/08 2019, paragraph 464.

[42] Summary of Commission Decision of 20 March 2019 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.40411 – Google Search (AdSense)) (notified under document number C(2019) 2173) (Only the English text is authentic) 2020/C 369/04 2020, paragraphs 249-251.

[43] 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)) (notified under document number C(2017) 4444) 2018, paragraphs 285-305, 294-296 and 314.

[44] Commission Decision of 03/10/2014 declaring a concentration to be compatible with the common market (Case No COMP/M.7217 - FACEBOOK / WHATSAPP) according to Council Regulation (EC) No 139/2004 (Only the English text is authentic) 2014, paragraphs 127-140.

providers;[45] in *Google/Fitbit*, finally, the Commission found that the transaction would likely increase the barriers to entry and expansion of competitors, in particular due to reduced availability of user data.[46]

The EU Report describes network externalities as the phenomenon by virtue of which the convenience of using a technology or a service increases with the number of users adopting it.[47]

Due to network externalities, in order for a new entrant to win next costumers, it will have not only to offer better quality and/or a lower price than the incumbent does; it also has to convince users of the incumbent to coordinate their migration to its own services.

As a result, network effects could prevent a superior platform from displacing an established incumbent. The size of the advantage of "incumbency" will then depend on a number of factors, including the possibility of multi-homing, data portability, and data interoperability.

According to the Furman Report, there are two types of network effects that can occur in digital markets:

- *Direct network effects* which occur when the benefits to a user increase as the number of users increases (for instance, having a telephone became increasingly valuable to households as additional homes were connected). In digital markets, these effects are strong for social networks, messaging services, dating services, and customer review sites but they are also relevant for online search, which can be improved through experience, and data, from more users.

[45]Commission Decision of 06/12/2016 declaring a concentration to be compatible with the common market (Case No COMP/M.8124 - MICROSOFT / LINKEDIN) according to Council Regulation (EC) No 139/2004 (Only the English text is authentic) 2016, paragraphs 340-344.

[46] Summary of Commission Decision of 17 December 2020 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.9660 – Google/Fitbit) (notified under document C(2020) 9105) (Only the English version is authentic) (Text with EEA relevance) 2021/C 194/05 2021, paragraphs 459-461.

[47] For an overview of the literature on network economics, see *e.g.*, Oz Shy, 'A Short Survey of Network Economics' (2011) 38 Review of Industrial Organization 119; Marc Rysman, 'The Economics of Two-Sided Markets' (2009) 23 Journal of Economic Perspectives 125; Avi Goldfarb and Catherine Tucker, 'Digital Economics' (2019) 57 Journal of Economic Literature 3; Christopher S Yoo, 'Network Effects in Action' (11 November 2020) <https://papers.ssrn.com/abstract=3733669> accessed 4 May 2024.

- *Indirect network effects* which occur when the benefits to users on one side of a platform market increase with the number of users on the other side of the market. These are high for users on both sides of online market places, streaming services, and app stores, and are also high for advertisers.

The Furman Report also explains that these dynamics can naturally lead to a winner-takes-most (or winner-takes-all) environment and discourage market entry thereafter.

Network effects do not necessarily lead to concentration, given that they can be overcome where consumers and businesses have the freedom to either switch between services, or use multiple services simultaneously (multi-homing). Digital markets, however, are characterized by strong lock-in effects and therefore network externalities are extremely pronounced, due to the reduced ability of consumers and businesses to migrate to alternative services.

3.3. Data

As data started to be more and more vital to our daily lives, it had already been declared by the World Economic Forum as a new category of economic asset, like gold or currency.[48] However, data is a peculiar type of asset as it is often a low value asset by itself and what gives value to data is its analysis. Once the analysis has taken place, data becomes an important input in our digital economy.[49]

The data that the digital platforms hold is typically referred to as "big data", which is "*the information asset characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value*".[50]

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[48] 'Big Data, Big Impact: New Possibilities for International Development' (*Vital Wave*) <https://vitalwave.com/article-presentation/big-data-big-impact-new-possibilities-international-development/> accessed 4 May 2024.

[49] Michal Gal, *Competition and Innovation in the Digital Environment*, in Giuseppe Colangelo and Valeria Falce, *Concorrenza e comportamenti escludenti nei mercati dell'innovazione - Giuseppe Colangelo - Valeria Falce - Libro - Il Mulino - Percorsi | IBS* <https://www.ibs.it/concorrenza-comportamenti-escludenti-nei-mercati-libro-vari/e/9788815267795> accessed 4 May 2024, p. 18.

[50] Xavier Boutin and Georg Clemens, 'Defining "Big Data" in Antitrust' (21 March 2017) <https://papers.ssrn.com/abstract=2938397> accessed 4 May 2024, pp. 122 - 135, to which 'Big Data: Bringing Competition Policy to the Digital Era - OECD' <https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>, refers. Big Data has initially been described as being characterized by three Vs: volume, velocity

Competition authorities have been focusing their attention on the increasing role of data in the digital economy and the impact on competition for a long time now. In May 2016, the German Federal Cartel Office and the French Competition Authority published a joint report on big data, which identified issues concerning potential data concentration and foreclosure of competitors in related markets (*e.g.*, online advertising) and potential foreclosure or marginalization of competitors active in markets where the data is used.[51] The U.K. Competition and Markets Authority had analysed the topic in a June 2015 report, addressing consumer protection laws, but underlining issues similar to those identified in the joint report of the German and French authorities.[52]

The Italian Competition Authority has also published a report on the role of data, highlighting that the use of data by digital platforms can potentially give rise to issues both in the phase of the acquisition of data and, more importantly, when such data are used to carry out the economic activity.[53] With reference to the acquisition of data, the Italian Competition Authority has noted that digital platforms can acquire a too large of quantity of data which can give rise to the exploitation of consumers. With reference to the use of such data, the Italian Competition Authority has highlighted in particular that the use of data can give rise to instances of price discrimination and abusive discrimination more

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and variety in Doug Laney, '3D Data Management: Controlling Data Volume, Velocity and Variety' (2001) 6 META group research note 1. Subsequently, in Maurice E Stucke and Allen P Grunes, 'Introduction: Big Data and Competition Policy' [2016] Big Data and Competition Policy, Oxford University Press <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849074> accessed 4 May 2024 a fourth V was added to the characteristics of Big Data, namely value. Volume is a function of the ubiquity of online and Internet activities, velocity refers to the velocity at which firms access, process and analyse data, which is now close to real time; variety refers to the fact that the information aggregated now refers to multiple aspects of today's lives and economies; value is both "a cause and a consequence" of the increase in volume, variety and velocity. Another commentator (Vicente Bagnoli, 'The Big Data Relevant Market' (2016) 23 Concorrenza e mercato <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064792> accessed 4 May 2024.) has noted that Big Data can sometimes be qualified as "virtuous", in which case other two Vs will be added to the characteristics of data: the veracity, which is the accurateness of the data; and the verification, namely the ability to check that data has been collected and processed in compliance with the relevant laws.

[51]See https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2

[52]See https://assets.publishing.service.gov.uk/media/5a7f2a8840f0b6230268dd76/The_commercial_use_of_consumer_data.pdf

[53] See https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf

generally. In particular, it noted that "*tailoring the search results may help putting in place search discrimination, which an undertaking may use to favour its own products and services that it offers on the platform*" and highlighted the need to increase the "*the transparency of the criteria that are used to elaborate and analyse data*" by such platforms.

The European Commission has also analysed the competitive significance of data, particularly in the context of merger control, and underlined that the main concern is that a combination of large sets of data can give rise to competition issues, in particular as this can strengthen an entity's market power in downstream markets or give rise to foreclosure.[54]

In the literature, it has been underlined that from a competition law perspective, data can constitute a barrier to entry and expansion in that the quantity of data held by the digital platforms creates access barriers that are capable of limiting entry and expansion of potential competitors into the different stages of the data value chain.[55]

Data can also be used by the incumbent in a data-driven market to expand (or, to use the term of art, leverage) its market power from the market where the undertaking is dominant to a connected market, therefore translating the monopoly power provided by data from one market to another market, which was still competitive.[56]

From a different angle, digital platforms can also potentially exploit data by harming consumer directly, through a deviation from privacy law. In this scenario, digital platforms use their market power to impose on consumers a privacy policy that is in breach of privacy law and that, from a competition law perspective,

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[54] See in particular, *Google/Fitbit* (Case M.9660) [2020] OJ C 194/7; *Meta/Kustomer* (Case M.10262) [2022]; *Microsoft/LinkedIn* (Case M.8124) [2016] C(2016) 8404; *Facebook/WhatsApp* (Case M.7217) [2014] OJ C 417/4.

[55] Daniel L Rubinfeld and Michal S Gal, 'Access Barriers to Big Data' (2017) 59 Ariz. L. Rev. 339., p. 32 ff.

[56] See, *inter alia*, Jens Prufer and Christoph Schottmüller, 'Competing with Big Data' (16 February 2017) <https://papers.ssrn.com/abstract=2918726> accessed 24 April 2024, p. 7; Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (8 September 2015) <https://papers.ssrn.com/abstract=2657732> accessed 4 May 2024, p. 490; Alessandro Mantelero, 'Competitive Value of Data Protection: The Impact of Data Protection Regulation on Online Behaviour' (2013) 3 International Data Privacy Law 229, p. 232; Pablo Ibáñez Colomo, 'Pinar Akman, The Concept of Abuse in EU Competition Law: Law and Economic Approaches' (2013) 76 The Modern Law Review 421, p. 156.

particularly inconvenient for consumers, to the point that it can be qualified as unfair.[57]

These concerns are acknowledged by the most recent reports on the digital economy. According to the EU Report, the spread of the digital economy has made it possible for companies to collect, store, and use large amounts of data, which is a crucial input to many online services, production processes, and logistics. As a result of this, the ability to use data to develop new, innovative services and products is a competitive parameter whose relevance will continue to increase.

In relation to data, the Furman Report speaks of a data advantage for incumbents and notes that economies of scale and scope appear to be particularly strong in relation to the accumulation and use of data relating to consumer behaviour.

The Furman Report also acknowledges that the significant amounts of data held by incumbent firms is viewed as being the single biggest barrier to entry in the digital economy. A data-rich incumbent is able to cement its position by improving its service and making it more targeted for users, as well as making more money by better targeting its advertising.

Exclusive possession of data, combined with a lack of engagement by consumers, can lead to a lack of competitive pressure within those markets. The

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[57] See *Meta Platforms Inc and Others v Bundeskartellamt* (n 9). In the literature, on the relationship between privacy and competition law with reference to the use of data, see among the most recent articles Giuseppe Colangelo, 'The Privacy/Antitrust Curse: Insights From GDPR Application in Competition Law Proceedings' (12 October 2023) <https://papers.ssrn.com/abstract=4599974> accessed 4 May 2024, p. 34, who argues that "*including privacy harms in antitrust proceedings turns out, instead, to be a potential curse for competition authorities, providing the major digital players with an opportunity for regulatory gaming to undermine antitrust enforcement*"; Christophe Carugati, 'The Antitrust Privacy Dilemma' (22 November 2021) <https://papers.ssrn.com/abstract=3968829> accessed 4 May 2024, who -- on the contrary -- argues in favour of coordination among competition and non-competition regulators and stakeholders to address both competition and privacy concerns with tailored remedies. On the same topic, see also Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the US' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125490> accessed 24 April 2024; Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Protection in Attention Markets: Protecting Privacy Through Competition?' (2 April 2017) <https://papers.ssrn.com/abstract=2945085> accessed 4 May 2024; Giovanni Pitruzzella, 'Big Data, Competition and Privacy: A Look from the Antitrust Perspective' [2016] Concorrenza e mercato 15; G Colangelo, 'Big Data, Piattaforme Digitali e Antitrust' (2017) 3 MERCATO CONCORRENZA REGOLE 425.

extent to which data are of central importance to the offer but inaccessible to competitors, in terms of volume, velocity or variety, may confer a form of unmatchable advantage on the incumbent business, making successful rivalry less likely.

According to the Furman Report, this competitive advantage can arise across many digital markets.

3.4. Barriers to entry and expansion

Economists have, since a long time, tried to provide a definition of barriers to entry. However, no clear definition exists and all the definitions provided have been criticized as missing some of the elements that can appropriately describe entry and expansion in a given industry. The main tentative definitions are presented below.

Bain has described barriers to entry as the advantage of established companies in an industry over potential entrants, which is reflected in the extent to which established companies can persistently raise their prices above competitive levels without attracting new firms to enter the industry.[58] This definition was however

[58] Joe S Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Harvard University Press 1956) <https://www.degruyter.com/document/doi/10.4159/harvard.9780674188037/html> accessed 24 April 2024, p. 3. Bain's definition was based on the limit-price model of entry deterrence, where the limit price is the highest price that incumbent firms can charge without inducing at least one other firm to enter the market. According to Bain, incumbents consider the market share that they would lose to a new entrant and the market conditions after entry and compare that to the profits they would forego by setting a price lower than the short run profit maximizing price. If setting a price lower than the short run profit maximizing price would still be more profitable compared to a situation where there is market entry, the price will be set at that level and entry will be discouraged. Therefore, freedom of entry (or lack thereof) is a crucial determinant to establish whether firms would want to sacrifice short-run profits by limit pricing. According to Bain, there were three broad structural market characteristics that can restrict freedom of entry: (1) incumbents have patents on production processes or control of crucial resources, (2) incumbents enjoy substantial cost advantages over potential entrants, including advantages in production costs, or (3) the scale of an optimum firm is very large compared to the market and the economies of scale are significant. Bain explained the reason why large scale economies are a barrier to entry: if a firm must add significantly to industry output in order to be efficient (supposing incumbent firms will want to maintain their output level even in the event of entry) and that firm enters at or above the efficient scale, then the combined industry output would exceed industry demand and industry prices would fall with a loss of profits for the entrant company. If the new entrant enters at less than the efficient scale, it will suffer a significant cost disadvantage compared to incumbent firms. In particular, Bain argued that scale economies have two effects on barriers to entry. First, what was explained above and which Bain called the "percentage effect", as it reflects the importance of the proportion of industry output supplied by a firm of efficient scale. Second, entry in a given industry could require a large amount of capital such that only a few companies could afford to

criticized as being tautological, in that Bain has defined the barrier to entry with its outcome (i.e. the "condition of entry").[59]

Stigler proposed another definition of barriers to entry which is that a barrier to entry is a cost of producing (at some or every rate of output) which must be borne by firms seeking to enter an industry but is not borne by firms already in the market.[60]

In addition to the two definitions above that are historically more relevant, other economists have proposed different definitions of barriers to entry, which however have all received criticisms with the result that – as it was briefly mentioned above -- there is not a unified notion of barrier to entry that is commonly accepted by industrial organization economists at present.[61]

Regardless of the definition, the Court of Justice has in previous cases recognized that economies of scale that newcomers cannot benefit from are a

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invest or, if they had to secure the necessary resources through a loan, they would be placed at a significant competitive disadvantage.

[59] Joseph E Harrington, John M Vernon and W Kip Viscusi, *Economics of Regulation and Antitrust* (MIT press 1996) <https://toc.library.ethz.ch/objects/pdf_ead50/3/E28_5133050_TB-I_002187389.pdf> accessed 24 April 2024.

[60] George J Stigler, *The Organization of Industry* (University of Chicago Press 1983) <https://books.google.com/books?hl=en&lr=&id=j6SOJv8OeHAC&oi=fnd&pg=PP7&dq=The+Organization+of+Industry&ots=fXirpJzAJ8&sig=IpWYmfhHUmkbAObGmvyGNIekvAc> accessed 24 April 2024, p. 67.

[61] Some of the definitions of barrier to entry that have been proposed in the literature are the following. According to Ferguson (James Milton Ferguson, 'Advertising and Competition: Theory, Measurement, Fact' <https://cir.nii.ac.jp/crid/1130282271017040640> accessed 24 April 2024, p.10), "*a barrier to entry is a factor that makes entry unprofitable while permitting established firms to set prices above marginal cost, and to persistently earn monopoly return*"; Fisher argued that "*a barrier to entry is anything that prevents entry when entry is socially beneficial*" (Franklin M Fisher, 'Diagnosing Monopoly' (1997) 27 J. Reprints Antitrust L. & Econ. 669); Von Weizsacker stated that "*a barrier to entry is a cost of producing that must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry and that implies a distortion in the allocation of resources from the social point of view*" (CC von Weizsacker, 'A Welfare Analysis of Barriers to Entry' (1980) 11 The Bell Journal of Economics 399, p.1); Gilbert proposed a definition according to which "*an entry barrier is a rent that is derived from incumbency*" (Richard J Gilbert, 'Mobility Barriers and the Value of Incumbency' (1989) 1 Handbook of Industrial Organization 475, p. 478); according to Carlton and Perloff, "*a barrier to entry is anything that prevents an entrepreneur from instantaneously creating a new firm in a market. A long-run barrier to entry is a cost that must be incurred by a new entrant that incumbents do not (or have not had to) bear*" (Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* (4th edition, Pearson 2004), p. 110); finally, Church and Ware defined a barrier to entry as "*a structural characteristic of a market that protects the market power of incumbents by making entry unprofitable*" (Ware and Roger Ware, *Industrial Organization: A Strategic Approach* (Richard d Irwin 1999), p. 487).

potential barrier to market entry.[62] Moreover, it is undisputed among commentators that digital markets are characterized by high barriers to entry,[63] which is confirmed in all the most recent reports on the digital economy.

According to these reports, economies of scale in digital markets are present due to the particular cost structure that exists in digital markets. Indeed, digital companies operate at low incremental costs and high fixed costs. Other features of digital markets also contribute to the creation of barriers to entry and expansion.

According to the Stigler Report, in digital markets incumbents have a massive cost advantage from their scale of operations, and a massive benefit advantage from the scale of their data. Therefore, an entrant cannot generally overcome these advantages without either a similar installed base (network effects) or a similar scale (scale economies), both of which are difficult to obtain quickly and cost-effectively.

In digital markets, incumbents also experience positive feedback loops. Once a company has a vast amount of data that feeds the development of algorithmic and AI training processes that can enable more profitable exploitation of consumer attention, *e.g.* through advertising. That in turn can lead to the achievement of a virtuous circle of critical economies of scale leading to network effects. A new entrant – on the contrary – is likely to experience this feedback loop in reverse, as it fails to surmount the entrance barrier.

The Stigler Report explains that due to these positive feedback loops that increase barriers to entry and expansion to the advantage of the incumbent operator, digital companies have strong incentives to violate competition law in order to stay ahead of competitors.

Moreover, according to the Stigler Report, barriers to entry are often created by the very consumers who are harmed by them. Consumers indeed tend not to replace the default apps on their phones, or do not scroll down to see more results, which are all behaviour that reinforce the market position of the incumbent by

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[62] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECJ Case 27/76, para. 122.

[63] See Tone Knapstad, 'Digital Dominance: Assessing Market Definition and Market Power for Online Platforms under Article 102 TFEU' (2023) 0 European Competition Journal 1 and references therein.

creating positive feedback loops that increase barriers to entry and expansion. This in turn makes demand less contestable and less favourable for an entrant.

Barriers to entry can also be created by the incumbent rival as they try to get users to single-home, given that in these instances the platform market power is higher. Therefore, even when it is possible for the data from one service to be read by a rival, platforms may encourage single-homing by preventing interoperability, as the actual multi-homing of the users (and not only a theoretical possibility) would decrease barriers to enter the market.

Barriers to entry and expansion are, according to the EU Report, the Furman Report and the Stigler Report the reason why digital platform market power has become entrenched.

4. Leveraging conducts and foreclosure in digital markets

4.1. Vertical foreclosure and the notion of leverage

The main competition concern around leveraging is that this can lead to the foreclosure of competitors in vertically-related or complementary markets.

To put the notion of leveraging and vertical foreclosure in context, the analysis will have to start from the theory of the so called Chicago School, according to which there was no rationale for leveraging of market power and vertical foreclosure.[64]

[64] The Chicago School advocated for a minimalist antitrust policy focusing on the most egregious competitive restraints with no efficiency justifications. According to the Chicago School, the main goal of antitrust is the promotion of consumer welfare, understood as general or total welfare whilst the protection of the competitive process itself and the protection of the "small-business welfare" should be avoided. The Chicago School was also in favour of the idea that false positives (i.e. an excess of antitrust intervention) are less damaging than false negatives (i.e. a too tenuous antitrust intervention) and that markets are capable of self-correcting. In accordance with the above, the Chicago School advocated for an extensive use of the efficiency defence both in the realm of mergers and unilateral conduct and strongly believed that antitrust analysis should always take into account the ability of new entrants to discipline anticompetitive conducts, also advocating in parallel for an restrictive view of barriers to entry, which according to the Chicago School are not common in many markets. The Chicago school was also a strong supporter of the view that mergers generally lead to efficiencies and that in principle antitrust authorities should focus their attention only on large, horizontal mergers while vertical and conglomerate mergers are typically efficient, and very rarely lead to foreclosure concerns. With reference to unilateral conducts, the Chicago School started from the general assumption that firms cannot generally obtain or enhance monopoly power through unilateral action, as this would typically involve a loss of profits. Finally, the Chicago School perceived many of the competition restrictions as efficiency-enhancing. It should also be noted that a competing school of thought of the Chicago School was the so-called Harvard School, which was concerned with market concentration and

According to the Chicago School's 'one monopoly profit' theory, an input monopolist has the ability, but not the incentive to exclude an efficient downstream competitor. This would be the case as the monopolist would make higher profits by supplying the input and extracting rents through appropriate pricing than by excluding competitors by withholding the input and therefore reducing profits as a result.

The example that has been provided in the literature by Elhauge to exemplify such theory is that of a monopolist in nuts trying to tie nuts and bolts:

"Suppose nuts and bolts each cost 10 cents to make, and thus would be priced at 10 cents each if the markets for both were competitive. Suppose further that the profit-maximizing price for a combined monopolist in both nuts and bolts would be 40 cents for the nut-bolt set that consumers need. If we have a nut monopolist and a competitive market in bolts, then the nut monopolist would simply charge 30 cents for nuts, with the customers paying 10 cents for bolts on a competitive market to arrive at 40 cents for the nut-bolt set. The nut monopolist would earn monopoly profits of 20 cents per set used. It would earn no additional monopoly profits by tying its sale of nuts to bolts, because if it did so the monopoly price for the nut-bolt set would be 40 cents and the cost 20 cents, leaving it with profits of 20 cents a set. It might try to charge a supra-competitive price of 11 cents for the tied bolts, but if it did so it would have to offer a corresponding 1 cent discount from the nut monopoly price of 30 cents, charging 29 cents for nuts, because the profit-maximizing price of 40 cents for the set is not altered by the tie. In fact, if a competitive market were more efficient and would

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took a more structuralist approach to antitrust analysis. For the most representative scholarly work of the Chicago School, see Robert H Bork, Mike Lee and Robert Bork, *The Antitrust Paradox: A Policy at War With Itself* (Bork Publishing LLC 2021); Richard A Posner, *Antitrust Law: An Economic Perspective* (Univ of Chicago Pr 1978); Richard A Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 University of Pennsylvania Law Review 925. The influence of the Chicago School on subsequent antitrust enforcement has been the object of the studies carried out in Anu Bradford, Adam Chilton and Filippo Lancieri, 'The Chicago School's Limited Influence on International Antitrust' (12 December 2019) <https://papers.ssrn.com/abstract=3435097> accessed 4 May 2024, which was aimed at demonstrating that many of the ideas rejected by the Chicago School are common features of antitrust regimes in the world and that the influence of the Chicago School has been more limited outside of the United States.

lower the price of bolts down to 5 cents, the monopolist in nuts would prefer that, because then it could sell nuts for 35 cents and earn 25 cents a set".[65]

Economists have, however, identified broad group of situations where the Chicago School's 'one monopoly profit' theory does not hold, at least three of which are relevant for digital markets too.[66]

The first instance where the 'one monopoly profit' theory does not hold is that of *imperfect rent extraction*. The 'one monopoly profit' theory is indeed based on the assumption that the input monopolist has sufficient freedom in pricing the input and therefore can extract rents from users. However, economists have noted that there may be situations where the vertically integrated firm can make more profits by foreclosing rivals and increasing sales of its affiliate rather than by providing the input to independent downstream rivals. An example of such a scenario where imperfect rents extraction materializes is when the input is subject to economic regulation.

The second scenario where the 'one monopoly profit' theory is not applicable is that of *dynamic vertical foreclosure*. The 'one monopoly profit' theory indeed assumes a static perspective, in which there is no reason for the input monopolist to foreclose rivals in a vertically-related or complementary product market. However, the incentive to foreclose comes in when the rival's success in the complementary or vertically-related product market would lead to entry in the primary market. Thus, in this instance, the rationale for vertical foreclosure is the protection of the core upstream (or primary) market by the input monopolist against both vertically-integrated new entrants or independent competitors that may expand from the downstream market to the upstream input market.

The third instance where the 'one monopoly profit' theory does not apply is that of the *raising rivals' costs strategy*.[67] The 'one monopoly profit' theory

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[65] Einer Elhauge, 'Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory' (2009) 123 Harv. L. Rev. 397, pp. 4-5.
[66] Massimo Motta, 'Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases' (2023) 90 International Journal of Industrial Organization 102974.
[67] The idea that raising rivals' costs can be anticompetitive was first introduced by Steven Salop in Steven C Salop and David T Scheffman, 'Raising Rivals' Costs' (1983) 73 The American

indeed assumes that the upstream input is produced in monopolistic conditions. However, economists have noted the following: in a scenario where the vertically integrated firm faces one rival upstream and one rival downstream, if it is able to commit not to supply its input to the downstream rival, the latter will have to buy its input from the upstream independent firm which is now effectively monopolising the supply of the input and therefore will increase the price of the input, softening the rival's competitive strength in the downstream market and enhancing the position of the integrated firm. Hence, the incentive to foreclose.

According to economists, this traditional scheme of a raising rivals' costs strategy is hard to apply in digital markets, given that these markets are characterised by zero price of the services offered to consumers and most of the abuse cases in the digital sector involve a platform that is an undisputed monopolist in the platform (or input) market. The raising rivals' cost strategy will therefore typically materialize as a customer foreclosure variant in platform cases.

In this scenario, the downstream unit of the vertically-integrated firm will commit not to buy the input of the upstream competitor. As a result, the costs of production of the competitor will increase and its scale of production will fall. This will in turn make the downstream independent competitor less competitive.

Other commentators have also taken a view on the application of the 'one monopoly profit' theory to self-preferencing specifically too. According to one author, the 'one monopoly profit' theory does not justify self-preferencing in that its conditions are not met.[68]

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economic review 267, according to whom competition between downstream firms is indirectly supported by upstream firms, and therefore vertical conducts such as raising rivals' costs affects competition and welfare in that it can potentially even lead a competitor to be forced out of the market entirely. Further work was dedicated to this topic in particular in the North American literature, and in particular see *inter alia* Timothy J Brennan, 'Understanding "Raising Rivals' Costs"' (1988) 33 The Antitrust Bulletin 95; Stephen Calkins, 'Comments on Presentation of Steven C. Salop' (1987) 56 Antitrust Law Journal 65; Elizabeth Granitz and Benjamin Klein, 'Monopolization by "Raising Rivals' Costs": The Standard Oil Case' (1996) 39 The Journal of Law and Economics 1; Thomas G Krattenmaker and Steven C Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96 Yale LJ 209; Steven C Salop and David T Scheffman, 'Cost-Raising Strategies' [1987] The Journal of Industrial Economics 19; John J Tharp, 'Raising Rivals' Costs: Of Bottlenecks, Bottled Wine, and Bottled Soda' (1989) 84 Nw. UL Rev. 321.

[68] David J Balan, 'Single Monopoly Profit and Self-Preferencing by Dominant Platforms' [2022] Available at SSRN 4279291 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4279291> accessed 4 May 2024.

The commentator has indeed noted that self-preferencing meets the first condition of the 'one monopoly profit' theory as applied to self-preferencing. The first prong requires that the practices chosen by the integrated platform owner that depart from those that would have been adopted by an owner who does not also operate on the platform must decrease the platform's profits. As the neutral owner chooses practices that maximize profits, a practice such as self-preferencing which clearly entails a deviation from the neutral handling of the platform must result in lower profits for the platform.

The second prong of the 'one monopoly profit' theory claims that the profits lost from self-preferencing (and the corresponding deviation from the practices of a neutral owner) must exceed the profits gained. According to economists, while self-preferencing causes the platform's profits to decrease it is still profitable overall as it results in an increase in profit through expansion or extension of the platform's market power. As a result, this more than offsets the initial decrease in profits and the second prong of the test is not met.

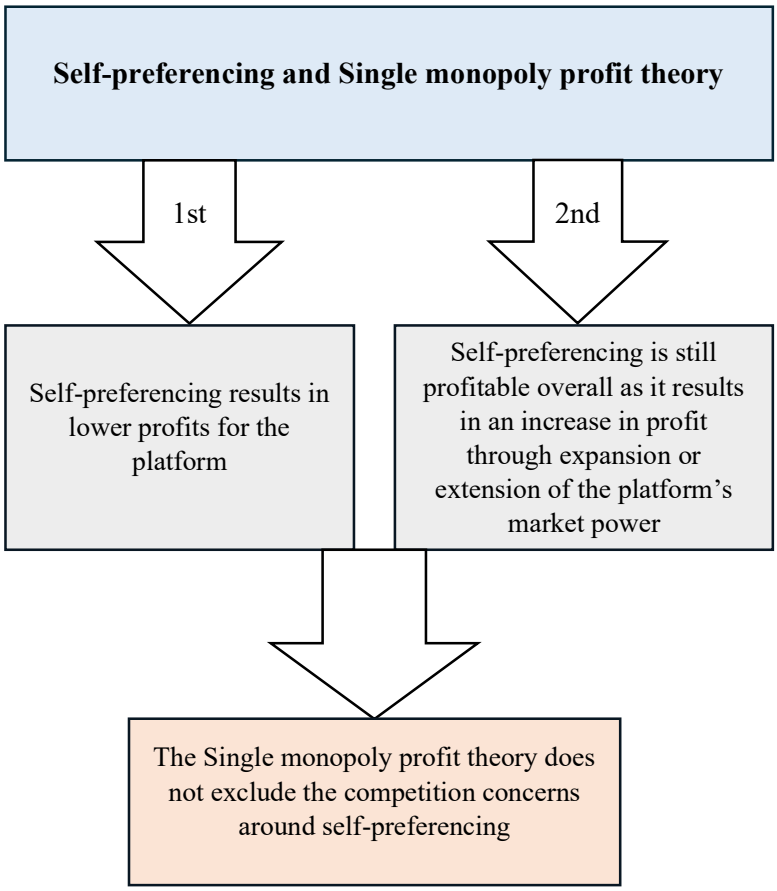

Figure 3: Application of the single monopoly profit theory to self-preferencing

Other commentators have also underlined that the 'one monopoly profit' theory cannot be used to justify the conclusion that self-preferencing does not give rise to any competition concerns, referring to potential abuses of dominance relating to internet search in particular.[69] According to these authors, from an economic perspective, the rationale for vertical foreclosure of competition is due to the two-sided nature of both horizontal and vertical search, and this also explains why the 'one monopoly profit' theory does not provide an economic justification for self-preferencing. By leveraging market power from general search to vertical search (through visual prominence), the monopolist is indeed able to attract additional advertisers on its vertical search platform that would have potentially advertised on competing vertical search platforms if the monopolist had not leveraged its market power by offering visual prominence.

It follows from the above that the 'one monopoly profit' theory does not rule out leveraging and foreclosure concerns in the digital economy. These concerns have indeed been acknowledged by both commentators and the various reports produced by competition authorities.

Leverage is not a defined notion, though. The concern is that a firm can translate the monopoly power it holds in one market to an adjacent market where it still does not have monopoly power, so that the traditional expressions of the exercise of monopoly power (i.e. an increase in prices and/or a restriction of output or quality) will manifest also in this secondary related market.[70] In the words of Louis Kaplow:

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[69] See Edward Iacobucci and Francesco Ducci, 'The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-Sided Markets' (2019) 47 European Journal of Law and Economics 15.

[70] See Patrick F Todd, 'Digital Platforms and the Leverage Problem' (2019) 98 Neb. L. Rev. 486, p. 488.

"*Traditional leverage theory claims that a monopolist's use of its power in its own market to control activities in another market typically represents an attempt to spread its power to the other market*"[71]

Leverage therefore resembles more a "term of art" that is used to describe conducts that does not suppress competition in a market that is already dominated but involves the creation of another monopoly or, in any event, the spread of market power in other markets.[72] Due to the characteristics of digital markets explained above, leveraging conducts are more frequent in these markets than in other markets.[73]

The EU Report notes that the recent economic literature has stressed that many platforms, in particular marketplaces, act as regulators, therefore having the ability to determine the rules and institutions through which their users have to interact with the platform. A result of such role of the platforms is their ability and incentive to leverage market power from one market to the other, which can take multiple forms, one of which is self-preferencing.[74]

According to the EU Report, from a business strategy perspective, leveraging can be "offensive" or "defensive". Offensive leveraging is aimed at generating more profits, while defensive leveraging is aimed at preventing entry in the platform's core market from an adjacent, often niche, market. However, the EU Report notes that the two forms of leveraging imply no analytical or legal differences and acknowledges that leveraging can take various forms.

The ability and incentive to leverage market power results from the large platforms' strong competitive advantages over new entrants that are the results of the extreme network externalities and privileged access to data that are pervasive features of digital markets.

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[71] Louis Kaplow, 'Extension of Monopoly Power through Leverage' (1985) 85 Columbia Law Review 515.
[72] See Todd (n 69), p. 488.
[73] See Christian Bergqvist and Elisa Faustinelli, 'Leveraging Conducts in the Digital Economy: A Competition and Regulatory Perspective', *Research Handbook on EU Internet Law* (Edward Elgar Publishing 2023) <https://www.elgaronline.com/edcollchap/book/9781803920887/book-part-9781803920887-11.xml> accessed 24 April 2024.
[74] See Friso Bostoen, *Abuse of Platform Power: Leveraging Conduct in Digital Markets Under EU Competition Law and Beyond* (Concurrences 2023) <https://research.tilburguniversity.edu/en/publications/abuse-of-platform-power-leveraging-conduct-in-digital-markets-und> accessed 4 May 2024, pp. 102-109.

In this respect, also the Stigler Report acknowledges the growing evidence that conglomerate digital platforms are in an advantaged position that allows them to stop or block entry by more focused rivals when compared to traditional businesses. The Stigler Report indeed notes that companies like Alphabet, Amazon, and Facebook operate in multiple business verticals (*e.g.*, mail, maps, and search), and this allows them to collect different dimensions of data on a consumer (e.g., identity, location, and purchase intent) and in turn provides these digital platforms with better intelligence on competitive threats. Therefore, the Stigler Report notes, these companies can then derive superior insights into what firms they should block, which they should buy, and how they should grow strategically. This gives the platform an advantage over a rival entrant considering the same set of opportunities, and increases their ability to exclude rivals.

The Stigler Report therefore concludes that large digital platforms have both the incentive and ability to leverage market power, for instance by purchasing and blocking entrants that compete with them, or that may be potential competitors in the future.

4.2. Specific conducts/set-up of digital platforms and leveraging

4.2.1. Dual mode

A company operates in dual mode when it is acting both as a marketplace, *i.e.* as a platform that enables third party sellers to sell to consumers, and as a seller itself, *i.e.* it sells products directly to customers directly under its own name and therefore competes with the other companies that operate on the marketplace.

According to many economists and commentators, the fact that digital platforms operate in dual mode raises concerns that the platform may want to favour the products it sells and therefore distort competition in the marketplace, and this would lead to a leverage of the market power it holds on the market place and therefore to a distortion of competition. The risks arising from a dual mode business model are twofold.[75]

[75] Andrei Hagiu, Tat-How Teh and Julian Wright, 'Should Platforms Be Allowed to Sell on Their Own Marketplaces?' (2022) 53 The RAND Journal of Economics 297.

The first risk is that the platform is able to obtain non-public proprietary information on the products of third-party sellers (concerning *e.g.* detailed demand and pricing data and data on users' search behaviour) via the marketplace, and then leverages that data opportunistically to potentially copy those products and compete on the more successful offerings, therefore leading to reduced incentives for third-party sellers to invest or innovate and to the elimination of the risks of competition at the retail level.

A second risk that economists have highlighted resulting from the dual-mode position is that the platform can steer consumers towards its own offerings rather than those offered by third-party sellers by displaying its own offerings more prominently.

Gilbert has indeed acknowledged that dual mode can create incentives for the platforms to harm rivals if sales of their own proprietary products are a large portion of total revenues, if they can choose price structures that discriminate against rival products, or if they can engage in other conduct such as a refusal to sell rival products.[76]

Allain, Chambolle and Rey have shown that generally the upstream subsidiary of a vertically integrated platform has an incentive to soften competition at the downstream level by lowering the quality of the services (the input) that the platform's upstream subsidiary offers to its downstream rivals.[77]

De Corniere and Taylor found that a vertically-integrated intermediary biases its recommendations in favour of its subsidiary seller at the expense of third-party sellers.[78] However, according to them, this bias resulting from dual mode can have a different impact on consumers, depending on whether there is a situation of conflict or congruence between a seller's the customers' interests. A conflict between a seller's the customers' interests exists when the seller increases the utility offered to consumers by reducing its per-unit mark-up (this reduction would typically correspond to a price decrease in standard price competition). On

[76] Richard J Gilbert, 'Separation: A Cure for Abuse of Platform Dominance?' (2021) 54 Information Economics and Policy 100876, p. 4.
[77] Marie-Laure Allain, Claire Chambolle and Patrick Rey, 'Vertical Integration as a Source of Hold-Up' (2016) 83 The Review of Economic Studies 1.
[78] Alexandre De Cornière and Greg Taylor, 'A Model of Biased Intermediation' (2019) 50 The RAND Journal of Economics 854.

the other hand, congruence arises when higher utility levels also involve higher mark-ups (this is the case, for instance, when quality is the most important dimension for competition). In their model, bias functions as a demand-shifter by increasing the number of consumers directed towards the integrated seller and correspondingly reducing the demand for its competitor. In response to this increase in the demand, the integrated seller will increase its mark-up per-unit therefore giving rise to a higher utility under congruence, and to a lower utility under conflict. The opposite will be true for the non-integrated seller. For consumers, bias is always harmful under conflict given that the favoured seller offers a lower utility to me than its rival. Under congruence, bias can be positive for consumers as it provides the favoured seller with stronger incentives to offer higher levels of utility.

Economists have also looked at "information biases", which are relevant, for instance, in cases where the dual mode takes place in the context of search. In particular, the question that has been looked at is whether informational intermediaries distort their advice to consumers in order to provide a "compensation maximizing" rather than a "users' surplus maximising" ranking to consumers.

Hagiu and Jullien have shown that an intermediary has an incentive to "lower" the quality of the interaction provided by the platform in exchange for higher revenues per interaction. In their model, the platforms trade off revenues per interaction for quantity of interactions.[79]

De Corniere and Taylor looked at instances where a technology market failure arises as some of the intermediaries are willing to divert uninformed consumers in exchange for a price under certain conditions.[80]

Bourreau and Gaudin have looked at the issue of biased recommendations in a scenario where some products/consumer choices are more profitable than others exploring a trade-off between distortion enhancing revenues (given higher

[79] Andrei Hagiu and Bruno Jullien, 'Why Do Intermediaries Divert Search?' (2011) 42 The RAND Journal of Economics 337.
[80] De Cornière and Taylor (n 78).

participation) and causing a decrease in demand as the content does not meet the consumers' requests.[81]

Calvano and Jullien have shown that recommendation bias is very robust even when there are no pecuniary incentives given that in these contexts recommender systems engage in inefficient risk taking as they recommend products which do not risk disappointing users. That is due to the fact that consumer trust in these recommendation systems is very fragile and if a product recommendation is wrong, then consumers will not trust these recommendations anymore in the future and their willingness to pay will be lower. Hence, the recommendation bias.[82]

Teh and Wright have analysed systems where informational intermediaries collect fees from advised firms if they provide a personalized ranking to consumers and the product is purchased. Consumers can always reject the suggestion and purchase the good that is not recommended, and therefore demand is elastic and will be low if the suggested product does not match the tastes of consumers. Platforms face a trade-off: if they supply a "commission maximizing" ranking, they collect high fees but face a low demand from consumers. Therefore, if consumers' demand is sufficiently elastic, the platform internalizes consumers' surplus and provides an informative ranking, which matches consumers' preferences.[83]

Economists have also assessed the opportunity of a ban on dual mode, given the leveraging concerns to which this particular set-up of digital platforms can give rise. In this respect, economists have largely taken the view that a ban on dual mode would be detrimental or in any event not practically feasible and therefore have argued against it.

Gutierrez has estimated the welfare impact of the dual role of Amazon and the results suggest that a ban of the dual model, transforming Amazon either into a pure marketplace or a pure retailer, would not create any benefits for consumers.

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[81] Marc Bourreau and Germain Gaudin, 'Streaming Platform and Strategic Recommendation Bias' (2022) 31 Journal of Economics & Management Strategy 25.
[82] Emilio Calvano, 'Recommender Systems: Trust and Biased Advice', *Tenth IDEI-TSE-IAST Conference on The Economics of Intellectual Property, Software and the Internet* (2017).
[83] Tat-How Teh and Julian Wright, 'Steering by Information Intermediaries' [2018] Working Paper.

The reason is that the ban would either degrade services that customers appreciate, such as shipping by Amazon, or reduce the vast selection of products available on Amazon, and it could also induce further increases in fees.[84]

Similarly, Etro has observed that simple interventions, such as a ban on dual mode can hardly benefit consumers, because they either degrade services and product variety or induce higher prices or commissions and that they also reduces variety.[85]

Hagiu, Teh and Wright concluded that "*a blanket ban on the dual mode (i.e., forcing platforms to choose the same mode for all products) is likely to do more harm than good, and even when considering a ban on the dual mode within a narrow product category... such a ban often benefits third-party sellers at the expense of consumer surplus or total welfare. The main reason for this is that in dual mode, the presence of the platform's products constrains the pricing of the third-party sellers on its marketplace, which benefits consumers*".[86]

Gilbert has argued that structural separation does not eliminate the platforms' incentives to discriminate and that in any event such a separation requirement would be difficult to practically implement and administer and can give rise to harms to innovation. According to Gilbert, structural separation is not capable of eliminating the platform's incentives to bias service quality as platforms can have an incentive to provide different service qualities to its users even if the platform does not compete with products sold by third-party independent firms that rely on its services. In fact, the platform can have an incentive to offer higher service quality to a third-party merchant when the platform is vertically integrated compared to when it is not. According to Gilbert, regardless of structural separation, discrimination allows the platform to extract greater revenues when merchants have different alternatives to the platform.[87]

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[84] German Gutierrez Gallardo, 'The Welfare Consequences of Regulating Amazon' (16 November 2021) <https://papers.ssrn.com/abstract=3965566> accessed 24 April 2024.
[85] Federico Etro, 'The Economics of Amazon' [2022] Available at SSRN 4307213 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4307213> accessed 24 April 2024, p. 4.
[86] Hagiu, Teh and Wright (n 74), pp. 319-20.
[87] Gilbert (n 75), p. 7.

4.2.2. Envelopment

The business model of digital platform is also characterized by phenomena of so called "platform envelopment", which describes a competitive move whereby a digital platform enters an adjacent market. Platform envelopments has been defined in particular as "*entry by one platform provider into another's market by bundling its own platform's functionality with that of the target's so as to leverage shared user relationships and common components*".[88]

Economists have also analysed the phenomenon of envelopment of complementary platforms, according to which a platform enters their ecosystem by either developing applications on their own or acquiring independent third-party applications, therefore competing directly with their complementors.[89] While this practice bears some efficiencies in particular in terms of integration efficiency resulting from the envelopment, it is also capable of discouraging third-parties from contributing to the ecosystem as they fear the platform enveloper will capture their rents.[90]

As it has been noted by economists envelopment can, on the one hand, lead to the dethroning of an established platform but, on the other hand, may also give rise to the creation of platform conglomerates, which increases the concentration of private power.[91]

The same concerns have also been shared by other commentators that have noted that while envelopment can increase value for the consumers, it also allows platforms to collect a vast amount of data, which empowers the enveloper

[88] Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, 'Platform Envelopment' (2011) 32 Strategic Management Journal 1270, pp. 1270-1285.
[89] Jens Foerderer and others, 'Does Platform Owner's Entry Crowd Out Innovation? Evidence from Google Photos' (2018) 29 Information Systems Research 444, pp. 444-460; Hye Young Kang, 'Intra-Platform Envelopment: The Coopetitive Dynamics between the Platform Owner and Complementors' (2017) 2017 Academy of Management Proceedings 11205; Zhuoxin Li and Ashish Agarwal, 'Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram' (2017) 63 Management Science 3438, pp. 3438-3458; Wen Wen and Feng Zhu, 'Threat of Platform-owner Entry and Complementor Responses: Evidence from the Mobile App Market' (2019) 40 Strategic Management Journal 1336, pp. 1336-1367.
[90] Li and Agarwal (n 88), pp. 3438-3458.
[91] Wen and Zhu (n 89).

platform to leverage data across market segments or different markets and expand its competitive position.[92]

Envelopment strategies can take many forms and economists have studied, for instance, the envelopment strategy that takes place through "privacy policy tying," whereby the enveloper requests consumers to grant their consent to combining their data in both origin and target market.[93] According to these economists, such a strategy may allow the enveloper to monopolize the target market and entrench its dominant position in the origin market, through the funding of the services offered to all sides of the target market by monetization of data in the origin market.

Other authors have noted that envelopments is important in competitive dynamics of markets given that network effects can make markets where an established platform is present hard to enter. Through envelopment, established platforms in other markets can strategically use of their existing customer base by bundling services into the new market. This would foreclose the incumbent in that new market from access to users and harnesses the network effects that originally protected the incumbent, this allowing the new entrant to compete with the incumbent. Therefore, platform envelopment through bundling can be beneficial to competition given that it facilitates entry into markets that were previously monopolised. On the flip side, though, it can be negative in that it can potentially allow companies to extend their market power from one market to another and to create a monopolistic ecosystem.[94]

The concerns expressed above by various commentators and economists have also been acknowledged very recently by the European Commission in the *Booking/eTraveli* merger, which was prohibited by the Commission on the basis of ecosystems theory of harms. In particular the Commission was concerned that "*the transaction would have allowed Booking to expand its travel services ecosystem, which revolves around its hotel OTA [online travel agencies] business.*

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[92] José Van Dijck, David Nieborg and Thomas Poell, 'Reframing Platform Power' (2019) 8 Internet Policy Review 1, pp. 1-18; Lina M Khan, 'Amazon's Antitrust Paradox' (2016) 126 Yale Law Journal 710.

[93] Daniele Condorelli and Jorge Padilla, 'Harnessing Platform Envelopment in the Digital World' (2020) 16 Journal of Competition Law & Economics 143.

[94] See 'Digital Competition Policy: Are Ecosystems Different?' <https://one.oecd.org/document/DAF/COMP/WD(2020)96/En/pdf> accessed 24 April 2024, p. 9.

A flight OTA product is a crucial growth avenue in this ecosystem as it would generate significant additional traffic to Booking's platform. This is because, among the different travel OTA services, flights have the highest chance to lead to the cross-selling of accommodation. These would have allowed Booking to benefit from existing customer inertia because a significant share of these additional consumers would have stayed on Booking's platforms. Therefore, the transaction would have made it more difficult for competitors to contest Booking's position in the hotel OTA market".[95]

The European Commission's decision thus signals the Commission's willingness to address the issues relating to the creation of large digital ecosystems and envelopment concerns. In particular, the decision also manifests the position that the Commission is going to rely on merger control as well to address the issues relating to envelopment, without relying exclusively on antitrust interventions and on the regulatory framework.

5. The regulation of digital markets

5.1. Antitrust assessment of conducts in the online and offline worlds

The modern enforcement of antitrust law was traditionally based on the paradigm of the consumer welfare standard, the gist of which is that a given conduct or a merger is unlikely to be considered anticompetitive if it does not result in direct consumer harm in the form of reduced output, higher prices or lower quality.[96]

In its basic formulation, the consumer welfare standard can be opposed to the total welfare standard. An example that can be used to draw the line between the

[95] See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573

[96] For a background overview of the consumer welfare standard in general and as applied to digital markets in particular, see, *inter alia*, Herbert J Hovenkamp and Fiona Scott Morton, 'The Life of Antitrust's Consumer Welfare Model' [2023] ProMarket <https://scholarship.law.upenn.edu/faculty_scholarship/2935/> accessed 4 May 2024; Roberto Pardolesi, 'Tutto (o Quasi) Quel Che Avreste Voluto Sapere Sul Principio Del Consumer Welfare in Diritto Antitrust' [2021] ORIZZONTI DEL DIRITTO COMMERCIALE 315; Herbert Hovenkamp, 'Is Antitrust's Consumer Welfare Principle Imperiled?' (2019) 45 J. Corp. l. 65; Svend Albæk, 'Consumer Welfare in EU Competition Policy' [2013] Aims and values in competition law 67; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620.

two standards is that of a merger that gives rise to significant efficiencies, where the negative effects in terms of reduction of welfare of consumers can be countered by an increase of the producers' welfare, which would be due not only to the transfer of the surplus from the consumers to producers but also to the profits generated through the reduction in costs as a result of the efficiencies to which the merger gives rise. In such a case, where the increase in the producers' surplus outweighs the reduction in the consumer welfare, the transaction would be authorized under the total welfare standard, while it would be prohibited under the consumer welfare standard. As it has been noted, if one was to express the distinction between the two standards through a metaphor, it could be said that the total welfare standard is concerned with the size of the pie, while the consumer welfare standard is concerned with how the pie is cut into slices.[97]

A basic graphic illustration will serve to show when a given conduct is harmful from the perspective of the consumer welfare. In the graph below, an anticompetitive practice enables a firm to raise prices from P* to the monopoly price, P^m. The firm's ability to raise prices in monopolistic conditions gives rise to a reduction in output from Q* to Q^m. In this scenario, a part of the surplus is transferred from the consumer to the producer and a part of the economic surplus is lost, giving rise to a deadweight loss which is due to the fact that the firm has now raised the prices above the equilibrium prices, therefore resulting in less consumers being able to consume the good or service.

[97] Federico Ghezzi and Gustavo Olivieri, *Diritto Antitrust* (G Giappichelli Editore 2013), p. 44 and 46.

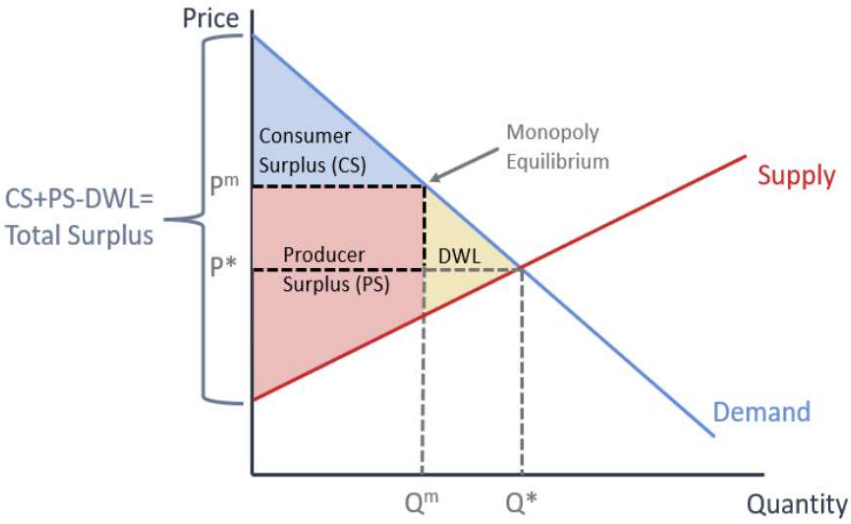

Figure 4: The effects of conducts. Note: taken from external sources.

The goal of the protection of consumer welfare (both directly and indirectly) has already been acknowledged in EU law as the ultimate goal of competition law since a long time now. The Court of Justice for instance has stated that competition rules cover "*not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition*",[98] and the General Court that "*the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers*".[99]

The Commission has also acknowledged such a goal of EU competition law in its Guidance paper on art. 102 TFEU where it is stated that "*the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have*

[98] *Post Danmark A/S v Konkurrencerådet* [2012] ECJ Case C-209/10; *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECJ Case C-52/09, para 24.
[99] *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities* [2006] GC Joined cases T-213/01 and T-214/01, para 115.

otherwise prevailed or in some other form such as limiting quality or reducing consumer choice".[100]

A strand of literature has however argued that, particularly due to the features described above which characterize digital markets, the consumer welfare standard would not be able to capture all of the potential harms to which digital platforms can give rise and have proposed to adopt the so called "protecting competition" standard.[101] This is the so called Neo-Brandeisian movement which has argued that antitrust enforcement is now poised for major potential changes in orientation to contrast the market power of digital platforms.

The essential claim of the supporters of the "protecting competition" standard is that antitrust should aim to preserve market opportunities for competitors, with the aim to disperse private power.[102] In particular, Tim Wu has argued that due to the entrenchment of market power of a small number of undertakings in certain sectors of the economy (what he calls the curse of bigness) antitrust laws should be enforced against conducts that have the potential to subvert the competitive process. Further, according to Wu, such a concentration of market power in the hands of a few large conglomerates -- beyond specific harms in markets -- risks

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[100] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) 2009, paragraph 19. This statement was not amended by the new Guidelines on the application of art. 102, which are still subject to consultation.

[101] See Robert H Lande, 'Consumer Choice as the Ultimate Goal of Antitrust' (2000) 62 U. Pitt. L. Rev. 503, according to whom the consumer welfare standard is at least somewhat responsible for the underenforcement of competition policy in some jurisdictions. In actuality, though, the disbelief in the consumer welfare's ability to function as a workable test to separate anti-competitive from pro-competitive conducts may also be due to the fact that as noted by Kaplow in Louis Kaplow, 'On the Choice of Welfare Standards in Competition Law' [2011] Harvard Law and Economics Discussion Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873432> accessed 5 May 2024, p. 1, "*unfortunately, the term consumer welfare, which naturally denotes the welfare of consumers, is often used to refer to total welfare, specifically including producers' surplus, largely as a consequence of Robert Bork's usage […]*". For this same argument, see also Barak Y Orbach, 'The Antitrust Consumer Welfare Paradox' (2011) 7 Journal of Competition Law and Economics 133. As explained above, under the total welfare standard, even in a situation where the increase in the producers' surplus outweighs the reduction in the consumer welfare, an hypothetical transaction would be authorized and therefore this standard does not resonate well with the contemporaneous understanding of antitrust laws that has been established on both sides of the Atlantic for a long time now.

[102] See Tim Wu, 'After Consumer Welfare, Now What? The 'Protection of Competition'Standard in Practice' [2018] The Journal of the Competition Policy International <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249173> accessed 24 April 2024; Marshall Steinbaum and Maurice E Stucke, 'The Effective Competition Standard' (2020) 87 The University of Chicago Law Review 595.

undermining democracy and causing harm to society. [103] Lina Khan has argued that the "protecting competition" standard would also bring competition enforcement back in line with the initial reasons for introducing antitrust laws, and would make the antitrust regime easier to predict, as it does not require complex economic analyses to be enforced, which also makes it less likely to be subject to protracted and costly litigation.[104] Moreover, this standard would also allow to evaluate the full range of harms that a violation of antitrust laws can give rise to not only in terms of efficiency, but also in terms of decrease in the welfare of workers, suppliers, innovators and entrepreneurs.[105]

The debate on the goals of competition law in relation to digital markets and the digital sector more broadly, has led commentators to ask the question of whether there should be any difference in the antitrust assessment in the digital sector. In particular, one question that has arisen is whether the characteristics of digital markets call for a new framework for the assessment of unilateral conduct by dominant firms (as the supporters of the "protecting competition" standard suggest) or whether we can simply apply the old framework to the new factual background.[106]

In this respect, the area of abuse of dominance is an ideal candidate to demonstrate the tension that can arise in the application of competition law to digital markets. The European case law has indeed traditionally defined the concept of abuse with an open-ended wording that has left many issues still

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[103] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, vol 21 (Columbia Global Reports New York 2018).

[104] Lina M Khan, 'The Ideological Roots of America's Market Power Problem' (2017) 127 Yale LJF 960.

[105] Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' <https://academic.oup.com/jeclap/article-abstract/9/3/131/4915966> accessed 24 April 2024.

[106] In the EU see, *e.g.*, European Commission, *Competition Policy for the Digital Era. A report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer* (2019); in the US see, *e.g.*, Washington Center for Equitable Growth, *Restoring competition in the United States, A vision for antitrust enforcement for the next administration and Congress* (2020); in the literature see e.g. Mario Libertini, 'Digital Markets and Competition Policy. Some Remarks on the Suitability of the Antitrust Toolkit' [2021] Orizzonti del diritto commerciale 337, who argued that the goal of contrasting the perceived excessive market power of the "web giants" can be achieved through an evolutionary interpretation of current antitrust rules; Pınar Akman, 'An Agenda for Competition Law and Policy in the Digital Economy' <https://academic.oup.com/jeclap/article-abstract/10/10/589/5611276> accessed 5 May 2024, p. 589 who argues that what is needed is a rethinking of the concepts of competition law and of the same tools that have been used traditionally to assess conducts.

unaddressed.[107] Among those issues, the question of what constitutes an abuse of dominance under art. 102 TFEU. This concept is extremely important and also quite unclear.[108]

These uncertainties around the concept of abuse of dominance are further exacerbated when one tries to apply such a concept to novel types of abuses, particularly in digital markets. A question that is left open is how to distinguish between a practice that has procompetitive effects versus one that has anticompetitive effects, *i.e.* how we define normal competition in a context, such as digital markets, where the practices of the companies operating in such markets and their business model often do not appear to be clearly outside the scope of "normal competition".[109]

The practice of self-preferencing exemplifies many of the tensions surrounding the application of art. 102 TFEU in this respect. In the first place, it is difficult to define what self-preferencing is, because potentially it can be a form of abuse that catches all the instances in which a company favors its own services over those of competitors and there is a further debate on whether the analysis should be different if such a conduct is adopted in the digital sphere versus in the non-tech world. Also, self-preferencing can give rise to both pro-competitive and anti-competitive effects and therefore it can often be difficult to determine when it constitutes "competition on the merits" and the applicable legal standard.[110] Self-

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[107] *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECJ Case 85/76, para. 91.

[108] Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Bloomsbury Publishing 2012) <https://books.google.com/books?hl=de&lr=&id=fyXcBAAAQBAJ&oi=fnd&pg=PR1&dq=Pinar+Akman,+The+concept+of+abuse+in+EU+Competition+law:+law+and+economic+approaches+(Hart+2012)%3B+&ots=Y4uA7_L2MY&sig=OdJBqjJEdDLUKgabKxb8uXV2jOU> accessed 5 May 2024; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press 2012) <https://doi.org/10.1093/acprof:oso/9780199226153.001.0001> accessed 5 May 2024; James, 'Scott M., The Concept of Abuse in EEC Competition Law: An American View,(1976)' 92 LQR 242.

[109] For a recent application of the concept of competition on the merits to novel types of abuses, see *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* [2022] ECJ Case C-377/20.

[110] See Marco Cappai and Giuseppe Colangelo, 'Taming Digital Gatekeepers: The 'More Regulatory Approach'to Antitrust Law' (2021) 41 Computer Law & Security Review 105559, p. 25, where the authors underline the "*ambiguity that, because of network externalities, characterizes conducts that occur in this context*", as a result of which "*the circumstances in which a practice within a multi-sided platform can determine a restriction of the market are exactly the same as those in which it can generate pro-competitive effects*".

preferencing can potentially be analyzed under the categories of duty to deal, margin squeeze, and discrimination. However, it can often be difficult to determine if such a practice clearly falls within one of these categories and this leaves competition authorities and courts without a solid analytical framework.

The research will show that, notwithstanding the apparent novelty of this form of abuse, there is nothing to suggest that its analysis should be any different from the traditional form of abuses that are common in the offline world. An adaption of the traditional tests indeed allows to address the harms that such a practice can give rise to. In essence, the different factual background will only mean that the assessment will be more difficult but not that the test should be different.

When looking closely at the literature that suggests that digital markets call for a reconsideration of fundamental aspects of EU competition law, it can be noticed that what these authors actually argue for is that online markets will just make it harder to assess the same sort of elements.[111] Let us take predatory pricing as an example. The relevant test for predatory pricing is enshrined in the *Akzo* judgment,[112] where the Court of Justice established that a dominant undertaking is presumed to be breaching Article 102 TFEU when it is charging under its average variable costs (AVC), while when the dominant company is pricing above AVC but under average total costs (ATC) it could be considered to be violating Article 102 TFEU if there is evidence of the intent to eliminate competition. The author does not dispute that predatory pricing in the online world should be assessed with a different test. The difference will only be the degree of complexity in the assessment of the same conduct. Indeed, as it is noted by the author, in order to determine whether the pricing is abusive, one will need to take into account both sides of the platform, as it is common that access to the platform for the consumers is free of charge on one side of the platform. In that respect, "*the complexity will increase substantially due to dynamic and discriminatory pricing possibilities that online platform have. The possibility to adapt price offers to*

[111] See Daniel Mandrescu, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market (s)' (2018) 41 World competition <https://kluwerlawonline.com/journalarticle/World+Competition/41.3/WOCO2018024> accessed 24 April 2024.
[112] *AKZO Chemie BV v Commission of the European Communities* [1991] ECJ Case C-62/86.

different costumers at every given moment means that in theory prices with regard to some costumers may be predatory and while other customers will receive non-predatory price offers".

Other commentators have argued that there are some differences between discrimination conducts specifically that take place in the online world and in the offline world, due to the specific characteristics of digital markets explained above.[113] One such difference that has been underlined is the scale of digital platforms and the possibility of expanding it. It has indeed been highlighted that platforms have unprecedented scale and have virtually unlimited market space where they can extend their market power. Also, digital platforms' expansion is not constrained by costly investments given that platforms do not need to invest in the production any forms of capital they give access to in order to expand their operations. On the contrary, brick and mortar companies need to make investments for such purposes, given that they do not benefit from the so-called "scale-without mass". The degree of "multi-sideness" of digital platforms is also much more pronounced than in traditional businesses. Digital platforms, compared to traditional businesses also have access to a larger set of data concerning the transactions that occur on their marketplace. These differences are due to the larger number of customers that digital platforms can reach and to the mechanics and possibilities of data collection, which are more limited for traditional businesses. In light of those differences, platforms' datasets on customers are richer by orders of magnitude, and therefore allow for behaviours that are much more sophisticated. Another difference between digital platforms and brick-and-mortar businesses is also the scale and speed in the use of data, which appear to be much more pronounced in the online world.

The main distinction between online platforms and the offline world that appears to arise from the above, as the authors acknowledge, is in terms of the magnitude and likelihood of the anticompetitive effects of the discrimination. Therefore, the framework of analysis should not be different for digital platforms

[113] European Commission, 'Commission Expert Group Publishes Progress Reports on Online Platform Economy | Shaping Europe's Digital Future' (10 July 2020) <https://digital-strategy.ec.europa.eu/en/library/commission-expert-group-publishes-progress-reports-online-platform-economy> accessed 19 May 2024.

and for the offline world, but what will change is the frequency of the enforcement against certain conducts in the digital space (which will be higher) and the magnitude of the effects, which will be rarely anti-competitive outside of the digital sector.

From the above, it follows that conducts in the online world should be assessed pursuant to the consumer welfare standard given that the calls for rethinking of antitrust laws, although fascinating, should be dismissed as in digital markets we are assessing fundamentally the same phenomena as in the offline world. The difference between conducts in the online and offline worlds will only rest on the likelihood of the effects and in the increased difficulty of their assessment in the online world.

5.2. The ex-ante regulation of digital markets

The perceived flaws of antitrust laws in tackling conducts in the digital space and the emergence of a consensus that some of the digital platforms had acquired a position of entrenched market power have given rise to a wave of regulation of digital markets in the EU, UK, the US and, more generally, around the world, all aimed at tackling the market power of GAFAM.

In particular, several factors have led to the perception that antitrust laws were not sufficient to police against antitrust infringements in the digital sector, and in particular leveraging abuses, namely: some of the doctrines that are applied to digital markets are still unclear in scope and reach (and self-preferencing constitutes an example of this), the scope of the prohibition of abuse of dominance is limited to active actions and companies may therefore be able to take advantage of market developments or structural market features without engaging in any abusive behaviour, the overall length of proceedings is excessively long also due to the fact that digital markets have features that contribute to making the overall assessment of conducts more complicated.[114]

[114] See also, on the leveraging conducts in digital markets, Bergqvist and Faustinelli (n 73).

This has led commentators to speak of a "more regulatory approach to antitrust law",[115] or "gatekeeper competition policy".[116] The first term describes the approach of advocating for an overhaul of the competition law toolkit with the introduction of hard and fast ex ante rules, which are general in scope and applicable to any business carried out through an online platform and which, due to the "platformization process" across a number of sectors, give rise to "*a shift of antitrust enforcement from the law enforcement model toward the regulatory model*". The second term describes the process through which "*competition policy proceeds by identifying a few large firms as gatekeepers and it then applies aggressive competition rules to them while leaving others unaffected*".

The introduction of ex-ante regulation of digital markets calls for a number of considerations, including the definition of the scope of the provisions included in the various instruments, the relationship between competition law and ex-ante regulation in policing conducts in digital markets and between European and national laws. In addition to that, ex-ante regulation in the digital space also gives rise to questions relating to the definition of its objectives and how it should be enforced, also with reference to the relationship between enforcement and compliance and their respective role in ensuring the correct functioning of digital markets.

While the emerge of the so called "more regulatory approach" has given rise to an interesting phenomenon of convergence of the three main jurisdictions in the world in terms of the perceived need to regulate the market power of GAFAM, the regulatory approaches that have been proposed or adopted are still specific to each jurisdiction nevertheless, with a varying degree of intrusiveness into the business model and trust (or lack thereof) in the ability of markets to self-regulate, at least partially.

At one end of the spectrum, there is the breakup approach. The proponents of this approach suggest that separations regimes should be introduced. These regimes would limit the lines of business in which a firm can operate, either by

[115] Cappai and Colangelo (n 110).
[116] Herbert Hovenkamp, 'Gatekeeper Competition Policy' [2023] U of Penn, Inst for Law & Econ Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392843> accessed 24 April 2024.

forbidding entry in certain markets or by requiring the operation of distinct lines of business through separate affiliates, thereby avoiding instances of leveraging of market power.[117] The proposals to break up companies that have achieved a sheer size is not new in the history of antitrust and regulation in the United States. In the United States, these proposals indeed date back to Standard Oil, an American company and corporate trust that from 1870 to 1911 controlled almost all oil production, processing, marketing, and transportation in the United States. It has been argued that today's concerns with the GAFAM's bigness reflects the same kind of response of Americans to big business and reflected their concerns about the political and economic dangers of bigness, beyond the threat of high prices.[118] In the European Union, on the contrary, breakups have been adopted only on rare occasions as a remedy in abuse of dominance cases under Article 102 TFEU, for instance in network industries like gas, electricity, and rail.[119]

A further possible regulatory approach to digital markets is that of creating rules-based and sector-specific regulation, like it has been done in the EU and in the US with the Digital Markets Act and the American Innovation and Choice Online Act and the Open App Markets Act, respectively. The DMA in particular is built on a three-layers architecture based on (i) the nature of the services provided by the online platform, (ii) the designation as a gatekeeper, and (iii) a set of rules imposing duties/bans on gatekeepers.[120] The services provided by the

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[117] See, *e.g.*, Khan, 'The Separation of Platforms and Commerce' (n 35); Khan, 'The New Brandeis Movement' (n 105); 'Break Up Big Tech | Elizabeth Warren' <https://2020.elizabethwarren.com/toolkit/break-up-big-tech> accessed 5 May 2024; Zephyr Teachout, *Break'em up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (All Points Books 2020) <https://books.google.com/books?hl=de&lr=&id=ElC9DwAAQBAJ&oi=fnd&pg=PT206&dq=Zephyr+Teachout,+Break%E2%80%99em+up+(All+Points+Books+2020)%3B+&ots=xA7NqLo8nZ&sig=A7i5NU-idwi5nZ3LGyCWa0xpMss> accessed 5 May 2024; Tim Wu, *The Curse of Bigness: How Corporate Giants Came to Rule the World* (Atlantic Books 2020) <https://books.google.com/books?hl=de&lr=&id=VWbBDwAAQBAJ&oi=fnd&pg=PT7&dq=Tim+Wu,+The+curse+of+bigness:+How+corporate+giants+came+to+rule+the+world+&ots=0UFe7KKtLv&sig=nuFlReJ7wmCIZaOtyAWrRX42XEY> accessed 5 May 2024.

[118] Naomi R Lamoreaux, 'The Problem of Bigness: From Standard Oil to Google' (2019) 33 Journal of Economic Perspectives 94.

[119] Tone Knapstad, 'Breakups of Digital Gatekeepers under the Digital Markets Act: Three Strikes and You're out?' (2023) 14 Journal of European Competition Law & Practice 394.

[120] For a general overview on the Digital Markets Act in the Italian literature, see *inter alia*, G Bruzzone, 'Verso Il Digital Markets Act: Obiettivi, Strumenti e Architettura Istituzionale' (2021) 1 Rivista della regolazione dei mercati 2021; Filippo Donati, 'Verso Una Nuova Regolazione Delle Piattaforme Digitali' [2021] RIVISTA DELLA REGOLAZIONE DEI MERCATI 238; Cristina Schepisi, 'L'enforcement Del Digital Markets Act: Perché Anche i Giudici Nazionali Dovrebbero

online platform that are caught by the regulation are the "core platform services", namely those services that "*feature a number of characteristics that can be exploited by the undertakings providing them*", with "*the effect of substantially undermining the contestability of the core platform services, as well as impacting the fairness of the commercial relationship between undertakings providing such services and their business users and end users*".[121] Gatekeepers are undertakings that "*feature an ability to connect many business users with many end users through their services, which, in turn, enables them to leverage their advantages, such as their access to large amounts of data, from one area of activity to another*" and that "*exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient those market operators may be*".[122] So far as the third layer of the DMA architecture is concerned, it introduces a fixed set of *ex ante* obligations split into self-enforcing obligations (Article 5) and obligations susceptible of further specification (Article 6), which include a number of provisions relating to, *e.g.*, a ban of parity clauses, self-preferencing and data portability and interoperability. These provisions are hard and fast rules that apply *indistinctively* to all the core

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Avere Un Ruolo Fondamentale' (2022) 2723 Annali AISDUE-ISSN 9969; Pietro Manzini, 'Equità e Contendibilità Nei Mercati Digitali: La Proposta Di Digital Market Act' (2021) 25 I Post di AISDUE <https://www.aisdue.eu/wp-content/uploads/2021/03/3-Post-Pietro-Manzini-DMA-1-marzo.pdf> accessed 19 May 2024; OSTI CRISTOFORO and others, *Competition Law Enforcement in Digital Markets* (G Giappichelli Editore 2021); V Falce and NM Faraone, ''Mercati Digitali e DMA: Note Minime in Tema Di Enforcement'' (2022) 1 Diritto industriale 5; Valeria Falce, 'Digital Markets between Regulation and Competition Policy. Converging Agendas' [2021] Eur. J. Privacy L. & Tech. 9; V Falce and NM Faraone, *Digital Markets Act: Profili Istituzionali*, in Pietro Manzini, Verso Una Legislazione Europea Su Mercati e Servizi Digitali (Cacucci editore 2021) <https://cris.unibo.it/handle/11585/887255> accessed 19 May 2024; Michele Polo and Antonio Sassano, 'Dma: Digital Markets Act o Digital Markets Armistice?' (2021) 23 Mercato Concorrenza Regole 501; Antonio Manganelli, 'The Eu Regulation for Digital Markets: Ratio, Pitfalls, and Possible Evolution' [2021] Mercato Concorrenza Regole 473; Guido Alpa, 'La legge sui servizi digitali e la legge sui mercati digitali' (*Altalex*, 2022) <https://www.altalex.com/documents/2022/04/21/la-legge-sui-servizi-digitali-e-la-legge-sui-mercati-digitali> accessed 9 June 2024; Mario Libertini, 'Il Regolamento Europeo Sui Mercati Digitali e Le Norme Generali in Materia Di Concorrenza' (2022) 4 Rivista trimestrale di diritto pubblico 1069.

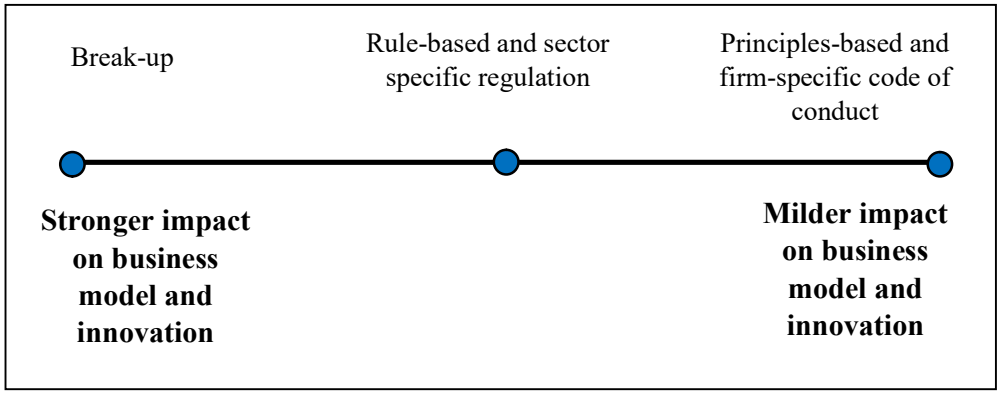
[121] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 2022 (OJ L), Recital 2.

[122] *Ibid.*, Recital 3.

platform services and gatekeepers, irrespective of the different characteristics, business models and incentives that they may have.

Finally, another regulatory approach for digital markets that has been adopted is that of issuing a principles-based and firm-specific code of conduct, like in the UK. The regime applies *ex ante* to online platforms with a "strategic market status", which will be evaluated with respect to a specific digital activity and will involve the assessment of whether a firm's market power in an activity provides it with a strategic position, meaning that the firm serves as a gateway for other businesses. Undertakings with "strategic market status" will be the addressees of codes of conduct which will be tailored to the specific firm and which will set out principles aimed at preventing these undertakings from taking advantage of their market status. In addition to these codes of conduct, the Competition and Markets Authority will also be entitled to issue pro-competitive measures (such as third-party access to data, interoperability, obligations to provide access on fair and reasonable terms) aimed at remedying more structural causes of market power which go beyond the individual conducts and that, therefore, could not be addressed through codes of conduct.[123]

The three regulatory approaches for the regulation of digital markets have different degrees of impact on digital platforms' business models and on innovation which are shown in the figure below, from the most intrusive and least conducive to innovation to the least intrusive and most conducive to innovation, from left to right.



[123] For a comment on the UK digital markets regulation see, *e.g.*, Niamh Dunne, 'Pro-Competition Regulation in the Digital Economy: The United Kingdom's Digital Markets Unit' (2022) 67 The Antitrust Bulletin 341.

Figure 5: Regulatory approaches and impact on business models and innovation

It is submitted that the principles-based and firm-specific code of conduct is the superior approach out of the three possible regulatory approaches for digital markets. Indeed, this allows to intervene in the instances where regulatory intervention is justified and through a set of principles that, as opposed to rules, are flexible enough to capture the specificities of the individual conducts as put in place by the different platforms. On the contrary, "one size fits all" rules for the whole digital sector may not be flexible enough to regulate the different platforms (which have different incentive structures and different characteristics) and run the risk of regulating conducts that are actually pro-competitive. The breakup approach, the most extreme, is not warranted as it gives rise to a significant loss of efficiencies and it does not necessarily solve the competition issues, as highlighted above. The three approaches also have a varying influence on innovation, with the principles-based and firm-specific code of conduct approach being the one that fosters overall market innovation the most, as it limits the potential anti-competitive practices of gatekeepers through the least intrusive means (therefore leaving its incentives to innovate intact), whilst still impeding anti-competitive conducts and therefore preserving third parties' incentives to innovate. For the same reasons highlighted above, the breakup option and the approach grounded on rules-based and sector-specific regulation are less conducive to innovation.

The thesis will focus on the "rules-based and sector-specific regulation" approach, as it is the one that inspires the Digital Markets Act, which is the focus of this work. Reference to the other regulatory approaches will be made where appropriate.

CHAPTER II
SELF-PREFERENCING AND ABUSE OF DOMINANCE

SUMMARY: 1. The economics of self-preferencing; - 1.1. Defining self-preferencing; - 1.2. Assessing the effects of self-preferencing; - 1.2.1. The pro-competitive effects of self-preferencing; - 1.2.2. The anti-competitive effects of self-preferencing; - 2. The legal framework to analyse self-preferencing under EU competition law; - 2.1. The possible legal avenues; - 2.2. The concept of "competition on the merits"; - 3. The EU Commission decision and the GC judgment in Google Shopping; - 3.1. The EU Commission decision in Google Shopping; - 3.2. The GC judgment in Google Shopping; - 4. A critical analysis of Google Shopping; - 4.1. Self-preferencing and duty to deal; - 4.2. Abnormality and irrationality of Google's conduct (the no economic sense test); - 4.3. The principle of equal treatment; - 4.4. Non-application of AEC test and lack of a proper analysis of effects; - 5. The Advocate General's Opinion in Google Shopping: a look into the future of self-preferencing; - 5.1. The Opinion of the Advocate General; - 5.2. A comment on the Opinion; - 6. The EU Commission decision in the Amazon case; - 6.1. The EU Commission decision in the Buy Box and Marketplace cases; - 6.2. A critical assessment of the Buy Box and Marketplace cases; - 7. The EU Apple store case (platform fee discrimination); - 7.1. The App Store case; - 7.2. A critical assessment of the Apple Store case; - 8. The Italian Competition Authority's approach to self-preferencing; - 8.1. The Amazon FBA Case; - 8.2. Other cases involving self-preferencing.

1. The economics of self-preferencing

1.1. Defining self-preferencing

Self-preferencing can be very hard to define.[124] Self-preferencing is indeed a generic term that covers a wide range of different leveraging practices.[125] All these practices have in common a leveraging component but they can be harmful in different ways and to a different extent.

[124] See Peter Ormosi, 'The Legal Definition of Self-preferencing: too Narrow too Broad or Both' <https://competitionpolicy.ac.uk/blog/the-legal-definition-of-self-preferencing-too-narrow-too-broad-or-both/> accessed 5 May 2024.

[125] See Herbert Hovenkamp, *Antitrust and Self-Preferencing* (HeinOnline 2023) <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/antitruma38&section=5> accessed 5 May 2024.

Some authors and policy reports have defined self-preferencing as a practice which requires two conditions: (i) the case involves two markets which are horizontally or vertically related, and (ii) a mechanism through which the firm preferences its activities over those of the others.[126] This definition is, however, a catch-all since it would cover essentially all the everyday practices of dominant firms (*e.g.* even asking for legal advice to the firm's in-house lawyers instead of hiring another lawyer). To avoid the risk that any charge for anything can be considered "self-preferencing" even when a firm is merely attributing any kind of charge to its internal division instead of other firms, one needs to draw some dividing lines.

First, the indispensability condition for a refusal to supply also needs to be met.[127] The dominant firm must therefore discriminate in its favour in relation to a product or service that is indispensable for other firms to compete on a related market. The indispensability condition has been interpreted differently in the case-law depending on the circumstances of each given case. In *Magill* and *Bronner* it was interpreted more restrictively. In *Magill*, in particular, the Court of Justice held that the input was indispensable as there was "*no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead*".[128] In *Bronner*, the Court of Justice decided that the input at issue was not indispensable given that "*it is undisputed that other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers, exist and are used […]*", and "*it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide*

[126] Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 World Competition <https://kluwerlawonline.com/journalarticle/World+Competition/43.4/WOCO2020022> accessed 28 April 2024; Directorate-General for Competition (European Commission) and others (n 2).
[127] Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal-Two Sides of the Same Coin' (2015) 1 CLPD 4.
[128] *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECJ Joined cases C-241/91 P and C-242/91 P., para. 52.

home-delivery scheme and use it to distribute its own daily newspapers".[129] In *IMS Health* and in *Microsoft*, though, the standard for indispensability was arguably relaxed. In *IMS Health*, the Court indeed considered that "*for the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by an intellectual property right which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind*",[130] and in *Microsoft* that "*in light of the very narrow technological and privileged links that Microsoft has established between its Windows client PC and work group server operating systems, and of the fact that Windows is present on virtually all client PCs installed within organisations, […] Microsoft was able to impose the Windows domain architecture as the 'de facto standard for work group computing*'".[131]

As some commentators have rightly noted with respect to digital platforms, "*platforms attracting such an enhanced duty of care are likely to play an outsized role in the evolution of competition in adjacent markets in a manner mirroring the rationale for the indispensability concept*".[132] Thus, the same competition law principles should apply and they can be effectively used to open up digital markets.[133] Certain commentators have argued that indispensability should be an element of the legal test where intervention leads to the imposition of

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[129] *Opinion of Mr Advocate General Jacobs delivered on 28 May 1998 Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG Reference for a preliminary ruling: Oberlandesgericht Wien - Austria Article 86 of the EC Treaty - Abuse of a dominant position - Refusal of a media undertaking holding a dominant position in the territory of a Member State to include a rival daily newspaper of another undertaking in the same Member State in its newspaper home-delivery scheme Case C-7/97* (ECJ)., paras. 43 and 44.

[130] *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECJ Case C-418/01, para. 30.

[131] Commission Decision of 06/12/2016 declaring a concentration to be compatible with the common market (Case No COMP/M.8124 - MICROSOFT / LINKEDIN) according to Council Regulation (EC) No 139/2004 (Only the English text is authentic) (n 44), para. 392.

[132] Niamh Dunne, 'Dispensing with Indispensability' (2020) 16 Journal of Competition Law & Economics 74, p. 25.

[133] Nikolas Guggenberger, 'Essential Platforms' (2020) 24 Stanford Technology Law Review 237.

proactive remedies (such as a structural separation or the regulation of the terms and conditions of access to an input or platform), while evidence of indispensability is not required for reactive remedies, *i.e.* when a negative obligation that can be administered on a one-off basis is imposed.[134] By this view, as the remedies adopted in self-preferencing cases typically involve a proactive change in the platforms' business models, the indispensability condition will apply.[135] However, the use of this criterion to decide whether the indispensability condition will apply may prove to be excessively subjective and can offer an easy escape to circumvent the application of the indispensability condition, as competition authorities could simply frame the remedy so that it does not appear to be a proactive remedy (*i.e.* they could simply impose an obligation to remove the anti-competitive situation without expressly specifying how to do so). The solution proposed by Graef, though, has some merit and ought to be incorporated into the assessment.[136] Graef has indeed proposed that the notion of indispensability should be tailored to the market situation at stake. In particular, in cases where there are external market failures such as the presence of strong network effects, switching costs, and entry barriers, the indispensability standard ought to be flexed in order to allow for a broader application of the indispensability criterion. It is submitted that what this means is that -- in digital markets -- platforms are more likely to be considered indispensable compared to the other infrastructures in the offline world, precisely due to the characteristics set out in Chapter I. Nevertheless, this does not mean that indispensability should be disregarded altogether and, instead, the assessment of indispensability should be carried out in accordance with the case-law, which indeed allows for this flexibility.[137] This thesis does also not seem to be different from that of certain

[134] Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10 Journal of European Competition Law & Practice 532.

[135] On the impact of antitrust intervention on business models, see Pablo Ibáñez Colomo, 'Product Design and Business Models in EU Antitrust Law' [2021] Available at SSRN 3925396 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3925396> accessed 28 April 2024.

[136] Inge Graef, 'The Future of Refusals to Deal and Margin Squeezes in the Face of Sector-Specific Regulation', *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing 2023) <https://www.elgaronline.com/edcollchap/book/9781839108723/book-part-9781839108723-18.xml> accessed 5 May 2024.

[137] For a helpful discussion of the importance of retaining the indispensability condition in Article 102, see Dunne (n 131), p. 37, according to whom *"[i]ndispensability today would appear to be*

authors who have argued that indispensability should not be required for vertical foreclosure actions, and have instead suggested to replace this concept with that of a "crucial asset".[138]

Second, one also needs to focus on the effects of such self-preferencing: if that discrimination gives rise to anti-competitive exclusionary effects, then such a charge can be considered anti-competitive self-preferencing.[139] Effects are discussed in greater detail in this chapter in the dedicated sections, and they do form part of the definition.

At the same time, disallowing the ancillary activities of the dominant firm when a company holds an indispensable input -- as some have proposed -- is not a workable option, given that this side business constitutes most of the big tech's businesses.[140] Such a structural separation would indeed cause a loss of the efficiencies that connect the two different sides of the market.[141] Also, not allowing the platforms to operate their complementors on the platform would greatly undermine their incentives to invest and this would lead to overall less innovation and ultimately harm to consumers.[142] Lastly, this solution seems to reflect the view that integration must always be treated with suspicion, even though this is not the case under EU competition law.[143]

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something of an endangered species in EU competition law, whose habitats are continually being diminished and destroyed. Yet this is neither an inevitable nor a desirable development. The abandonment of indispensability on the pretext of increasing levels of enforcement, or of facilitating innovation in enforcement activity, is misguided. Retaining indispensability as the cornerstone of refusal to deal case-law does not inhibit the progressive development in other areas of Article 102 TFEU jurisprudence; ditching it in respect of refusal to deal cases is unlikely to enhance the quality or longer-term competitive impact of such decision-making, even if it increases the absolute number of cases taken in the short term. Accordingly, it should only be with great hesitation that the Commission and Union Courts dispense with indispensability in a more wholesale fashion. The exceptions [to the indispensability condition] should thus be treated as confirming the underlying rule, and to extent that there in any fundamental incompatibility, it is the derogation and not the rule itself that ought to yield".

[138] Chiara Fumagalli and Massimo Motta, 'Dynamic Vertical Foreclosure' (2020) 63 The Journal of Law and Economics 763, pp. 16-19.

[139] See Colomo, 'Self-Preferencing' (n 126).

[140] For a proposal of structural separation, see Lina Khan "The Separation of Platforms and Commerce" (2019) 119 Columbia Law Review 973.

[141] Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, London, Hart Publishing 2020).

[142] International Center for Law & Economics, "Invited Statement of Geoffrey A. Manne on House Judiciary Investigation Into Competition in Digital Markets" (International Center for Law & Economics, 2020), *https://laweconcenter.org/wp-content/uploads/2020/04/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf*.

[143] Ibáñez Colomo, "Self-Preferencing: Yet Another Epithet in Need of Limiting Principles", p. 11.

In the non-tech world, companies have adopted self-preferencing practices for a long time.[144] One example that immediately comes to mind is that of a supermarket that promotes its own private labels products over competitors' products. A supermarket which has its own private label product can not only give a less favourable placement to competing products, but it can also refuse to carry the competing product. By the same token, traditional stores and companies also use their own employees to carry out their operations and yet all those refusals to outsource are not considered unlawful self-preferencing. That is because the duty to deal is perceived as an interference with the general freedom to contract of the companies, and the conditions that need to be met to establish such an abuse are very strict.[145] Therefore, also a monopolist can typically refuse to deal with competitors.[146] Self-preferencing can be characterized as a form of refusal to

[144] An example of a sector where instances of self-preferencing conducts have existed for a long time and in which they have been addressed by the law is that of patents, where the concern was that the patentee could use licensing arrangements to extend the market power resulting from the patent and capture sales that were beyond the rights conferred by the patent, as highlighted by Hovenkamp in Hovenkamp, 'Gatekeeper Competition Policy' (n 116). Already in 1850, the United States Supreme Court refused to enforce a requirement imposed by the patentee of a commercial wood planing machine that users had to use solely their own cutter blades, which wore out and had to be replaced frequently (see *Wilson v Simpson, 50 US 109 (1850)* (US Supreme Court)). In 1854, the United States Supreme Court refused to enforce a requirement that users of a patent knitting machine use solely the patentee's replaceable knitting needles (*Aiken v Manchester Print Works* (Circuit Court, D New Hampshire)). In 1894, the United States Supreme Court again refused to enforce a requirement imposed by the patentee that users of its patented toilet paper dispenser purchase exclusively its own toilet paper (*Morgan Envelope Co v Albany Paper Co, 152 US 425 (1894)* (US Supreme Court)). Following these decisions in the very early days, the United States courts took different stances on these instances of discrimination of patentees. In 1912, the United States Supreme Court permitted a manufacturer of office equipment to impose a requirement that users of its patented mimeograph machine had to purchase its single-use paper, stencils, and ink from the patentee (*Henry v A B Dick Co, 224 US 1* (US Supreme Court)). In 1917, the United States Supreme Court held that a restriction imposed by the patentee on its patented film projector to the effect that it could be used only with its own films was unlawful (*Motion Picture Patents Co v Universal Film Co, 243 US 502* (US Supreme Court)). Taking a similar stance, in 1931, the United States Supreme Court condemned the imposition from a seller of patented ice box of an obligation that users purchase only its own dry ice (*Carbice Corp v Patents Development Corp, 283 US 27* (US Supreme Court)). For a further description of the case-law see Hovenkamp, 'Gatekeeper Competition Policy' (n 116).

[145] *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECJ Case C-7/97. According to the ECJ, a complainant needs to prove: (i) indispensability of the input; (ii) elimination of all competition in the related market where the company seeking access is operating; and (iii) lack of objective justification.

[146] In the United States, broadly the same rule applies and the duty to deal doctrine applies only to monopolists and even in these circumstances imposes dealing obligations rarely. In this respect, see for instance the landmark case *Aspen Skiing Co v Aspen Highlands Skiing Corp, 472 US 585*

supply, given that also refusal to supply involves an element of favouring the dominant firm's own services or products. However, in the case of self-preferencing, the dominant company continues to provide access to the relevant input, even though on less favourable terms. Self-preferencing is a lesser restriction than a complete refusal and it should therefore be immune from antitrust scrutiny in cases where a complete refusal is legal.

In defining self-preferencing, one also needs to determine whether self-preferencing is a category of abuse that applies only to digital markets.[147] In this respect, one European Commission's official, who was asked to comment on the definition of self-preferencing, expressed the view that one can define this practice as a very specific form of conduct that takes place essentially (or exclusively) in digital markets and that consists in a undertaking favouring the acquisition of internet traffic of its services over competitors through artificial measures (such as discriminatory treatment of competitors).[148] According to this definition, self-preferencing applies only to digital markets and requires a very specific conduct in a situation in which internet traffic is a key factor for the market. This definition seems excessively narrow. First, the specificity of the conduct seems to be irrelevant as to whether there is a violation or a potential violation, given that the violation could take place also through special or unusual conducts. Second, self-preferencing does not apply only to digital markets. Because of the specific business models of companies operating in digital markets, the amount of information that they have is way larger than in the non-digital world and also the visibility of products can be way greater than in the analogic world, thereby arguably making self-preferencing more effective. However, while this means that enforcement against self-preferencing in the

(US Supreme Court), recognized a narrow duty to deal where the parties had a previous, voluntary dealing arrangement and the defendant withdrew from it without an adequate explanation.

[147] See Christian Ahlborn, Gerwin Van Gerven and William Leslie, 'Bronner Revisited: Google Shopping and the Resurrection of Discrimination Under Article 102 TFEU' (2022) 13 Journal of European Competition Law & Practice 87, who argue that self-preferencing is a narrow category of abuse, relevant most notably for certain digital platforms.

[148] Massimiliano Kadar, 'Competition Enforcement contro i giganti dell'high-tech. Spunti di riflessione derivanti dalla recente casistica nazionale e comunitaria' (*AAI*, 15 February 2022) <https://www.associazioneantitrustitaliana.it/attivita/competition-enforcement-contro-i-giganti-dellhigh-tech-spunti-di-riflessione-derivanti-dalla-recente-casistica-nazionale-e-comunitaria/> accessed 5 May 2024.

digital markets will be more frequent, such elements do not justify a restriction of the notion of self-preferencing to digital markets and they do not allow a departure from the traditional analysis of abuses in the non-tech world. Further, the favouring of a firm's own services can certainly happen also through other means than the acquisition of internet traffic.[149]

The analysis of a possible definition of self-preferencing revealed that the two-prong definition of this category of abuse given by the reports and commentators is too broad and would cover essentially all the practices of dominant firms. At the same time, the definition that restricts self-preferencing to a very specific form of conduct that takes place in digital markets is too narrow to address the potential competition concerns that can arise.

Hence, the definition turns on whether the dominant firm discriminates in relation to an indispensable input and on the analysis of the likely foreclosure effects (like in the duty to deal doctrine in the form of constructive refusal to supply). Since self-preferencing can be defined as a discrimination by a dominant undertaking holding an indispensable input that has likely foreclosure effects, the analysis of the effects is essentially part of the definition.

1.2. Assessing the effects of self-preferencing

1.2.1. The pro-competitive effects of self-preferencing

Commentators and the European Commission itself have acknowledged that vertical integration and self-preferencing have many pro-competitive effects.[150] The main ones are summarised below.[151]

The most important pro-competitive effect of self-preferencing is its impact on investments by the dominant firm. When a firm knows that it will have to share the result of its investments with competitors, its incentives are greatly reduced as a result. The main aspect of dynamic competition is indeed investment

[149] See, *e.g.*, 'Antitrust: Commission Accepts Commitments by Amazon' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777> accessed 5 May 2024.

[150] See Michael A Salinger, 'Self-Preferencing' (11 November 2020) <https://papers.ssrn.com/abstract=3733688> accessed 5 May 2024.

[151] For a comprehensive literature review of the relevant papers authored by economists on this topic, see Yuta Kittaka, Susumu Sato and Yusuke Zennyo, 'Self-Preferencing by Platforms: A Literature Review' [2023] Japan and the World Economy 101191.

and innovation by firms seeking to gain a competitive advantage over competitors.[152] Along the same lines, commentators have also clarified that product integration and the ensuing discrimination can be the mechanism to ensure that a firm is rewarded for its investments and innovation efforts. A firm may refuse to supply an input that it has developed to its rivals on the downstream market because it wants to offer the final product on an exclusive basis, thereby obtaining a reward for its efforts.[153]

Foerderer, Kude, Mithas and Heinzl have studied the market for photography apps and have found that Google's decision to enter such market in competition with third-parties increased consumer attention and created further demand for photography apps, which in turn gave rise to spillover effects benefitting complementors in the same segment. Overall, they found that the Google's decision to compete with complementors by entering their market segment with its own, rival product, had a positive effect on the innovation output of complementors.[154]

In a similar fashion, Li and Agarwal have studied the impact of the tighter integration between the platform and first-party applications compared to third-party applications on consumer demand for first-party applications and competing third-party applications. Specifically, they have studied Facebook's integration of Instagram in its photo-sharing application ecosystem. Li and Agarwal have showed that tighter integration of a platform's application increases consumer demand, which benefits larger and more sophisticated third-party applications.[155]

De Cornière and Taylor have found that self-preferencing by search engines may give rise to pro-competitive effects as it allows to provide better content to consumers by reducing the nuisance costs due to excessive

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[152] See *e.g.*Howard A Shelanski, 'Unilateral Refusals to Deal in Intellectual and Other Property' (2009) 76 Antitrust Law Journal 369; *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* (n 144), Opinion of AG Jacobs, para. 55, where he expressed the view that "*the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits*".
[153] Colomo, 'Self-Preferencing' (n 125), p. 15.
[154] Foerderer and others (n 89).
[155] Li and Agarwal (n 89).

advertising.[156] According to their model, the increase in revenue through sponsored ads could enable the search engine to reduce the number of advertisements and would therefore increase users' utility. In a more recent article, the same authors have found that self-preferencing behaviour by information intermediaries may benefit consumers, for instance, when firms compete on quality.[157]

Zennyo has found that self-preferencing conducts of digital platforms can benefit consumers through lowered commission fees to third-party sellers, allowing them to decrease their prices, and in turn attracting more consumers and more third-party sellers onto the platform. [158] According to a commentator, behind this model, "*[t]he economic intuition is that algorithmic self-preferencing enables the platform to sell its own products more effectively, which increases its expected profit per consumer and therefore increases its incentives to attract more consumers. To this end, the platform has economic incentives to reduce commission fees to make the resulting consumer prices lower, increasing consumer participation. The increase in consumer participation in turn stimulates third-party seller participation*".[159]

Economists have also acknowledged that a firm promoting or favouring its own services over those of competitors can also benefit consumers in two ways, namely by promoting greater quality and trust and by improving consumers' choices through more accurate ranking and prominence of the services that consumers want.[160] Additionally, the welfare of consumers can also be enhanced by self-preferencing practices due to the fact that a first-party app – as it is fully

[156] Alexandre de Cornière and Greg Taylor, 'Integration and Search Engine Bias' (2014) 45 The RAND Journal of Economics 576.
[157] De Cornière and Taylor (n 78).
[158] Yusuke Zennyo, 'Platform Encroachment and Own-Content Bias*' (2022) 70 The Journal of Industrial Economics 684.
[159] Emily Feyler and Veronical Postal, 'Can Self-Preferencing Algorithms Be Procompetitive?' (2023) <https://www.competitionpolicyinternational.com/wp-content/uploads/2023/06/5-CAN-SELF-PREFERENCING-ALGORITHMS-BE-PRO-COMPETITIVE-Emilie-Feyler-Veronica-Postal.pdf> accessed 28 April 2024, p. 5.
[160] Oxera, 'How Platforms Create Value for Their Users: Implications for the Digital Markets Act, Prepared for the Computer and Communications Industry Association' (2021) <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf> accessed 5 May 2024.

integrated in the software of the platform -- may guarantee a better and more seamless experience to a user than a third-party app.[161]

The European Commission's guidelines on the assessment of non-horizontal mergers also make it clear that vertical integration can increase consumer welfare and foster competition in a number of cases.[162]

For instance, the European Commission acknowledges that vertical integration can lead to the "internalisation of double mark-ups",[163] it can "decrease transaction costs" and "allow for a better co-ordination in terms of product design".[164]

1.2.2. The anti-competitive effects of self-preferencing

Competition authorities (including the European Commission) and commentators have identified and analysed the harms that can arise from self-preferencing and have warned that it can give rise to antitrust issues. The theories of harm in cases concerning self-preferencing revolve around two main aspects: vertical foreclosure arising from leveraging of market power (which is the main

[161] Chiara Fumagalli and Massimo Motta, *Economic Principles for the Enforcement of Abuse of Dominance Provisions* (Centre for Economic Policy Research 2024) <https://cepr.org/system/files/publication-files/196442-policy_insight_125_economic_principles_for_the_enforcement_of_abuse_of_dominance_provisions.pdf> accessed 28 April 2024.

[162] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2008.

[163] ibid, para. 13, according to which "[…] *vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other. The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. In vertical relationships for instance, as a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. This is often referred to as the 'internalisation of double mark-ups'. Similarly, other efforts to increase sales at one level (e.g. improve service or stepping up innovation) may provide a greater reward for an integrated firm that will take into account the benefits accruing at other levels*".

[164] ibid, para 14, according to which "[i]*ntegration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold. Similarly, mergers which involve products belonging to a range or portfolio of products that are generally sold to the same set of customers (be they complementary products or not) may give rise to customer benefits such as one-stop-shopping*".

harm identified) and consumer harm (which is often less pronounced).[165] The foreclosure effects arise from the discriminatory conduct of the vertically-integrated platform which typically give rise to input foreclosure effects or customer foreclosure effects, if the platform is downstream of the side business. These foreclosure effects can lead to the exclusion of competitors in the market where the market power is leveraged (through reduced access, increased costs or reduced incentive to innovate), which will take place if the rivals cannot substitute the input (or the customer, as the case may be) from other sources, and which will in turn depend on the degree of dominance of the platform and therefore on the indispensability of the input. As a result, competition may be distorted in the downstream market (or in the upstream market, in the scenario of costumer foreclosure). Distortion of competition in the upstream or downstream market can also lead to indirect foreclosure effects in the platform market, therefore further strengthening the position of dominance of the platform.[166]

From the above description of the harms arising from self-preferencing it is evident that they depend on the degree of indispensability of the input and that these are concerns that are no different from those that have already been dealt with in the past (*e.g.*, input and costumer foreclosure are a traditional concern in vertical mergers).[167]

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[165] On vertical foreclosure theories of harm, see *e.g.* Fumagalli and Motta (n 138); Chiara Fumagalli, Massimo Motta and Thomas Rønde, 'Exclusive Dealing: Investment Promotion May Facilitate Inefficient Foreclosure' (2012) 60 The Journal of Industrial Economics 599; Patrick Rey and Jean Tirole, 'Chapter 33 A Primer on Foreclosure' in M Armstrong and R Porter (eds), *Handbook of Industrial Organization*, vol 3 (Elsevier 2007) <https://www.sciencedirect.com/science/article/pii/S1573448X06030330> accessed 5 May 2024; Oliver Hart and others, 'Vertical Integration and Market Foreclosure', *Brookings Papers on Economic Activity. Microeconomics* (1990) <https://www.jstor.org/stable/2534783?origin=crossref> accessed 5 May 2024.

[166] Matt Hutt, 'Self-Preferencing in Digital Markets' <https://www.alixpartners.com/insights/102i859/self-preferencing-in-digital-markets/> accessed 5 May 2024.

[167] Economists have analysed potential vertical issues in merger control from the early days. In this respect, in the literature see, *e.g.*, Michael A Salinger, 'Vertical Mergers and Market Foreclosure' (1988) 103 The Quarterly Journal of Economics 345; Patrick Bolton and Michael D Whinston, 'The" Foreclosure" Effects of Vertical Mergers' (1991) 147 Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft 207; Yongmin Chen, 'On Vertical Mergers and Their Competitive Effects' [2001] RAND Journal of Economics 667. More recently, there has been a renewed interest in vertical theories of harm in merger control, particularly in the United States. In this respect, see, *e.g.*, Jonathan B Baker and others, 'Five Principals for Vertical Merger Enforcement Policy' (2018) 33 Antitrust 12; Steven C Salop, 'Invigorating Vertical Merger Enforcement' [2018] The Yale Law Journal 1962; Steven C Salop,

The European Commission has identified both leveraging and anticompetitive foreclosure concerns relating to self-preferencing in *Google Shopping*. According to the Commission, by leveraging its market power from the market in which the undertaking is dominant to the related competitive market, the dominant company is able to foreclose competitors in the competitive market. This foreclosure leads to an increase in rivals' costs and, as consequence, an increase in product prices for consumers making their purchase. Moreover, this conduct would also lead to a decrease in innovation from both competitors and the dominant undertaking itself. This is because the dominant company would have less incentives to innovate without the competitive pressure exerted by its competitors and the latter would not improve their services if they do not have access to a sufficient customer base. As a whole, the conduct leads to consumer harm because consumers would not have access to the most relevant services and their choice would be reduced as a result.[168]

Other national competition authorities have also identified similar concerns in relation to self-preferencing. The below cases allow to show what are the harms from self-preferencing that have been identified by competition authorities.

The Italian Competition Authority raised costumer foreclosure concerns in relation to Amazon's practices on the Amazon Marketplace, *i.e.* the market for

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'A Suggested Revision of the 2020 Vertical Merger Guidelines (July 2021)' [2021] Antitrust Bulletin <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839768> accessed 28 April 2024; Hans Zenger, 'Analyzing Vertical Mergers' (16 October 2020) <https://papers.ssrn.com/abstract=3713352> accessed 28 April 2024. As a result of the heated academic debated on this topic, in 2020, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) released new vertical merger guidelines but withdrew them in 2021 due to disagreements within the FTC. Differently from the guidelines on non-horizontal mergers adopted in the EU and in the UK, the proposal for new merger guidelines adopted and then withdrew by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) relating to foreclosure and raising rivals' costs does not include language on input and customer foreclosure but instead speaks of "related market". However, the basic approach to these concepts in merger control is broadly convergent across the United States, United Kingdom and the European Union. See, for this consideration, Kostis Hatzitaskos and Bob Majure, 'An Initial Comparison of the Draft US Vertical Guidelines with the EU Non-Horizontal and the UK Merger Assessment Guidelines'.

[168] 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)) (notified under document number C(2017) 4444) (n 43).

intermediation services on online marketplaces.[169] In particular, according to the Italian Competition Authority Amazon had provided enhanced access to consumers to the merchants who used Amazon's own logistics services and this created a strong incentive for third-party merchants to choose Amazon's logistics services over third-party providers. The ICA found that Amazon's conduct had exclusionary effects in the market for e-commerce logistics, given that it hindered third-party logistics operators' ability to innovate and prevented them from reaching the sufficient economies of scale necessary to improve their offerings. The ICA also found that Amazon's conducts had an indirect foreclosure effects in the platform market, *i.e.* the market for intermediation services on online marketplaces, given that third-party merchants were discouraged from selling on alternative e-commerce platforms, in light of the need to replicate logistics costs.

The French Competition Authority also raised concerns relating to Google's self-preferencing practices in the ad-tech space.[170] In particular, Google granted an informational advantage to its own unit in the context of the bids that Google itself organizes to sell the ad inventory it manages to the highest-bidding advertisers. According to the French Competition Authority this led to the foreclosure of Google's competing bidders. Further, the French Competition Authority also held that Google only granted full interoperability to its ad inventory to Google's unit so that it was the only publisher ad server that had full access to it. According to the French Competition Authority, this conduct prevented rival publisher ad servers from competing against Google by forcing them to use Google as their primary ad server.

The consumer harm piece of the competition authorities' theory of harm is instead less pronounced. In the Amazon case indeed the Italian Competition Authority only hinted at the fact that indirect consumer harm could materialize through distortion of the competitive process, without properly assessing the

[169] Italian Competition Authority, 'A 528 - FBA Amazon' (2021) 29925 <https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/801201274D8FDD40C12587AA0056B614/$File/p29925.pdf> accessed 19 May 2024.
[170] Autoritè de la Concurrence, 'Decision 21-D-11 of June 07, 2021' (*Autorité de la concurrence*, 26 July 2021) <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-online-advertising-sector> accessed 5 May 2024.

consumer harm.[171] In the same vein, the French Competition Authority also focused on the harm to ad tech rivals and publishers and did not take into account consumer harm specifically. As it was mentioned in the first chapter, in Europe, antitrust enforcement is inspired by the reliance on the consumer welfare standard, which means that competition authorities should enforce antitrust laws only when a given conduct gives rise to consumer harm in one of the various forms that this can take (*e.g.* reduction in output, innovation and quality or increase in prices).[172]

The absence of consideration of consumer harm in the most recent self-preferencing cases therefore provides an indication of the flaws in the framework of assessment given that, as also economists have pointed out, "*for an exclusionary abuse to be established, it is necessary to show that the conduct at issue, by excluding (totally or partially) existing or potential rivals, harms consumer welfare*".[173]

Commentators too have pointed out that self-preferencing can give rise to two primary harms: (i) it allows the firm engaging in such a behaviour to maintain and extend its market power unfairly because it artificially affects the competitive position of rivals who are often dependent on the service provided; and (ii) it causes significant exclusionary and foreclosure effects which can reduce consumer choice for alternative services and can lead to consumer harm in the

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[171] See Lazar Radic and Geoffrey Manne, *Amazon Italy's Efficiency Offense*, Truth on the Market (January 11, 2022), available at https://truthonthemarket.com/2022/01/11/amazon-italys-efficiency-offense/, who note that "[a]*lthough it is not necessary to demonstrate anticompetitive effects under Article 102 TFEU, the AGCM claims that Amazon's behavior has caused drastic worsening in other marketplaces' competitive position by constraining their ability to reach the minimum scale needed to enjoy direct and indirect network effects. The Italian authorities summarily assert that this results in consumer harm, although the gargantuan 250-page decision spends scarcely one paragraph on this point*".

[172] The reference to the consumer welfare standard in Europe can be traced back to the Green Paper on Vertical Restraints. See European Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' (1997). After then, the consumer welfare has always informed antitrust enforcement, at least in its basic notion, although with some debates on its exact meaning. See, *e.g.*, Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 The Competition Law Review (2015) 131.

[173] Fumagalli and Motta (n 160); Renato Nazzini, 'Google and the (Ever-Stretching) Boundaries of Article 102' <https://papers.ssrn.com/Sol3/papers.cfm?abstract_id=2965420> accessed 28 April 2024, pp. 11 and 12, who distinguished between the case law on vertical foreclosure by refusal to supply IP rights which requires the prevention of the emergence of a new product for which there is potential demand or the slowing down of the pace of innovation (what the author calls the "enhanced consumer harm test") and the proof of consumer harm that needs to be demonstrated in all refusal to supply cases noting that "*in refusal to supply cases more generally, consumer harm in the form of higher prices, reduced output, or lower quality is sufficient*".

form of decreased rivalry among firms and also a decrease in potential innovation stemming from it. In particular, according to these authors, the harm under (i) increases barriers to entry, leading to anti-competitive effects such as increased bargaining power of incumbent firms. This increased bargaining power would allow them to impose more favourable conditions and increased costs on dependent firms (a rising rivals' costs strategy) and would ultimately lead to less consumer choice. According to these authors, the foreclosure effects arising from self-preferencing can also not allow a firm to reach the sufficient scale to become a viable market participant. Lastly, also the threat of foreclosure can harm consumers because it deters the entry of potential competitors. This is so because these firms would not take the risk of entering the market when they know that they can be excluded from it if they end up becoming a challenge to the dominant firm.[174]

It should be noted that this description of the potential harms arising from self-preferencing is incomplete and therefore not sufficiently informative given that even pro-competitive behaviours such as selling a better products or offering a lower price can have the same effects. Thus, an analysis of whether these effects can be considered the result of "competition on the merits" will be needed (see below, paragraph 2.2.). However, it is helpful to note here that these harms are not in any way new to antitrust analysis and they can be targeted through, for instance, margin squeeze or other forms of refusals to supply, a category of abuse that has long been used to address rising rivals' costs strategies.

Other authors identified at least two scenarios under which platform self-preferencing could harm competition and consumers. [175] The first scenario is when a platform with a monopoly in the platform market anticompetitively maintains its monopoly through identification and elimination of nascent threats to that monopoly in the platform market. The second scenario is when a platform is using self-preferencing in order to monopolize a downstream market (therefore not just

[174] Daniel Hanley, 'How Self-Preferencing Can Violate Section 2 of the Sherman Act' [2021] Competition Policy International Antitrust Chronicle <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868896> accessed 6 May 2024.
[175] Bruce Hoffman and Garrett Shinn, 'Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem' (2021) 3 CPI Antitrust Chronicle.(Junio 2021) <https://www.clearygottlieb.com/-/media/files/cpi--hoffman--final-pdf.pdf> accessed 6 May 2024.

the service itself but a well-defined antitrust market that includes the service that the platform has decided to favour). These are, however, the same concerns that have been dealt with through the antitrust scrutiny of mergers and buyouts of nascent threats and predatory pricing.

Another author has identified another instance in which self-preferencing may give rise to competition concerns.[176] According to this commentator, self-preferencing may have anticompetitive effects when there is interoperability between two products or services and the dominant company takes active steps to make them no longer interoperable so that it can exclude efficient rivals. These anticompetitive harms have already been attacked directly since a long time. [177]

Finally, other economists have claimed that self-preferencing theories of harm need to account for exploitative abuse, arguing that the concern with exclusionary abuse is not adequate for the digital economy.[178] According to Bougette, Budzinski, and Marty, self-preferencing may lead to exploitation abuses and generate economic dependence abuses beyond the anti-competitive leveraging concerns. In particular, they have argued that self-preferencing conducts can lead to crowding out effects vis-à-vis business users of the platform that are not exclusively independent sellers (and also vis-à-vis upstream competing platforms). Bougette, Budzinski, and Marty have explained this crowding out effect with reference to Amazon logistics services in particular:

"*Outsourcing their logistics to Amazon pushes independent sellers to opt for single homing and Amazon's growing market share in logistics reduces the competitiveness of other logistics providers. This penalizes competing platforms in two ways. The horizontal crowding-out effect is indirect: it is induced by the*

[176] Aurelien Portuese, '"Please, Help Yourself": Toward a Taxonomy of Self-Preferencing' (Information Technology and Innovation Foundation 2021) <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing/> accessed 6 May 2024.
[177] As a mere example of a case involving the same competition concerns, see *Microsoft Corp v Commission of the European Communities* [2007] GC Case T-201/04. In the literature, see Erik Hovenkamp, 'Trinko Meets Microsoft: Leverage and Foreclosure in Platform Refusals to Deal' [2023] CPI Antitrust Chronicle (2023 Forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392072> accessed 6 May 2024.
[178] Patrice Bougette, Oliver Budzinski and Frédéric Marty, 'Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses' (2022) 67 The Antitrust Bulletin 190.

reduction in the number of sellers and by the increase in costs and reduction in logistics performance. Firstly, sellers who have entrusted their logistics to the dominant platform have a greater tendency to opt for single homing in order not to duplicate costs. Secondly, competing logistics companies, deprived of an increasing share of traffic, experience diseconomies of scale and scope, and will be increasingly expensive and less efficient. This leads to a reduction in the overall performance of competing marketplaces and thus reduces their attractiveness to both independent merchants and consumers".

These crowding out effects, the sellers' tendency to single-home (*i.e.* to be active only on one platform) and the presence of switching costs foster the creation of situation of economic dependence of independent sellers on the platform. As sellers are commercially dependent on the platform to reach consumers, this would force the sellers to enter into contracts or to subscribe to ancillary services to improve their visibility, which may contain unfair terms as they are the result of a situation where there exists an unbalance of bargaining power between the parties.

The assessment of whether the conditions of the contracts entered into between the sellers and the platform are unfair and due to the unbalance of bargaining power is likely to be an extremely subjective exercise. Moreover, it is submitted that these harms can be looked at also through the lenses of the exclusionary effects, given that in such a scenario, the lack of visibility could potentially give rise to exclusion, if the relevant criteria to determine anti-competitive exclusion are met.

The harms outlined by the European Commission and by commentators seem to be common to all forms of leveraging abuses and there are no actual harms that can arise specifically from self-preferencing, even as applied to digital markets.[179] An analysis of the harms that can arise from self-preferencing therefore appears to confirm the conclusion that was reached above in relation to the definition of such a conduct, *i.e.* that it cannot be distinguished from other

[179] See Giuseppe Colangelo, 'Antitrust Unchained: The EU's Case against Self-Preferencing' (2023) 72 GRUR International 538.

forms of leveraging abuses and – so far as its analysis is concerned – that we should not think about this debate any differently from the usual.

2. The legal framework to analyse self-preferencing under EU competition law

2.1. The possible legal avenues

Under EU competition law, the leveraging and anticompetitive foreclosure concerns to which self-preferencing can give rise have traditionally been dealt with through specific types of abuses. In particular, one could analyse self-preferencing under the analytical framework developed for refusal to supply or margin squeeze. More recently, commentators have also argued that the competition concerns that arise from self-preferencing conducts in digital markets should be dealt through exploitative abuses, and the discussion has revolved in particular around the possibility to analyse self-preferencing under the framework for discrimination pursuant to Article 102(c) TFEU.

Self-preferencing and exploitative abuses: Exploitative abuses have traditionally found very little space in antitrust enforcement in Europe, mainly due to the uncertainty and subjectivity in the assessment and to the weak economic analysis surrounding them.[180] In the United States, exploitative abuses are not

[180] The arguments against the enforcement of excessive prices (which are applicable to exploitative abuses more generally as well) are summarized effectively by Luigi Di Gaetano and Elisabetta Iossa, 'The Italian Experience in the Enforcement of Excessive Prices: A Calibrated Approach' [2023] CPI Antitrust Chronicle.
"In brief, the arguments run as follows.
Entry. If market forces are allowed to operate freely, high prices will attract new entrants and markets will self-correct. Therefore, competition authorities should only intervene if there are high and non-transitory barriers to entry preventing markets from self-correcting; for example, because the dominant position is due to current or past legal protection or past anticompetitive practices. Otherwise, intervention may deter entry.
Investment. Ex-post market power may be the reward for ex-ante investment and innovation. Competition authorities should therefore carefully balance static and dynamic considerations to avoid distorting incentives to invest and innovate. Intervention may be unwarranted in the presence of intellectual property rights.
Legal Uncertainty. Excessive-prices cases are complex and involve a high risk of error in establishing when prices are excessive, as there is rarely a clear guidance for firms on what is a non-excessive price. To limit such legal uncertainty, competition authorities should avoid intervening when there are other instruments available (e.g. advocacy could identify and remove the barriers to entry) or when there is effective regulation that could solve the matter.
Monitoring. It is costly to monitor prices continuously after infringement to assess compliance with an antirust decision on excessive prices. Competition authorities should therefore intervene

prohibited under antitrust laws.[181] Below is a graph showing the percentage of exclusionary abuses *vis-à-vis* exploitative abuses which shows the clear lack of confidence in the latter framework of analysis in the EU.

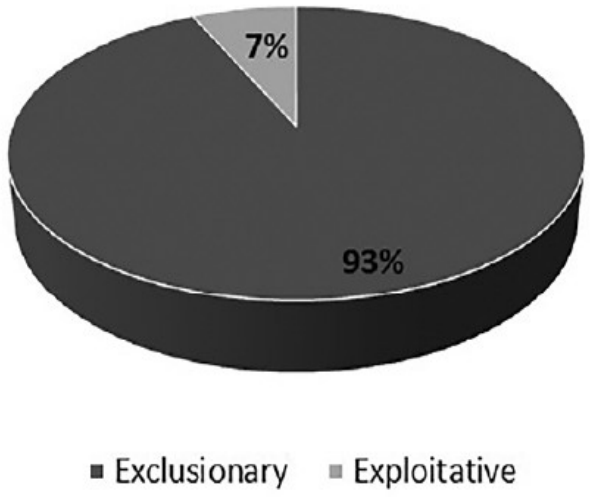

Figure 6: Main categories of abuse of dominance enforced by the EU. Note: Taken from Christophe Samuel Hutchinson & Diana Treščáková (2022) Tackling gatekeepers' self-preferencing practices, European Competition Journal, 18:3, p. 574.

Some economists, however, have argued that the theoretical roots of exploitative abuses lie in economic theory and that industrial organization and economic models provide the tools to characterize these abuses, assess their effects, and structure remedies. These types of abuses, according to these authors, would be particularly helpful in the context of the digital economy given that the

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only when it helps to remove structural barriers and fill regulatory gaps, generating long-term benefits".

[181] The United States Supreme Court indeed first declared void for vagueness a federal law prohibiting "any unjust or unreasonable" price (*United States v L Cohen Grocery Co, 255 US 81* (US Supreme Court)). See also, *Northern Pacific R Co v United States, 356 US 1* (US Supreme Court) according to which US antitrust law "*rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions*"; and *Standard Oil Co v FTC, 340 US 231* (US Supreme Court), according to which "*the heart of our national economic policy long has been faith in the value of competition*". For a comparison between the US and the EU in this respect, see Michal S Gal, 'Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly?' (2004) 49 The Antitrust Bulletin 343.

concern with exclusionary abuse is not adequate for the digital economy. According to them, self-preferencing may lead to exploitation abuses and generate economic dependence abuses beyond the anti-competitive leveraging concerns.[182] Other authors have expressed the view that there would be potentially three categories of exploitative abuses by dominant online platforms that are capable of directly harming consumers: (i) excessive pricing, and in particular, in data markets, this conduct could take the form of an excessive amount of personal data that digital platforms require final consumers to provide in exchange for 'free' access to online services; (ii) discriminatory pricing, and in particular through algorithms which via the analysis of personal data and predictive modelling (*i.e.* consumer profiling) facilitate price discrimination among different consumers who purchase goods and services from a dominant digital platform; and (iii) the imposition of unfair trading conditions, and in particular the potential unfairness from a competition law standpoint of data protection terms and privacy policies or also the possibility that a dominant digital platform unilaterally imposes a change of these policies thereby decreasing the product quality of its services. However, these commentators have highlighted the fact that the enforcement of EU competition law with reference to exploitative conducts should remain the exception and have underlined the challenges that competition authority would face when applying the relevant legal standards to sanction these abuses under Art. 102 TFEU.

It is submitted that, precisely due to the uncertainty and subjectivity in the assessment and to the weak economic analysis surrounding exploitative abuses, which is the reason why exploitative abuses have found very little space in antitrust enforcement in Europe, their use in digital markets should be limited too. If anything, indeed, the analysis would be even more difficult and subjective in digital markets due to their features. Moreover, the exclusionary theories of harm are the correct way to analyse self-preferencing, given that the relevant concern would be with anti-competitive exclusion even in the instances mentioned by these authors to support the need to rely on exploitative abuses. Below is a

[182] Patrice Bougette, Oliver Budzinski and Frédéric Marty, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn from an Industrial Organization Approach?' (2019) 129 Revue d'économie politique 261.

description of the potential application of Article 102(c) TFEU, one of the *species* of the exploitative abuses *genus*, to self-preferencing.

Self-preferencing and Article 102(c) TFEU: Article 102(c) TFEU provides that it is abusive for a dominant firm to apply "*dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*". The instances of price discrimination that are relevant for this provision "*may be defined as the sale or purchase of different units of a good or service at prices not directly corresponding to differences in the cost of supplying them*". Therefore, the provision does not cover the instances in which the difference in costs in the supply of goods or services may result in the charging of differentiated and yet non-discriminatory prices. Also, the provision does not typically cover instances of so-called Ramsey pricing, namely when a company supplies different products which share common costs and the price will be different depending on the price sensitivities of costumers.[183] This provision is aimed at addressing the so called "secondary line injury", *i.e.* a situation in which the dominant undertaking distorts the competition taking place between its customers or suppliers.[184] While this provision has typically been applied to incumbents in liberalized sectors, arguably some of these cases also rely on a theory of self-preferencing.[185] Indeed, this norm at least partially reflects the provision that was enshrined in civil codes and imposed on legal monopolists the duty to treat equally all the parties with which it was involved in any dealings. The objective of this provision appears to be the protection of competitors in the business relationships with the dominant undertaking, while it is less concerned with the protection of consumers vis-à-vis the dominant undertaking. A given conduct will be prohibited under Article 102(c) TFEU only when the terms that have been imposed by the dominant undertaking have no objective economic justifications and can be explained only by the desire to grant an advantage to certain competitors over others. The European Court of Justice has also recently

[183] Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2021), p. 800.
[184] Nicolas Petit, 'Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) 1 Competition Law & Policy Debate <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253> accessed 6 May 2024.
[185] Pedro Caro de Sousa, 'What Shall We Do about Self-Preferencing?' [2020] Competition Policy International, June Chronicle <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659065> accessed 6 May 2024.

clarified the concept of "competitive disadvantage" under Article 102(c) TFEU holding that the notion of competitive disadvantage does not require an actual and quantifiable deterioration of the competitive position of the undertakings but the analysis of the relevant circumstances in the case is sufficient.[186] Commentators have debated whether such a provision could apply to self-preferencing in digital markets and to the *Google Shopping* case. According to one author, such a provision could have been applied to *Google Shopping*, precisely because the theory behind Article 102(c) cases is one of self-preferencing.[187] However, Akman has noted that this provision would be ill-suited to address self-preferencing theories of harm, because the purpose of the provision is to prevent dominant firms from applying dissimilar conditions to equivalent transactions "with other trading parties" and this case is different from that of self-preferencing, where the discrimination takes place between one's self and its competitors.[188] By the same token, Nazzini has underlined that under Article 102(c) discrimination must occur between parties other than the dominant undertaking itself.[189] The latter approach

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[186] Ghezzi and Olivieri (n 96), p. 224; *Opinion of Advocate General Wahl delivered on 20 December 2017 MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência Request for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão Reference for a preliminary ruling — Competition — Abuse of dominant position — Article 102, second paragraph, point (c), TFEU — Concept of 'competitive disadvantage' — Discriminatory prices on a downstream market — Cooperative for the management of rights relating to copyright — Royalty payable by domestic entities which provide a paid television signal transmission service and television content Case C-525/16* (ECJ) 20, paras 26, 28 and 37.

[187] *Petit* (n. 21).

[188] Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' [2017] U. Ill. JL Tech. & Pol'y 301, p. 329.

[189] Nazzini (n 172), p. 10. According to him, "[i]*t would also be problematic to derive such a rule from the general prohibition of discrimination to be found under Article 102. It is true that Article 102(c) contains an express prohibition of conduct which consists of "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" but this prohibition is better understood as applying to non-exclusionary price discrimination. Article 102(c) prohibits discrimination vis-à-vis "other trading parties", that is, the discrimination must occur between parties other than the dominant undertaking itself. This is clear when the conditions for the application of Article 102(c) are considered: not only must the conditions applied be different but the transactions must be equivalent. It is clear that the internal cost structure of a vertically integrated undertaking cannot be considered equivalent to a sale to a non-vertically integrated third party. Vertical integration is a material factor that makes the transactions in question nonequivalent. Article 102(c) applies much more naturally to the application of dissimilar conditions to equivalent transaction with two or more third parties, with the effect of distorting competition on the downstream market between customers of the dominant undertaking. But even if, in line with a certain line of case law, Article 102(c) were considered applicable to the behaviour of a dominant undertaking "favouring" its own business to the detriment of its competitors, the problem would remain one of vertical foreclosure*".

seems to be correct and the European Commission was right in not relying on Article 102 (c) TFEU to assess self-preferencing.

Self-preferencing and refusal to supply: the behaviour of a dominant undertaking constitutes an abuse of a dominant position if an undertaking refuses to grant access to an input without any objective justification, when that input is indispensable to compete on the downstream market. The refusal does not need to be an outright refusal, but it can also be a constructive refusal to supply, which materializes when the dominant undertaking does grant access to the relevant input, but it does so on worse terms.[190] The EU case law has set a very high bar for duty to deal obligations. In particular, in the *Bronner* judgment, the European Court of Justice held that in a refusal to supply case the complainant needs to prove: (i) indispensability of the input; (ii) elimination of all competition in the related market where the undertaking seeking access is operating; and (iii) lack of objective justification. The indispensability condition is interpreted in a restrictive manner, and the EU case law has specified that for an input to be considered indispensable it is not sufficient that it is not economically viable for the specific undertaking seeking access to replicate that input, but it is necessary to prove that it is economically not feasible to create an alternative input for *any* undertaking seeking access to the market.[191] Commentators have discussed whether there can be a duty not to self-favour below the essential facility threshold.[192] The EU Commission expressly stated that *Google Shopping* was not a refusal to deal case and the GC – even though it held that Google search had characteristics akin to those of an essential facility – decided that the Bronner test did not have to be applied in this case. These aspects will be further discussed below, but for the time being suffice it to say that given that given that the self-preferencing conduct in *Google Shopping* can be construed as a margin squeeze or a constructive refusal to deal, the condition of indispensability should apply.

Self-preferencing and margin squeeze: margin squeeze takes place when a vertically integrated undertaking which is dominant in the upstream market (as the

[190] Ghezzi and Olivieri (n 97). , p. 215.
[191] ibid., p. 217.
[192] Among the others, see Vesterdorf (n 126), Caro de Sousa (n 184), Petit, 'Theories of Self-Preferencing under Article 102 TFEU' (n 184).

holder of non-replicable essential input), sets conditions that are not replicable by competitors on the downstream market. The conduct would typically take place through two steps: the access fee for the upstream input is set particularly high and the prices charged by the downstream unit of the dominant undertaking are particularly low, such that the competitors on the downstream market would not be able to compete effectively. Such a practice can give rise to exclusionary effects through leveraging of market power from the upstream market to the downstream market, in that the competitors on the downstream market – even when they are as efficient as the vertically-integrated undertaking (*i.e.* an as-efficient competitor) – cannot compete without incurring losses (or, at the minimum, without earning sufficient margins) and therefore may be forced out of the market in the medium term. This in turn leads to consumer harm in the medium term, as a result of reduced competition and choice for consumers as well as strengthening of the dominant position of the vertically-integrated undertaking through means different from "competition on the merits".[193] The EU case law has decided that margin squeeze is an independent abuse and the condition of indispensability that applies to refusal to deal does not need to be met.[194] Under margin squeeze, the traditional test set out in the EU case law to assess whether the dominant firm's pricing is abusive is to see "*whether a competitor having the same cost structure as that of the downstream activity of the vertically integrated undertaking would be in a position to offer downstream services without incurring a loss if that vertically integrated undertaking had to pay the upstream access price charged to its competitors*".[195] This test can be adapted to self-preferencing, as it will be shown below, and essentially it would ask whether the dominant platform could operate profitably if it had to pay the price that it charges for prominence to as-efficient-rivals. Moreover, the test can also take into account the reduction in traffic due to the self-preferencing behavior, in the case of *Google Shopping*. The EU Commission and the GC rejected the application of the as-efficient-competitor test, as it will be shown below, but wrongly so.

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[193] Ghezzi and Olivieri (n 97)., pp. 212 and 213.
[194] *Konkurrensverket v TeliaSonera Sverige AB* (n 98).
[195] *Telefónica, SA and Telefónica de España, SA v European Commission* [2012] GC Case T-336/07, para 194.

Notwithstanding the above-mentioned legal avenues that could have been used to find that self-preferencing is abusive, both the European Commission and the General Court have decided that self-preferencing does not belong to any of these categories.[196] As a result, the assessment of whether a company favours its services or products over those of its competitors turns heavily on whether the practice constitutes a legitimate expression of competition on the merits, or whether it falls outside this concept. The analysis below will show that there is no need to depart from the traditional test for "competition on the merits" which has already been adopted in the assessment of other leveraging abuses.

2.2. The concept of "competition on the merits"

"Competition on the merits" is an unclear and vague concept. Some commentators have even argued that such concept is a void one, which lacks any real normative meaning beyond the mere reference to the prohibitions and limits imposed by antitrust laws of competitive activities, figuratively describing it as a "ghost", and arguing that it should not form part of the competitive analysis altogether.[197] Others have claimed that such standard does not satisfy the basic notions of legal certainty and the rule of law.[198] Notwithstanding the criticisms of this standard, it is still often used in the Article 102 setting and it does have a particular relevance for self-preferencing cases.

The concept of competing on the merits was first introduced by the Court of Justice in *Hoffman-La Roche*,[199] where the Court famously held that "[t]*he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the*

[196] 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)) (notified under document number C(2017) 4444) (n 43).
[197] Gustavo Ghidini, '«Competition on the Merits»: A Pseudo-Concept?' (2016) 1/2016 Luiss Law Review <https://lawreview.luiss.it/files/2016/09/%C2%ABCompetition-on-the-merits%C2%BB-a-pseudo-concept.pdf> accessed 19 May 2024.
[198] Damien Geradin, 'The Uncertainties Created by Relying on the Vague "Competition on the Merits" Standard in the Pharmaceutical Sector: The Italian Pfizer/Pharmacia Case.' (2014) 5 Journal of European Competition Law & Practice.
[199] *Hoffmann-La Roche & Co AG v Commission of the European Communities* (n 107).

degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[200] The approach to the notion of competition on the merits then changed over time and with cases, as it has been explained clearly by commentators such as Ibanez Colomo. [201] In *Michelin I*, *Michelin II* and *Akzo* the Court followed the same approach as in *Hoffman-La Roche*. In *Michelin I* and *Michelin II*, the Court indeed considered that in order to decide whether the rebate scheme at issue was contrary to competition on the merits, the relevant question was whether that scheme was comparable in its nature, operation and purpose to a scheme that was loyal-inducing, as it was formally conditional upon loyalty. In *Akzo*, the Court decided that below-cost pricing is abusive when prices are below average variable costs or, when they are above such measure of costs but below average total costs, but there is evidence of an exclusionary strategy. In essence, the Court therefore decided that predatory pricing runs against competition on the merits where it has an anticompetitive purpose, either because the behaviour makes no economic sense but for the foreclosure of a rival or because there is evidence of an exclusionary strategy. The Court then departed from this strand of case-law in *Post Danmark I*, where it held that "*the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as 'price discrimination', that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse*".[202] In *Servizio Nazionale*, more recently, the Court clarified whether the analysis of anti-competitive effects and of whether the conduct constitutes competition on the merits can be blended together and ruled that "[…] *Article 102 TFEU must be interpreted as meaning that a practice which*

[200]ibid, para. 91.
[201] Pablo Ibáñez Colomo, 'Competition on the Merits' (2023) 61 Forthcoming in (2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4670883> accessed 28 April 2024, p. 16.
[202] *Post Danmark A/S v Konkurrencerådet* (n 98).

is lawful outside the context of competition law may, when implemented by an undertaking in a dominant position, be characterised as 'abusive' for the purposes of that provision if it is capable of producing an exclusionary effect and if it is based on the use of means other than those which come within the scope of competition on the merits. Where those two conditions are fulfilled, the undertaking in a dominant position concerned can nevertheless escape the prohibition laid down in Article 102 TFEU if it shows that the practice at issue was either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers".[203] Finally, in the *European Superleague* judgment, the Court decided that "*conduct may be categorised as 'abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation*".[204] While the Court clarified the relevance of the concept of "competition on the merits", its meaning is still unclear.

In this respect, commentators have noted that the categorization of a conduct as "abusive" or as "competition on the merits" is often grounded on which conduct is perceived to generally lead to anticompetitive or pro-competitive outcomes, according to economic knowledge and experience.[205] Other authors have argued that conducts that are consistent with the objective of art. 102 TFEU constitute normal competition. According to this commentator, competition is on

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[203] *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (n 109).
[204] *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* [2023] ECJ Case C-333/21, para. 131.
[205] Justin Lindeboom, 'Formalism in Competition Law' (2022) 18 Journal of Competition Law & Economics 832.

the merits when it would be a rational commercial conduct for a non-dominant undertaking and it does not reflect the ability to harm competition which is the constitutive element of the dominant position. Also, whether a certain behaviour is competition on the merits needs to be assessed in relation to the form, purpose, and effect of the conduct in each individual case.[206] Another commentator has argued that practices can be grouped into four broad categories: 1) conduct that is deemed a legitimate method of competition; 2) conduct that is, absent exceptional circumstances, lawful expression of competition on the merits; 3) conduct for which an analysis of its actual or potential anticompetitive effects is necessary in order to determine whether it is in line with normal competition; 4) conduct that is, by its very nature, at odds with competition on the merits. In order to assess these circumstances, one should rely on the lessons of experience and economic analysis.[207] The below table summarizes the thinking of this author.

[206] Renato Nazzini, 'Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google', *GCLC Annual Conference Series (Louvain-la-Neuve, Bruylant 2017, Forthcoming)* (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815081> accessed 6 May 2024, p. 286.
[207] Colomo, 'Competition on the Merits' (n 201).

	Against competition on the merits?	Reason	Examples
Presumptively abusive conduct ("by object")	Against competition on the merits by its very nature	No plausible pro-competitive rationale	*AKZO*, *AstraZeneca*
		Conduct involves assets not obtained on the merits (exclusive rights or State aid)	*Servizio Elettrico Nazionale*, *Post Danmark II*
Conduct subject to a case-by-case assessment	Against competition on the merits only insofar as it excludes equally efficient rivals	The exclusion of less attractive rivals is a normal expression of the competitive process	*Deutsche Telekom*, *TeliaSonera*, *Post Danmark I*
	Against competition on the merits if, inter alia, it involves the use of an indispensable asset	Firms should only be required to deal with rivals in "exceptional circumstances"	*Magill*, *Bronner*, *IMS Health*
Presumptively lawful conduct	Legitimate expression of competition on the merits	An equally efficient rival would be able to withstand competition	*Post Danmark I* (above-cost pricing) and *II* (quantity rebates)

Figure 7: Taxonomy of competition on the merits in the case-law. Note: Taken from Ibáñez Colomo, Pablo, Competition on the merits (December 20, 2023). Forthcoming in (2024) 61 Common Market Law Review, Available at SSRN: https://ssrn.com/abstract=4670883, p. 29.

As explained above, self-preferencing may be problematic because it entails both leveraging and foreclosure concerns. Given that these effects can arise also because the dominant firm is simply selling a better product or offering a better service, one needs to understand when these effects are anti-competitive, which is tantamount to being against competition on the merits. In order to operationalize the concept of "competition on the merits", different tests have been developed to try to create administrable rules. In particular, a literature review shows that four main tests have emerged: (i) profit sacrifice test; (ii) the no economic sense test; (iii) the as-efficient-competitor (AEC) test; and (iv)

consumer welfare balancing tests.[208] All these leading tests can be applied to self-preferencing without any major departures from the way in which they would be applied to other types of abuse.

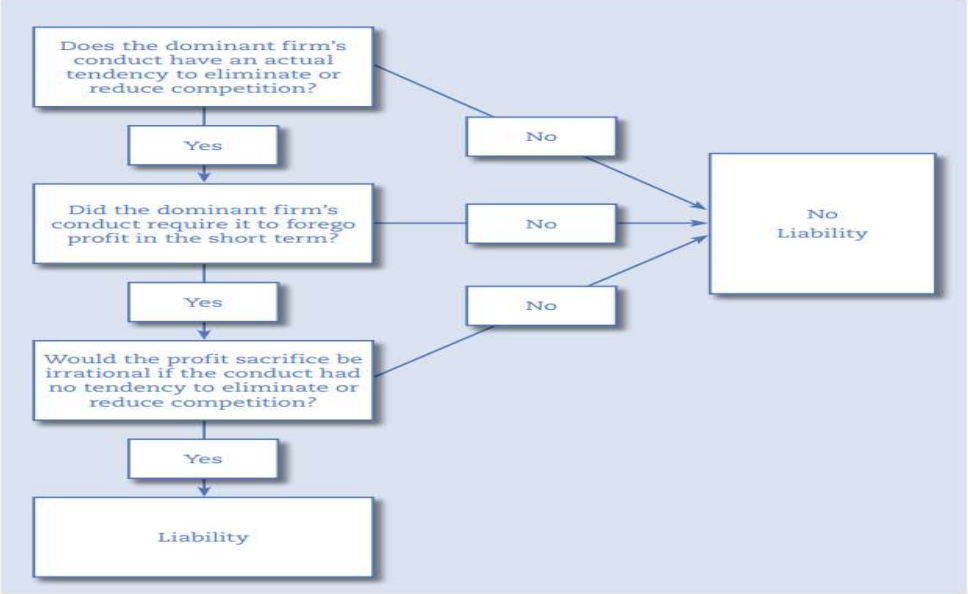
The profit sacrifice test:[209] if one applies the profit sacrifice test to self-preferencing, the conduct would be considered outside "competition on the

[208] Jeremy K West, 'Competition on the Merits' [2005] SSRN Electronic Journal <http://www.ssrn.com/abstract=875360> accessed 6 May 2024.

[209] For a definition of this test, see ibid, p. 24, according to which "[t]*he profit sacrifice ("PS") test, sometimes called the "but for" test, holds that when a dominant firm engages in conduct requiring it to forego short run profit, the conduct should be deemed unlawful if it would be irrational absent its tendency to eliminate or reduce competition in the longer run*". The OECD report explains that "[T]*he PS test captures predatory pricing because the strategy involves absorbing short-run losses in anticipation of eliminating or disciplining rivals, thereby making it possible to earn higher profits and recoup the short term losses*" but "*the PS test does not seem to be well-suited for evaluating exclusionary conduct that does not involve below-cost pricing*". The first criticism of this test is that it is under-inclusive in certain circumstances in that some conducts that do not entail a sacrifice of short run profit can still be exclusionary and harmful to competition, such as raising rivals' costs. Another criticism is that the profit-sacrifice test is too lenient, given that when a defendants has multiple purposes for its conduct, the conduct will not be considered abusive so long as at least one of the purposes (other than the elimination of competition) is sufficient to make the conduct profitable. A further criticism is that the profit-sacrifice test can also be over-inclusive in other circumstances. For instance, when conducts increase consumer welfare even though they also exclude competitors, such as the development of a drug that excludes competitors and gives the firm market power. Finally, the OECD report notes that the profit-sacrifice test is not easy to apply, as its application presupposes the response to some normative questions such as how to identify "sacrifice" or the relevant measure of "profit". For a commentary on the profit-sacrifice test, see *e.g.*, Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stan. L. Rev. 253; Andrew I Gavil, 'Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance' (2004) 72 Antitrust LJ 3; Steven Salop, 'Section 2 Paradigms and the Flawed Profit-Sacrifice Standard' [2005] Antitrust Law Journal 2. The below is an illustration of the functioning of the profit sacrifice test (source: West (n 208).).

merits" and therefore abusive only when the dominant firm's favouring of its own services over those of competitor's entails a sacrifice of gains in the short-term with the prospect of long-run profits, due to the exclusionary effects of the conduct. This test does not seem to rightly capture the competitive harm that can result from self-preferencing in the vast majority of cases. Given that self-preferencing often involves making more profits even in the short-term, one can arguably infer with more certainty the exclusionary effects of self-preferencing from an immediate gain in profits rather than from a short-term loss.[210] While this test might work to assess whether certain conducts such as predatory pricing constitute competition on the merits, it does not seem to be well-suited for conducts such as self-preferencing or refusal to deal.

The no economic sense test:[211] the no economic sense test -- as applied to self-preferencing in particular -- asks whether the company that is dominant in the



[210] For this consideration with respect to refusals to deal, which is applicable by analogy to self-preferencing (given that the former can be seen as a species of the latter), see Erik Hovenkamp "The Antitrust Duty to Deal in the Age of Big Tech" (2022) 131 Yale Law Journal 1483, 1516.

[211] For a definition of this test, see West (n 207), p. 27, according to which "[t]*he no economic sense ('NES') test holds that conduct should be unlawful if it makes no economic sense absent its tendency to eliminate or lessen competition*". The OECD report also explains that the no economic sense test differs from the profit sacrifice test in that profit sacrifice is neither a necessary nor a sufficient condition for the no economic sense test. According to the OECD report the test therefore avoids the two major criticisms against the profit sacrifice test, i.e. that the profit sacrifice test is under inclusive and too lenient. A further formulation of the test is that it "*prohibits conduct that has an actual tendency to eliminate competition when that conduct provides an*

platform market would have still favoured its own services over those of competitors if there were no exclusionary effects. This test is different from the profit sacrifice test in that even if a practice does not involve any losses for the company in the short term, it could still be considered unlawful if it makes no sense from an economic perspective or it could be considered lawful if it involves losses but it is justified by potential economic efficiencies.[212] In essence, the no economic sense test also investigates the question of *why* the dominant company accepts to bear losses.[213] This test, differently from the profit sacrifice test, is potentially capable to capture the harm deriving from self-preferencing. Favouring its own services over those of competitors leads to more profits for the platform and sometimes even to better services for consumers and in this case the conduct would pass the economic sense test. In certain instances, however, the company's

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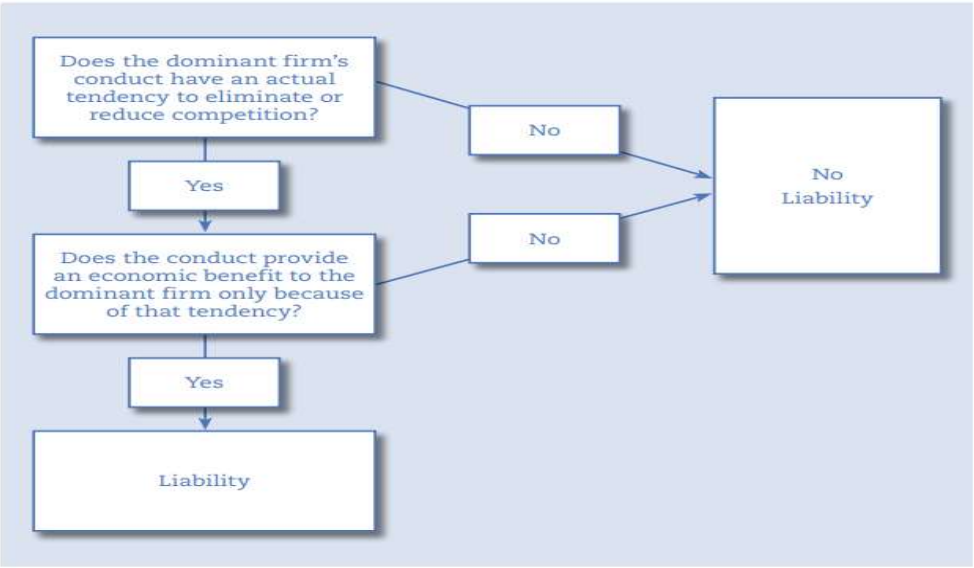
economic benefit to the defendant only because of that tendency, regardless of whether the conduct is costless". The OECD report however notes that the no-economic sense still does not solve the over-inclusiveness issue with the profit sacrifice test and it does not address the question of how to deal with conduct that is likely to produce both beneficial and harmful effects. For a commentary on the no economic sense test, see *e.g.*, Gregory J Werden, 'The No Economic Sense Test for Exclusionary Conduct' (2005) 31 J. Corp. L. 293; R Hewitt Pate, 'The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct', *ANNUAL PROCEEDINGS-FORDHAM CORPORATE LAW INSTITUTE* (Kluwer Academic Publishers 2004). The below is an illustration of the functioning of the no economic sense test (source: West (n 208).).



[212] Werden (n 211).
[213] Thibault Schrepel, 'The Enhanced No Economic Sense Test: Experimenting with Predatory Innovation' (2017) 7 NYU J. Intell. Prop. & Ent. L. 30.

favouring might be considered irrational from an economic perspective.[214] While favouring its own services always leads to higher profits for the firm in the short term, if the dominant firm is not only favouring its own services but it is also putting at a disadvantage the services offered by competitors that consumers want, this can make no economic sense because those consumers may not use the firm's services in the long run, thereby leading to less profits for the firm. However, the criteria that are used to apply the no economic sense test are uncertain and can lead to subjective interpretation of the firm's motives to favour its own services and rely on its intent, which does not seem desirable.[215] While it is true that the no economic sense test should look at the objective intent of the firm,[216] the distinction between objective and subjective intent is often blurred and the evaluation of the objective intent necessarily reflect an interpretation of the documents and of the firm's motives. Also, the no economic sense test can lead to competition authorities second-guessing the rationality and the merits of business models of the dominant companies, which seems a risky approach. For these reasons, the no economic sense test should not be a test to rely on with respect to self-preferencing, as with the other forms of abuse.

The as-efficient-competitor (AEC) test:[217] the as-efficient-competitor test is a test that is typically used for pricing abuses.[218] In relation to self-preferencing,

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[214] See Muxin Li, 'Self-Preferencing Across Markets', according to whom self-preferencing does not always translate into profitability for the platform given that -- in light of the complementary relationship between intermediation services and ancillary products -- the platform has to lower its platform fees when it is self-preferencing its services or products. Therefore, such a conduct is only profitable when there is strong competition in the ancillary product market.

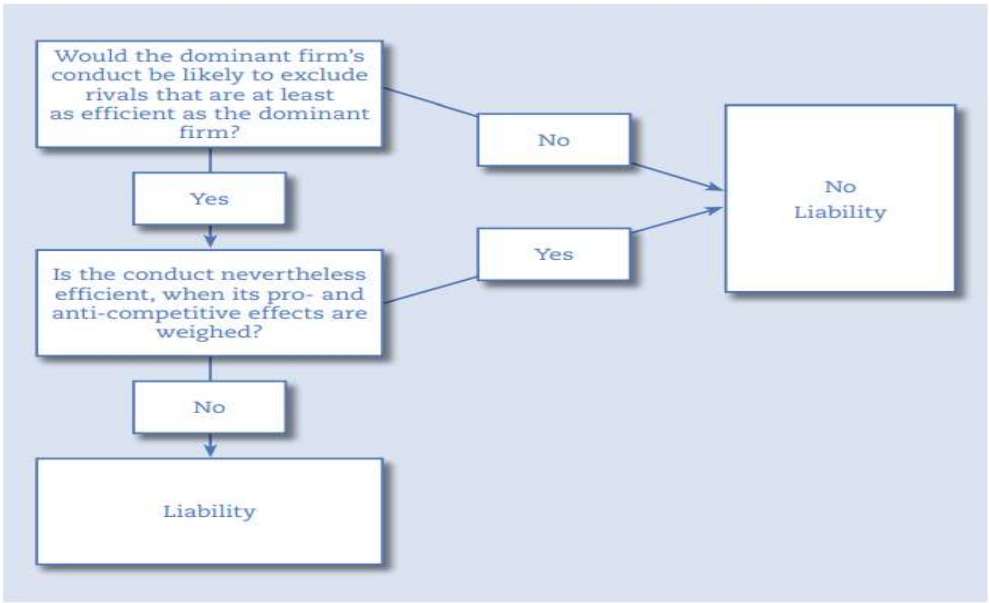
[215] See, in the European literature, *e.g.* Pınar Akman, 'The Role of Intent in the EU Case Law on Abuse of Dominance' (2014) 39 European law review 316; but see also, in the U.S., Marina Lao, 'Reclaiming a Role for Intent Evidence in Monopolization Analysis' (2004) 54 Am. UL Rev. 151, where she reports that Frank H. Easterbrook stressed the fact that evaluating the subjective intent reduced legal certainty.

[216] Schrepel (n 213).

[217] For a definition of this test, see West (n 207), p. 29, according to which "[t]*he equally efficient firm ('EEF') test aims to identify dominant firm conduct that harms competition by asking whether the conduct would be likely to exclude rivals that are at least as efficient as the dominant firm is. If the answer is that EEFs would probably be excluded, then the conduct is considered harmful to competition. Otherwise, the conduct is considered lawful*". The main merit of this test is that this allows to protect competition instead of competitors, given that it allows to identify the instances in which the conduct has an effect on equally efficient competitors. The report by West notes that most of the criticisms that have been directed towards this test concern the fact that it would be too lenient to dominant firms, given that even when an entrant is less-efficient than the incumbent firm, entry may still improve social welfare by driving the market price downward (and quantity

the test asks whether an as-efficient competitor would still earn a positive profit when faced with the same conduct imposed by the dominant company on the entrant. The General Court decided that the AEC test could not be applied in self-preferencing cases, given that it would be applicable only to pricing abuses.[219] However, commentators have elaborated models that show how a variation of the AEC test can be applied to self-preferencing.[220] In particular, the model compares the margin of the dominant firm if it were in the entrant's position (having to pay the wholesale price for each unit sold) multiplied by the demand served by the incumbent if it were in the entrant's position (and thus had to face the negative effects of "self-preferencing" on its own demand) to the fixed costs of operating the downstream service. If the margin earned by the hypothetical as-efficient firm which has to pay the wholesale price charged by the incumbent and whose demand is affected by the negative effects of self-preferencing is greater or equal

upward). The below is an illustration of the functioning of the as efficient competitor test (source: ibid).



[218] For a definition of the test, see *Telefónica, SA and Telefónica de España, SA v European Commission* (n 195).

[219] Summary of Commission Decision of 17 December 2020 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.9660 – Google/Fitbit) (notified under document C(2020) 9105) (Only the English version is authentic) (Text with EEA relevance) 2021/C 194/05 (n 46).

[220] Germain Gaudin and Despoina Mantzari, 'Google Shopping and the As-Efficient-Competitor Test: Taking Stock and Looking Ahead' (2022) 13 Journal of European Competition Law & Practice 125.

to the fixed costs of operating the downstream service, an as-efficient competitor would not be foreclosed by the conduct. If that is not the case, the result is that the incumbent's conduct would foreclose as-efficient competitors.[221] The AEC test is therefore applicable to self-preferencing, although with some variations to take into account the specificities of this practice, as explained above. Moreover, as it will be elaborated below, the remedy in *Google Shopping* seems to be in significant part a *pricing* remedy and therefore the violation can be considered a pricing violation, warranting the application of the AEC test. In any event, the assessment of whether self-preferencing behaviour can be considered "competition on the merits" should also be informed by the use of the equal efficient competitor principle, of which the AEC test is an application.[222] In essence, the as-efficient-competitor principle as applied to self-preferencing demands a comparison between the conditions of competition with and without self-preferencing. It then asks whether the competitors were made less efficient because of the self-preferencing practice.[223] As some authors have suggested,[224] this test can also be supplemented with a minimum efficient scale test to supplement the AEC rationale.[225] According to this test, as applied to self-preferencing, the first step is to assess if the downstream market can accommodate at least two firms to reach the minimum efficient scale and the second step is to assess whether the conduct impeded a rival from reaching the

[221] ibid.

[222] For the distinction between the as-efficient-competitor test and principle see Pablo Ibáñez Colomo, 'As Efficient Competitors in Case T-612/17, Google Shopping: The Principle and the Conflations' (*Chillin'Competition*, 19 November 2021) <https://chillingcompetition.com/2021/11/19/as-efficient-competitors-in-case-t%e2%80%91612-17-google-shopping-the-principle-and-the-conflations/> accessed 6 May 2024.

[223] See *Post Danmark A/S v Konkurrencerådet* (n 97), para. 22. See also *Post Danmark A/S v Konkurrencerådet* [2015] ECJ Case C-23/14, para. 47, where the Court referred to the principle of attributability.

[224] Xingyu Yan and Hans Vedder, 'Minimum Efficient Scale, Competition on the Merits, and The Special Responsibility of a Dominant Undertaking' (2023) 19 Journal of Competition Law & Economics 123.

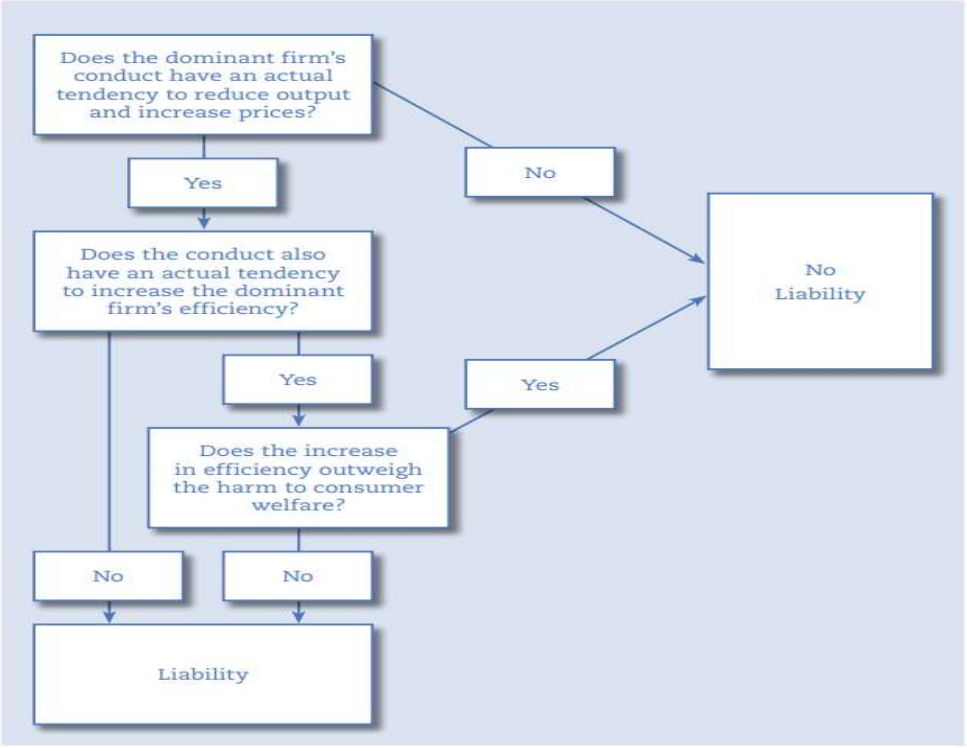
[225] The concept of minimum efficient scale (MES) is associated with economies of scale. The extent of economies of scale depends on the marginal cost curve. Suppose that marginal cost (MC) is a U-curve. Marginal cost falls to a bottom as the output level increases up to the quantity coordinate of that point, and starts to rise after then. As marginal cost keeps rising with the expansion of output, at a certain point the amount of marginal cost is bound to catch up to the amount of average cost (AC) and so marginal cost increase becomes proportional to the total cost increase. When that happens, economies of scale are exhausted. MES can thus be defined as the lowest level of output at which economies of scale are exhausted.

minimum efficient scale or undermined a rival's efficiency to the extent below minimum efficient scale. This test would be particularly helpful in cases where it is more difficult to analyse the conduct as a pricing abuse.[226]

The consumer welfare balancing tests:[227] Under consumer welfare balancing tests, self-preferencing will be considered anti-competitive when the positive effects arising from the conduct do not offset the negative effects

[226] See Yan and Vedder (n 223), p. 145.

[227] For a definition of this test, see West (n 207), p. 31, according to which "[t]*he consumer welfare test in its most general form holds that conduct is not unlawful unless there is a tendency for it to reduce consumer welfare by raising prices and lowering output*". Consumer welfare balancing tests require competition authorities to balance positive and negative effects of a given conduct on consumer welfare and, as a result, determine whether it should be unlawful depending on which effects prevail. The report by West notes that the main appeal of the consumer welfare balancing tests is that they use consumer welfare directly as a standard of assessment instead of using indirect proxies such as profit sacrifice or no economic sense of the conduct. However, the OECD report notes that – as they require a difficult balancing exercise of effects – it is difficult to apply them accurately, objectively, and consistently. Furthermore, it is not clear what the appropriate time horizon should be when applying the test, nd this has very important implications for dynamic strategies. The below is an illustration of the functioning of the consumer welfare balancing test (source: ibid.).



stemming from it. In essence, the test would require the Commission to balance the harm with the efficiencies arising from the conduct already at the stage of proving that the conduct is anti-competitive. This test, however, both as applied to self-preferencing and more generally to the other forms of abuse, may favour pricing abuse violations. That is because a lower price would increase consumer welfare and would therefore not be found unlawful in essentially all cases under this test. Also, this test would undermine the institutional structure of enforcement in the EU, by shifting the burden of proof.

Since the application of these tests is not distinctive to self-preferencing (and even less to self-preferencing in digital markets), there is nothing that suggests that we should think about the self-preferencing debate any differently from the usual. Therefore, the test that should be applied to self-preferencing is the AEC test (and principle), which has traditionally been used by European courts to analyse similar categories of abuse. The as-efficient-competitor test and principle seem to be the best-suited to capture the instances where self-preferencing can give rise to actual consumer harm, given that they allow to assess whether the leveraging and foreclosure effects which may arise from self-preferencing actually harm as-efficient competitors. The application of this test and principle to self-preferencing therefore prevents the protection of less-efficient competitors, which may lead to protecting competitors and not competition.[228] All the other tests that have been proposed by commentators should instead be rejected, given that they do not find any legal basis in the case-law of the European courts and there are no specific characteristics of self-preferencing which make their application necessary.

[228]Robert O'Donoghue KC and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Bloomsbury Publishing 2020) 102, pp. 389–393; *Post Danmark A/S v Konkurrencerådet* (n 97), paras 21 and 22.

3. The EU Commission decision and the GC judgment in Google Shopping

3.1. The EU Commission decision in *Google Shopping*

As stated above, the European Commission relied for the first time on a self-preferencing theory of harm in the Google Shopping decision, even though it did not mention it explicitly.[229] Also, Google Shopping is the only judgment of the European Courts concerning self-preferencing specifically.[230] For this reason, it is particularly interesting to offer a description and a critical assessment of this case, in order to benchmark it against the analysis offered above.

The case involved the market for generic search services on the internet and the market for comparison shopping services. The general search services are those services that allow people to search information on the web. A comparison shopping service is instead a website that gathers offers from online merchants and sends users to the retailers' websites to view and purchase those products. Comparison shopping services place shopping ads on the Google general search results page, acting on behalf of the merchants they represent and they make profits by charging a fee to their merchants (this can be a flat fee or more frequently a cost-per-click fee). Moreover, Google also makes profits by charging comparison shopping services for advertisements and featuring promoted products.

In *Google Shopping*, the Commission found that Google had abused its dominant position in the market for generic search services on the internet by favouring Google Shopping (Google's own comparison shopping service) over the competitors' shopping services. According to the Commission, Google leveraged its market power in the market for general search services into the market for comparison shopping services by (i) treating Google shopping more favourably in terms of positioning and display in the results pages of the Google

[229] 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)) (notified under document number C(2017) 4444) (n 43).
[230] *Google LLC, formerly Google Inc and Alphabet, Inc v European Commission* [2021] GC Case T-612/17.

generic search engine, while (ii) demoting the competing comparison shopping services.

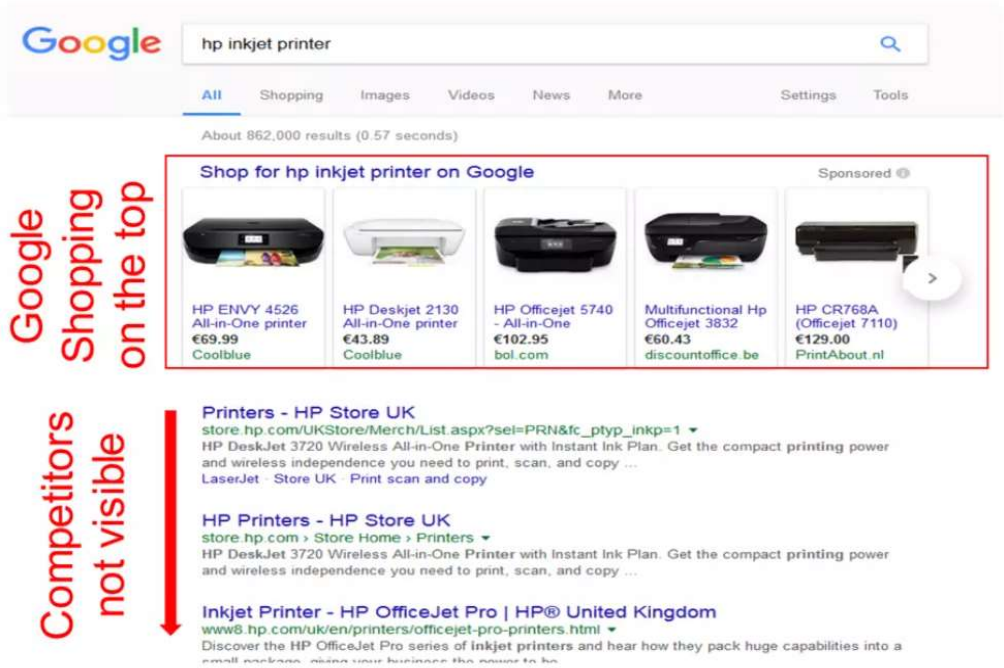


Figure 8: Screenshot of Google's conduct. Note: Taken from Joao Vareda, Line of Business Restrictions: the Google Shopping case), presentation at the OECD, 8 June 2020.

In particular, the demotion of rivals took place through the use of special ranking algorithms that were consistently applied to rivals and never to Google Shopping itself, even though it had many of the features that made rivals eligible to be lowered in their rankings.[231] According to the Commission, it was precisely the fact that Google had not applied these specific algorithms to its shopping unit that made the conduct objectionable.[232]

The Commission then showed how such a conduct led to a decrease in visibility and user traffic for competing comparison shopping services and to an increase in visibility and user traffic for Google Shopping respectively. According

[231]ibid, paras 358 and 380.
[232]ibid, para. 440.

to the Commission, visibility and user traffic from Google's general search service is of fundamental importance for comparison shopping services to compete effectively and it cannot be replaced by other sources of traffic.[233] Therefore, Google's conduct had exclusionary effects because giving an artificial advantage to Google Shopping had the potential to anticompetitively foreclose competing comparison shopping services. The Commission also held that Google failed to provide an adequate objective justification for its conduct.[234] The Commission indeed rejected Google's argument that its algorithm benefitted consumers as it provided them with the most relevant results, given that there were less restrictive means to achieve such a result.

As for the legal test, the Commission analysed Google's conduct as a leveraging abuse, defining it as a "*a well-established, independent, form of abuse falling outside the scope of competition on the merits*". However, it did not use the wording self-preferencing.[235] The Commission also decided that Google's conduct could not be qualified as a refusal to supply and that the legal test established by the EU case law for such a category of abuse could not apply.[236] Remarkably, the Commission did not consider other elements nor pointed to other facts or explained how it applied the test and attributed the liability to Google.

With reference to remedies, the Commission ordered Google to implement measures that were in compliance with the principle of equal treatment and in particular remedies that ensured that Google treated rival comparison shopping services no less favourably than its own comparison shopping services.[237] In order to address the Commission's competition concerns, Google decided to set up a competitive auction where companies can bid for placement in the Shopping Units and where Google bids for priority placement too, through a separate Google Shopping unit.[238] The remedy that Google proposed and that the

[233]ibid., paras 342 and 539.
[234]ibid., paras 660-671.
[235]ibid., para. 649.
[236]ibid., paras 650 and 651.
[237]ibid., para. 699.
[238] The remedy has attracted a lot of criticism from various commentators and competing shopping services, as it was deemed to be ineffective; in this respect, see Thomas Hoppner, 'The European Google Shopping Competition Saga, Compliance and the Rule of Law' (2022) 15 Compliance and the Rule of Law (February 9, 2022) 9. However, for a positive assessment of the remedy, see Bo Vesterdorf and Kyriakos Fountoukakos, 'An Appraisal of the Remedy in the Commission's

Commission accepted in Google Shopping is essentially a *pricing* remedy and it is not dissimilar to the remedy that would have been imposed for a margin squeeze or a constructive refusal to deal abuse, even though the Commission did not attribute a liability to Google for its conducts on this basis.[239] The Commission's decision indeed mandated that the remedy "*should not lead to competing comparison shopping services being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established by this Decision*".[240] Therefore, the fee that Google charges and the commitment that the Commission has envisioned should allow comparison shopping services that are as efficient as Google's independent shopping unit to compete on the downstream market for comparison shopping services. Competitors that are not as efficient as Google's independent shopping unit will rightly not be protected by this remedy, given that otherwise the principle of equal treatment would imply the protection of non-efficient competitors, which would be subsidized by Google in this case.[241] The remedy therefore implies that the source of competitive harm derives from the fact that Google discriminated by assigning the Google Shopping units exclusively to its subsidiary Google Shopping instead of enabling competitors to pay a wholesale price in order to have access to preferential positioning in Google Shopping that could allow as-

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Google Search (Shopping) Decision and a Guide to Its Interpretation in Light of an Analytical Reading of the Case Law' (2018) 9 Journal of European Competition Law & Practice 3; Dirk Auer, 'Case Closed: Google Wins (for Now)' (*Truth on the Market*, 19 November 2021) <https://truthonthemarket.com/2021/11/19/case-closed-google-wins-for-now/> accessed 6 May 2024.

[239] The theory of harm based on margin squeeze has not been addressed by many commentators, with reference to the Google Shopping case. This thesis however has been proposed by Friso Bostoen, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (2018) 6 Journal of antitrust enforcement 355; KC and Padilla (n 228). who recognize that the remedy in Google Shopping has substantial similarities with the remedies imposed in margin squeeze or constructive refusal to deal cases; Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448.

[240]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)) (notified under document number C(2017) 4444) (n 42), para. 700 (d).

[241] Vesterdorf and Fountoukakos (n 238).

efficient competitors to compete (a form of behavioural or even a *de facto* structural vertical separation).[242]

It follows from these considerations on the source of competitive harm -- which we can derive from relating the rule for determining violations to remedies -- that the Commission implicitly acknowledged that the right test for the antitrust assessment of self-preferencing was the AEC test, even though it did not spell it out nor it carried out the analysis. As discussed above, this is indeed the test that should be applied to analyse self-preferencing.

3.2. The GC judgment in *Google Shopping*

The General Court upheld the European Commission's decision in Google Shopping.

A substantial part of the findings of the GC rests on whether Google's conduct constituted "competition on the merits" and on the concept of "abnormality" of Google's conduct. In particular, the GC decided that Google's conduct consisting in favouring its own product results while demoting rivals' product results was "abnormal" and departed from a rational conduct of a general search service and thereby fell outside "competition on the merits". The GC held that Google's conduct departed from competition on the merits because of the importance of traffic generated by Google's general search engine; users' tendency to focus only on the top few results; and the importance of the traffic diverted from Google's general results for rival comparison shopping services.[243] The GC also held that Google's behaviour was "abnormal", because the promotion of Google's own product results is inconsistent with the "universal vocation" of Google's general search engine, which is designed to index results containing any possible content.

The GC found that Google's search services may have features "*akin to those of an essential facility*" because "*there is currently no actual or potential*

[242] Bostoen (n 238) argues that this is a form of behavioural vertical separation, while KC and Padilla (n 227) argue that this is a *de facto* structural vertical separation.

[243] *Google LLC, formerly Google Inc and Alphabet, Inc v European Commission* (n 229), para. 169.

substitute available".[244] However, it decided that the Commission did not have to meet the strict conditions to find a refusal to deal that were established in *Bronner*. This was so because Google's conduct "*consists in independent conduct which can be distinguished, in its constituent elements, from a refusal to supply*".[245]

In referring to the effects of Google's conduct, the GC first decided that the Commission would meet the relevant standard of proof even by demonstrating only "*potential*" anticompetitive effects.[246] The GC also held that the Commission had provided adequate evidence of the effects of Google's conduct on the traffic diverted from competing comparison shopping services, and that was sufficient to demonstrate that the conduct was capable of decreasing competition in the market for comparison shopping services.

Finally, the GC dismissed Google's arguments that there was a pro-competitive rationale for showing Google Shopping units on top of the search results and that this constituted an improvement to the quality of its general search service. The GC recognized that Google's behaviour could lead to efficiencies but held that these efficiencies did not justify an unequal treatment between Google's own comparison shopping service and rival comparison shopping services.

4. A critical analysis of Google Shopping

The GC's judgment in Google Shopping touches upon a number of aspects that have been discussed above with reference to self-preferencing in general and to the application of the concept of abuse in relation to this practice. Given that self-preferencing is generally implicitly equivalent to a constructive refusal to deal and, in the Google Shopping case, to a margin squeeze, the Commission and the GC should have analysed the case according to the appropriate analytical framework for these abuses. First, indispensability of the input should have been established. Second, they should have analysed whether the conduct led to the elimination of effective competition in the related market, with the AEC test and principle. Third, they should have assessed the existence of objective

[244]ibid, para. 224.
[245]ibid, para. 231.
[246]ibid, para. 441.

justifications. Instead, the Commission first and the GC after reiterated some of the already existing ambiguities in the refusal to deal case-law and added further unclarity to the analytical framework by introducing new tests such as the no economic sense test and categories like the duty of equal treatment.

4.1. Self-preferencing and duty to deal

As stated above, the GC held that the European Commission did not have to meet the strict conditions established in *Bronner* for refusal to deal and in particular the condition of "indispensability". The GC's reasoning in this respect seems to be formalistic. Indeed the GC reached such a decision by stating that for a refusal to supply to exist, there need to be two elements: (A) an express request to which to the dominant undertaking opposes a proper "refusal", and (B) that the exclusionary effect arising from the conduct must be triggered principally by the refusal itself, and not by another form of leveraging abuse.[247] This reasoning, which is essentially based on form rather than substance, also leads to the paradoxical policy result that dominant company would be better off not dealing with rivals instead of dealing at worse terms in order to be subject to the stricter *Bronner* criteria.[248] In this specific case, for instance, Google would have benefited from the higher *Bronner* standard (and therefore might have won under the duty to deal doctrine) if it had not shown the other comparison shopping services at all and kept its search engine for itself, displaying exclusively its products.

The GC was arguably also not correct in holding that the remedies should not inform the rules for determining the abuse.[249] Under Regulation 1/2003, the remedies must address the Commission's competition concerns and therefore there is clearly a direct correlation between the remedies and the European

[247]ibid, para. 232.
[248]Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics* (Foundation press 2007) <https://scholar.harvard.edu/files/einer_elhauge/files/global_antitrust_chpt_1_2d_ed_final.pdf> accessed 6 May 2024, p. 521.
[249]*Google LLC, formerly Google Inc and Alphabet, Inc v European Commission* (n 229), para. 246

Commission's theory of harm.[250] As discussed above the remedies imposed in Google Shopping are the same that would have been imposed in a margin squeeze case or a constructive refusal to supply cases, which are both species of refusal to deal.

The judgment therefore seems to reflect the ambiguities of the EU case law and in particular of *Teliasonera*, where the CJEU held that margin squeeze "*may, in itself, constitute an independent form of abuse distinct from that of refusal to supply*" and decided that the indispensability condition did not apply to margin squeeze.[251] As stated in the literature, margin squeeze is a constructive refusal to supply and margin squeeze and refusal to supply are functionally the same.[252] Since self-preferencing, like margin squeeze, is a form of refusal to supply, it should also be subject to the condition of essentiality of the input.

4.2. Abnormality and irrationality of Google's conduct (the no economic sense test)

In this part of the judgment the GC introduces the no economic sense test to assess whether Google's conduct can be considered outside "competition on the merits". As stated above, this test is not desirable since its application can become subjective and lead to second-guessing the business models of the dominant firm. The GC's judgment shows why it is not sensible to rely on this test.

The GC's argument that it was abnormal for Google to promote its own product results, given that this would be inconsistent with the "universal vocation" of its general search engine is factually not necessarily true. Some commentators have described the reasoning of the GC in this respect as a *non sequitur* and have argued that while it can be abnormal for a general search engine to reduce indexed content, that does not necessarily mean that it is abnormal to present it to consumers favouring its own results.[253] At the same time, the fact that favouring a

[250] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) 2002 (OJ L), art. 9.
[251] *Konkurrensverket v TeliaSonera Sverige AB* (n 98).
[252]Elhauge and Geradin (n 247), p. 521. This position seems to find comfort also in the EU Commission's Guidance Paper, where margin squeeze is considered a form of refusal to supply.
[253] Nicolas Petit, 'Legal Analysis of Google v EC (Shopping), T-612/17' (GCLC Lunch Talk, Brussels, 16 November 2021)

firm's own services or products over those of competitors is something that has always been done by firms in the non-tech world (and that there is no need to apply different rules to digital markets) seems to point against the conclusion that such a behavior can be considered abnormal. Indeed, even though this has always been a common behavior it has always received a favorable treatment by antitrust agencies. Further, it seems nonsensical to draw the line between what is a lawful and an illegal conduct on the basis of what is normal, since very harmful behaviors could be considered normal in a given context.

The GC also pointed to the fact that Google changed its behavior over time stating that this would be a further indication of "abnormality" of the conduct. In particular, the GC noted that before entering the market for comparison shopping service, Google was displaying all the results of specialised search services in the same way and according to the same criteria. After it entered the market for specialised comparison shopping search services and it witnessed the failure of its own comparison shopping service, Google started promoting its own specialised search results and demoting the results of its competitors. According to the GC, this type of change was problematic. This reasoning seems to be prone to criticisms too. The changes in the way in which businesses operate is a key aspect for the evolution of markets and of market economies more generally. Of course, this is all the more true for fast-moving markets like digital markets. Here, the change of conduct is also consistent with Google's business incentives. It is indeed perfectly rational for a firm to expand to adjacent markets like Google has done and to favour its own services as it leads to efficiencies for the firm.

The application of the no economic sense test here seems to be even more problematic in the light of the fact that the GC derived basically a *per se* prohibition against self-preferencing, solely on the basis of the vague standard of the "abnormality" of the conduct.[254] The GC indeed decided that given the abnormality of Google's conduct, "*it is for the person responsible for that*

<https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Petit/Legal-Analysis-of-Google-v-EC-Shopping-T-61217.pdf> accessed 6 May 2024.

[254] ibid.

difference in treatment to justify it in the light of competition law".[255] As it has been noted by commentators, this amounts to a shift in the burden of proof between the European Commission and the defendant.[256]

In order to assess whether Google's conduct was "competition on the merits" the GC also considered: (i) the importance of traffic generated by Google's general search engine for comparison shopping services; (ii) the behaviour of users when searching online, which typically focus only on the top few results; and (iii) the traffic diverted from Google's general results pages was a substantial part of the traffic of rival comparison shopping services and it cannot be effectively replaced by other sources. While these criteria make more sense -- as they resemble a form of competitive analysis -- there are still some troubles with this analysis. The first is the potential impact of this approach on innovation. Indeed, it follows from the GC's reasoning that the better Google is at doing something valuable for competitors, the more it should be prohibited to favour itself.

In addition to that, the analysis asks only whether the self-preferencing conduct was *capable of* having foreclosure and exclusionary effects, but not whether the conduct was *likely to* produce anti-competitive effects.[257] Self-preferencing is always capable of producing foreclosure and exclusionary effects. However, these effects are anti-competitive only in a very narrow set of circumstances. Indeed, simply selling a better product has those effects too. Therefore, one needs both a higher standard to assess effects (likelihood instead of capability) and a clear analysis of when these effects constitute competition on the merits and when they do not. This can be done through the use of the AEC test and principle, but the GC fails to do it here.

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[255] *Google LLC, formerly Google Inc and Alphabet, Inc v European Commission* (n 229), para. 179.
[256] •Makis Komninos, 'Competition Stories: November & December 2021' (*Network Law Review*, 6 January 2022) <https://www.networklawreview.org/competition-stories-nov-dec-2021/> accessed 6 May 2024.
[257] Ibid.

4.3. The principle of equal treatment

The GC introduced for the first time in Google Shopping the concept of equal treatment as a stand-alone parameter to assess whether an abuse of a dominant position took place.[258] According to the GC, "*the abuse may take the form of an unjustified difference in treatment*" because

"*the general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified*".[259]

Even though the principle of equal treatment is a general principle of EU law, this formulation has been widely criticized for providing very little clarity on the fundamental question of what constitutes a "comparable situation".[260] Given that the issue of what situations are comparable (*i.e.* whether Google Shopping can be compared to competing shopping services) is precisely what is at stake in this case, relying on this principle does not seem to be a sound option. Also, the GC seems to scrutinize Google's conduct through a regulatory approach, instead of embarking on a more rigorous antitrust analysis of the conduct. This is demonstrated also by the fact that the GC cites different regulations to support the thesis that there is a duty of equal treatment under EU law.[261] As commentators have noted, the GC is applying for the first time here -- in an art. 102 setting -- a type of analysis that had been used so far only in the context of art. 106 TFEU,

[258] See Lena Hornkohl, 'Article 102 TFEU, Equal Treatment and Discrimination after Google Shopping' (2022) 13 Journal of European Competition Law & Practice 99.
[259] *Google LLC, formerly Google Inc and Alphabet, Inc v European Commission* (n 229), para. 155.
[260] See, *e.g.*, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECJ Case C-427/06, para. 44. In the literature, see, *inter alia*, Steve Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2021); Pieter Jan Kuijper and others, *The Law of the European Union and the European Communities* (Kluwer Law International BV 2018).
[261] For instance, see Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance) 2015 (OJ L), which introduced the principle of network neutrality in the EU legislation.

where state-funded infrastructures or public undertakings are involved.[262] While dominant firms in general have a "special responsibility" not to impair the competitive process,[263] applying a concept that has traditionally been applied in the context of public dominant companies to digital platforms goes too far.[264] Indeed, there are no privileges that those platforms have received, as it is the case for state-funded infrastructure. The development of the principle of equal treatment may lead to the undesirable outcome of protecting competitors – even if they are less efficient -- instead of competition and therefore consumers.[265]

All in all, the decision seems to go in the direction of antitrust enforcement based on fairness. Commentators have indeed acknowledged that the "*ethos*" of fairness "*is intrinsic to the theory of harm*" of the Commission in Google Shopping,[266] and that the "*fair treatment*" of competitors is at the core of the Google Shopping case.[267] While fairness is one of the objectives of art. 102, it becomes undesirable when it is understood as concerning the behavior of the dominant undertaking *vis-à-vis* competitors (as it is in the Google Shopping case), since competition law is not supposed to protect competitors, but competition instead.[268]

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[262] Édouard Bruc, 'Google Shopping and Article 106 TFEU: A Legal Dystopia in the EU Constitutional Order' (2023) 14 Journal of European Competition Law & Practice 334; Komninos (n 256); Pablo Ibáñez Colomo, 'The General Court in Case T-612/17, Google Shopping: The Rise of a Doctrine of Equal Treatment in Article 102 TFEU' (2021) 10 Chillin'Competition Blog.

[263] This principle is expressed in long-standing case law in the EU. See, *e.g.*, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECJ Case 322/81, para. 57; *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* [2000] ECJ Joined cases C-395/96 P and C-396/96 P, para. 37.

[264] See Tea Mustac, 'Institutionalizing Google: When Self-Preferencing Becomes Anticompetitive' (30 September 2022) <https://papers.ssrn.com/abstract=4234997> accessed 6 May 2024.

[265] See *Post Danmark A/S v Konkurrencerådet* (n 97), para. 22.

[266] Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84 The Modern Law Review 230.

[267] Alberto Pera, 'Fairness, Competition on the Merits and Article 102' (2022) 18 European Competition Journal 229.

[268] Akman, *The Concept of Abuse in EU Competition Law* (n 108); Barak Orbach, 'Mandated Neutrality, Platforms, and Ecosystems', *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing 2023) <https://www.elgaronline.com/edcollchap/book/9781839108723/book-part-9781839108723-29.xml> accessed 6 May 2024.

4.4. Non-application of AEC test and lack of a proper analysis of effects

While the GC decided that the AEC test was not applicable given that the practices at issue were not pricing practices, this conclusion seems to be prone to criticisms. The remedy that was adopted was the same that would have been adopted in a margin squeeze or constructive refusal to deal case and ultimately suggest that Google's violation was a pricing violation. Therefore, the AEC test could and should have been applied.[269]

A further confirmation that the Commission and the General Court mistakenly analysed Google's conduct and got a wrong result can be derived by looking at the effects of the remedy. Given that the remedy had no impact and has been described as ineffective,[270] one can arguably infer that the remedy was in fact a pricing remedy to which the Commission and the GC should have properly applied the AEC test and that Google would have prevailed under it. The fact that the remedy was ineffective indeed arguably shows that Google is arguably just more efficient and there was no violation.

In addition to the above, the standard of foreclosure that is established by the GC is also prone to criticisms. The GC held that the Commission did not have to prove the "actual" anti-competitive effects of Google's behavior on competitors but it was sufficient that it demonstrated that it had "at least potential" anticompetitive effects on the relevant market. This test seems wrong for two reasons. First, as stated above, the favoring of a firm's services over those of competitors will always weaken the competitors' competitive position *vis-à-vis* the dominant undertaking and therefore any instance of favoring can potentially lead to a finding of abuse. Also, the standard of foreclosure seems to contradict the EU case-law, according to which the different standard for effects depends on an analysis of the context of each case.[271] In this respect, it is hard to see how a *per*

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[269] This would be coherent also with *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (n 108), para. 82.

[270] See Thomas Hoppner, 'Google's (Non-) Compliance with the EU Shopping Decision' (28 September 2020) <https://papers.ssrn.com/abstract=3700748> accessed 6 May 2024.

[271] In this respect, see the recent *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others* (n 109). In the literature, see Renato Nazzini, 'Standard of Foreclosure under Article 102 TFEU and the Digital Economy' [2020] King's College London Law School Research Paper Forthcoming

se prohibition can be sustained with reference to self-preferencing, which clearly has also pro-competitive effects.

The GC also held that the Commission was not required to analyze the relevant counterfactual, *i.e.* what would have been the competitive conditions absent the abuse. However, this does not allow to carry out the so called "attribution test" in order to verify whether the decrease in traffic for comparison shopping service and the weakening of their competitive position was due to Google's behavior or to the fact that they are less efficient and less attractive for consumers and therefore it is reasonable that they are driven out of the market.[272]

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3650837> accessed 6 May 2024, who argues that under EU law, two standards of foreclosure may apply: capability of foreclose and likelihood of foreclosure of as efficient competitors causing negative effects on price, output, quality, or innovation. According to Nazzini:

The capability standard should apply solely to conducts that clearly fall outside competition on the merits as its sole purpose is to restrict competition and there is no plausible efficiency rationale to support the finding that such a practice can be beneficial to consumers. Examples of such practices are predatory prices when prices are below average variable costs or average incremental costs or abuses consisting in making false representations to public authorities.

The standard of foreclosure of as efficient competitors causing negative effects on price, output, quality, or innovation should apply to all types of conduct that could be anti-competitive but also consistent with competition on the merits. Examples of such practices are tying, conditional rebates or payments, and self-preferencing.

See also Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (12 May 2020) <https://papers.ssrn.com/abstract=3599407> accessed 6 May 2024, who argues that, in terms of probability of effects, the relevant thresholds are: plausibility, likelihood, and certainty. At the low end of the spectrum is plausibility, which, according to the author entails "*a finding of anticompetitive effects in the relevant economic and legal context would not be contrary to 'logic and experience'*". At the high end of the spectrum is certainty, which is a 100% probability, or quasi certainty of the effects. In the middle is likelihood, "*which would be met where it can be shown that the impact on competition is more likely than not to occur (that is, a level of probability right above 50%)*". According to Ibanez Colomo, "[w]*hen prima facie unlawful practices are at stake, the applicable threshold is one of plausibility. In other words, it is only in a narrow set of circumstances that the firm(s) involved are able to rebut the presumption that the behaviour is capable of having anticompetitive effects. Second, a threshold of likelihood, as defined by AG Kokott in Post Danmark II, is relevant to evaluate the impact of practices subject to a 'standard effects' analysis, as well as concentrations within the meaning of Regulation 139/2004. Finally, the threshold of certainty, or quasi-certainty appears to be the applicable one where the 'enhanced effects' test defines the conditions against which the legality of conduct is assessed*".

[272] For this considerations, see also Colomo, 'As Efficient Competitors in Case T-612/17, Google Shopping' (n 222).

5. The Advocate General's Opinion in *Google Shopping*: a look into the future of self-preferencing

5.1. The Opinion of the Advocate General

On 11 January, 2024, Advocate General Kokott rendered her Opinion in *Google Shopping*, in which she proposed that the Court of Justice confirms the judgment of the GC. The Opinion of the Advocate General is not binding on the Court of Justice, although these opinions are often followed,[273] and therefore, as a matter of fact, it offers an interesting perspective on the future of antitrust enforcement in the realm of self-preferencing conducts of digital platforms. At the time of writing, however, the GC judgment is still good law. Hence, the Opinion will be analysed with a view to offering a *de jure condendo* perspective on this subject matter, given that it raises and answers some questions which *"are of great legal and practical importance*", in the words of the Advocate General Kokott.[274]

As for the legal test, the Advocate General started its analysis from Article 102(c) TFEU, arguing that instances of discriminatory treatment that are similar to

[273] In the literature, there has been a significant amount of empirical studies aimed at providing an indication in terms of percentages of the number of times the Court of Justice follows the opinion of the Advocate General. In this respect, see, *e.g.*, Carlos Arrebola, Ana Julia Mauricio and Héctor Jiménez Portilla, 'An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union' (2016) 5 Cambridge International Law Journal 82, who have estimated that the Court of Justice is approximately 67 per cent more likely to annul an act (or part of it) if the Advocate General advises the Court to annul than if it advises the Court to dismiss the case or declare it inadmissible; Alan A Dashwood, 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 Legal studies 202, according to whom "the received wisdom is that the Court follows the Advocate General in about 70 per cent of cases"; Takis Tridimas, 'The Role of the Advocate General in the Development of Community Law: Some Reflections' (1997) 34 Common Market Law Review <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\157630.pdf> accessed 6 May 2024, who concluded that the opinions were followed in 88 per cent of the cases; Roman Zakharenko, 'Invisible Influence? The Role of the Advocate General in the European Court of Justice in the Development of Community Law' [2012] University Honors in International Studies, who observed that the Court followed the AG opinions in 91 per cent of the infringement procedure cases during the selected time period and, in 76.5 per cent of the cases, "the wording and phrasing used in the concluding statements were identical"; Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435, found that the opinions of the AG and decisions of the Court of Justice were coinciding on 86 percent of the legal issues, and the likelihood of a pro-plaintiff decision by the Court of Justice increased between 49 per cent and 66 per cent if the opinion of the Advocate General was pro-plaintiff.

[274] *Opinion of Advocate General Kokott delivered on 11 January 2024* (ECJ), para. 2.

Article 102(c) TFEU may also be classified as an abuse,[275] when competitors are put at a competitive disadvantage in a fashion that is contrary to competition on the merits.[276] This is the case also when the indispensability criterion is not met, as this condition is not part of the legal test for self-preferencing.[277] Indeed, according to the Advocate General, since Google had already granted access to its services, there would be no interference with Google's freedom of contract and the provision of access to competitors on equal terms would not affect its incentive to invest in essential infrastructure. Thus, the rationale for the indispensability condition would not apply in the case at issue.[278] With reference to competition on the merits specifically, the Advocate General held that Google's behavior could be considered against competition on the merits, as its business model was based on offering a "*fundamentally open infrastructure designed to attract maximum number of internet users and to generate maximum volume of data traffic*" and therefore the fact that Google gave preferential treatment to its own comparison shopping service vis-à-vis those of its competitors run counter to this business model.[279] That is, the Advocate General also applied a no economic sense test.

The Advocate General Kokott considered that self-preferencing "*constitutes an independent form of abuse through the application of unreasonable conditions of access to competing comparison shopping services, provided that it has at least potentially anticompetitive effects*".[280] Interestingly, she notes that "[t]*he present case of self-preferencing exhibits some proximity to the cases involving the 'margin squeezing' of competitors*", given that, like margin squeeze, the conduct involved "*unequal treatment between that undertaking and its competitors in relation to conditions of access to an input that is essential to business on the downstream market"*.[281]

With reference to the role of the AEC test and principle, the Advocate General rightly noted that the relevant counterfactual was a situation which

[275] Ibid., para. 76.
[276] Ibid. para. 78.
[277] Ibid., para. 81.
[278] Ibid., para. 91.
[279] Ibid., para. 92.
[280] Ibid., para. 90.
[281] Ibid., para. 95.

"*reflects an actual situation 'that is initially similar but whose development is not affected by all of the practices at issue*''[282] and that this was needed in order to identify whether there was a causal link between Google's conduct and the exclusion of rival comparison shopping services.[283] As for the AEC test, AG Kokott held that the AEC test is not generally applicable and – a fortiori – is not a pre-requisite for demonstrating that a conduct is compatible with competition on the merits.[284] Moreover, according to the Advocate General, if the structure of the market is such that, for instance, high barriers to entry exist which make it unlikely that competitors can become as efficient as the dominant firm, nevertheless the pressure of less efficient competitor *"is capable of ensuring that the market structure and the choices available to consumers do not deteriorate further*".[285]

On the basis of the arguments outlined above, the Advocate General Kokott suggested that the Court of Justice upholds the GC's judgment, thereby effectively consecrating self-preferencing, a term which is now mentioned explicitly for the first time in the Opinion.

5.2. A comment on the Opinion

The Opinion of the Advocate General reiterates many of the flaws of the GC judgment which this thesis has discussed, as it is in many parts a reiteration of the same arguments of the GC. What is interesting to note for the purposes of this work is that the Advocate General, in her Opinion, clearly notes the similarities between self-preferencing and margin squeeze, which this thesis has highlighted. Thus, the Advocate General explicitly recognizes that self-preferencing is akin to a constructive refusal to supply.

The implications of the Opinion of Advocate General Kokott are significant, even though the Court of Justice will have the final say on many of the open questions. First, the Advocate General has re-stated that self-preferencing is an independent form of abuse, comparable to margin squeeze, to which the

[282] Ibid., para. 168.
[283] Ibid., para. 160.
[284] Ibid., para. 196.
[285] Ibid. para. 195.

indispensability condition does not apply. This finding is likely to be confirmed by the Court of Justice, as it is consistent with the case-law that has been critically commented above.[286] Likewise, the Advocate General confirmed the assessment of whether self-preferencing falls within competition on the merits on the basis of the no economic sense test and re-instated that the application of the AEC test is not needed to assess the competitive effects of this conduct. Also these findings are likely to be confirmed by the Court of Justice. As certain commentators have noted, however, while the legal test has to some extent been established, it is still unclear what the specific boundaries of abusive self-preferencing will be and, importantly, what the threshold of effects ought to be.[287]

The ball is now in the Court of Justice's court to shape the contours of self-preferencing.

6. The EU Commission decision in the Amazon case

6.1. The EU Commission decision in the Buy Box and Marketplace cases

The cases involved the role of Amazon as marketplace enabling third-party sellers to sell products to consumers, and as a retailer, selling products under its own name, therefore operating in dual-mode.[288] These cases share, as a background, the same concerns that have been voiced also by some commentators, who are preoccupied that "[g]*iven Amazon's market power and its*

[286] See also, *e.g.*, for a very recent example, *Lietuvos geležinkeliai AB v European Commission* [2023] ECJ Case C-42/21 P, where the Court of Justice held that the removal of railway infrastructure which the inevitably becomes unusable by competitors but also by the dominant undertaking itself, must not be analysed as a refusal of access. This conduct can indeed constitute an independent form of abuse. For other instances in which the Court of Justice singled out specific conducts within Article 102 TFEU and held that the indispensability condition did not apply, see *Konkurrensverket v TeliaSonera Sverige AB* (n 98); *Telefónica, SA and Telefónica de España, SA v European Commission* (n 195); *Microsoft Corp v Commission of the European Communities* (n 177).

[287] See 'AG Kokott Issues Opinion in Google Shopping with the Commission Looking Set to Win Round 3 with a Knockout' (*European Law Blog*, 1 February 2024) <https://europeanlawblog.eu/2024/02/01/ag-kokott-issues-opinion-in-google-shopping-with-the-commission-looking-set-to-win-round-3-with-a-knockout/> accessed 19 May 2024.

[288] See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777

strategic position in the online economy, its dual role as platform and seller raises significant risks to competition".[289]

a) The Marketplace investigation

In the Marketplace investigation, the Commission raised concerns that Amazon may have abused its dominant position through the use it made of the information on the offers of the third-party sellers that it obtains through its marketplace.[290] In particular, according to the Commission, Amazon was using this commercially-sensitive information opportunistically to decide whether to replicate the offers of the third-party sellers and how to compete with them.

According to the Commission, by using these data Amazon would be exploiting its dual role as (i) a marketplace providing services to third-party sellers operating within it and (ii) an online retailer, providing its internal retail unit an anticompetitive advantage against the third-party sellers it competes with in the downstream market, therefore avoiding the normal risks of retail competition. Amazon would indeed retain a very large quantity of non-public sellers' data which concern aspects such as the number of ordered and shipped products, the sellers' revenues within the marketplace, the number of visits to sellers' offers, data relating to shipping and sellers' past performance. This data would then be aggregated by Amazon and used by its own retail unit to tailor

[289] See Damien Geradin and Tom Smith, 'Spinning Amazon's Flywheel: How Amazon's Business Model Harms Competition–A View from Europe' [2023] Available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4398725> accessed 29 April 2024. According to these authors, Amazon's dual role as a platform and seller gives rise to concerns relating to both self-preferencing and access to (and use of) data. In relation to self-preferencing, the authors have noted that Amazon has complete control of its platform, and it enjoys financial benefits when its own labels win a sale, so its ability and incentive to self-preference is clear. The authors note two potential competition concerns with Amazon's self-preferencing practices. The first one is that the best results for consumers are not necessarily those that appear higher in the rankings, and therefore this would give rise to harm to consumers. The second concern is that Amazon's self-preferencing practices determine an increase in rivals' costs. Indeed, in order to obtain a higher ranking, brands pay for advertising and these costs may be passed on to consumers, or otherwise these competitors risk being not as efficient as Amazon. According to them, "*Amazon's self-preferencing process is a very clever strategy because it is profitable twice – once when it improves the sales of its own products and then a second time when competing brands are pushed into buying advertising to mitigate the effects*".

[290] On this theory of harm, see Giuseppe Colangelo, '"(Not so) Elementary, My Dear Watson": A Competition Law & Economics Analysis of Sherlocking' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4753117> accessed 29 April 2024.

Amazon's retail offers and inform its strategic business decisions, to the detriment of third-party sellers operating within the marketplace.

In the Commission's view, this would enable Amazon to decide whether or not expand into new markets and launch new products in competition with third-party retailers, thereby achieving greater economies of scale and leveraging its market power.

b) The Buy Box investigation

In the Buy Box investigation, the Commission took issue with the criteria set by Amazon for access to the Buy Box and Prime.[291]

In particular, the Commission raised concerns due to the fact that third-party retailers relying on Amazon's own logistics services were granted preferential treatment as they were *automatically* eligible for the Prime program and for Amazon's Buy Box in the same manner as Amazon's own offerings. In contrast, third-party retailers which decided not to use Amazon's own logistics services had to specifically qualify for the Prime program and for Amazon's Buy Box and were subject to differential treatment, also in the form of slower delivery services.

The Commission's theory of harm in this case relies on the fact that most consumers rely on the Buy Box to decide which goods they buy on the marketplace and value the advanced delivery services (in terms of zero price paid and speed) offered by the Prime program. In light of these consumer preferences, access to these services has a substantial impact on sales. According to the Commission, Amazon's criteria therefore had the potential to distort competition (i) between Amazon's offerings and those of third-party retailers and (ii) between the third-party retailers which decided to use Amazon's own fulfilment services and those who did not. The theory of harm is therefore essentially a theory of self-

[291] See also Devesh Raval, 'Steering in One Click: Platform Self-Preferencing in the Amazon Buy Box' [2022] Unpublished manuscript <https://deveshraval.github.io/buyBox.pdf>, whose research finds that Amazon is engaging in substantial self-preferencing in favour of both its retail and fulfilment arms over competitors. According to Raval, this happens across countries and almost all product categories. Raval finds that the largest self-preferencing effects are for books, due to the fact that in this segment Amazon arguably has the greatest market power. Raval also finds that in a counterfactual -- holding offer terms fixed -- removing the effects of self-preferencing for Amazon retail and/or Amazon fulfilment would reduce substantially Amazon's Buy Box share and the average Buy Box price.

preferencing, although as commentators have noted the Commission's legal analysis is not particularly detailed, given that the case was closed with commitments.[292]

With reference to commitments, for the Marketplace investigation the Commission accepted Amazon's commitment not to use non-public third-party retailers data in competition with them. The relevant data includes both individual and aggregate data (of the same nature that Amazon was found to be leveraging in the investigation). Amazon's commitment not to use such data covers both branded goods and Amazon's private label products and will bite both on Amazon's automated tools and its staff.

Regarding the Buy Box investigation, the Commission accepted Amazon's commitment to treat equally all sellers in ranking their offers for the purposes of the selection of the winner of the Buy Box. Moreover, Amazon will also display a second competing offer to the Buy Box winner in the instance where there is a second offer that is sufficiently differentiated from the first one in terms of price and/or delivery. Both boxes will display the same descriptive information and provide the same purchasing experience.

As for the piece of the investigation concerning Prime, Amazon committed to: (A) set non-discriminatory criteria for sellers to be eligible for Prime, (B) allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate the terms of the services directly with them, (C) not leverage any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services, and (D) no longer prevent sellers from contacting the consumer directly.

The commitments resemble in many respects the remedies in *Google shopping* and therefore imply that the source of competitive harm derives from the fact that Amazon discriminated by (i) assigning the Buy Box units and Prime on more favourable terms to its own retail unit instead of enabling competitors to pay a wholesale price in order to have access to preferential positioning in the Buy

[292] See Christian Bergqvist, 'Amazon Buy Box–Another Secret Jewel on Discrimination' [2023] Available at SSRN 4630315 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4630315> accessed 7 May 2024.

Box that could allow as-efficient competitors to compete; and (ii) by leveraging the data it collects from third-party retailers to benefit its own retail unit.

The commitments constitute a form of behavioural or even a *de facto* structural vertical separation which have substantial similarities with the remedies imposed in margin squeeze or constructive refusal to deal cases. Also in this case, it follows from these considerations on the source of competitive harm -- which we can derive from relating the rule for determining violations to remedies -- that the Commission implicitly acknowledged that the right test was the AEC test, although it did not actually carry out the analysis.

6.2. A critical assessment of the Buy Box and Marketplace cases

Both the Amazon Buy Box and Marketplace investigations should have been analyzed under the framework for constructive refusal to deal or margin squeeze, in the same fashion as the *Google Shopping* case. As noted above, this can be derived from an analysis of the remedies.

The applicability of this framework of assessment has been suggested also in the literature,[293] although these suggestions require some specifications.

In light of the above-mentioned need to integrate the indispensability condition in the test for constructive refusal to deal and margin squeeze (as they are functionally the same thing, and this conclusion is in line with economics), the Commission should have therefore crafted the case in a different way. In the Marketplace investigation, the Commission should have first proved that the data to which Amazon has access is indispensable for third-party sellers to compete effectively in downstream market and there are no substitutes for the information Amazon collects. The Commission should have then analysed whether the conduct led to the elimination of effective competition in the related market,

[293] See in particular, Caterina Fratea, 'Competition Law and Digital Markets: Adaptation of Traditional Categories or New Rules? Some Reflections Arising from the Amazon Cases Regarding the Access to Non-Public Data' (2022) 33 European Business Law Review <https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/33.7/EULR2022044> accessed 7 May 2024; Vladya MK Reverdin, 'Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?' (2021) 12 Journal of European Competition Law & Practice 181.

through the AEC test and principle. As stated above, this test is fully applicable with the adjustments for self-preferencing scenarios. Third, the Commission should have assessed the existence of objective justifications.

Given that unfortunately the case was closed with commitments, the Commission's theory of harm is not fully spelled out but as a general remark, it can be noted that it seems difficult to argue that the data to which Amazon has access is indispensable for third-party sellers to compete effectively in downstream market. Instead, the Commission's concerns that have then led to the adoption of the commitments seem to reflect a more general concern for leveraging behaviour of big tech platforms. The concerns around the Buy Box and Prime closely mirror the Commission's concerns in the *Google Shopping* case, and the same can be said for the remedies. Even here, the Commission has carried out no analysis of the indispensability of the input and no rigorous analysis of the effects, but rather seems to have been concerned with the effects on other businesses competing with Amazon.

Hence, even though the case has been closed with commitments and the assessment is therefore less detailed and relevant than *Google Shopping*, the analysis outlined above and the remarks of commentators in the literature show that also this case should have been analyzed under the constructive refusal to deal/margin squeeze framework of analysis, instead of raising vague leveraging concerns.

7. The EU Apple store case (platform fee discrimination)

7.1. The App Store case

The Commission issued a first Statement of Objections in 2021.[294] In this instance, the Commission took issue with (i) the mandatory use of Apple's own in-app purchase mechanism that Apple imposed on music streaming app developers to distribute their apps via Apple's App Store and (ii) certain restrictions applied by Apple on app developers preventing them from informing iPhone and iPad users of alternative, cheaper purchasing possibilities.

[294] See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061

The Commission found that Apple has a dominant position in the market for the distribution of music streaming apps through its App Store, given that for app developers the App Store is the sole gateway to consumers using Apple's smart mobile operating system iOS. According to the Commission, Apple's devices and software are a “closed ecosystem” meaning that Apple controls every aspect of the user experience. The App Store is the only app store that iPhone and iPad users can use to download apps for their mobile devices. In this respect, the Commission noted that users of Apple's devices do not switch easily to other brands but instead tend to stick with Apple. As a result of this, app developers have to distribute their apps through the App Store in order to serve iOS users, thereby accepting all of Apple's mandatory and non-negotiable rules.

The Commission's concerns related in particular to two aspects:

- The mandatory use of Apple's proprietary in-app purchase system (IAP) for the distribution of paid digital content for which Apple charges app developers a 30% commission fee on all subscriptions bought through the mandatory IAP.
- The “anti-steering provisions” included in Apple’s agreements, which limit the ability of app developers to inform users of alternative purchasing possibilities outside of apps.

According to the Commission, Apple's rules distort competition in the market for music streaming services by raising the costs of competing music streaming app developers. This in turn would lead to higher prices for consumers for in-app music subscriptions on iOS devices. In addition, Apple becomes the intermediary for all IAP transactions. With reference to consumer harm, the Commission noted that most streaming providers passed this fee on to end users by raising prices and that users of Apple devices pay significantly higher prices for their music subscription services or they are prevented from buying certain subscriptions directly in their apps.

In 2023, the Commission sent another Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers,[295] and

[295] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217

issued its final decision in March 2024.[296] Here, the Commission dropped the concerns around the lawfulness of the IAP obligation and decided to focus on the contractual restrictions that Apple imposed on app developers which prevent them from informing iOS devices' users of alternative music subscription options at lower prices outside of the app and to effectively choose those (the "anti-steering provisions").

According to the Commission, Apple's anti-steering obligations constitute unfair trading conditions in breach of article 102 TFEU. In particular, the Commission noted that the anti-steering obligations imposed by Apple on music streaming app developers prevent app developers from informing consumers about subscription to streaming services at lower prices. In the Commission's view, the anti-steering obligations: (i) are neither necessary nor proportionate for the provision of the App Store on iOS devices; (ii) are detrimental to users of music streaming services on Apple's mobile devices who could potentially be worse-off by paying a higher price; and (iii) affect the interests of music streaming app developers as they limit consumer choice.

As it is clear from the above, the Commission substantially changed its theory of harm in this case, departing from the original theory of harm based on exclusionary effects (a raising rivals' costs theory of harm) and moved toward a theory of harm based on exploitation, taking issue with the fairness of the trading conditions imposed by Apple. The Commission case is therefore now aligned with the case brought by the Netherlands Authority for Consumers and Markets (ACM), which had held that Apple had abused its dominant position by imposing App Store rules that were *unreasonable*.[297]

7.2. A critical assessment of the Apple Store case

The commission fee on all subscriptions bought through the mandatory IAP charged by Apple could have been analysed through the framework of

[296] See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161
[297] https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf

assessment of margin squeeze, as it easily fit within this analytical framework being a pricing conduct.[298]

Apple is indeed a vertically integrated company in that it sells a product or service to competitors on an upstream market where it is dominant (that is, app distribution services on iOS) and competes with those companies on the downstream market. The Commission should have therefore analysed whether the difference between the price charged to competitors in the upstream market (the 30% commission fee on subscriptions) and the price charged to the dominant undertaking's own customers downstream is either negative or insufficient for an as-efficient competitor to compete profitably in the downstream market. As part of the test, the Commission should have also established the indispensability of the app distribution services on iOS offered by Apple and, finally, the existence of any objective justifications.

Commentators have also noted that alternatively Apple's conduct could constitute a constructive refusal to deal under article 102 TFEU.[299] Indeed, according to them, the constructive refusal conduct would materialize as apps offering "digital" goods or services can be distributed on iOS only if they accept to bear the App Store commission and hand over their sensitive data to Apple.

An interesting question is why the Commission dropped its charges on the commission fee given that Apple's self-preferencing conducts in this case could have easily been analyzed under the margin squeeze or constructive refusal to deal frameworks, as it has been recognized in the literature. A possible answer is that the Commission felt that it did not have a strong case and decided not to pursue this theory of harm any further when it was self-evident that citing mere leveraging concerns would not have been sufficient, as the conduct at issue was clearly a pricing conduct that had to be analyzed under the appropriate framework. This would therefore reinforce the thesis that self-preferencing is problematic only in limited circumstances, when the test for margin squeeze or constructive refusal to supply can be met.

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[298] For an application of margin squeeze to Apple's criteria to set commissions, see Bostoen, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (n 239); Damien Geradin and Dimitrios Katsifis, 'The Antitrust Case against the Apple App Store' (2021) 17 Journal of Competition Law & Economics 503.

[299] See Geradin and Katsifis (n 298).

The Commission also seems to have radically shifted its theory of harm, relying on exploitative concerns (revolving around fairness) instead of exclusionary concerns. This might have been the case as the Commission felt more confident in building this case in light of the experience of the ACM in this respect. However, as it was stated above, exploitative abuses are highly subjective in their assessment and the Commission has traditionally been heavily reluctant to rely on them. Therefore, it is difficult to understand how turning to a concept which is very difficult to pin down as it can be very subjective and change over time can help structuring the analysis. In particular, this is true for a practice like self-preferencing whose unlawfulness is very difficult to detect.

This case is a missed opportunity for the Commission to clarify the concerns around self-preferencing and the appropriate test to assess the exclusionary concerns that may derive from it. At the same time, it also signals a potential shift towards exploitative theories of harm, which is not desirable.

8. The Italian Competition Authority's approach to self-preferencing

8.1. The Amazon FBA Case

In November 2021, the Italian Competition Authority imposed on Amazon the record fine of above EUR 1,1 billion for having allegedly abused its dominant position in the market for intermediation services on e-commerce platforms through a self-preferencing conduct that allowed Amazon to extend its market power in the vertically-related market for logistics services for e-commerce.[300]

In particular, Amazon made a series of exclusive and irreplicable benefits (and in particular Amazon Prime and other Amazon services) available conditional upon vendors subscribing to "Fulfillment by Amazon" (FBA), Amazon's own logistics service. More in detail, the advantages for vendors which subscribed to Amazon's FBA were: (i) non-application of performance metrics to third-party sellers; (ii) the Prime badge; (iii) higher probability of being awarded the BuyBox; (iv) possibility to participate in special events and offers; and (v) eligibility for "Free Shipping via Amazon". According to the Italian Competition

[300] Italian Competition Authority, 'A 528 - FBA Amazon' (n 169).

Authority, Amazon's conduct constituted "*a single, complex and articulated exclusionary strategy, implemented by the Amazon group in violation of Article 102 TFEU*". More specifically, according to the Italian Competition Authority, Amazon had put in place a self-preferencing conduct and abused its super-dominant position in the market for intermediation services on e-commerce platforms in order to increase third-party seller demand for its logistics service. In the words of the Italian Competition Authority, "*Amazon has artificially combined two distinct services: the presence on the platform at remunerative conditions (possibility of not being subject to the evaluation of one's own performance, of offering products with the Prime label, of selling during special events and of having a high chance of winning the BuyBox) and the FBA service for the fulfilment of orders - in order to create an illicit incentive to purchase FBA, in the absence of alternative ways of accessing the same advantages, apart from the use of FBA*".

As for the effects of the conduct, the Italian Competition Authority held that Amazon's conducts had anticompetitive exclusionary effects vis-à-vis both logistics operators and other e-commerce platforms. With regard to other logistics operators, the Italian Competition Authority decided that Amazon's conduct (i) excluded potential competition and technological development, as well as (ii) having the effect of limiting competition from operators that had already invested in the market, which were not given the opportunity to compete on a par with Amazon, given that in order to reach the minimum efficient scale and compete efficiently, new logistics operators had to intercept the demand of a significant number of players, which was possible only on the Amazon marketplace. As a result, Amazon's market power in the logistics segment increased. With reference to the effects on other e-ecommerce platforms, the Italian Competition Authority held that Amazon's conduct made it more difficult to operate on other e-commerce platforms and on Amazon simultaneously, as that required multi-homing logistics services, which was made more difficult by Amazon's conduct.

According to the Italian Competition Authority, Amazon's conduct could not be justified by any commercial or technical reason, and it could also not be justified on grounds of efficiency. The Italian Competition Authority indeed held

that Amazon had not provided evidence of its superior efficiency compared to competitors to the requisite legal standard. Moreover, it also held that "*the attribution of exclusive benefits to FBA offers has nothing to do with the objective of granting fast and reliable deliveries to consumers, a goal which can be achieved through a mechanism allowing to verify the capability of competing logistics services to reach qualitative standards that are adequate for the Prime service but that, at the same time, is suitable to eliminate their position of competitive disadvantage vis-à-vis FBA in the retailers' perspective*".

Finally, so far as remedies are concerned, the Italian Competition Authority ordered Amazon to make Prime and the other advantageous services that were previously accessible only for sellers subscribing to Amazon FBA accessible on FRAND (fair, reasonable, and non-discriminatory) terms to all the sellers which met certain quality requirements. Clearly, the same remedy that would have been adopted in an essential facility case.[301]

Commentators have noted that, although the Italian Competition Authority itself labelled Amazon's conduct as self-preferencing, the definition might not be adequate to fully describe Amazon's conduct.[302] Other authors have highlighted the fact that "*the decision's words and expressions would equally fit a tying case, an essential facility case, and a self-preferencing case*".[303]

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[301] See Mariateresa Maggiolino and Federico Cesare Guido Ghezzi, 'The Italian Amazon Case and the Notion of Abuse' [2022] Bocconi Legal Studies Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4288948> accessed 29 April 2024, p. 2.

[302] See Claudio Lombardi, 'The Italian Competition Authority's Decision in the Amazon Logistics Case: Self-Preferencing and Beyond' [2022] Competition Policy International <https://aura.abdn.ac.uk/bitstream/handle/2164/21682/Lombardi_CPIEU_The_Italian_Competition_VOR.pdf?sequence=1> accessed 29 April 2024, who notes the existence of differences with Google Shopping and argues that "*Alphabet relied on its own platform alone to redirect consumers by fine-tuning the website's design. Amazon, on the other hand, had set up a series of connected contractual arrangements with third parties to create the exclusionary effects under scrutiny. Moreover, although not sufficiently evidenced, the ICA's investigation suggests that Amazon may be exploiting its position of dominance. The decision often mentions the fact that Amazon's logistics services are more expensive than the competition. But again, the ICA focuses on the exclusionary effects of the infringement, thus purporting little evidence on this point*".

[303] See Maggiolino and Ghezzi (n 300), who bring as an example the fact that "in, back-to-back sections, the ICA was able to state that:

"[Amazon's] abusive conduct consists in having coupled with FBA a set of features indispensable for the success of [the sellers] on the platform […]. In this way, on its marketplace, Amazon has artificially combined two distinct services […] in order to create an illicit incentive to purchase FBA, in the absence of alternative ways of accessing the same features and their benefits";

"The visibility and benefits associated with the set of features above identified has essential nature for the success of the seller's activity on www.amazon.it";

As it has been noted by the same authors, the fact that the Italian Competition Authority has not fit Amazon's conduct within one of the established typologies of abuse is not an issue in and of itself, as the conducts can be against Article 102 TFEU when it is capable of producing exclusionary anti-competitive effects even though it does not fit within one of the pre-defined liability tests.[304] However, it is submitted that Amazon's conduct does seem to fall squarely within the category of constructive refusals to supply and that, in any event, the issue is with the analysis and not so much with the relevant category of abuse.

This thesis has defined self-preferencing as "a discrimination by a dominant undertaking holding an indispensable input that has likely foreclosure effects" (therefore fully agreeing with the approach that separates the finding of an abuse from the pre-determined liability tests). Let us take the decision of the Italian Competition Authority instrumentally to show how its practice in relation to self-preferencing seems to depart from the suggested definition. Starting from indispensability, even though the Italian Competition Authority did not clearly spell out the necessity of such condition, it still defined the benefits available to vendors upon subscription to FBA as "essential", therefore arguably making indispensability a part of the test. The analysis of the effects, though, is arguably flawed for mainly two reasons. First, the AEC test has not been applied properly by the Italian Competition Authority, although here the minimum efficient scale variant described above would have been particularly helpful.[305] Second, the analysis of the impact of the conduct on consumer welfare is almost neglected, as it was also stated above in section 2.2.).[306]

"Amazon has been able to exploit its super-dominant position among marketplaces to increase demand for its logistics service from third-party sellers at the expense of competing services in the secondary non-monopolized market. This allows the firm's conduct to qualify as self-preferencing."

[304] See ibid; Mariateresa Maggiolino, 'The Value of Liability Test in Abuses of Dominance' (2023) 7 Mkt. & Competition L. Rev. 45; Federico Ghezzi and Mariateresa Maggiolino, 'Considerazioni Intorno al Provvedimento Dell'Autorità Garante Della Concorrenza FBA Amazon: Nulla Di Nuovo Sotto Il Sole?' [2022] RIVISTA DELLA REGOLAZIONE DEI MERCATI 478.

[305] See, for the same consideration, also Petrocelli Francesco, 'The Fba Amazon Case between Tying Conduct and Self-Preferencing (I Wish I Could but I Can't!)' [2022] Mercato Concorrenza Regole 353, p. 371.

[306] See also Lombardi (n 301), who notes that in the ICA's decision there is little evidence about direct consumer harm.

Thus, what seems helpful would be to focus on the correcting the analysis of self-preferencing, in light of the relevance that these cases are likely to assume in the practice of the Italian Competition Authority, as briefly explained below.

8.2. Other cases involving self-preferencing

In May 2023, the Italian Competition Authority opened an investigation against Apple to ascertain the existence of an alleged abuse of a dominant position in the market for online app distribution platforms for iOS users.[307]

According to the Italian Competition Authority, Apple would be guilty of having adopted a privacy policy for third-party app developers that is more restrictive than the privacy policy that Apple applies to itself. In particular, the difference would lie in the characteristics of the prompt that appears to users for acquiring consent to track their web browsing data and the tools used to measure the effectiveness of advertising campaigns. Apple indeed requires only competitors to use a consent prompt in a more prominent position than the deny option and includes deterrent language about tracking. In addition to that, third-party developers and advertisers appear to be at a disadvantage in terms of the quality and detail of the data made available by Apple concerning the effectiveness of advertising campaigns on their applications, given that the technical characteristics of the programming interface that they can access is much less effective than Apple's own interface.

In the Italian Competition Authority's view, the availability of data on both user profiling and the measurement of advertising campaign effectiveness are essential elements for the attractiveness of advertising space sold by app developers and purchased by advertisers. Therefore, according to the Italian Competition Authority, Apple's alleged discriminatory conduct (defined by the Italian Competition Authority itself as "self-preferencing") is likely to have the effect of causing third-party advertisers' revenues to fall, to the benefit of its own marketing division; reduce the entry and/or prevent competitors from entering

[307] Italian Competition Authority, 'A561 - App Tracking Transparency Di Apple' (2023) <https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/2E5B30DEABDF25F7C12589B00038A77F/$File/p30620.pdf> accessed 19 May 2024.

and/or staying in the market for app development and distribution; and benefit its own apps and, consequently, Apple's mobile devices and iOS operating system.

For the Italian Competition Authority, the alleged reduction of competition in the relevant markets and the ensuing strengthening of Apple's digital ecosystem could reduce the incentives to develop innovative apps and hinder users from switching to competing digital ecosystems, giving rise to competitive harm. The proceeding is still pending.

In the past, the Italian Competition Authority had already pursued another case that had a theory of harm broadly based on self-preferencing concerns, in the *Google Android Auto* case.[308] In this case, according to the Italian Competition Authority, Google was liable of having refused to integrate the Enel's app for the provision to end users of information and charging services for electric and hybrid vehicles ("JuicePass"), into the Android Auto environment, *i.e.* an extension of the Android operating systems for the automotive segment. In the Italian Competition Authority's view, this refusal was motivated by Google's intention to favour its own app Google Maps, which, due to its features – according to the Italian Competition Authority – was in competition with Juicepass. The Italian Competition Authority found that, as a result of this discriminatory practice, Enel was prevented from building a solid user base at a time of significant growth in sales of electric vehicles and that the conduct led to an impoverishment of consumer choice and to the creation of obstacles to technological progress, potentially influencing the development of electric mobility. As a result, the Italian Competition Authority ordered Google to make available to Enel X Italia, as well as to other app developers, tools for the programming of apps that are interoperable with Android Auto. The decision of the Italian Competition Authority has been confirmed by the TAR Lazio.[309]

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[308] Italian Competition Authority, 'A529 - Google/Compatibilità Enel X Italia Con Sistema Android Auto' (27 april2021) <https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/D7C5BF86903B8387C12586D800495AB1/$File/p29645.pdf> accessed 19 May 2024.

[309] See Ernesto Apa Foco Eugenio, 'The Administrative Court of Lazio Annuls the Sanctions Inflicted Against Amazon and Apple by the Italian Competition Authority' (*GALA*) <http://blog.galalaw.com/post/102i2xe/the-administrative-court-of-lazio-annuls-the-sanctions-inflicted-against-amazon-a> accessed 7 May 2024.

These cases show that the Italian Competition Authority is paying increasing attention to discriminatory conducts of digital platforms that compete with other companies that are active on their platform (and one can potentially expect more cases in the future, as digital markets remain at the top of competition authorities' enforcement agenda). Hence, the increasing relevance of this research.

CHAPTER III
SELF-PREFERENCING IN THE DIGITAL MARKETS ACT

SUMMARY: 1. The premises of the DMA; - 1.1. Interpretation; - 1.2. Ex ante application; - 1.3. Core platform services; - 1.4. Gatekeepers; - 2. The objectives of the DMA; - 2.1. The definition of contestability; - 2.2. The definition of fairness; - 3. The main pitfalls of self-preferencing in the DMA; - 4. The scope of the prohibition against self-preferencing; - 4.1. Self-preferencing from ranking and display on the marketplace; - 4.2. Self-preferencing from the use of data; - 4.3. Self-preferencing through platform fee discrimination; - 5. Remedies; - 6. The compliance with the DMA; - 7. A comparison with the ex-ante regulatory approach to self-preferencing in the United States; - 7.1. The American Innovation and Choice Online Act; - 7.2. The Open App Markets Act.

1. The premises of the DMA

1.1. Interpretation

The DMA's basic architecture is based on two sets of obligations that are imposed on gatekeepers with reference to their core platform services: obligations that are self-executing (*i.e.* that are detailed in the legislation),[310] and obligations

[310] Article 5 of 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 Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), provides the following:

1. The gatekeeper shall comply with all obligations set out in this Article with respect to each of its core platform services listed in the designation decision pursuant to Article 3(9).

2. The gatekeeper shall not do any of the following:
(a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper;
(b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;
(c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and
(d) sign in end users to other services of the gatekeeper in order to combine personal data,
unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.
Where the consent given for the purposes of the first subparagraph has been refused or withdrawn by the end user, the gatekeeper shall not repeat its request for consent for the same purpose more than once within a period of one year.

This paragraph is without prejudice to the possibility for the gatekeeper to rely on Article 6(1), points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable.

3. The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.

4. The gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper.

5. The gatekeeper shall allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using the core platform services of the gatekeeper.

6. The gatekeeper shall not directly or indirectly prevent or restrict business users or end users from raising any issue of non-compliance with the relevant Union or national law by the gatekeeper with any relevant public authority, including national courts, related to any practice of the gatekeeper. This is without prejudice to the right of business users and gatekeepers to lay down in their agreements the terms of use of lawful complaints-handling mechanisms.

7. The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services.

8. The gatekeeper shall not require business users or end users to subscribe to, or register with, any further core platform services listed in the designation decision pursuant to Article 3(9) or which meet the thresholds in Article 3(2), point (b), as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services listed pursuant to that Article.

9. The gatekeeper shall provide each advertiser to which it supplies online advertising services, or third parties authorised by advertisers, upon the advertiser's request, with information on a daily basis free of charge, concerning each advertisement placed by the advertiser, regarding:
(a) the price and fees paid by that advertiser, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper,
(b) the remuneration received by the publisher, including any deductions and surcharges, subject to the publisher's consent; and
(c) the metrics on which each of the prices, fees and remunerations are calculated.
In the event that a publisher does not consent to the sharing of information regarding the remuneration received, as referred to in point (b) of the first subparagraph, the gatekeeper shall provide each advertiser free of charge with information concerning the daily average remuneration received by that publisher, including any deductions and surcharges, for the relevant advertisements.

10. The gatekeeper shall provide each publisher to which it supplies online advertising services, or third parties authorised by publishers, upon the publisher's request, with free of charge information on a daily basis, concerning each advertisement displayed on the publisher's inventory, regarding: (a) the remuneration received and the fees paid by that publisher, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper;

that need further specification from the European Commission before implementation, of which some of the provisions on self-preferencing are an example.[311]

(b) the price paid by the advertiser, including any deductions and surcharges, subject to the advertiser's consent; and
(c) the metrics on which each of the prices and remunerations are calculated.
In the event an advertiser does not consent to the sharing of information, the gatekeeper shall provide each publisher free of charge with information concerning the daily average price paid by that advertiser, including any deductions and surcharges, for the relevant advertisements.

[311] Article 6 of the Digital Markets Act provides the following:

1. The Gatekeeper shall comply with all obligations set out in this Article with respect to each of its core platform services listed in the designation decision pursuant to Article 3(9).

2. The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users.
For the purposes of the first subparagraph, the data that is not publicly available shall include any aggregated and non-aggregated data generated by business users that can be inferred from, or collected through, the commercial activities of business users or their customers, including click, search, view and voice data, on the relevant core platform services or on services provided together with, or in support of, the relevant core platform services of the gatekeeper.

3. The gatekeeper shall allow and technically enable end users to easily un-install any software applications on the operating system of the gatekeeper, without prejudice to the possibility for that gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties.
The gatekeeper shall allow and technically enable end users to easily change default settings on the operating system, virtual assistant and web browser of the gatekeeper that direct or steer end users to products or services provided by the gatekeeper. That includes prompting end users, at the moment of the end users' first use of an online search engine, virtual assistant or web browser of the gatekeeper listed in the designation decision pursuant to Article 3(9), to choose, from a list of the main available service providers, the online search engine, virtual assistant or web browser to which the operating system of the gatekeeper directs or steers users by default, and the online search engine to which the virtual assistant and the web browser of the gatekeeper directs or steers users by default.

4. The gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper. The gatekeeper shall, where applicable, not prevent the downloaded third-party software applications or software application stores from prompting end users to decide whether they want to set that downloaded software application or software application store as their default. The gatekeeper shall technically enable end users who decide to set that downloaded software application or software application store as their default to carry out that change easily.
The gatekeeper shall not be prevented from taking, to the extent that they are strictly necessary and proportionate, measures to ensure that third-party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper.

Furthermore, the gatekeeper shall not be prevented from applying, to the extent that they are strictly necessary and proportionate, measures and settings other than default settings, enabling end users to effectively protect security in relation to third-party software applications or software application stores, provided that such measures and settings other than default settings are duly justified by the gatekeeper.

5. The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.

6. The gatekeeper shall not restrict technically or otherwise the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users.

7. The gatekeeper shall allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant listed in the designation decision pursuant to Article 3(9) as are available to services or hardware provided by the gatekeeper. Furthermore, the gatekeeper shall allow business users and alternative providers of services provided together with, or in support of, core platform services, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same operating system, hardware or software features, regardless of whether those features are part of the operating system, as are available to, or used by, that gatekeeper when providing such services. The gatekeeper shall not be prevented from taking strictly necessary and proportionate measures to ensure that interoperability does not compromise the integrity of the operating system, virtual assistant, hardware or software features provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper.

8. The gatekeeper shall provide advertisers and publishers, as well as third parties authorised by advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the data necessary for advertisers and publishers to carry out their own independent verification of the advertisements inventory, including aggregated and non-aggregated data. Such data shall be provided in a manner that enables advertisers and publishers to run their own verification and measurement tools to assess the performance of the core platform services provided for by the gatekeepers.

9. The gatekeeper shall provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.

10. The gatekeeper shall provide business users and third parties authorised by a business user, at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services provided together with, or in support of, the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users. With regard to personal data, the gatekeeper shall provide for such access to, and use of, personal data only where the data are directly connected with the use effectuated by the end users in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end users opt in to such sharing by giving their consent.

11. The gatekeeper shall provide to any third-party undertaking providing online search engines, at its request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click

In this respect, it is submitted that the analysis developed in the context of the antitrust assessment of self-preferencing should be applied to the DMA, since self-preferencing is included within the regulated practices but it is not clear yet what are the guiding principles that define the scope of its application. The position on the interpretation of the DMA is also further strengthened by the consideration that the goals pursued by the DMA are the same of competition law goals, as it is further explained below. Therefore, the obligations in the DMA that need further clarification should be interpreted according to the learnings from previous antitrust investigations in this space. Having previously identified the harms that can arise from self-preferencing and what are the concerns around such a conduct allows to formulate rules, exceptions and tailor the analysis.[312]

This potential for further specification of these obligations also creates an opportunity for economic input.[313] Economists have indeed argued that for the provisions that may need further specification, as they allow the Commission to specify the measures that will be "effective in achieving the objectives of the DMA and the obligation", and "proportionate" for the specific circumstances of the gatekeeper and service, economics should play a role in providing guidance on the general framework for specification in order to help ensure that obligations are effective and proportionate.

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and view data in relation to free and paid search generated by end users on its online search engines. Any such query, click and view data that constitutes personal data shall be anonymised.

12. The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9).
For that purpose, the gatekeeper shall publish general conditions of access, including an alternative dispute settlement mechanism.
The Commission shall assess whether the published general conditions of access comply with this paragraph.

13. The gatekeeper shall not have general conditions for terminating the provision of a core platform service that are disproportionate. The gatekeeper shall ensure that the conditions of termination can be exercised without undue difficulty.

[312] For the same position, see *e.g.* Belle Beems, 'The DMA in the Broader Regulatory Landscape of the EU: An Institutional Perspective' (2023) 19 European Competition Journal 1.

[313] Amelia Fletcher and others, 'The Effective Use of Economics in the EU Digital Markets Act' [2024] Journal of Competition Law & Economics.

1.2. Ex ante application

Differently from competition law, the DMA is applied *ex ante*. This means that the obligations contained therein will apply before the conduct takes place.[314] *Ex ante* regulation bears a number of benefits in terms of speed of enforcement, predictability and administrability, not least because it is based on rules, while competition law is based on standards.[315] Competition law, on the contrary, is applied *ex post*, *i.e.* after the fact. This allows flexibility and some room for maneuver in terms of policy choices on the degree of enforcement.[316]

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[314]For a discussion on the features of both ex ante and ex post regimes, see among others, Peter Alexiadis and Martin Cave, 'Regulation and Competition Law in Telecommunications and Other Network Industries' <https://academic.oup.com/edited-volume/34523/chapter/292911368?searchresult=1&utm_source=TrendMD&utm_medium=cpc&utm_campaign=Oxford_Academic_Books_TrendMD_0> accessed 7 May 2024 where the authors summarize in an effective manner the differences between the two regulatory systems:
Ex post competition rules are, in general:
backward-looking (relying on historical evidence of abuse);
adopting a relatively narrow view of product markets that is driven primarily by demand-side substitutability;
very fact-specific (as opposed to establishing broader criteria for market conduct);
resulting in remedies which are essentially declaratory in nature and "neutral" in terms of the broader implications for industry of the remedies sought in a specific piece of competition litigation; and
arguably best enforced through the civil courts (at least where the system reaches maturity).
By contrast, sector-specific *ex ante* rules are:
forward-looking (insofar as they prescribe types of market behaviour regardless of particular circumstances, based on public policy priorities);
likely to identify or to define "markets" in broader terms than their competition law counterparts, based as much on the forces of supply as those of demand (on the understanding that the regulation of overly narrow segments is prone to creating a system of over-regulation, on the one hand, while incapable of keeping up with subtle shifts in technology and innovation, on the other);
focused on addressing market failures driven by the logic of a certain industry structure;
not fact-specific (precisely because they need to be forward-looking and capable of applying to a wide range of operators which satisfy certain criteria);
very specific in their prescription of remedies (both in terms of their prescriptive nature and granularity);
best enforced through independent sector-specific regulators (who are most likely to be able to address complex technical detail and the economic disciplines which characterize a specific industry).

[315] On the distinction between rules and standard and their respective advantages and disadvantages see, in particular, Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557. See also Louis Kaplow, 'A Model of the Optimal Complexity of Legal Rules' (1995) 11 The Journal of Law, Economics, and Organization 150; in the context of the DMA, Wolfgang Kerber, 'Taming Tech Giants with a Per-Se Rules Approach? The Digital Markets Act from the "Rules vs. Standard" Perspective' (7 June 2021) <https://papers.ssrn.com/abstract=3861706> accessed 29 April 2024; Anne C Witt, 'Platform Regulation in Europe—Per Se Rules to the Rescue?' (2022) 18 Journal of Competition Law & Economics 670.

[316] In the literature, the departure from the optimal standard of enforcement has traditionally been presented as the distinction between Type I Errors (a false positive or error of the first kind, leading to over-enforcement) and Type II Errors (a false negative or error of the second kind,

As explained in the previous chapter, in digital markets often the practices of the companies operating in these markets and their business models do not appear to be clearly outside the scope of "normal competition" and therefore, one would expect that *ex ante* regulation in this space should be applied as restrictively as possible, precisely because of the greater need for flexibility as opposed to predictability and the relevant features of *ex ante* and *ex post* regulation, explained above.

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leading to under-enforcement). Type I error is defined as "the incorrect rejection of a true null hypothesis". With a real world example, this could be the case of a doctor diagnosing a disease from which the patient is *not* actually affected. In antitrust, Type I error represents a false judgment in which the court condemns a conduct that was not anticompetitive. Type II error is defined as "the failure to reject a false null hypothesis". With a real world example, this could be the case of a doctor *not* diagnosing a disease that a patient actually has. In antitrust, Type II error represents a false judgment in which the court does not condemn a conduct that is anti-competitive. Given that these errors are comment and somewhat inevitable, the literature has developed an error-cost framework which is aimed at ensuring that antitrust enforcement minimizes the expected cost of enforcement. In essence, the objective of the error-cost framework is to ensure that antitrust enforcement minimizes the expected cost of (1) erroneous condemnation and deterrence of beneficial conduct (false positives); (2) erroneous allowance and under-deterrence of harmful conduct (false negatives); and (3) the costs of administering the system itself (which includes the cost of producing and enforcing rules and judicial decisions, the costs of obtaining and evaluating the relevant information and evidence, and the costs of compliance). Certain commentators have noted that the concern with avoiding Type I errors is even more significant in the enforcement of antitrust in the digital economy given that the costs of erroneous antitrust enforcement are magnified due to the importance of innovation and the likelihood and social cost of false positives are increased in digital and other innovative markets. See, for these observations, Geoffrey A Manne, 'Error Costs in Digital Markets' (2020) 3 The Global Antitrust Institute Report on the Digital Economy <https://ssrn.com/abstract=3733662> accessed 7 May 2024, from which the below table is taken. Contrast with Elias Deutscher, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67 The Antitrust Bulletin 302, who argues that the new regulatory instruments for digital markets such as the Digital Markets Act repudiate the traditional understanding of the error costs framework that postulates under-enforcement as the optimal standard of intervention in markets that are innovation-driven.

Competitive impact	Illegal	Legal
Harmful to competition	Percent of cases correctly condemning anticompetitive practices	Percent of cases falsely absolving anticompetitive practices ("false negatives")
Not harmful to competition	Percent of cases falsely condemning legitimate practices ("false positives")	Percent of cases correctly absolving legitimate practices

The DMA is also very prescriptive and its *ex ante* nature is particularly pronounced as it is based on a set of rigid rules with very few exceptions,[317] which should lead to even more caution in applying its provisions in a broad manner. This should be all the more true with reference to self-preferencing, *i.e.* a practice that has many pro-competitive effect and which can be produce an anti-competitive effect in a very narrow set of circumstances, rarely plausible outside of digital markets.

Commentators have therefore advocated for a restrictive application of the DMA noting that the scope of the law should be constrained by limiting its application to a few large platform ecosystems.[318] This reasoning applies to the self-preferencing provisions as well where competition law should therefore always be the first line of intervention in new cases.[319] This approach would indeed allow to test new theories of harm or to determine whether some theories of harm are still workable under a new set of facts.

Another argument for arguing in favour of the restrictive application of *ex ante* regulation (in this case, the DMA) vis-à-vis competition law is the emergence in the EU of a doctrine similar to the Trinko doctrine, which governs the relationship between regulation and competition law in the United States.[320]

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[317] See Assimakis Komninos, 'The Digital Markets Act: How Does It Compare with Competition Law?' (14 June 2022) <https://papers.ssrn.com/abstract=4136146> accessed 7 May 2024, p. 5.

[318] C Colangelo, 'The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy' [2022] European Law Review, Forthcoming <https://laweconcenter.org/wp-content/uploads/2022/03/Giuseppe-Double-triple-jeopardy-final-draft-20220225.pdf> accessed 7 May 2024.

[319] Alexandre de Streel and others, 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust' [2022] Compliance, and Antitrust (December 1, 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4314848> accessed 7 May 2024.

[320] *Verizon Communications, Inc v Law Offices of Curtis V Trinko, LLP, 540 US 398* (Supreme Court of The United States). The facts of the case in Trinko are as follows. The Telecommunications Act of 1996 imposed upon incumbent local exchange carriers (LEC) the obligation to share their telephone network with competitors, including the duty to provide access to individual network elements on an "unbundled" basis. New entrants combined and resold these unbundled network elements (UNEs). Verizon Communications Inc., the incumbent LEC in New York State, had signed interconnection agreements with rivals such as AT&T, as the law obliged it to do, detailing the terms on which it was making its network elements available. As part of Verizon's obligations is the provision of access to operations support systems (OSS), without which a rival cannot fill its customers' orders. Verizon's interconnection agreement, approved by the New York Public Service Commission, and its authorization to provide long-distance service, approved by the Federal Communications Commission, each specified the mechanics by which its OSS obligation would be met. Competing LECs, amongst which was Trinko, complained that Verizon was violating that obligation, and the relevant authorities imposed financial penalties, remediation measures, and additional reporting requirements on Verizon as a result. A class action

Commentators have indeed underlined the existence of a "EU Trinko-doctrine", implying a pre-emption of competition law investigations in the instances where sector regulation is available.[321] While so far this doctrine has been limited to traditional regulated sectors, with the implementation of the DMA its relevance could go well beyond those instances and prevent the application of competition law in all the instances where it is theoretically possible to apply the DMA (which, given the breath of the DMA obligations, would be quite often the case in practice).[322]

In light of the above, the DMA and -- for the present purposes -- the provisions on self-preferencing in particular should therefore be applied restrictively. Article 102 can then be used *ex-post* to potentially correct under-

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was then filed, where it was alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competing LECs in violation of §2 of the Sherman Act.
The case reached the United States Supreme Court which held, in essence, that the breach of the incumbent's regulatory duty to share its network with competitors did not constitute a valid claim under §2 of the Sherman Act. The Supreme Court acknowledged that the 1996 Telecommunications Act created certain affirmative duties but noted that the fact "[t]*hat Congress created these duties, however, does not automatically lead to the conclusions that they can be enforced by the antitrust laws*" and emphasized the fact that although the savings clause in the 1996 Telecommunications Act "*preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond* [them]". In the words of the Supreme Court, "*... we do not believe that traditional antitrust principles justify adding the present case to the few exceptions from the proposition that there is no duty to aid competitors*", also because the facts of this case were different from those in *Aspen Skiing*, where an instance of duty to deal of a monopolist was acknowledged by the United States Supreme Court. Indeed, according to the Supreme Court: "*The refusal to deal alleged in the present case does not fit within the limited exception recognized in Aspen Skiing. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would even have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal — upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contract between the cases is heightened by the difference in pricing behavior. In Aspen Skiing, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under §251(c)(3) tells us nothing about dreams of monopoly*". The Supreme Court also rejected claims of Trinko based on the essential facility doctrine given that "*essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms*" as it was the case here and held that: "[Trinko] *believes that the existence of sharing duties under the 1996 Act supports* [his] *case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent* [Trinko's] *'essential facilities' argument is distinct from its general §2 argument, we reject it*".

[321] Christian Bergqvist, 'Has EU (Tacitly) Adopted a Trinko-Doctrine Giving Priority to Sector Regulation?' (24 January 2023) <https://papers.ssrn.com/abstract=4336331> accessed 7 May 2024.

[322] For a recent case where the European Court of Justice seems to have advocated for the application of the EU Trinko-doctrine, see *Lietuvos geležinkeliai AB v European Commission* (n 286).

enforcement.[323] Given that this is not the view that has been taken by the drafter of the DMA, this aspect will need to be corrected through the interpretation of the new provisions.

1.3. Core platform services

The DMA covers ten core platform services, to all of which the self-preferencing obligations apply:

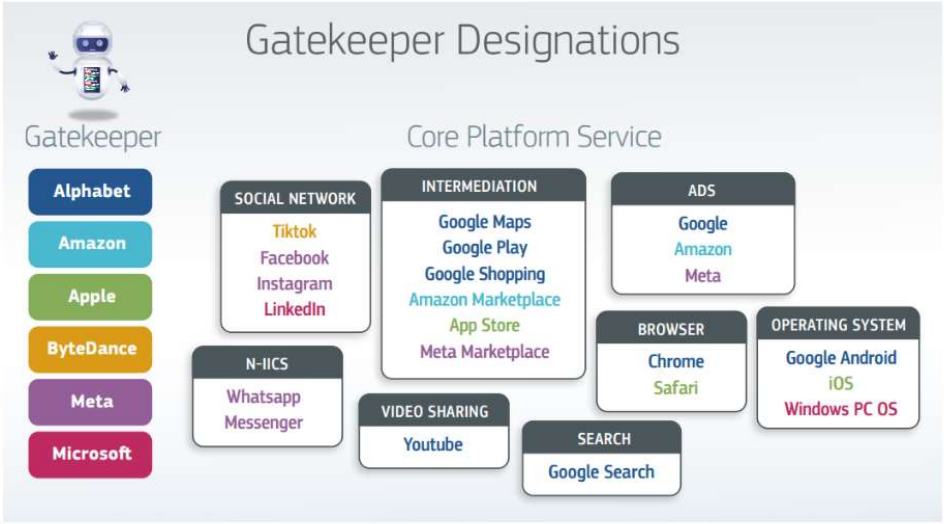
- Online intermediation services;
- Online search engines;
- Online social networking services;
- Video-sharing platform services;
- Number-independent interpersonal communication services;
- Operating systems;
- Cloud computing services;
- Advertising services;
- Web browsers;
- Virtual assistants.[324]

[323] Christian Bergqvist, 'Between Regulation and Deregulation (1. ed.): Studies on the limitations of competition law and its ambiguous application to the supply of electricity and telecommunications in the EU', *Between Regulation and Deregulation (1. ed.)* (Djøf Forlag 2016), 181–182.

[324] Digital Markets Act, Article 2. In total, the European Commission has initially designated 22 core platform services provided by gatekeepers. For social networks, the European Commission has designated Tiktok, Facebook, Instagram and Linkedin; for intermediation, Google Maps, Google Play, Google Shopping, Amazon Marketplace, App Store, Meta Marketplace; for advertising, Google, Amazon and Meta; for number-independent interpersonal communication services, Whatsapp and Messenger; for video sharing, Youtube; for search, Google Search; for browsers, Chrome and Safari; and for operating systems, Google Android, iOS and Windows PC OS.

All these core platforms services have different features and a different ability and incentive to engage in self-preferencing conducts.

In particular, economists have underlined that ad-funded business models (such as online search engines) have stronger incentives to engage in self-preferencing conducts than device-funded platforms (such as cloud computing services and virtual assistants), mainly because the platforms adopting this business model make profits only through volumes of traffic/users and have much less leeway to set the price for the final goods, in contrast to device-funded platforms.[325] Instead, according to economists, a gatekeeper selling devices has the ability and incentive to foreclose only in a limited number of circumstance. In particular, a gatekeeper selling devices has the incentive and the ability to exclude from the market third-party suppliers of a service that consumers buy through its devices when it is facing potentially saturated demand for its device. Foreclosure will be more likely if demand growth for the platform's devices is slow or negative, and it has the potential to harm consumers if the device-seller gatekeeper's services are inferior to those offered by the third parties.[326] Even



Source: European Commisison, "Digital Markets Act: Commission designates six gatekeepers", 6 September 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

[325] Fiona Scott Morton and others, 'Designing Regulation for Digital Platforms: Why Economists Need to Work on Business Models' (*CEPR*, 4 June 2020) <https://cepr.org/voxeu/columns/designing-regulation-digital-platforms-why-economists-need-work-business-models> accessed 7 May 2024.

[326] Jorge Padilla, Joe Perkins and Salvatore Piccolo, 'Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms' (28 September 2020) <https://papers.ssrn.com/abstract=3701250> accessed 7 May 2024.

among ad-funded business models the different core platform services have different characteristics and, as it was explained in the previous chapter, those were of fundamental importance in the *Google Shopping* case in holding that Google's conduct was anticompetitive. Some of the core platforms services to which self-preferencing applies, however, do not have the same features as search.

Further, commentators have noted that in relation to certain core platform services (and in particular virtual assistants), it would be challenging to pinpoint to the specific features that have led to self-preferencing behaviour and that the evolution of digital technologies and the new mechanisms to reach anticompetitive outcomes suggest that the anti-competitive effects of such practices should be dealt with under Article 102 instead of the DMA.[327] This suggests that this reasoning has broader implications and self-preferencing conducts should be dealt with under competition law when the specific features of the relevant core platform services are not clear yet and when the self-preferencing conduct could take innovative forms that are better dealt with through a more flexible instrument.

In light of the above, ad-funded platforms should be the natural candidates for the application of the self-preferencing provisions in the DMA and even within those the European Commission should carefully assess their characteristics. Moreover, the provision in the DMA should be applied only to those core platform services in relation to which the Commission has familiarity with their features and type of anti-competitive conducts that can take place.

1.4. Gatekeepers

The DMA applies to platforms that operate as gatekeepers between business users and end users and that hold an "*entrenched and durable position*" and operate at least one core platform service in at least three member states.[328]

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[327] Viktorija Morozovaite, 'The Future of Anticompetitive Self-Preferencing: Analysis of Hypernudging by Voice Assistants under Article 102 TFEU' (2023) 19 European Competition Journal 410, pp. 14 and 15.

[328] Digital Markets Act, Article 3. In total, the European Commission initially designated six gatekeepers: Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft. Booking has been subsequently added to the list. To date, three gatekeepers have announced that they will be pursuing proceedings before the General Court: Apple (Cases T-1079/23 and T-1080/23); Meta (Case T-1078/23) and ByteDance (Case T-1077/23). ByteDance has also sought interim measures

A firm will be presumed to be a gatekeeper when it operates a core platform service and meets three cumulative criteria:

- The firm's group has an annual EU turnover equal to or above EUR 7,5 billion in each of the last three financial years, or an average market capitalisation amounting to at least EUR 75 billion in the last financial year;
- The core platform service it provides a core platform service that has at least 45 million monthly active end users established or located in the EU and at least 10,000 yearly active business users established in the Union in the last financial year;
- The quantitative thresholds for end users and business users were met in each of the last three financial years.[329]

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before the General Court, requesting the suspension of the effects of the decision that designated TikTok as a core platform service. According to a press release (see https://newsroom.tiktok.com/en-eu/appealing-our-gatekeeper-designation-under-the-digital-markets-act), the company challenged its designation as gatekeeper before the EU courts on five main grounds:
"TikTok does not hold an "entrenched" position", as in fact it faces "*intense competitive pressure from some of the world's largest and most successful companies*";
"TikTok is a challenger, not an incumbent, in the digital advertising market", arguing that "*it is well known that a small number of platform businesses account for the vast majority of digital advertising revenues and coupled with their ability to monetise across multi-service ecosystems, these same businesses monopolise industry profits*" and "*TikTok is a recent entrant to the digital advertising space and this designation diminishes the prospect of mounting an effective challenge in an area that has long been dominated by a handful of players*";
"TikTok does not meet the EEA revenue threshold the DMA has set", arguing that TikTok was designated on the basis of the parent company's market capitalization, a figure that is based "*primarily on the performance of business lines that do not even operate in Europe*";
"TikTok did not have an opportunity to present its evidence", arguing that TikTok did not have the opportunity to fully address the Commission's concerns given that "*no market investigation was conducted in relation to our* [TikTok's] *designation, while the extensive evidence we provided in our* [TikTok's] *rebuttal submission was not accepted*";
"TikTok embraces relevant obligations", arguing that TitTok's presence instils competition in the market and that "*the designation decision is based on a fundamental misunderstanding of our business and threatens our ability to grow and compete with true gatekeepers - put simply, it risks protecting the very monopolies that the law intended to open up*".
As for the petition for interim measures, the General Court has already rejected Bytedance's application seeking suspension of the Commission decision designating it as a gatekeeper, with a judgment of 9 February, 2024. The General Court held that ByteDance did not demonstrate the urgency required for an interim order in order to avoid serious and irreparable damage to the requisite legal standard. Indeed, the General Court held that ByteDance did not show that there was a real risk of disclosure of confidential information or that such a risk would give rise to serious and irreparable harm, in response to Bytedance's argument that the immediate implementation of the contested decision would enable competitors to obtain insight into TikTok's business strategies in a way that would significantly harm its business.
[329] Digital Markets Act, Article 3, paragraph 2.

The DMA also provides that the gatekeeper is in principle able to rebut the presumption established on the basis of the criteria above,[330] and that the Commission can qualify other undertakings as gatekeepers on the basis of qualitative criteria.[331]

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[330] Digital Markets Act, Article 3, paragraph 5, according to which:
"The undertaking providing core platform services may present, with its notification, sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in paragraph 2, due to the circumstances in which the relevant core platform service operates, it does not satisfy the requirements listed in paragraph 1.
Where the Commission considers that the arguments submitted pursuant to the first subparagraph by the undertaking providing core platform services are not sufficiently substantiated because they do not manifestly call into question the presumptions set out in paragraph 2 of this Article, it may reject those arguments within the time limit referred to in paragraph 4, without applying the procedure laid down in Article 17(3).
Where the undertaking providing core platform services does present such sufficiently substantiated arguments manifestly calling into question the presumptions in paragraph 2 of this Article, the Commission may, notwithstanding the first subparagraph of this paragraph, within the time limit referred to in paragraph 4 of this Article, open the procedure laid down in Article 17(3).
If the Commission concludes that the undertaking providing core platform services was not able to demonstrate that the relevant core platform services that it provides do not satisfy the requirements of paragraph 1 of this Article, it shall designate that undertaking as a gatekeeper in accordance with the procedure laid down in Article 17(3)."

[331] Digital Markets Act, Article 3, paragraph 8, according to which:
"The Commission shall designate as a gatekeeper, in accordance with the procedure laid down in Article 17, any undertaking providing core platform services that meets each of the requirements of paragraph 1 of this Article, but does not satisfy each of the thresholds in paragraph 2 of this Article.
For that purpose, the Commission shall take into account some or all of the following elements, insofar as they are relevant for the undertaking providing core platform services under consideration:
(a) the size, including turnover and market capitalisation, operations and position of that undertaking;
(b) the number of business users using the core platform service to reach end users and the number of end users;
(c) network effects and data driven advantages, in particular in relation to that undertaking's access to, and collection of, personal data and non-personal data or analytics capabilities;
(d) any scale and scope effects from which the undertaking benefits, including with regard to data, and, where relevant, to its activities outside the Union;
(e) business user or end user lock-in, including switching costs and behavioural bias reducing the ability of business users and end users to switch or multi-home;
(f) a conglomerate corporate structure or vertical integration of that undertaking, for instance enabling that undertaking to cross subsidise, to combine data from different sources or to leverage its position; or
(g) other structural business or service characteristics.
In carrying out its assessment under this paragraph, the Commission shall take into account foreseeable developments in relation to the elements listed in the second subparagraph, including any planned concentrations involving another undertaking providing core platform services or providing any other services in the digital sector or enabling the collection of data.
Where an undertaking providing a core platform service that does not satisfy the quantitative thresholds of paragraph 2 fails to comply with the investigative measures ordered by the Commission in a significant manner, and that failure persists after that undertaking has been invited to comply within a reasonable time limit and to submit observations, the Commission may designate that undertaking as a gatekeeper on the basis of the facts available to the Commission."

The criteria that are used in the DMA to define gatekeepers are mainly quantitative in nature and thereby do not seem appropriate to capture the potential harms arising from self-preferencing. On the contrary, they seem to reflect a narrative against "bigness", which is detached from the specific harms that can arise from the conducts of digital players.[332]

So far, the only self-preferencing case at the EU level that has reached the EU courts and therefore sets out a slightly more comprehensive framework of analysis (*Google Shopping*) is arguably premised on the fact that Google was found to be super-dominant in the market for general search.[333] The *Google Shopping* judgment is indeed heavily reliant on the particular market position of Google, which played an essential role in the Commission's assessment that Google's conduct was problematic. The concept of super-dominance has not been introduced for the first time in the Google Shopping judgment. The distinction pertaining to the degree of dominance dates back to the seminal *Compagnie Maritime Belge (CMB),*[334] where the Court drew a further distinction between dominant undertakings and super-dominant undertakings hinting at the fact that obligations could be imposed on the relevant undertakings on the basis of their market position rather than their actual conduct.[335]

Against this background, the criteria in the DMA are not suitable to qualify the market position of the undertakings, as none of them is capable of accurately capturing their specific market position. Commentators have indeed noted that the theory of harm at the core of the DMA is based on the notion of dependency.[336] This is in line with the definition of self-preferencing that was provided in the previous chapter and which is based on the indispensability of the input in relation to which discrimination takes place. The criteria in the DMA fail

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[332] Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68 The Antitrust Bulletin 263.
[333] Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-Dominant and Super-Problematic? The Degree of Dominance in the Google Shopping Judgement' (2022) 18 European Competition Journal 614.
[334] Joined Cases *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities* (n 263).
[335] D'Amico and Balasingham (n 333).
[336] Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?' (18 February 2021) <https://papers.ssrn.com/abstract=3788152> accessed 7 May 2024.

to reflect this aspect and will likely make the application of the provisions disproportionate and over-broad, going beyond the limited instances where self-preferencing can actually be problematic. One example of such a disproportionate application would be when there is multi-homing in relation to the use of the core platform services,[337] *i.e.* the users do not rely exclusively on the core platform service offered by a particular gatekeeper but use different services at the same time. Given that the anti-competitive effects of self-preferencing are more likely to manifest when the input is indispensable, the application of the DMA provisions in this scenario would be disproportionate and unjustified.[338]

In light of the above, it is suggested that the Commission should apply the self-preferencing provisions only to the gatekeepers whose core platform services are indispensable for users and when there is a concrete situation of dependency, which will need to be assessed on a case-by-case basis. In this manner, the application of the provisions on self-preferencing will be limited to a few large platform ecosystems.[339]

2. The objectives of the DMA

The definition of the two concepts that constitute the fundamental conceptual underpinning of the DMA, *i.e.* contestability and fairness, will help the interpretation of the obligations that gatekeepers must fulfill and should inform the way in which the provisions of the DMA are applied.

2.1. The definition of contestability

Contestability is referred to in Recital 32 of the DMA as "*the ability of undertakings to effectively overcome barriers to entry and expansion and*

[337] ibid.
[338] In this respect, the definition of undertaking with Significant Market Status (SMS) included in the UK Digital Markets, Competition and Consumers Bill better captures the instances in which self-preferencing can be problematic as it is built around the notion of dependency, which in turn better aligns with the condition of indispensability that is necessary for self-preferencing to be more likely to produce anti-competitive effects. The UK Digital Markets, Competition and Consumers Bill indeed provides that an undertaking with SMS is one that holds "*a position of enduring market power or control over a strategic gateway market with the consequence that the platform enjoys a powerful negotiating position resulting in a position of business dependency*".
[339] Colangelo, 'The Digital Markets Act and EU Antitrust Enforcement' (n 318).

challenge the gatekeeper on the merits of their products and services". However, no clear-cut definition is provided.

Contestability is a concept that is "unusual" in EU competition law.[340] The term, however, is often used by industrial organization economists, in the context of theories of industry structures. In particular, the theory of contestable markets postulates that when entry onto and exit from markets appear easy, and therefore markets are contestable, the threat of entry would force competitive pricing even on highly concentrated (or even monopoly) markets.[341] This does not appear to be what the DMA is getting at with the notion of contestability.[342]

Certain commentators have noted that contestability in the DMA should be defined as "*the ability for non-dominant firms to overcome barriers to entry and to expansion to the benefit of users*".[343] This definition adds helpful color to the text of the DMA, in that it adds the reference to the benefit of users. However, according to these authors, users includes both end-users and business users while it is submitted that the relevant criteria should be the benefit brought to consumers only and consumer harm, according to the consumer welfare standard. Also, the authors note that this provision should be aimed mainly at ensuring competition *in* the market instead of competition *for* the market. While this is indeed a sensible approach for certain provisions of the DMA, it renders the objective of contestability arguably overreaching to what can be accommodated under Article 102.

As with the antitrust analysis, also under the DMA the definition of contestability therefore turns on the meaning of "on the merits". As discussed, even offering a better product increases barriers to entry and expansion but does so *on the merits*. Therefore, the DMA should not be interpreted as to prohibit

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[340] Bruzzone (n 120).

[341] William A Brock, 'Contestable Markets and the Theory of Industry Structure: A Review Article' (1983) 91 Journal of Political Economy 1055.

[342] See, for the same consideration, Giorgio Monti, 'The Digital Markets Act–Institutional Design and Suggestions for Improvement' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730> accessed 3 May 2024, p. 3; Alba Ribera Martínez, 'The DMA's Ithaca: Contestable and Fair Markets' (2023) 46 World Competition <https://kluwerlawonline.com/journalarticle/World+Competition/46.1/WOCO2023021> accessed 7 May 2024, p. 438.

[343] Jacques Crémer and others, 'Fairness and Contestability in the Digital Markets Act' [2021] SSRN Electronic Journal <https://www.ssrn.com/abstract=3923599> accessed 7 May 2024.

conducts that undermine contestability when this is the result of pro-competitive behavior. To do so, would foster an approach to competition that is purely ordo-liberal, a movement that saw competition as an instrument to protect the structure of the market, and which was not concerned with efficiency.[344]

The DMA seems to take purely structuralist approach and in particular seems to be drafted with the Structure-Conduct-Performance paradigm in mind. According to the Structure–Conduct–Performance paradigm, the market structure has a direct influence on the firm's economic conduct, which in turn affects market performance. Market performance may also have an impact on conduct and structure, or conduct may affect market structure. In this paradigm, structure refers to the features of an industrial organization (barriers to entry, pricing dynamics, etc.); conduct describes the behaviour of buyers and sellers within the relevant market; and performance relates to the outcome achieved in the industry in terms of *e.g.*, product quantity, product quality, and efficiency. [345] However, this structuralist approach to competition has undergone significant criticism in recent years, due to the rise of the so called more economic approach.[346] The DMA should therefore focus on anti-competitive practices that affect long-term contestability of markets, causing consumer harm.[347]

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[344] Akman, *The Concept of Abuse in EU Competition Law* (n 107), p. 152; KC and Padilla (n 227), p. 839.

[345] The model was first set out in Edward S Mason, 'Price and Production Policies of Large-Scale Enterprise' (1939) 29 The American Economic Review 61 and Joe S Bain, 'Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940' (1951) 65 The Quarterly Journal of Economics 293.

[346] See *Intel Corp v European Commission* [2017] ECJ Case C-413/14 P. In the literature see, *e.g.*, Wouter PJ Wils, 'Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance, The' (2014) 37 World Competition 405; Damien Geradin, 'The Opinion of AG Wahl in Intel: Bringing Coherence and Wisdom into the CJEU's Pricing Abuses Case-Law' (7 November 2016) <https://papers.ssrn.com/abstract=2865714> accessed 29 April 2024; Nicolas Petit, 'The Advocate General's Opinion in Intel v Commission: Eight Points of Common Sense for Consideration by the CJEU' (24 November 2016) <https://papers.ssrn.com/abstract=2875422> accessed 29 April 2024; Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' [2019] The Antitrust Bulletin <https://journals.sagepub.com/doi/abs/10.1177/0003603X19844637> accessed 29 April 2024. For a discussion on the role of the more economic approach in current competition enforcement and policy, see Pablo Ibáñez Colomo, 'The New EU Competition Law' 1, Chapter 2.

[347] See Alexandre de Streel and Bruno Liebhaberg, 'The European Proposal for a Digital Markets Act: A First Assessment' (*CERRE*, 19 January 2021) <https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/> accessed 7 May 2024, according to whom the DMA's contestability goal "*should ensure good functioning of the markets in the long run and*

At least in relation to self-preferencing, contestability in the DMA pursues the same objectives as competition law.[348] This is also demonstrated by the fact that the obligations relating to self-preferencing in the DMA clearly mirror the remedies and theories of harm adopted by the Commission in the antitrust cases.

Table 2: DMA provisions and relevant competition law precedents[349]

Article	Obligation	Relevant precedent
Article 5(4), 5(7)	Obligation not impose anti-steering provisions and not to require that developers and consumers use the app stores' in-app payment system (IAP)	European Commission, *Apple App Store Practices* Dutch Competition Authority (ACM), *Apple*
Article 6(2)	Obligation not use business users' data in competition with them	European Commission, *Amazon Marketplace* European Commission, *Facebook Marketplace*
Article 6(5)	Obligation not to self-preference in ranking	European Commission, *Google Search (Shopping)* and *Amazon Buy Box* Italian Competition Authority (ICA), *FBA Amazon*

The intention is therefore to address the same type of harm and to protect the same legal interest. For the obligations that are concerned with competition *for*

favours long-term competition over short-term efficiencies, thereby promoting the diversity and probably the rate of innovation".

[348] See Colangelo, 'The Digital Markets Act and EU Antitrust Enforcement' (n 318); Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' [2021] Forthcoming, ZEuP <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341> accessed 7 May 2024; Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625> accessed 7 May 2024.

[349] For the full set of Digital Markets Act provisions and corresponding relevant antitrust cases, see Bostoen, 'Understanding the Digital Markets Act' (n 332).

the market (*e.g.* data sharing) and not with competition *in* the market (therefore not the self-preferencing obligations), contestability may potentially have a different meaning from competition and may refer to the necessity to keep market open but this will also depend on how broadly the Commission will interpret the relevant provisions.[350]

2.2. The definition of fairness

Fairness is referred to in the DMA (Recital 33) as "*imbalance between the rights and obligations of the business users where the gatekeeper obtains a disproportionate advantage*". As with contestability, the DMA therefore offers no clear definition of fairness, which is a difficult concept to pin down given that it can be very subjective and change over time.

Contrary to the concept of contestability, which is a new concept in EU competition law, the concept of fairness has a long history in this legal field. Article 102 TFEU in particular relies on the concept of fairness and equality in certain instances such as in letter (a), which mandates the dominant company not to impose "unfair purchase or selling prices" and "unfair trading conditions". The Advocate General of the Court of Justice has referred to it in its Opinion in *Servizio Elettrico*, where it held that "*…where the national court refers to 'normal competition', it is using terminology repeatedly used by the Court,…. (such as) 'fair competition'…*".[351] Other legislative measures pertaining to the regulation of commercial relationships are also aimed at ensuring fairness in the relationship among business users, such as Directive 2005/29/CE on unfair commercial practices, Directive 2019/63 on unfair commercial practices in the food chain and Regulation 2019/1150 on "fairness" and transparency in the relationship between platforms and business users.[352]

Commentators have argued that fairness in competition policy is a concept with four different meanings: (1) *equity*, *i.e.* the proper allocation of gains/burdens

[350] See in particular Monti (n 341), p. 3, who argues that "*the DMA is more than an enhanced and simplified application of Article 102 TFEU: while the obligations may be criticised as being based on existing competition concerns, they are forward-looking in trying to create a regulatory environment where gatekeeper power is contained and perhaps even reduced*".
[351] *Opinion of Advocate General Rantos delivered on 9 December 2021* (ECJ).
[352] See Bruzzone (n 120).

among market participants, such as under Article 101(3) or in the context of the excessive pricing doctrine; (2) *correctness*, *i.e.* the need to abide to recognized market rules/behaviours, such as with reference to the provision on unfair trading conditions; (3) *equality*, *i.e.* non-discrimination, such a in relation to discriminatory pricing; (4) *equal opportunities*, *i.e.* equal opportunities among market participants, such as in relation to exclusionary abuses (*e.g.*, self-preferencing and preferential access).[353]

Other authors have expressed the view that EU competition law incorporates aspects of process-oriented fairness and aspects of distributional fairness.[354] Process-oriented fairness refers to "*the commitment of EU competition law to open markets with undistorted competition* [which] *is undergirded by a notion that rivalry in the market shall not be decided on the basis of power but based on "competition on the merits". Consequently, EU competition law strives to protect opportunities for competitive entry and expansion against foreclosure*". Distributional fairness is embedded – for instance -- in exploitative abuses, and prevents the unfair allocation of economic rents, in particular by not allowing a monopolist to use its market power to extract economic rents from consumers that are higher than those that would be expected in a competitive counterfactual.

In terms of the role of fairness in the analysis of conducts and actual enforcement, this seems to deserve a residual role in EU competition law. Indeed, it has been argued that "*fairness has definitely a significant role in EU competition policy as a general guiding objective, but unless stated explicitly as part of a legal test or principle, fairness is not taken into account concretely in the substantive analysis of the different aspects of competition rules*".[355] Other authors have advocated against the use of fairness in antitrust enforcement, arguing that the concept is vague and ambiguous, and that although these features may make the use of such a doctrine palatable for policy makers in order to gain more

[353] Marco Botta, 'Fairness in the Platform – End Users Relation' (CDS Autumn Conference, 'Fairness in the Digital Age', EUI, Firenze, 20 October 2023).
[354] See Schweitzer (n 347), p. 8-9.
[355] See Damien Gerard, Assimakis Komninos and Denis Waelbroeck, *Fairness in EU Competition Policy : Significance and Implications: An Inquiry into the Soul and Spirit of Competition Enforcement in Europe* (Bruylant 2020), pp. 263-264; for an extensive contribution on fairness in EU competition law, policy and enforcement see Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' <https://academic.oup.com/jeclap/article-abstract/9/4/211/4956515> accessed 7 May 2024.

discretion and allow for more room for intervention, antitrust enforcement should not incorporate fairness.[356]

So far as the concept of fairness in the DMA is concerned, some authors have argued that it should be defined as "*the organization of economic activity to the benefit of users in such ways that they reap the just rewards for their contributions to economic and social welfare and that business users are not restricted in their ability to compete*".[357] As for the first part of the definition, it is difficult to define what the "just" reward is, especially in digital markets where the price paid by consumers for services is often equal to zero. The same difficulties that have been highlighted with reference to the antitrust enforcement against excessive prices and the definition of what a "just price" is are applicable here and militate against such a definition.[358] The second part of the definition

[356] Giuseppe Colangelo, 'In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets' (2023) 68 The Antitrust Bulletin 618.
[357] Crémer and others (n 343).
[358] In the European Union administrative practice and case-law, excessive pricing cases are relatively rare and have been brought only in a limited number of instances. See *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (n 62); *OSA — Ochranný svaz autorský pro práva k dílům hudebním os v Léčebné lázně Mariánské Lázně as* [2014] ECJ Case C-351/12; *British Leyland Public Limited Company v Commission of the European Communities* [1986] ECJ Case 226/84; *General Motors Continental NV v Commission of the European Communities* [1975] ECJ Case 26-75; *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECJ Case 30/87; *Société civile agricole du Centre d'insémination de la Crespelle contre Coopérative d'élevage et d'insémination artificielle du département de la Mayenne* [1994] Cour de justice Affaire C-323/93; 2001/892/EC: Commission Decision of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail) (Text with EEA relevance) (notified under document number C(2001) 1934) 2001 (OJ L); *Scadlines Sverige AB v Port of Helsinborg* [2004] European Commission COMP/A.36.568/D3. One of the reasons why excessive prices have been so infrequent is the difficulty in determining what constitutes a "just" or "fair" price. The issues with this determination are clearly and effectively summarized in Amelia Fletcher and Alina Jardine, 'Towards an Appropriate Policy for Excessive Pricing' [2007] European competition law annual 533. According to Fletcher, "*the key problem here is that it is not clear what the appropriate benchmark should be. One obvious option is the "competitive price". But how does one define the competitive price in a market that is not competitive? Should dominant firms really be required to price at levels which would obtain under vigorous (Bertrand) price competition, when such prices would not be observed in non-cooperative oligopolies not subject to Article 82?*", and in relation to the "economic value" test established in United Brands, Fletcher argued: "*In economic terms, if a person is willing to pay a given price for a product, then the economic value of that product to that person must be at least as high as that price. It is worth noting that the UK Court of Appeal recently overturned a High Court finding of excessive pricing, on the basis that the "economic value" of a product should take account of its value to the buyer.4 Since this latter concept equates economically to what a buyer would be willing to pay for the product, this line of reasoning taken to its logical conclusion would seem to suggest that – based on the "economic value" test – excessive pricing cases cannot be brought if the buyer ever actually buys the product. One can, of course, look at historic margins, margins in other regions or countries for comparison or margins earned in similar industries. "But", say the advocates of a*

arguably overlaps with contestability and therefore is not helpful to guide the application of the provision.

Fairness under the DMA therefore appears to be an unworkable legal test. As some authors have suggested, the DMA is quite clear that the objective of fairness is the distribution of economic rent between gatekeepers and non-gatekeepers but fails to provide any indication as to what the fair distribution of economic rent is.[359] Failing to provide any indication on this point, the standard of fairness becomes moot. Other authors have noted that fairness-driven conduct rules introduce an inherent level of uncertainty and subjectivity into the assessment and this would in turn lead to, *inter alia*, an increase in the likelihood of litigation and to losing any advantage in terms of speed of intervention (which are the very reasons why the DMA was introduced in the first place).[360]

In addition to the above, the harms arising from self-preferencing are also more about contestability than fairness. Concerns around the exploitative nature of self-preferencing should be rejected as the harms arising from the conduct relate to leveraging of market power and foreclosure, all of which are exclusionary concerns. In rare instances, self-preferencing conducts can indeed lead to an anti-competitive exclusion of competitors through leveraging of market power but there appear to be no harms arising from such conducts that can only be dealt with through the framework for exploitative conduct and the assessment of the fairness of the conduct, which also brings a degree of subjectivity in the analysis. For this reason, contestability – which is capable of capturing the leveraging and foreclosure concerns around self-preferencing – and not fairness should guide the assessment of this conduct under the DMA.

Contestability and fairness also seem to be intertwined in many part of the DMA. Both concepts can, indeed, be regrouped under the notion of "competition" and, in particular, "contestability" can be renamed as "inter-platform

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laissez-faire approach to excessive pricing, "none of these is perfect and sometimes none is possible." Moreover, even if one does observe differences in margins, should this necessarily imply abuse, or should some degree of differential margin be acceptable?". For a recent overview on excessive pricing, see Miroslava Marinova, 'Unmasking Excessive Pricing: Evolution of EU Law on Excessive Pricing from United Brands to Aspen' [2023] European Competition Journal 1.

[359] Linus J Hoffmann, 'Fairness in the Digital Markets Act' (2023) 8 European Papers 17.

[360] Akman, 'Regulating Competition in Digital Platform Markets' (n 348).

competition", while "fairness" as "intra-platform competition".[361] If one were to put it this way, the DMA would simply seek to protect competition, in all its possible facets. And this is a correct way to go about it.

Fairness concerns can be better dealt with under the national legislation relating to abuses of economic dependence or other fields of law, such as private law generally and contracts more specifically.

In this respect, it should be noted that a number of European Member States have already introduced laws aimed at addressing precisely these concerns. For instance, Italy introduced a specific provision on economic dependence relating to instances where an undertaking is using intermediation services provided by a digital platform that have a "key role" in reaching end users or suppliers.[362] In 2021, Germany introduced provisions on economic dependence targeting undertakings acting as "intermediaries on multi-sided markets", when they serve as gateways to access markets and no reasonable alternatives exist.[363] Finally, also Belgium included a provision on abuse of economic dependence in its Code of Economic Law in 2020, with a particular reference to digital platforms.[364]

Similar laws have also been introduced and successfully applied in Asia (and specifically in South Korea), where market power in the digital sector is policed through provisions concerning 'superior bargaining power', which dispense regulators from having to prove market power from a competition law standpoint, although with some differences compared to the EU due to the

[361] See Bostoen, 'Understanding the Digital Markets Act' (n 331), p. 5.
[362] Italian Annual Competition Law, 5 August 2022, No. 118, Article 33; for a comment on this provision, see Silvia Scalzini, 'Dipendenza economica e regolazione «asimmetrica» dell'attività d'impresa. Prime osservazioni sul novellato art. 9 ln 192/1998' [2022] Analisi Giuridica dell'Economia 563; Silvia Scalzini, 'Abuso Di Dipendenza Economica, Mercati Digitali e Libertà d'impresa' [2022] Orizzonti del diritto commerciale 113; Silvia Scalzini, 'Economic Dependence in Digital Markets: EU Remedies and Tools' (2021) 5 Mkt. & Competition L. Rev. 81; Valeria Falce, 'Rapporti Asimmetrici Tra Imprese e Soluzioni Pro-Concorrenziali' (2021) 4–5 Rivista di diritto industriale 189 ss.
[363] GWB Digitalization Act, 18 January 2021, Section 20.
[364] Belgian Royal Decree of 31 July 2020 amending the Code of Economic Law, Article 4; for a comment see Jan Blockx, 'Belgian Prohibition of Abuse of Economic Dependence Enters into Force' (2021) 12 Journal of European Competition Law & Practice 321.

difference that there are no concerns relating to the creation of a single market in Asia.[365]

3. The main pitfalls of self-preferencing in the DMA

The DMA has some structural pitfalls that mainly seem to derive from the structuralist approach to competition outlined above that appear to be particularly problematic in relation to self-preferencing: (i) the absence of effects analysis (so called *per se* rules),[366] and (ii) the lack of an efficiency defense.[367]

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[365] Christian Bergqvist and Yo Sop Choi, 'Controlling Market Power in the Digital Economy: The EU and Asian Approaches' (2023) 50 Computer Law & Security Review 105834.

[366] See Anne C Witt, 'The Digital Markets Act: Regulating the Wild West' (2023) 60 Common Market Law Review <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/60.3/COLA2023047> accessed 8 May 2024, p. 641, which highlights the "per se character" of the DMA rules: "*The conduct rules in Articles 5 to 7 DMA are per se rules. Many are intended to reduce barriers to entry by outlawing conduct that is likely to exclude competitors. Unlike Article 102 TFEU, however, which also prohibits exclusionary conduct that is not competition on the merits, the DMA does not require the Commission to prove that the conduct is likely to exclude competitors in the specific case, let alone prove that it is likely to impact consumer welfare, for example in the form of higher prices or lower levels of innovation. In other words, engaging in the type of conduct described in the 22 conduct rules is illegal as such*". The language of "per se rules" comes from US antitrust law, under which it constitutes one of the standards to evaluate a business practice under Section 1 of the Sherman Act. Section 1 of the Sherman Act provides that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.". Under US antitrust law, one can broadly distinguish three standards of review: 1) per se test; 2) rule of reason test; 3) quick look test. Under the per se test, the restraint analysed is always (or nearly always) so inherently anticompetitive and damaging to competition that these agreements warrant condemnation without any further inquiry into the effects on the market or the existence of objective justifications. For the agreements that are condemned by per se rules, a plaintiff only needs to prove that the specific anticompetitive conduct actually took place without any need to demonstrate the conduct's competitive unreasonableness or negative competitive effects in the relevant product and geographic markets. Moreover, under the per se rule, defendants will not be able to justify their conduct on the basis of objective competitive justifications. Practices that are considered per se illegal under antitrust laws include: (a) horizontal market allocation agreements, (b) horizontal agreements to fix prices, (c) certain horizontal group boycotts by competitors, (d) bid rigging among competitors, and (e) certain tying arrangements. A business practice that does not fit into the per se category is instead analysed under the so-called rule of reason test, which will require a full-blown competitive analysis, including *inter alia* (a) the definition of the relevant product and geographic market, (ii) the assessment of the market power of the relevant undertakings in the relevant market, (iii) and the existence and magnitude of anticompetitive effects. The defendant(s) will then be able to present to the court procompetitive justifications for the agreement. The quick look test, finally, applies to business practices that, while not per se illegal, appear so likely to have anticompetitive effects that it is not necessary for a court to go through the full competitive analysis of the rule of reason test. In this case, the plaintiff will only need to demonstrate the injury deriving from the conduct. For a further discussion of these aspects, see Elhauge and Geradin (n 248).

[367] The regulation of self-preferencing in the DMA follows the indications contained in Luis MB Cabral and others, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (9 February 2021) <https://papers.ssrn.com/abstract=3783436> accessed 29 April 2024., where the

Both these elements are indeed needed in order to correctly assess whether self-preferencing is problematic, as it was demonstrated in the previous chapter dedicated to the antitrust analysis of self-preferencing. The analysis of the effects is essentially part of the definition of self-preferencing, given that such conducts can be defined as a discrimination in relation to an indispensable input that has likely foreclosure effects. The DMA does not provide for an indispensability condition and instead captures a wide range of core platform services (with very different characteristics amongst themselves and from the platform that have been subject to antitrust scrutiny) and applies to all the undertakings that qualify as gatekeepers, a concept that falls short of dominance – let alone the concept of super-dominance that the European Court of Justice used in the *Google Shopping* judgment in the context of the assessment of Google's conduct. Without an assessment of the effects, the self-preferencing provisions in the DMA would catch every single practice of a gatekeeper, without any limiting principles. Given that this would be clearly disproportionate, it is suggested that the Commission takes into account the exclusionary effects in the definition of the scope of application of the DMA and only acts in the very rare situations where it would be very confident that a platform is behaving in ways that are unambiguously harmful to consumers or business users.[368]

The DMA also does not include any form of efficiency defense, a feature which appears to be in sharp contrast with learnings from economics. Digital markets have specific features (see Chapter I) that economists have acknowledged to lead to efficiencies, such as economies of scale and scope, network and ecosystem effects, data and feedback loops. Economists have also noted that these features can also drive anti-competitive market outcomes which can have harmful long-term effects on welfare.[369] In light of the features of digital markets (and in

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experts concluded the following: "*Ex-ante regulation might include a general prohibition to discriminate against third parties. Ex-post regulation might include specific provisions for third parties to complain against unequal or unfair treatment. The DMA Article 6 proposes a number of ex-ante remedies to address self-preferencing. We would suggest that any form of discrimination against third parties be deemed unlawful. In other words, we believe self-preferencing is a natural candidate for the "blacklist" of practices to be deemed anti-competitive and "per se" disallowed*".

[368] Miguel de la Mano and others, 'The Digital Markets Act' <https://www.compasslexecon.com/wp-content/uploads/2021/06/The-DMA-Back-to-the-Form-Based-Future.pdf> accessed 8 May 2024.

[369] Fletcher and others (n 313).

particular of the existence of extreme economies of scale and scope), efficiency defences should be carefully considered and the prohibitions in the DMA should only apply to conducts that have harmful long-term effects on consumer welfare.

In this respect, it should be noted that, for instance, the US Federal Trade Commission closed a proceeding against Google precisely for self-preferencing without any finding of infringement, on the basis of the fact that it constituted a technical improvement and enhanced the consumers' experience.[370] Moreover, while the European Commission has traditionally taken an extremely strict stance in relation to efficiencies in abuse of dominance cases,[371] under the DMA this approach seems to be even more worrying given that it is a system based on strict *per se* rules where an analysis of effects is also lacking.

The lack of an efficiency defence in the DMA is therefore an *absurdum*. The absence of an efficiency defense is generally problematic in digital markets, where it is often not clear whether the practices are anti-competitive or pro-competitive and it is even more problematic with regard to self-preferencing, a practice that has undisputed pro-competitive effects.

Commentators have pointed out that efficiency considerations can and should make their way into the enforcement of the DMA and this can be done in the context of the regulatory dialogue that is foreseen for the obligations that need to be further specified.[372] Self-preferencing is one of such obligations and therefore it is suggested that the Commission specifically takes into account the

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[370] Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Google Inc. FTC File Number 111-0163 January 3, 2013, available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf, checked on 21 August, 2023. In this investigation, the FTC acknowledged the harm to competitors that may have derived from the fact that they received less traffic as a consequence of Google's conduct, but considered that this was a by-product of Google's focus on improving the consumers' experience. The FTC also decided that the demotion of competing comparison-shopping services to the following results pages allowed for a richer variety of results on the first results page. According to the FTC, because of the extra space that was created on the first page by this conduct, consumers could even by-pass Google Shopping entirely because the retailer websites would appear there. The FTC decided that this represented an improvement of the quality of Google's search engine and it was a legitimate justification for Google's conduct.

[371] On the limited room for efficiency defences in abuse of dominance cases, see, *e.g.*, Gianluca Faella, 'The Efficient Abuse: Reflections on the EU, Italian and UK Experience' (2016) 2 CLPD 33; Hans Wolfgang Friederiszick and Linda Gratz, 'Dominant and Efficient–On the Relevance of Efficiencies in Abuse of Dominance Cases' [2012] ESMT White Paper No. WP-12-01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191492> accessed 8 May 2024.

[372] Bostoen, 'Understanding the Digital Markets Act' (n 332).

efficiencies deriving from self-preferencing outlined in the previous chapter and exempts from enforcement self-preferencing practices where the net outcome in terms of competitive effects is pro-competitive. Such a specification is indeed required in the definition of the scope of the self-preferencing provisions in the DMA in order to bring them in line with the principle of proportionality.

4. The scope of the prohibition against self-preferencing

4.1. Self-preferencing from ranking and display on the marketplace

Article 6(5) of the DMA, which is the main provision on self-preferencing, reads as follows:

"*the gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking*".

At face value, such a provision appears excessively broad and there are *de facto* no limiting principles. Hence, its scope has to be defined.

The first interpretative issue concerns the meaning of separate service or product, and whether these must be considered as such from the perspective of businesses or consumers.[373] Given that the self-preferencing provision in the DMA should be intended to ensure contestability and, as explained above, this should be understood as the long-term contestability of markets, which prevents consumer harm, the issue arguably needs to be considered from the perspective of consumers. If any harm were to arise, this can only materialize if a related service or product market exists for a certain group of consumers. Relatedly, and precisely by virtue of the consumer-oriented interpretation of the contestability goal in the DMA, the scope of the provision should be limited to services that

[373] Inge Graef, 'DMA Workshop - Applying the DMA's Ban on Self-Preferencing: How to Do It in Practice? - European Commission' <https://digital-markets-act.ec.europa.eu/events/dma-workshop-applying-dmas-ban-self-preferencing-how-do-it-practice-2022-12-05_en> accessed 8 May 2024.

have a specific utility for consumers.[374] Indeed, only services or products that have a distinct destination and when there are alternative providers that make a comparable offer on a self-standing basis can constitute a separate service or product.

The second interpretative issue concerns how to draw the distinction between a first-party offer (which is the offer of the gatekeeper) and a third-party offer. Commentators have suggested that there are three possible scenarios in this respect where the Commission will have to decide how to interpret the provision:[375]

- The gatekeeper offers its own products or services to end user and operates as a gatekeeper for end users to have access to these services or products as well as services and products provided by other business users (**Scenario 1**);
- The gatekeeper operates as a pure marketplace for a specific product or service and offers its own ancillary services such as fulfilment or payment services as well as third-party fulfilment or payment services. The gatekeeper treats its own fulfilment or payment services more favourably than third-party fulfilment or payment services in its ranking given to the sellers on the platform (**Scenario 2**);
- The gatekeeper offers a more favorable ranking on its marketplace to the sellers if they use the ancillary service (*e.g.* fulfilment) offered by the gatekeeper (**Scenario 3**).

[374] Martin Peitz, 'The Prohibition of Self-Preferencing in the DMA' [2022] CERRE Issue Paper <https://cerre.eu/wp-content/uploads/2022/11/DMA_SelfPreferencing.pdf> accessed 8 May 2024.
[375] ibid.

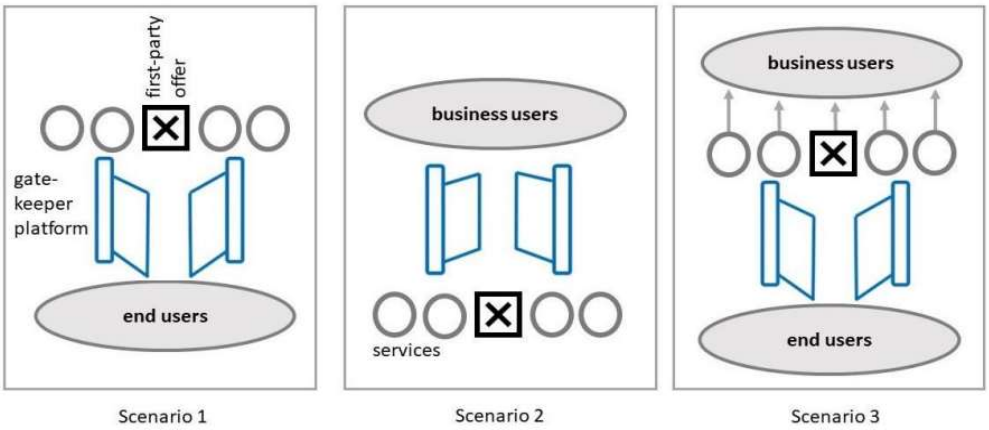

Figure 9: The prohibition of self-preferencing in the DMA Note: Taken from CERRE, *The prohibition of self-preferencing in the DMA*, Issue Paper, November 2022

It is suggested that in principle Article 6(5) of the DMA should apply only to the first scenario (pure self-preferencing), given that this is the only case in which, in certain limited instances, consumer harm can materialize. The last two scenarios describe instances of hybrid discrimination, which do not clearly fall within the self-preferencing prohibition.[376] In these cases, the conduct is directed toward business users and therefore there is no immediate and direct effect on the long-term contestability of markets, causing consumer harm. In light of the need to interpret the self-preference provisions in the DMA restrictively, as explained above, the Commission should apply Article 6(5) of the DMA only to the first scenario. The provision could then be applied to the other two scenarios if the Commission finds (and if such finding is confirmed in the potentially ensuing litigation) that also in these two other cases there is harm to contestability in the form of consumer harm, most likely through the antitrust assessment of such conducts.

Further, the self-preferencing provision in the DMA also requires the services of the first-party and those of the third-party to be "similar". Economics should guide the enforcement in this respect with reference to the interpretation of

[376] Graef, 'Differentiated Treatment in Platform-to-Business Relations' (n 239).

the term "similar", given that this provision should be interpreted as to require at least some analysis of competition between services.[377]

Another aspect of the provision that is unclear is the definition of "equal treatment". As it was explained in the previous chapter (Chapter II), the formulation of the principle of equal treatment is question-begging as the issue of what situations are comparable (*i.e.* whether the services offered by the gatekeeper can be compared to the competing services) is precisely what is at stake. The Commission will therefore need to clearly identify the relevant services and explain at length which services are comparable and for which reasons before applying this provision. Moreover, commentators have noted that this provision may be difficult to apply, since rankings are by definition "discriminatory".[378] In addition to clearly identifying what constitutes a comparable service, the Commission will therefore need to carefully analyze ranking criteria in order to determine what are the parameters used and only intervene in situations where these appear to be clearly unjustified, as otherwise its margin of appreciation would be too broad.

Other authors have noted that Article 6(5) of the DMA does not include the requirement of demotion of competitors, which was an element of the analysis in the *Google Shopping* case and have therefore argued that this would be a constitutive element of the Article 102 analysis while it would not be required under the DMA.[379] In reality, the demotion of competitors does not seem to be required for a finding of abuse of dominance. Indeed, the way in which the conduct takes place is not a constitutive element of the abuse given that the conduct can take place in many forms and still be anti-competitive in the limited circumstances outlined in the previous chapter. The demotion of competitors was therefore only an accessory element of the Commission's analysis in *Google Shopping* which can very well be absent. In this regard, the analysis of self-

[377] Fletcher and others (n 313).
[378] Christophe Carugati, 'How to Implement the Self-Preferencing Ban in the European Union's Digital Markets Act' [2022] Bruegel Policy Contribution Issue <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366700> accessed 8 May 2024.
[379] Carlo F Petrucci, 'Self-Preferencing in the EU: A Legal and Policy Analysis of the Google Shopping Case and the Digital Markets Act' (2023) 22 Competition Law Journal 18.

preferencing under Article 102 and under the DMA is consistent and such an element is not required under any of them.

Economists have also argued that it is unclear to what extent fees associated with rankings are subject to Article 6(5) of the DMA.[380] This approach does not seem to be correct. As it was argued in the previous chapter, the conduct in *Google Shopping* was indeed a *pricing* violation. The Commission and the General Court in *Google Shopping* implicitly recognized the fee that Google charges and the commitment that the Commission has envisioned should allow comparison shopping services that are as efficient as Google's independent shopping unit to compete on the downstream market for comparison shopping services. The remedy therefore implied that the source of competitive harm derived from the fact that Google discriminated by assigning the Google Shopping units exclusively to its subsidiary Google Shopping instead of enabling competitors to pay a wholesale price in order to have access to preferential positioning in Google Shopping that could allow as-efficient competitors to compete. Both symmetric and asymmetric fees charged by the gatekeeper should therefore be assessed under Article 6(5) of the DMA, given that self-preferencing can be compared to a form of margin squeeze or constructive refusal to deal and the framework of analysis set out in the previous chapter will apply.[381]

Other commentators have also argued that when the gatekeeper is facing strong competition from another gatekeeper (inter-platform competition), this competition compensates for the reduced competition within the platform. Therefore, this trade-off between cross-platform and within-platform competition shall enter the analysis and find application when implementing the DMA.[382] The result will be that the Commission ought not to intervene in cases where there is strong inter-platform competition given that this could compensate for the loss of within-platform competition.

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[380] Jacques Crémer and others, 'The Digital Markets Act: An Economic Perspective on the Final Negotiations' <https://research-portal.uea.ac.uk/en/publications/the-digital-markets-act-an-economic-perspective-on-the-final-nego> accessed 8 May 2024; Peitz (n 374).

[381] Christophe Samuel Hutchinson and Diana Treščáková, 'Tackling Gatekeepers' Self-Preferencing Practices' (2022) 18 European Competition Journal 567, where the obligation in Article 6(5) of the DMA is described as a margin squeeze obligation.

[382] Carmelo Cennamo and Juan Santaló, 'Potential Risks and Unintended Effects of the New EU Digital Markets Act' <https://www.esade.edu/ecpol/wp-content/uploads/2023/02/AAFF_EcPol-OIGI_PaperSeries_04_Potentialrisks_ENG_v5.pdf> accessed 8 May 2024.

In light of the analysis above, Article 6(5) of the DMA should not be applied by the Commission as a *carte blanche* ban against any act of self-preferencing by digital platforms. The Commission should instead focus its enforcement of this provision solely on the core platform services for which economics shows that the incentives to self-preference are more pronounced (in particular, ad-funded platforms) and which are controlled by a gatekeeper constituting an indispensable trading partner, with the effect that the other undertakings in the market find themselves in a situation of dependency. The Commission should also carry out an appropriate investigation into the relevant core platform services given that some of these are/may be competitive and there may not be an undertaking that holds a particular market position as it was in the *Google Shopping* case (*i.e.* there is not a super-dominant undertaking). The scope of the provision will also need to be applied restrictively, by limiting it only to those acts of self-preferencing that are likely to be against market contestability and the long-term interest of consumers, and use guidance from economics and previous antitrust cases (and analysis) to define the unclear scope of the provision. Efficiencies should make their way into the analysis, as the self-preferencing conducts that have an overall net positive effects on competition should be exempted from the application of the provision. Given that the prohibition in Article 6(5) of the DMA is largely based on experience in competition law enforcement, in new cases it will be appropriate to continue to use competition law as a first line of intervention.[383]

4.2. Self-preferencing from the use of data

Article 6(2) of the DMA, which addresses the issue of the use of business user data in those scenarios where the gatekeeper operates in dual role mode (as the platform holder and as a competitor in the downstream market vis-à-vis other business users) reads as follows:

"*the gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users*

[383] de Streel and others (n 319).

in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users".

The provision at issue differs from the other data-related provisions in the DMA in that it does not raise issues of coordination with the GDPR[384] or the more recent EU Data Act, which will likely be the elephant in the room in the application of data-related provisions in the DMA.[385] The reason for this is that Article 6(2) of the DMA is not concerned with the distinction between personal and non-personal data (which would have to be interpreted in the light of the GDPR's definitions) but only with the distinction between publicly available data and non-publicly available data.

The prohibition aims at creating a data silo (*i.e.* avoiding the use of the data that the gatekeeper receives from competitors), which is intended to prevent the gatekeeper from leveraging the data it receives from business users' interactions with the platform in the context of its commercial activities, even though such an outright ban is arguably unjustified.[386] From the first indications that the European Commission has provided, the provisions seem to cover both aggregated and non-aggregated data as well as anonymised and personal data, provided that the data falls within the broader concept of non-publicly available data.[387] Moreover, the provision should be interpreted as to cover both manual data (data that are collected and used by Amazon employers directly) as well as the data which are incorporated into the marketplace's processes in terms of commercial decision-making in the downstream market. The data will of course have to be competitively sensitive in order for the ban to apply, given that the ban expressly concerns the data used by the gatekeeper *in competition* with business users.

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[384] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) 2016 (OJ L).

[385] See, *e.g.*, Muhammed Demircan, 'The DMA and the GDPR: Making Sense of Data Accumulation, Cross-Use and Data Sharing Provisions' (8 December 2022) <https://papers.ssrn.com/abstract=4297229> accessed 8 May 2024.

[386] See Colangelo, '"(Not so) Elementary, My Dear Watson"' (n 290).

[387] DMA workshop – The DMA and data-related obligations.

The provision in Article 6(2) of the DMA is identical to the commitments Amazon offered in the Buy Box and Amazon Marketplace antitrust cases at the end of 2022, before the DMA entered into force. In this respect, commentators have noted that this raises issues with regard to the relationship between the enforcement of competition law and the DMA and between the implementation of the commitments and the compliance mechanisms in the DMA.[388]

4.3. Self-preferencing through platform fee discrimination

The DMA also addresses another form of self-preferencing, which has manifested itself in the context of app stores, *i.e.* self-preferencing through platform fee discrimination. Article 5(4) of the DMA, regarding anti-steering in particular, reads as follows:

"*the gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper*."

Article 5(7) of the DMA provides that:

"*The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services.*"

The provision in Article 5(4) aims at disallowing gatekeepers to prevent business users to communicate and promote to end users the possibility to access

[388] See https://competitionlawblog.kluwercompetitionlaw.com/2022/07/27/an-inverse-analysis-of-the-dma-amazons-proposed-commitments-to-the-european-commission/

offers outside of the gatekeeper's platform, or to conclude contracts with the end users outside the platform, particularly when the app developers offers contain different conditions from those available through the app store (for example different price, different cancellation policy, different subscription model) ("anti-steering"). The provision in Article 5(7), instead, aims at addressing the tying of the gatekeeper's in-app payment services (and identification services, web browser engines or other technical services as well) to that of the whole range of payments performed in the ecosystem. According to commentators, the idea behind these tying conducts of gatekeepers is "*their fee-based business model. When operating on mobile systems, the ecosystem holders of app stores and mobile devices' operating systems fund the range of their services through fees imposed on the developers when they access their app store as well as when a user makes a purchase on the device*".[389]

For instance, Apple imposes a fee of 30% on App Store purchases and locks this fee into the Apple ecosystem, given that Apple has not allowed alternative in-app payment systems to be deployed in the apps available in the App Store. Instead, Apple only allows payments to be processed through its proprietary In-App Purchase (IAP). Google also imposes a 30% fee on developers, although it is reported that recent events have led to a decrease of the fees down to 15%. Google, however, compared to Apple, is more flexible with regards to the tying in its own payment processing system.[390]

Through a combination of these provisions, the DMA seeks to protect and instil competition in the app store environment. In particular, Article 5(4) and Article 5(7) both protect "intra-platform competition" as they aim to allow app developers to compete on a par with Apple (or Google, as the case may be) on their platform. To the same end, Article 6(12) of the DMA should also be mentioned, as it mandates gatekeepers to provide access to app stores on fair, reasonable, and non-discriminatory (FRAND) terms, thus also protecting "intra-

[389] See Alba Ribera Martínez, 'Third Workshop on the DMA - This Is Not a Blueprint for the DMA: The Proof of the App-Store Pudding Is in the Eating' (*Kluwer Competition Law Blog*, 7 March 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/03/07/third-workshop-on-the-dma-this-is-not-a-blueprint-for-the-dma-the-proof-of-the-app-store-pudding-is-in-the-eating/> accessed 8 May 2024.
[390] ibid.

platform competition". The provisions should therefore be interpreted in line with the meaning to be attributed to such concept and they should be enforced only when the conduct affects long-term contestability of markets, causing consumer harm.

One of the most complex aspects of these provisions, however, will be implementation and compliance, given that this is going to require at least a change in the terms and conditions of app stores and potentially a change in the very architecture of the app stores.[391] Moreover, economists have also warned that the implementation of this provision can be difficult given that "*app-store operators can retaliate by charging higher fees on alternative payment channels*" and may result in forms of price regulation.[392]

5. Remedies

A significant part of the literature has argued that antitrust enforcement in the digital sector has failed due to the ineffectiveness of remedies.[393] Remedies have indeed been criticized as they do not deliver in addressing the competition problems underlying the digital sector both in light of the fact that they require intervention on the business model of the dominant companies and that their implementation is too lengthy.[394] For self-preferencing specifically, it has been noted in the previous chapter that a possible explanation behind the alleged

[391] DMA workshop - The DMA and app store related provisions.
[392] Bertin Martens, 'Has the Digital Markets Act Got It Wrong on App Stores?' (*Bruegel | The Brussels-based economic think tank*, 4 April 2024) <https://www.bruegel.org/blog-post/has-digital-markets-act-got-it-wrong-app-stores> accessed 8 May 2024.
[393] See, *e.g.*, in this respect Filippo Lancieri and Caio Mario S Pereira Neto, 'Designing Remedies for Digital Markets: The Interplay between Antitrust and Regulation' (2022) 18 Journal of Competition Law & Economics 613, citing also other authors and reports that have expressed concerns around the perceived inadequateness of the remedies in the digital space; Michal S Gal and Nicolas Petit, 'Radical Restorative Remedies for Digital Markets' (2021) 36 Berkeley Tech. LJ 617, p. 2.
[394] On the interference of competition law with business models see in particular Colomo, 'Product Design and Business Models in EU Antitrust Law' (n 135). On the (excessive) length of antitrust proceedings see President Jourová, 'Missing in Action? Competition Law as Part of the Internal Market On 5 September 2023, Executive Vice-President Vestager Took Unpaid Leave from the Commission for the Duration of Her Campaign for the Position of President of the Management Committee of the European Investment Bank (EIB). President von Der Leyen Temporarily Assigned Vestager's Portfolio' (2023) 60 Common Market Law Review 1503, which shows that the average duration of Article 102 proceedings before the European Commission that were not closed with a commitment decision increased from 4 years in the period 1990-2005 to 7.4 years in the period since 2015.

ineffectiveness of the remedies that have been imposed in *Google Shopping* is that Google was simply more efficient than its competitors and hence the lack of effects on market competitive dynamics. However, it is acknowledged that the implementation of remedies in the antitrust setting can often be lengthy and arrive too late, given that the digital sector is fast-moving and market dynamics constantly change and so do the practices of the undertakings.

The remedies envisaged under the DMA for self-preferencing practices are in a way already "embedded" within the provisions of the DMA. Therefore, the obligation-remedy relationship in the DMA is very different compared to competition law. In light of this difference, one would expect that the enforcement of the DMA will be mainly based on compliance and the actual remedies will not be used often, as otherwise the philosophical approach behind the DMA would suffer a major blow.[395] This aspect could greatly improve on the existing remedies already imposed in antitrust proceedings as it would foster compliance based on the regulatory dialogue between the European Commission and the gatekeepers.

The EC has also pervasive investigatory powers to check compliance, and it can open proceedings and adopt implementing acts to specify the measures.[396] The implementing acts have to be adopted within six months after opening the proceedings. After three months, the EC must communicate and make public preliminary findings on which third parties can comment.[397] The Commission should then issue a final decision within twelve months after the opening of proceedings.[398] Commentators have noted that such a proceeding addresses the issue of need for speed, given that it is at least three times faster than the average infringement decision under Article 102 TFEU and the Commission can also adopt interim measures in case of prima facie non-compliance.[399] If the Commission finds that the gatekeeper is not compliant with the DMA provisions, in addition to the typical cease-and-desist order, it can impose fines of up to 10% of the gatekeeper's worldwide turnover during the last financial year (and daily

[395] For the consideration that the DMA should be mainly based on compliance and dialogue between gatekeeper and the European Commission see also Komninos (n 317).
[396] DMA, arts 8(2) and 20.
[397] DMA, art 8(2) and (5)–(6).
[398] DMA, art 29.
[399] Bostoen, 'Understanding the Digital Markets Act' (n 332).

penalty payments of 5% of daily turnover).[400] If the gatekeeper engages in a second same or similar infringement of an obligation in relation to the same core platform service within eight years, however, the DMA allows for fines up to 20% of the turnover.[401] If the EC issues three non-compliance decisions (regardless of whether they concern the same core platform service or obligation) within eight years, it can impose "any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance".[402] Before then, the gatekeeper can offer commitments, which the EC can make binding.[403]

Commentators have noted that in principle these structural remedies include breaking up the gatekeeper, although according to them that will not easily qualify as proportionate and necessary.[404] Some other authors have instead noted that the principles of proportionality, necessity, and effectiveness that must inspire the application of the DMA, grant more room for manoeuvre in remedy design, meaning that there is a possibility that breakups are adopted as a remedies. This would depend, however, on the type of obligation that is infringed, with provisions aimed at addressing situations of conflict of interests such as those on self-preferencing being the natural candidates. Further, the possibility of adopting breakups will also depend on the analysis of benefits and costs of breakups on the specific platform market.[405] In this respect, in light of the fact that the Commission has already hinted at the possibility of breaking up the business in the context of a recent antitrust investigation,[406] it is submitted that this solution (although unwarranted) may be adopted under the DMA as well.

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[400] DMA, arts 30(1) and 31.
[401] DMA, art 30(2).
[402] DMA, art 18(1) and (3) and recital 75.
[403] DMA, art 25.
[404] Bostoen, 'Understanding the Digital Markets Act' (n 332).
[405] Knapstad (n 119).
[406] Case AT.40670-*Google-Adtech and Data-related practices*. In its press release, available at https://ec.europa.eu/commission/presscorner/detail/eN/ip_23_3207, the European Commission held that "*the Commission preliminarily finds that, in this particular case, a behavioural remedy is likely to be ineffective to prevent the risk that Google continues such self-preferencing conducts or engages in new ones. Google is active on both sides of the market with its publisher ad server and with its ad buying tools and holds a dominant position on both ends. Furthermore, it operates the largest ad exchange. This leads to a situation of inherent conflicts of interest for Google. The Commission's preliminary view is therefore that only the mandatory divestment by Google of part of its services would address its competition concerns.*" For a comment on this case, see, *e.g.*, Christian Bergqvist, "EU's Google AdTech Investigation—Some Preliminary Thoughts" [2024] E.C.L.R. 123-126.

In terms of actual remedies, the DMA is probably inferior to competition law. The DMA indeed imposes general remedies, and there is no possibility to concretely tailor them to the specificities of the individual cases in the event of an infringement. Therefore, DMA remedies might be insufficient compared to some antitrust remedies and inconsistencies may arise. Commentators have also noted that the remedies under the DMA do not solve the remedial issues that have impacted antitrust enforcement in the digital sector. In particular, the obligations and remedies under the DMA continue to relate to the business models or product design of the gatekeepers.[407] All of the above considerations apply to self-preferencing as well, where the remedies under the DMA do not seem adequate to solve the issues that have been highlighted with reference to the antitrust enforcement of the abuse of dominance provision.

What could really move the needle on the application of the self-preferencing provisions as well as the other provisions on the DMA is the emphasis on compliance vis-à-vis enforcement. Compliance indeed allows for a constant dialogue between the regulator and the designated gatekeeper and to monitor potential anti-competitive behavior before their effect have taken place. This fundamental philosophical difference between the DMA and competition law should therefore guide the Commission in its approach to monitor the obligations in the DMA and emphasis should be on compliance instead of actual remedies.[408]

At the end of the day, the functioning of the compliance mechanism is what will determine the success (or lack thereof) of the DMA.

At the time of writing, however, the Commission has already opened non-compliance proceedings against some gatekeepers, thus signalling that (at least in the first stage of the application of the DMA) some of the issues may not necessarily be resolved in the context of the dialogue between the regulator and the designated gatekeeper. In particular, for the purposes of the present work, it is important to highlight that the Commission has opened proceedings under Article 5(4) of the DMA against Apple and Google for their anti-steering conducts. The Commission is concerned that both Apple and Google's proposed measures

[407] Bostoen, 'Understanding the Digital Markets Act' (n 332).
[408] Komninos (n 317); Bostoen, 'Understanding the Digital Markets Act' (n 332).

violate Article 5(4) of the DMA as they continue to impose several restrictions on developers, for example by imposing various charges on any contracts concluded between developers and end users outside of the app store.[409] The Commission is also investigating whether Google is treating its own services (*e.g.*, Google Shopping) more favourably than rival services, thus breaching Article 6(5) of the DMA.[410]

6. The compliance with the DMA

The real revolution of the DMA is arguably its focus on compliance instead of enforcement, and it is therefore important to highlight what can be the challenges in ensuring compliance with the self-preferencing provisions, as well as outlining the solutions in this respect.

Compliance with the DMA will have to be demonstrated by the gatekeeper itself in the positive and will not ordinarily require the Commission to make any findings in the negative in this respect.[411] Compliance will indeed mainly be based

[409] See CASE DMA.100109 – Apple – Online Intermediation Services – app stores – App Store – Article 5(4), available at: https://ec.europa.eu/competition/digital_markets_act/cases/202417/DMA_100109_233.pdf; and CASE DMA.100075 – Alphabet – Online Intermediation Services – app stores – Google Play – Article 5(4), available at: https://ec.europa.eu/competition/digital_markets_act/cases/202417/DMA_100075_135.pdf.

[410] See CASE DMA. 100193 – Alphabet _ Online Search Engine – Google Search – Article 6(5), available at: https://ec.europa.eu/competition/digital_markets_act/cases/202417/DMA_100193_249.pdf.

[411] Some authors, and see *e.g.*, de Streel and others (n 318), have made a number of recommendations concerning the compliance reports, which are necessary in their way to make the Digital Markets Act more effective. In particular, they have urged that:

"The Commission demand that compliance reports are effective in that they contain: (i) verifiable technical and economic facts; (ii) a description of how the gatekeeper complies with the DMA and what concrete behavioural changes the gatekeeper undertook to do so; and (iii) the legal, technical, and economic analysis that forms the basis of the gatekeeper's belief that it satisfies the DMA.

To incentivize useful compliance report, the Commission treat an incomplete, unclear, or unsatisfactory report as a signal of possible non-compliance. This should substantially increase the likelihood of investigation or proceeding against such a gatekeeper. Importantly, even though obfuscatory reports are likely to make it harder to investigate a gatekeeper, the Commission must resist the temptation to investigate more aggressively gatekeepers with more informative reports to set the right reporting incentives.

After the first year, the Commission require the annual compliance report to demonstrate the effects of the changes the gatekeeper introduced to comply with the DMA. To do so, the gatekeeper should be required to use quantitative indicators and measures of business users' access to consumers, business user entry, end-user choices, end-user switching, changes in prices, or terms of use, etc. The report must include all useful and readily available outcomes. Over time, these indicators will evolve and become more stringent.

The Commission require all but the truly confidential data to be included in the public summary of the annual compliance report. The public summary must be written in plain language in a way that

on the compliance report, which will have to be completed by the gatekeepers themselves.[412] As noted by commentators, while this is helpful in digital cases that are complex and require a very significant amount of information, on which the Commission is systematically worse-placed than gatekeepers, it also raises concerns given that the gatekeepers themselves will have to be establish whether they are compliant with the relevant provisions, although the Commission will be

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explains to business users, end users, and competitors how to take advantage of technical or other changes that aim to either make the service more contestable or to increase its fairness. Furthermore, the Commission should establish a low-cost method for these stakeholders (as well as researchers) to provide feedback on the report as well as the core platform's behaviour more generally.

The Commission use its (soft) power to encourage a 'compliance culture' within the gatekeepers covered by the DMA. To incentivize such a culture, the Commission should take the strength of the internal compliance function into account when prioritizing enforcement proceedings.

The Commission develop procedures for regular exchange and communication with the chief compliance officer. The Commission could also strengthen the role of the chief compliance officer within the gatekeeper itself. To do so, it can require the annual report to explain the chief compliance officer's role in the company and at what stage of a new product/technology development the compliance team became involved. Finally, higher ranking members of the Commission should ask the chief compliance officer to be present at all meetings with the company (even if not concerning the DMA)."

[412] The European Commission has released a draft of the template for reporting pursuant to Article 11 of the Digital Markets Act, on 9 October 2023. The latest draft template for the compliance report is divided into five different sections:

Section 1 requires the gatekeeper to provide the details of the reporting undertaking;

Section 2 constitutes the core part of the compliance report and requires the gatekeeper to provide the long 26-item list of elements that a gatekeeper must communicate to the European Commission to compliance with the compliance obligation under Article 11 of the DMA. The template must be used by the gatekeeper in "*separate and standalone annexes for each core platform service*". Among the information required by Section 2 of the draft compliance report released by the European Commission is "*an explanation of how you have assessed compliance with the obligation, including whether any assessment projects, such as external or internal audits have been carried out, and, for any such assessment project, provide information about the identity and the role of the people involved and whether they are independent from your Undertaking, the assessment methodology and timeline for the relevant assessment project, and any output (e.g. audit reports or compliance plans)*" and "*an exhaustive explanation of how the Undertaking complies with the obligation, including any supporting data and internal documents. Please provide a detailed description of any measures that ensure such compliance, indicating whether such measures were already in place pre-designation or if they were implemented post-designation.*";

Section 3 requires the gatekeeper to provide the details of the compliance function that will be set up within the organisation of the gatekeeper to ensure compliance;

Section 4 is aimed at preparing the publication of the non-confidential summary version of the compliance reports;

Section 5 requires the gatekeeper to declare that the compliance report is true, correct and complete.

For a critical comment on the European Commission's draft of the template for reporting pursuant to Article 11 of the Digital Markets Act, see Alba Ribera Martínez, 'The European Commission's (Draft) Template for DMA Compliance Reports: Sailing Through Rough Seas' (*Kluwer Competition Law Blog*, 8 June 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/06/08/the-european-commissions-draft-template-for-dma-compliance-reports-sailing-through-rough-seas/> accessed 8 May 2024.

able to dispute such findings, and therefore could "*capture the regulation for their own benefit*".[413] In order to avoid this form of "regulatory capture", the same commentator has proposed that the Commission should also rely on information from third parties in relation to any practice or behaviour by gatekeepers in order to strengthen the functioning of the compliance mechanism.[414] Other authors have proposed to focus on output indicators (for example, the Apple iPhone users that use an alternative third-party app store in a certain amount of years) as a proxy to verify compliance with the DMA.[415] Another solution that has been proposed is to derive a set of compliance principles from the DMA obligations, to be implemented through a series of second-level principles, which can then be monitored by both gatekeepers and the European Commission.[416]

In any event, detecting acts against the provisions would still be hard in practice for different reasons. First, it will be particularly important to clarify the scope of the different provisions on self-preferencing (either through the regulatory dialogue envisaged under the DMA or by virtue of guidelines as the Commission has previously done in other sectors) given that in light of the vagueness of the text, compliance would necessarily be sub-optimal. Second, the Commission will also have to pay particularly close attention to ways to identify circumvention, *e.g.* if the gatekeeper is offering incentives to achieve the same end.[417] This will require ongoing compliance supervision.

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[413] Carugati, 'How to Implement the Self-Preferencing Ban in the European Union's Digital Markets Act' (n 378).

[414] ibid.

[415] Alexandre de Streel and Richard Feasey, 'DMA Output Indicators-Draft Issue Paper' [2023] Available at SSRN 4519687 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4519687> accessed 8 May 2024.

[416] Christophe Carugati, 'Compliance Principles for the Digital Markets Act' (Bruegel 2023) <https://www.bruegel.org/sites/default/files/2023-11/PB%2021%202023_0.pdf> accessed 8 May 2024. According to this author, for self-preferencing in particular, the relevant principle would be that of "fair conditions (principle 2)", according to which "gatekeepers shall propose non-discriminatory treatment". According to this principle, "gatekeepers should define terms and conditions based on the following underpinning principles:
Public: The conditions should be publicly available with transparent terms, clearly understandable and predictable, set out in plain and intelligible language.
Objective: The conditions should be based on objective and justified criteria.
Proportionate: The conditions should be justified and reasonable relative to the pursued objective or service provided.
Easy to act on: The conditions should enable a simple and understandable action with minimal steps".

[417] See Article 13 of the Digital Markets Act, which includes an anti-circumvention provision:

Beyond the general compliance issues with the DMA outlined above, each self-preferencing provision has its own specific compliance issues that the Commission will need to deal with.

As for self-preferencing from ranking and display on the marketplace, Article 6(5) of the DMA will present challenges relating to the identification of the relevant self-preferencing conducts. Commentators have indeed noted that only the gatekeeper has full access to data and algorithms and the Commission does not have the resources to carefully analyse them and detect any possible infringement of the prohibition. Moreover, the gatekeepers may be able to omit

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1. An undertaking providing core platform services shall not segment, divide, subdivide, fragment or split those services through contractual, commercial, technical or any other means in order to circumvent the quantitative thresholds laid down in Article 3(2). No such practice of an undertaking shall prevent the Commission from designating it as a gatekeeper pursuant to Article 3(4).

2. The Commission may, when it suspects that an undertaking providing core platform services is engaged in a practice laid down in paragraph 1, require from that undertaking any information that it deems necessary to determine whether that undertaking has engaged in such a practice.

3. The gatekeeper shall ensure that the obligations of Articles 5, 6 and 7 are fully and effectively complied with.

4. The gatekeeper shall not engage in any behaviour that undermines effective compliance with the obligations of Articles 5, 6 and 7 regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioural techniques or interface design.

5. Where consent for collecting, processing, cross-using and sharing of personal data is required to ensure compliance with this Regulation, a gatekeeper shall take the necessary steps either to enable business users to directly obtain the required consent to their processing, where that consent is required under Regulation (EU) 2016/679 or Directive 2002/ 58/EC, or to comply with Union data protection and privacy rules and principles in other ways, including by providing business users with duly anonymised data where appropriate. The gatekeeper shall not make the obtaining of that consent by the business user more burdensome than for its own services.

6. The gatekeeper shall not degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5, 6 and 7, or make the exercise of those rights or choices unduly difficult, including by offering choices to the end-user in a non-neutral manner, or by subverting end users' or business users' autonomy, decision-making, or free choice via the structure, design, function or manner of operation of a user interface or a part thereof.

7. Where the gatekeeper circumvents or attempts to circumvent any of the obligations in Article 5, 6, or 7 in a manner described in paragraphs 4, 5 and 6 of this Article, the Commission may open proceedings pursuant to Article 20 and adopt an implementing act referred to in Article 8(2) in order to specify the measures that the gatekeeper is to implement.

8. Paragraph 6 of this Article is without prejudice to the powers of the Commission under Articles 29, 30 and 31.

certain information, while at the same time being formally compliant with the DMA. Therefore, the only possible way to ensure compliance is for the Commission to issue guidelines on what constitutes self-preferencing and benchmark the gatekeepers' conduct against those.[418]

From the first indications provided by the Commission, compliance with Article 6(2) of the DMA concerning the use of business user data in those scenarios where the gatekeeper operates in dual role mode will consist of data discovery and mapping. The European Commission – even through the appointment of a monitoring trustee – will need to monitor data flows within the gatekeeper, ensuring that the use of such data is in line with the dedicated use envisaged under the relevant provision of the DMA. This will likely be challenging for the European Commission given that it will require a vast amount of resources and – being behavioral in nature - will likely present the traditional implementation challenges with behavioral remedies. In the context of the pre-implementation dialogue organized by the European Commission, the private stakeholders have noted that the GDPR compliance programs will be helpful in ensuring the effective enforcement of Article 6(2) of the DMA. According to them, the GDPR compliance programs will allow to interrogate the gatekeepers' internal data systems in order to understand which data is used for which purpose, allowing to check therefore that the gatekeepers' use of data is in line with the requirements in the DMA.[419] It is submitted that while GDPR compliance programs may be helpful in ensuring compliance, in that they already envisage internal systems of control of data within the gatekeepers' organizations, Article 6(2) of the DMA is based on different categories than those in the GDPR and compliance programs will therefore require adjustments to reflect the different categories of data involved.

Finally, Articles 5(4) and 5(7) of the DMA relating to self-preferencing through platform fee discrimination will likely require a change in the very architecture of the app stores, leading to interferences with the gatekeepers'

[418] Carugati, 'How to Implement the Self-Preferencing Ban in the European Union's Digital Markets Act' (n 378).
[419] DMA workshop – The DMA and data-related obligations.

business models.[420] Moreover, these changes will require time to be implemented and constant monitoring.

In light of the importance of compliance within the construction of the DMA, it is suggested that the Commission works on solving the issues outlined above, potentially with the help of data scientists and engineers, given that many of these issues will require non-legal skills.

7. A comparison with the *ex*-ante regulatory approach to self-preferencing in the United States

7.1. The American Innovation and Choice Online Act

In the United States, self-preferencing conducts in general are covered by the American Innovation and Choice Online Act (AICOA), which is yet to come into force.[421]

AICOA applies to "covered platforms". The latest draft of OICOA defines that term to mean "online platforms" that exceed certain thresholds for U.S.-based active users; exceed certain thresholds for annual sales, market capitalization, or worldwide active users; and hold a positions as "critical trading partner". According to AICOA, the term "critical trading partner" means a person that has the ability to restrict or materially impede the access of: (A) a business user to the users or customers of the business user; or (B) a business user to a tool or service that the business user needs to effectively serve the users or customers of the business user.[422]

The AICOA prescribes a set of ten categories of conduct in which covered platforms are prohibited from engaging. In particular, for the purposes of the analysis, suffices to mention the following provisions:

- Section 3(a)(1) makes it unlawful for covered platforms to "*preference the products, services, or lines of business of the covered platform*

[420] See Colomo, 'Product Design and Business Models in EU Antitrust Law' (n 135).
[421] The latest version of the draft Act has been introduced in the Senate of the United States of America on 15 June, 2023. The text has been read twice and referred to the Committee on the Judiciary. The latest draft of the Act is available here: https://www.congress.gov/bill/118th-congress/senate-bill/2033/text
[422] Section 2(6) of AICOA.

operator over those of another business user on the covered platform in a manner that would materially harm competition";

- Section 3(a)(2) prohibits to "*limit the ability of the products, services, or lines of business of another business user to compete on the covered platform relative to the products, services, or lines of business of the covered platform operator in a manner that would materially harm competition*";
- Section 3(a)(3) prescribes not to "*discriminate in the application or enforcement of the terms of service of the covered platform among similarly situated business users in a manner that would materially harm competition*";
- Section 3(a)(5) makes it unlawful for covered platforms to "*condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator that are not part of or intrinsic to the covered platform*";
- Section 3(a)(6) prohibits to "*use nonpublic data that are obtained from or generated on the covered platform by the activities of a business user or by the interaction of a covered platform user with the products or services of a business user to offer, or support the offering of, the products or services of the covered platform operator that compete or would compete with products or services offered by business users on the covered platform*";
- Section 3(a)(9) makes it unlawful to "*in connection with any covered platform user interface, including search or ranking functionality offered by the covered platform, treat the products, services, or lines of business of the covered platform operator more favorably relative to those of another business user and in a manner that is inconsistent with the neutral, fair, and nondiscriminatory treatment of all business users*".

Section 3(b) of the AICOA also provides covered platforms with several affirmative defences, when the conduct was "*reasonably tailored and reasonably*

necessary" to achieve goals such as, *e.g.*, preventing a violation of the law, protecting users' safety and privacy, or in order to "*maintain or substantially enhance the core functionality of the covered platform*".

As it is evident from the above, the AICOA broadly follows the same premises of the DMA, as it is indeed inspired by (and reflects) the same concerns about the state of competition in the digital sector. In particular, any assessment of market power in the traditional competition law sense has been taken out of the picture and substituted with notions mostly based on quantitative and easily verifiable metrics.[423] In the same fashion of the DMA, the AICOA also includes a set list of obligations concerning conducts that are made unlawful for gatekeepers.[424] What differs from the DMA is that the AICOA includes a reference to the standard of "material harm to competition" either as an element that the agency needs to prove to bring an enforcement action or as a defence to raise for the covered platforms, depending on the different obligations. This element is therefore a relevant one, and it "*could limit overreaching, depending on*

[423] For a critical opinion on this aspect, see, *e.g.*, Aurelien Portuese, The Revised (But Uncorrected) Version of the Klobuchar Bill, INFO. TECH. & INNOVATION FDN. (June 21, 2022), https://itif.org/publications/2022/06/21/the-revised-but-uncorrected-version-of-theklobuchar-bill/ (arguing that the criteria in the AICOA have limited relevance to assess a firm's ability to harm competition); Erik Hovenkamp, 'Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?' [2022] CPI Antitrust Chronicle (2022 Forthcoming), USC CLASS Research Paper No. CLASS22-8, USC Law Legal Studies Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127334> accessed 8 May 2024 (criticizing the AICOA on the basis of the fact that it does not take into account any consideration relating to market power). Contrast with Letter from Fiona M. Scott Morton, *et al.*, to Sen. Amy Klobuchar & Sen. Charles Grassley 5 (July 7, 2022), https://som.yale.edu/sites/default/files/2022-07/AICOA-Final-revised.pdf (according to whom the AICOA's reliance on the concept of critical trading partners makes it carefully targeted and it allows to greatly strengthens antitrust enforcement against big tech platforms).

[424] For a comment on the obligations in the AICOA see, *e.g.*, ibid, who argues that the self-preferencing provision in the AICOA could be interpreted as to encompass any actions that treat a platform's own products more favourably than those of competitors; Brian Huseman, 'Antitrust Legislation and the Unintended Negative Consequences for American Consumers and Small Businesses' (*About Amazon*) <https://www.aboutamazon.com/news/policy-news-views/antitrust-legislation-and-the-unintended-negative-consequences-for-american-consumers-and-small-businesses> accessed 8 May 2024; Aaron Schur, The Critiques Against the American Innovation and Choice Online Act Miss the Mark, PROMARKET (July 18, 2022), https://www.promarket.org/2022/07/18/the-critiques-against-the-american-innovationand-choice-online-act-miss-the-mark/; Ryan Bourne and Brad Subramaniam, 'The "Big Tech" Self-Preferencing Delusion' <https://www.cato.org/briefing-paper/big-tech-self-preferencing-delusion?ref=near-media> accessed 8 May 2024 (opposing the AICOA and arguing that it would "fundamentally alter business conduct on covered platforms"); Daniel Francis, 'U.S. Senate Testimony for Hearing on "Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets"' (7 March 2023) <https://papers.ssrn.com/abstract=4383193> accessed 8 May 2024.

how it is defined".[425] The AICOA also provides for the possibility to raise affirmative defences, although it has been noted that they are fairly narrow in their formulation.[426]

7.2. The Open App Markets Act

The United States have also introduced legislation specifically addressed at the potential competition issues that can arise in the context of app stores, the so called Open App Markets Act (OAMA). OAMA is yet to enter into force.[427]

OAMA applies to any entity that owns or controls an app store for which users in the United States exceed 50 million.[428] The relevant entities are prohibited from, *inter alia*, (A) requiring developers to use an in-app payment system owned or controlled by the company as a condition of distribution or accessibility, (B) requiring that pricing or conditions of sale be equal to or more favourable on its app store than another app store, or (C) taking retaliatory actions against a developer for using or offering different pricing terms or conditions of sale through another in-app payment system or on another app store.[429] OAMA then provides that the relevant entities will not be held liable when they can validly

[425] Hovenkamp, 'Gatekeeper Competition Policy' (n 115), p. 41. For considerations arguing in favour of the "material harm to competition" standard in AICOA, see, *e.g.*, Bill Baer, 'Why Amazon Is Wrong about the American Innovation and Online Choice Act' <https://policycommons.net/artifacts/4141396/why-amazon-is-wrong-about-the-american-innovation-and-online-choice-act/4949748/> accessed 8 May 2024; Adam Conner and Erin Simpson, 'Evaluating 2 Tech Antitrust Bills To Restore Competition Online' (*Center for American Progress*, 2 June 2022) <https://www.americanprogress.org/article/evaluating-2-tech-antitrust-bills-to-restore-competition-online/> accessed 8 May 2024; Aaron Schur, 'The Critiques Against the American Innovation and Choice Online Act Miss the Mark' (*ProMarket*, 18 July 2022) <https://www.promarket.org/2022/07/18/the-critiques-against-the-american-innovation-and-choice-online-act-miss-the-mark/> accessed 8 May 2024. For criticisms of the "material harm to competition" standard in AICOA, see, *e.g.*, A Douglas Melamed, 'Why I Think Congress Should Not Enact the American Innovation and Choice Online Act' (*PYMNTS.com*, 19 June 2022) <https://www.pymnts.com/cpi_posts/why-i-think-congress-should-not-enact-the-american-innovation-and-choice-online-act/> accessed 8 May 2024, supra note 21.

[426] See, e.g., Letter from Aurelian Portuese to Sen. Dick Durbin, et al., 3 (Jan. 19, 2022), https://www2.itif.org/2022- ITIF-letter-S2992.pdf; Letter from Timothy Powderly to Sen. Dick Durbin, et al., 2 (Jan. 18, 2022), https://9to5mac.com/wp-content/uploads/sites/6/2022/01/Apple-letter-full.pdf; Lawrence J Spiwak, 'The Third Time Is Not the Charm: Significant Problems Remain With Senator Klobuchar's Antitrust Reform Bill' (7 June 2022) <https://fedsoc.org/commentary/fedsoc-blog/the-third-time-is-not-the-charm-significant-problems-remain-with-senator-klobuchar-s-antitrust-reform-bill> accessed 8 May 2024.

[427] The latest version of t-he draft Act has been reported to the Senate of the United States of America on 17 February, 2022. The latest draft of the Act is available here: https://www.congress.gov/bill/117th-congress/senate-bill/2710/text

[428] OAMA, Section 2(3).

[429] OAMA, Section 3.

raise as an affirmative defence that their conduct is necessary to achieve user privacy, security or digital safety, to prevent spam or fraud, or to prevent a violation of the law.[430] This bill would therefore essentially cover leveraging practices in the specific context of app stores, as opposed to the broader spectrum of practices that are caught by the AICOA.

All in all, both the AICOA and the OAMA are very similar to the DMA, at least in their regulatory approach,[431] and represent an interesting phenomenon of convergence in the regulation of digital markets.

[430] OAMA, Section 4.

[431] For a comparison between the provisions in the OAMA and the DMA, see Geradin Partners, 'Apple and Google's App Store Dominance Suffers Another Blow – the Open App Markets Act' (*The Platform Law Blog*, 18 August 2021) <https://theplatformlaw.blog/2021/08/18/apple-and-googles-app-store-dominance-suffers-another-blow-the-open-app-markets-act/> accessed 9 May 2024.

CHAPTER IV
THE ENFORCEMENT OF SELF-PREFERENCING

SUMMARY: 1. Setting the scene: the intricacies of enforcing self-preferencing; - 2. The principle of ne bis in idem: an erratic concept; - 3. The interplay between the DMA and the other regimes; - 3.1. DMA and competition law; - 3.2. DMA and economic dependence; - 4. Policy choices in the application of the available tools.

1. Setting the scene: the intricacies of enforcing self-preferencing

The basic philosophical approach behind the DMA is that of creating "one-stop shop" for regulatory enforcement in digital markets. Indeed, besides the goal of ensuring "contestability" and "fairness" in digital markets, the DMA is also aimed at harmonizing the rules designed to address the competition problems in digital markets at the EU level, which is particularly important in light of the cross-border nature of services provided by digital platforms. Hence, the DMA finds its relevant legal basis under Article 114 TFEU which allows the EU to adopt *"measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market"* instead of Article 103 TFEU, enabling the Council to legislate in order to "*give effect to the principles set out in Articles 101 and 102*".[432]

[432] The choice of using Article 114 TFEU as a legislative basis for the Digital Markets Act has been criticized in the literature. In particular, see Sophia Catharina Gröf, 'Regulating BigTech: An Investigation on the Admissibility of Article 114 TFEU as the Appropriate Legal Basis for the Digital Markets Act Based on an Analysis of the Objectives and Regulatory Mechanisms' (10 May 2023) <https://papers.ssrn.com/abstract=4549209> accessed 29 April 2024, arguing that the European Commission should have chosen Art. 352 TFEU as the relevant legal basis for the Digital Markets Act and that, in order to make the Digital Markets Act lawful, the European Commission now has the possibility to either amend the Treaties according to Art. 48 TEU or to present a new competition instrument that is based on the correct legal basis, *i.e.* Art. 103 in conjunction with 114 TFEU or only Art. 352 TFEU; see also Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12 Journal of European Competition Law & Practice 576, arguing that the DMA may be incompatible with primary EU Law for two main reasons: first, the DMA does not appear to be designed to prevent regulatory fragmentation and, second, the definition of the DMA's scope in Article 3 and some of the obligations and prohibitions in Articles 5 and 6 appear

In light of this ambition of the DMA to create a "one-stop shop" for regulatory enforcement in digital markets, the enforcement of the DMA is heavily geared towards centralisation. The starting point to the analysis of the enforcement of self-preferencing is necessarily Article 1(5) of the DMA, which provides that

"[i]*n order to avoid the fragmentation of the internal market, Member States shall not impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets. Nothing in this Regulation precludes Member States from imposing obligations on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation, provided that those obligations are compatible with Union law and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.*"[433]

According to commentators, the European legislator has opted for a "full harmonization rationale" with this article,[434] and has replicated the "different objective" test already enshrined in Article 3 of Regulation 1/2003.[435] This tendency towards centralization is then corrected with Article 1(6) of the DMA, which provides that the DMA is "without prejudice" to the application of general national competition rules, national competition rules prohibiting other forms of

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to potentially breach the principle of proportionality, and impinge on the fundamental rights of the gatekeepers that are subject to its obligations. As a result, according to these authors, the DMA would require important changes in order to validly rely on Article 114 TFEU and avoid the unanimity requirement that would have been applicable under Article 352 TFEU.

[433] Recital 9 of the DMA provides that "Fragmentation of the internal market can only effectively be averted if Member States are prevented from applying national rules which are within the scope of and pursue the same objectives as this Regulation. That does not preclude the possibility of applying to gatekeepers within the meaning of this Regulation other national rules which pursue other legitimate public interest objectives as set out in the TFEU or which pursue overriding reasons of public interest as recognised by the case law of the Court of Justice of the European Union ('the Court of Justice')"

[434] See Josef Drexl and others, 'Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA)' <https://academic.oup.com/grurint/article-abstract/72/9/864/7232225> accessed 9 May 2024, p. 8.

[435] See Or Brook and Magali Eben, 'Who Should Guard the Gatekeepers: Does the DMA Replicate the Unworkable Test of Regulation 1/2003 to Settle Conflicts between EU and National Laws?' [2022] CPI Antitrust Chronicle (Forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4305810> accessed 9 May 2024, who argue that "[r]*eplicating Article's 3 "different objective" test to the DMA […] is not a robust means to ensure uniformity, effectiveness, and legal certainty in the application of the DMA across the internal market*".

unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers, and merger control rules.[436] Article 1(7) of the DMA, finally, provides that "*national authorities shall not take decisions which run counter to a decision adopted by the Commission under this Regulation* [and that] *the Commission and Member States shall work in close cooperation and coordinate their enforcement actions…*".[437]

Beyond the black-letter law, which provides that the application of legislative instruments of national law will co-exist with the DMA "without prejudice", it has been noted that there has been an "*avalanche of legislative proposals for platforms*",[438] and therefore issues of concurrent (and potentially conflicting) application of various legislative provisions may arise. With regard to self-preferencing in particular, there are at least other two sets of legislative provisions that are relevant to potentially tackle this conduct, in addition to the DMA.

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[436] See Konstantina Bania, 'Fitting the Digital Markets Act in the Existing Legal Framework: The Myth of the "without Prejudice" Clause' (2023) 19 European Competition Journal 116, noting that "a reading of the "without prejudice" provisions of the DMA suggests that all legislative instruments that govern the conduct of gatekeeper platforms (in the EU and domestically) will harmoniously co-exist and complement each other"; see also Recital 11 of the DMA which provides that "Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application".

[437] This paragraph arguably reflects a more cognizant approach towards the impact that National Competition Authorities (NCAs) can have in the enforcement of the DMA, given that it speaks of cooperation and coordination of enforcement actions. The push for greater involvement of the NCAs in the enforcement of the DMA came in particular from the European Competition Network and some NCAs. In particular, see ECN, 'How National Competition Agencies Can Strengthen the DMA' (2021) <https://www.autoritedelaconcurrence.fr/sites/default/files/DMA%20-%20Joint%20EU%20NCAs%20paper.pdf> accessed 9 May 2024; German Federal Ministry for Economic Affairs and Energy, French Ministére de l'Économie, les Finance et de la Relance, and Dutch Ministry of Economic Affairs and Climate Policy, 'Strengthening the Digital Markets Act and Its Enforcement' (2021) <https://www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4> accessed 9 May 2024; Stijn Huijts, 'Making Sense of NCAs' Roles under the DMA – The Dutch Proposal' (*The Platform Law Blog*, 21 March 2023) <https://theplatformlaw.blog/2023/03/21/making-sense-of-ncas-roles-under-the-dma-the-dutch-proposal/> accessed 9 May 2024.

[438] See Bania (n 436).

First, both European and national competition laws apply to self-preferencing. As the European Commission is in charge of enforcing the DMA, issues of application of conflicting provisions will not materialize in this respect, although there is a policy question as to what is the right balance of regulation and competition law in tackling gatekeepers' conducts. In this respect, it should be highlighted that NCAs have worked on a number of self-preferencing cases in this realm (*e.g.*, the Italian Competition Authority, the French Competition Authority, the Dutch Competition Authority), which were discussed in Chapter II. National legislations have also introduced amendments to their competition laws, aimed at addressing specifically the conducts of digital platforms, including self-preferencing. An illuminating example in this respect is that of Germany: here, the national legislator introduced Section 19a to German competition law, which applies to companies with "paramount cross-market significance for competition" and prohibits conducts that can be qualified as self-preferencing such as preventing a company from "*favouring its own offers over the offers of its competitors when mediating access to supply and sales markets*"; "*taking measures that impede other undertakings in carrying out their business activities on supply or sales markets where the undertaking's activities are of relevance for accessing such markets*"; "*directly or indirectly impeding competitors on a market on which the undertaking can rapidly expand its position even without being dominant*"; and "*creating or appreciably raising barriers to market entry or otherwise impeding other undertakings by processing data relevant for competition that have been collected by the undertaking, or demanding terms and conditions that permit such processing*".[439] Other countries too have proposed to introduce amendments to their competition laws along these lines.[440]

[439] The English translation of the German competition law is available here: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf. For a comment on the new German legislative provisions, see, *e.g.*, Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law & Practice 513; Silke Heinz, 'New Rules on Digital Gatekeepers Ramp up Antitrust Enforcement in Germany' (*Kluwer Competition Law Blog*, 30 September 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/09/30/new-rules-on-digital-gatekeepers-ramp-up-antitrust-enforcement-in-germany/> accessed 9 May 2024.

[440] See, for instance, the example of Greece, where the Hellenic Competition Commission proposed the inclusion of a new provision in the Greek Competition Act, in order to enable the Commission to police ex post abusive conduct of companies holding a position of power in "an ecosystem of paramount importance for competition." (Hellenic Ministry of Economic

Second, national laws on economic dependence can also apply to self-preferencing. As discussed in Chapter III, several countries have introduced such provisions and they can apply to situations in which the contractual terms imposed by the digital platforms appear to be "unfair", in particular as they can constitute the result of an imbalance of powers between the parties.

As a result of the potential concurrent application of the different legislative instruments, a digital platform can be subject to a situation of at least "triple jeopardy" in relation to self-preferencing conducts.[441] The graph below shows the concurrent legislative instruments that can apply to digital platforms, depending on their legal characterization.

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Development, 'Greek Competition Law Bill', (2021) http://www.opengov.gr/ypoian/?p=12356), which in the end was not approved by the Greek Parliament; see also the amendment to Austria Competition Law (Competition Law Amendment Act (KaWeRÄG) 2021, 9 September 2021) to include the possibility for the Austrian Competition Authority to request the Competition Tribunal to declare an undertaking dominant in multi-sided digital markets. Pursuant to the new provision, the existence of a dominant position will be assessed by taking into account three criteria in particular, *i.e.* the significance of a company's intermediation services for other companies' ability to access upstream or downstream markets, the access to data, and network effects.

[441] See Giuseppe Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (19 May 2022) <https://papers.ssrn.com/abstract=4070310> accessed 29 April 2024, who has argued that a digital platform can even be subject to "quadruple jeopardy", as a result of the concurrent application of (i) the Digital Markets Act, (ii) EU and national competition laws, (iii) national competition laws that embed regulatory features such as Section 19a of German competition law, and (iv) national laws on economic dependence. In this chapter, competition laws and competition laws that embed regulatory features are discussed together, hence the difference in language. See also Bania (n 435), who has identified other legislative instruments with reference to which coordination with the DMA is needed, but which are less likely to be relevant for self-preferencing specifically and thus are not discussed in this chapter.

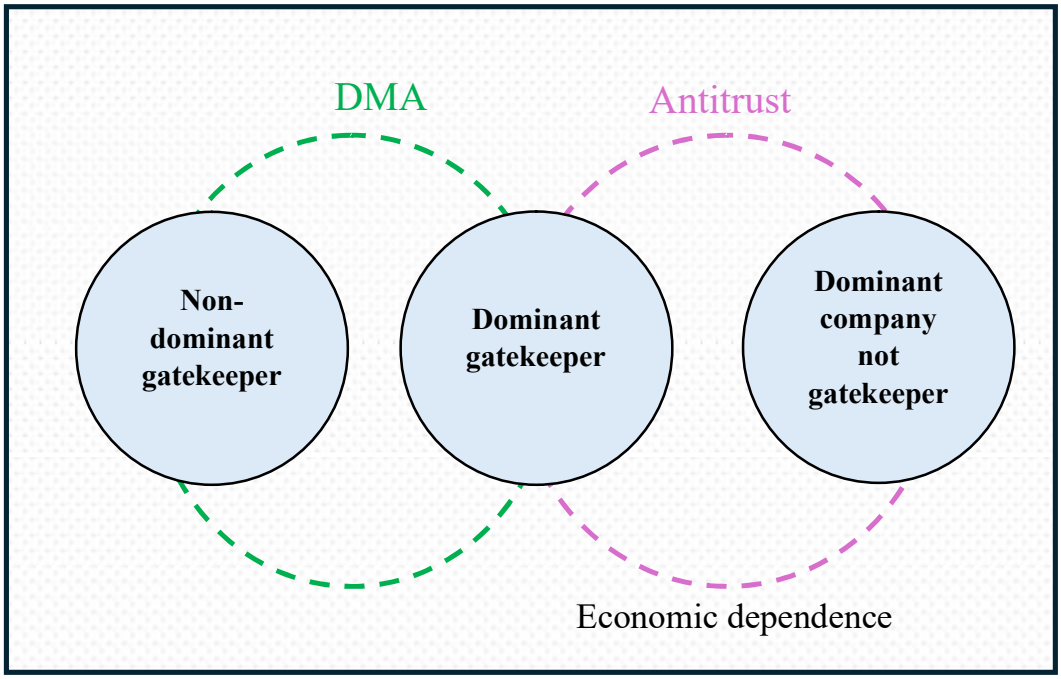

Figure 10: Legal regimes applicable to digital platforms, depending on their legal status.

As per above, *all* the undertakings are subject to the rules on economic dependence; an undertaking that has been designated as a gatekeeper but which is not dominant in competition law terms, will also be subject to the DMA and an undertaking that is dominant in competition law terms but is not a gatekeeper will also be subject to competition law (**double jeopardy**); an undertaking that is both designated as a gatekeeper and is dominant from a competition law standpoint will be subject to both competition law and the DMA (**triple jeopardy**).

Due to the potential concurrent application of a number of different legislative instruments, two orders of issues will need to be addressed in this chapter. On the one hand, the conflict of laws issue relating to the potential conflicts amongst these rules when applied to self-preferencing. And on the other hand, the policy issue of how to balance the application of the different regimes that can potentially regulate self-preferencing conducts. This chapter will discuss both accordingly.

2. The principle of ne bis in idem: an erratic concept

The reference provision for the ne bis in idem principle is Article 50 of the Charter of Fundamental Rights, which provides that "[n]*o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*".[442] Even though the provision refers only to criminal proceedings, it has been interpreted as to cover competition law and regulatory proceedings as well.[443]

If one tries to unpack the relevant legislative provision it emerges that – at a high level -- two elements are required for the ne bis in idem provision to apply: 1) there must be a prior final decision (the "bis" condition), and 2) the prior decision and the subsequent proceedings or decision must concern the same conduct (the "idem" condition). The "bis" condition has not been the object of much contention and it has been applied in a straightforward manner. The "idem" condition, on the contrary, has sparked much doctrinal and judicial controversy and it has been applied differently depending on whether the facts at issue concerned competition law or other fields of law.[444]

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[442] See also Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), on the "Right not to be tried or punished twice":
"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention."

[443] See, *e.g.*, *Schindler Holding Ltd and Others v European Commission* [2013] ECJ Case C-501/11 P.; ECtHR, A. Menarini Diagnostics S.r.l. v Italy, judgment of 27 September 2011, application no. 43509/08.

[444] On the academic literature on the ne bis in idem generally, see, *e.g.*, Peter Whelan, 'Applying Ne Bis in Idem to Commission Proceedings Implicating Article 11 (6) of Regulation 1/2003: Case C-857/19 Slovak Telekom' (2021) 12 Journal of European Competition Law & Practice 746; Pierpaolo Rossi and Valentina Sansonetti, 'Untangling the Inextricable: The Notion of'Same Offence'in EU Competition Law' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660322> accessed 9 May 2024; Renato Nazzini, 'Parallel Proceedings in EU Competition Law', *Ne Bis in Idem in EU Law* (Cambridge University Press Cambridge 2016); Wouter Devroe, 'How General Should General Principles Be? Ne Bis in Idem in EU Competition Law' 401; Frederic Louis and Gabriele Accardo, 'Ne Bis in Idem, Part'Bis'' (2011) 34 World Competition <https://kluwerlawonline.com/journalarticle/World+Competition/34.1/WOCO2011005> accessed 9 May 2024; Giacomo Di Federico, 'EU Competition Law and the Principle of *Ne Bis in Idem*' (2011) 17 European Public Law

In the competition law realm, the European Courts have historically required a three-fold test for the "idem" condition to be deemed fulfilled, namely the identity of the offender, the facts, and the protected legal interest. In the most recent judgment concerning this strain of case-law, *Slovak Telecom*, this position was confirmed (the so called "Toshiba approach").[445] In other realms of EU law, the European Courts have instead adopted a two-fold test to assess the application of the ne bis in idem principle, requiring only the identity of offender and of the facts (the so called "Menci approach").[446]

The European Court of Justice has recently rendered two judgments that have provided the latest clarifications on the ne bis in idem principle: bpost,[447] Nordzucker,[448] and Volkswagen.[449]

In bpost, the Court of Justice held that the compliance with the ne bis in idem principle should be assessed according to the Menci approach and thereby extended the approach adopted in the other fields of EU law to EU competition law as well.[450] According to bpost, in addition to establishing that the offender and facts are the same, one also needs to assess whether a limitation of the fundamental right guaranteed by Article 50 of the Charter of Fundamental Rights

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<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EURO\EURO2011018.pdf> accessed 29 April 2024; Wouter PJ Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 World Competition <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\WOCO\WOCO2003001.pdf> accessed 29 April 2024.

[445] See *Slovak Telekom as v Protimonopolný úrad Slovenskej republiky* [2021] ECJ Case C-857/19; *Walt Wilhelm and others v Bundeskartellamt* [1969] ECJ Case 14-68; *Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission of the European Communities* [2004] ECJ Joined cases C-204/00 P, C-205/00 P, C-211/00 P C-213/00 P C-217/00 P C-219/00 P; *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2012] ECJ Case C-17/10.

[446] *Criminal proceedings against Luca Menci* [2018] ECJ Case C-524/15; *Criminal proceedings against Leopold Henri Van Esbroeck* [2006] ECJ Case C-436/04.

[447] *bpost SA v Autorité belge de la concurrence* [2022] ECJ Case C-117/20.

[448] *Bundeswettbewerbsbehörde v Nordzucker AG and Others* [2022] ECJ Case C-151/20.

[449] *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato* [2023] ECJ Case C-27/22.

[450] *bpost SA v Autorité belge de la concurrence* (n 446), paras. 33-35. In particular, see para. 34 where the Court held that "it is apparent from the case-law of the Court that the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another".

can be justified on the basis of Article 52(1).[451] Pursuant to this provision, for duplicate proceedings to be justified, the following conditions must be fulfilled:

- The possibility of duplicate proceedings must be provided for by the law;
- The possibility of duplicate proceedings must respect the essence of the rights affected: as a result, the law should only provide for the possibility of a duplication of proceedings and penalties under different rules that pursue distinct legitimate objectives and not when they aim to achieve the same objective;
- The duplication of proceedings should not exceed what is appropriate and necessary to attain the objectives legitimately pursued by that legislation (principle of proportionality): in order to assess necessity, the following conditions are relevant, (i) whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities; (ii) whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe (the proceedings must be sufficiently close in substance and in time); and (iii) whether any penalty that may have been imposed in the first proceedings was taken into account when assessing the second penalty.

As it is apparent from the above, even though the Court of Justice unified the test for ne bis in idem by adopting the Menci approach,[452] it nonetheless introduced the criterion of the protected legal interest through Article 52(1). Hence, this element is in fact still required for the analysis.

In Nordzucker, the European Court of Justice followed the same approach of bpost and confirmed that the existence of the ne bis in idem should be assessed

[451] Article 52(1) of the Charter of Fundamental Rights provides that "[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[452] For this suggestion, in the literature, see Giuseppe Colangelo and Marco Cappai, 'A Unified Test for the European Ne Bis in Idem Principle: The Case Study of Digital Markets Regulation.' (27 October 2021) <https://papers.ssrn.com/abstract=3951088> accessed 29 April 2024.

according to Menci. In this case, the Court of Justice specified that whether there is identity of facts needs to be determined "*having regard to the territory, product market and period covered by that decision*".[453] In relation to the analysis under Article 52(1), the Court of Justice found that proceedings brought by two different national competition authorities in relation to anticompetitive agreements pursue the same objective (i.e. they protect the same legal interest). Per bpost, the identity of the legal interest protected is not required to trigger the ne bis in idem principle (as the legal interest is not part of the "idem"), but when the legal interest protected is the same the result will be that a duplication of such proceedings against the same person for the same facts will not be justified under Article 52(1) of the Charter.

In Volkswagen, a case in which fines were imposed in different Member States both for criminal violations (Germany) and for unfair commercial practices (Italy), the Court of Justice re-stated that for the ne bis in idem principle to apply it is sufficient that the proceedings concern the same facts and are brought against the same entity, irrespective of the manner in which the decision has become final and whether it was issued in a different Member State under a different set of rules. As for Article 52(1), the Court of Justice held that the Italian and German legislation pursued distinct objectives (namely, ensuring the protection of consumers and the compliance with the law, respectively) but that -- the condition that the proceedings must be conducted in a coordinated manner between the competent authorities – was not satisfied, and is a difficult condition to satisfy in particular when the relevant entities operate in different Member States.

Given the multiplicity of legislative instruments that can potentially apply to self-preferencing, these developments regarding the ne bis in idem principle are extremely relevant for the analysis. Their application will be discussed below.

3. The interplay between the DMA and the other regimes

3.1. DMA and competition law

Self-preferencing practices may well be the object of a duplication of proceedings under the DMA and EU and national competition laws, when a given

[453] *Bundeswettbewerbsbehörde v Nordzucker AG and Others* (n 447), para. 42.

company is both a gatekeeper under the DMA and a dominant undertaking in competition law terms. Conflicts between the DMA and EU competition law are likely to be extremely rare at the EU level (or, even, almost impossible), given that the European Commission has the monopoly to enforce the DMA – safe for the cooperation mechanisms envisaged under this legislative instrument -- and will apply EU competition law as well.[454] What is likely to happen, though, is a conflict between the DMA and EU or national competition laws, when these are enforced by National Competition Authorities.[455] This paragraph will therefore focus on this fact pattern accordingly.

First, one needs to assess under what circumstances the "idem" condition can be satisfied by the parallel application of competition law and the DMA under Article 50 of the Charter of Fundamental Rights. In this respect, the test set out in Nordzucker seems particularly informative as it requires, specifically with reference to this element, that the territory, product market and period are the same. The main element that can move the needle here seems to be the "territory",[456] as the national competition authority will investigate conducts that concern their territory, while the DMA will apply to the rest of the European

[454] This conclusion is undisputed in the relevant literature. In this respect, amongst many, see Monti (n 342); Bania (n 436).

[455] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which has introduced a system of enforcement based on "decentralization". In the context of the discussion around the principle of decentralization of the enforcement of competition law, however, one also needs to take into account the principle of primacy of EU law, as established by the Court of Justice since the seminal case in *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECJ Case C-198/01.

[456] See *Order of the General Court (First Chamber) of 14 October 2021 Amazon.com, Inc and Others v European Commission Action for annulment – Competition – Abuse of dominant position – Online sales – Decision to open an investigation – Territorial scope of the investigation – Exclusion of Italy – Act not open to challenge – Preparatory act – Inadmissibility Case T-19/21* (GC). In this case, there were two parallel proceedings before the Italian Competition Authority and the European Commission pending against Amazon for self-preferencing conducts. The General Court has rejected the application of Amazon against the European Commission's decision to open the proceedings, whilst a proceedings of the Italian Competition Authority was pending and concerned the same facts Amazon has then appealed the General Court's Order in Case T-19/21 before the Court of Justice, which confirmed the decision of the General Court and rejected Amazon's appeal. Hence, the European Courts have confirmed the legitimacy of having the two investigations at the national and EU level running together. According to the European Courts, therefore, the European Commission was entitled to open a proceedings according to Article 102 TFEU against Amazon for a set of facts that are identical to those that had already been the object of an investigation run by the Italian Competition Authority, so long as the European Commission had limited the relevant geographic market to the European Economic Area with the exclusion of Italy.

Union.[457] With regard to the product market, under the DMA there will be no need to define product markets, which are replaced by the core platform services. When the relevant product market defined by the national competition authority does not match the relevant core platform services, for instance when it is a sub-segment of those, the ne bis in idem also does not appear to be triggered and duplicate proceedings should be possible.[458]

Assuming that the conditions for the "ne bis in idem" are fulfilled, it is also not clear whether the concurrent application of the DMA and competition law would be justified under Article 52(1). In particular, one will need to establish whether the DMA and competition law pursue the same objectives.[459] This thesis has argued in Chapter III that competition law and the DMA indeed pursue overarching objectives and this thesis finds support also in the literature.[460] One way to differentiate the objectives is to apply the DMA narrowly, thereby making the protection of competition with reference to a few platforms in cases where it is evident on the basis of experience that a given conduct will give rise to long term consumer harm its objective.[461] In any event, it is not clear whether this condition would be deemed to be satisfied by the European Courts. The assessment of the other conditions will need to take place on a case-by-case basis.

All in all, it seems likely that competition law will continue to be applied by national competition authorities in parallel with the application of the DMA by the European Commission, as there is no apparent conflict with the ne bis in idem principle. This is therefore another argument in favour of a restrictive application of the DMA, including the provisions on self-preferencing.[462] In terms of its

[457] See Colangelo, 'The European Digital Markets Act and Antitrust Enforcement' (n 441).
[458] See Bania (n 436).
[459] See Xavier Groussot, 'The Digital Market Act and the Principle of Ne Bis in Idem: A Revolution in the Enforcement of EU Law' <http://lup.lub.lu.se/record/b4212490-6769-4577-be03-0f7c46983a36> accessed 29 April 2024, arguing that "when it comes to the application of the ne bis in idem principle in duplication scenarios involving the DMA and competition rules, our analysis shows that it is very unlikely that the CJEU will find the ne bis in idem and Article 50 EUCFR to be applicable in potential cases, and this for two main reasons. The first reason is that the CJEU will have to make a finding that the objectives of the DMA and competition law are the same. This is not an easy finding to make considering that the DMA is based only on the 'internal market' clause of Article 114 TFEU and its overall logic is not merely based on 'market fairness' but also on 'market contestability'".
[460] See, for instance, Colangelo, 'The Digital Markets Act and EU Antitrust Enforcement' (n 318).
[461] See Colangelo, 'The European Digital Markets Act and Antitrust Enforcement' (n 441).
[462] See Drexl and others (n 434).

harmonization rationale, the DMA would still harmonize the treatment of conducts by a few platforms when it is evident that a given conduct will give rise to long term consumer harm, even if interpreted restrictively.[463]

This thesis seems to be confirmed by the recent decision of the Bundeskartellamt pursuant to Section 19A GWB (B7-70/21), where the German authority took issue with Google's conduct consisting in the application by Google of its policy relating to the treatment of personal data of users, which allowed Google to combine the data that Google obtained through its services, with those derived from third parties (a conduct that overlaps with Art. 5(2) oft he DMA).

3.2. DMA and economic dependence

In addition to competition law, the DMA can also overlap with the national provisions on the abuse of economic dependence. As it was noted in Chapter III, indeed, the provisions on the abuse of economic dependence address issues that are similar to those that the DMA seems to cover under the heading of fairness.

The provisions on the abuse of economic dependence tackle situations of relative market power which differs from the position of absolute market power triggering competition law enforcement.[464] Whilst imbalances in bargaining power between the parties to an agreement and their respective economic powers can be regarded as a consequence of free and competitive markets based on freedom of contract and trade, it has been noted that the existence of effective market mechanisms can be adversely affected by these situations of relative market power and that these are the situations addressed by provisions on the abuse of

[463] For the opposite conclusion, arguing that the legal interests protected under the DMA should be construed according to the broadest interpretation, see Jasper van den Boom, 'What Does the Digital Markets Act Harmonize? – Exploring Interactions between the DMA and National Competition Laws' [2023] European Competition Journal <https://www.tandfonline.com/doi/abs/10.1080/17441056.2022.2156728> accessed 29 April 2024.

[464] See Giuseppe Colangelo, *L'abuso Di Dipendenza Economica Tra Disciplina Della Concorrenza e Diritto Dei Contratti* (Giappichelli 2004) <https://iris.unibas.it/handle/11563/19343> accessed 9 May 2024.

economic dependence.[465] In light of the aims and conditions that need to be fulfilled for the abuse of economic dependence to exist, it has been noted that "*the abuse of economic dependence may represent a powerful tool alternative to the DMA in evaluating the relationship between digital platforms and their business users*".[466] In addition to that, the application of the provisions on the abuse of economic dependence also allows to protect dynamic competition in the relevant markets.[467]

Another author has highlighted the fact that, particularly in digital markets, abuse of economic dependence should be sanctioned when there is a concrete prejudice to the interests of the "weak" undertaking in the context of its commercial relationships with the "strong" undertaking. According to this author, this prejudice would materialize when the undertaking's freedom to freely adopt business decisions on the market is compressed, leading to an alteration of the competitive dynamics in the market.[468]

Another commentator has argued that abuse of economic dependence should not been conceived as a tool to use exceptionally and sporadically with reference to digital platforms but its role should be strengthened, in particular to address the specific characteristics of digital platforms and digital markets.[469]

It has also been suggested that the provisions on the abuse of economic dependence can effectively address some of the challenges posed by online

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[465] See Kati Cseres, 'Competition and Contract Law' [2011] Nephrology Dialysis Transplantation - NEPHROL DIALYSIS TRANSPLANT 205; AS Hartkamp and others, 'Towards a European Civil Code, 4th Rev. and Exp. Ed' [2011] Alphen aan den Rijn: Kluwer Law International <https://dare.uva.nl/document/2/87978> accessed 9 May 2024; Sangyun Lee and Jan Schißler, 'Platform Dependence and Exploitation', *14th ASCOLA Conference, Aix-en-Provence, June* (2019).

[466] See Colangelo, 'The European Digital Markets Act and Antitrust Enforcement' (n 441).

[467] See Scalzini, 'Dipendenza economica e regolazione «asimmetrica» dell'attività d'impresa. Prime osservazioni sul novellato art. 9 ln 192/1998' (n 362); Bougette, Budzinski and Marty (n 182); Thomas K Cheng and Michal S Gal, 'Superior Bargaining Power: Dealing with Aggregate Concentration Concerns', *Abusive Practices in Competition Law* (Edward Elgar Publishing 2018) <https://www.elgaronline.com/abstract/edcoll/9781788117333/9781788117333.00017.xml> accessed 9 May 2024; Mor Bakhoum, 'Abuse without Dominance in Competition Law: Abuse of Economic Dependence and Its Interface with Abuse of Dominance', *Abusive Practices in Competition Law* (Edward Elgar Publishing 2018) <https://www.elgaronline.com/edcollchap/edcoll/9781788117333/9781788117333.00016.xml> accessed 9 May 2024.

[468] See Scalzini, 'Abuso Di Dipendenza Economica, Mercati Digitali e Libertà d'impresa' (n 361), p. 118.

[469] See Anna Licastro, 'La Riscoperta Dell'abuso Di Dipendenza Economica Nell'era Dei Mercati Digitali.' [2022] FEDERALISMI. IT 118.

marketplaces for two main reasons.[470] First, given that economic dependence is found through the test of reasonable/sufficient alternatives, it dispenses from defining markets and assessing dominance. Second, it also represents a suitable tool to tackle abusive refusals to provide access by non-dominant undertakings. This second scenario is the most relevant one for self-preferencing cases.

From the above, it is clear that economic dependence does have a role to play in the context of digital markets in particular, specifically in order to address concerns relating to the unfairness of the business relationships in this context. As a result, it is submitted that national authorities should continue enforcing the provisions on economic dependence, notwithstanding the entry into force of the DMA.[471]

But can the DMA and the provisions on economic dependence be applied cumulatively? The answer appears to be yes, in light of the test set out by the European Courts in the ne bis in idem case-law.

So far as the "idem" condition is concerned, the provisions on abuse of economic dependence are enforced at the national level and will therefore involve a situation that is typically purely domestic in terms of geographic reach of the conduct at stake. Importantly, the provisions concerning the abuse of economic dependence also seem to cover a different legal interest, compared to both the DMA and competition law. In particular, it has been highlighted that

"*Digital Markets Act and economic dependence are different legal regimes with different goals. The DMA is aimed at ensuring that markets are*

[470] See Despoina Mantzari, 'Power Imbalances in Online Marketplaces: At the Crossroads of Competition Law and Regulation' (Edward Elgar Publishing 2022) <https://discovery.ucl.ac.uk/id/eprint/10133994/7/Mantzari_Power%20Imbalances%20in%20Online%20Marketplaces-%20At%20the%20Crossroads%20of%20Competition%20Law%20and%20Regulation_AAM2.pdf> accessed 9 May 2024.

[471] For the opposite view, see, *inter alia*, Mario Libertini, 'The Presumption of Economic Dependence in Digital Markets. A Comment to Article 33 of Law No. 118 of August 5th, 2022' [2023] Orizzonti del Diritto Commerciale 9; Roberto Alimonti and Matthew Johnson, 'Abuse of Economic Dependence and Its Interaction with Competition Policy: The Economics Perspective' (2022) 21 Competition Law Journal 87; Julian Nowag and Carla Valeria Patiño, 'Enough of Fairness: Pre-Emption and the DMA' (21 July 2023) <https://papers.ssrn.com/abstract=4769198> accessed 3 May 2024, where it is submitted that fairness in digital markets with regard to business users and consumers has been exhaustively regulated by the DMA and, as a consequence, existing and future national rules that aim to address additional fairness matters are pre-empted and cannot be applied to gatekeepers.

contestable, through bans and obligations. Not only the DMA applies only to a few gatekeepers but, above all, in the event of violations, end users are not entitled to any form of protection, given that the DMA belongs to the realm of public law, and not of private law. Thus, economic dependence completes the DMA, instead of overlapping with it (similarly with what happens with class action and antitrust infringements), and it allows access to civil or administrative justice when an entity is entitled to a given right and this right has been breached. There is also no formal overlap or contrast, given that the DMA makes it clear from the beginning (as it is obvious) that the European Regulation does not impact nor it interferes with the national legislation, also with reference to national competition law and the legislation on economic dependence".[472]

Hence, the provisions concerning the abuse of economic dependence will likely continue to apply in parallel to the Digital Markets Act. This consideration also supports the conclusion that the Digital Markets Act, and the provisions on self-preferencing specifically, should be applied restrictively. Other tools, such as competition laws and economic dependence can then be used to correct potential under-enforcement.

4. Policy choices in the application of the available tools

From the above, it is apparent that legally speaking, parallel enforcement of the Digital Markets Act, competition law and rules on the abuse of economic dependence will be possible. However, there is a policy question as to whether competition law and the other sets of rules will and should continue to be applied by competition authorities in the post-DMA world or whether the enforcement of the latter will "cannibalize" the former.

Cani Fernandez, the President of the Comisión Nacional de los Mercados y la Competencia (the Spanish Competition Authority) has argued that the DMA should not hinder the application of Articles 101 and 102 TFEU to digital

[472] Valeria Falce, 'L'abuso di dipendenza economica nel digitale. Perché no?' (*Filodiritto*, 5 May 2022) <https://www.filodiritto.com/labuso-di-dipendenza-economica-nel-digitale-perche-no> accessed 9 May 2024; for the same opinion see also Nicola MF Faraone, 'Il principio del ne bis in idem alla prova delle piattaforme digitali' <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=48490> accessed 9 May 2024.

markets, given that the DMA "*is conceived as a tool to reinforce the capacity of keeping digital markets more contestable by early controlling unfair practices* [and] *[t]here is room for the competition rules to continue shaping effective competition in digital markets post-DMA*".[473] Another commentator has argued that the DMA is highly unlikely to replace competition law in the case of practices that the DMA does not cover, in particular when (A) it is clear that those practices are not regulated by the DMA, and (b) those practices bite businesses that have the resources to pursue an antitrust complaint.[474] Geradin has submitted that "[o]*nce the provisions of the proposed DMA have entered into force, they will not supplant EU competition rules, but complement these rules*" and that this is so for a number of reasons. First, competition law will remain the first port of call for digital platforms that have not been designated as gatekeepers; second, when the gatekeeper engages in problematic conduct that is not covered by Articles 5 and 6 of the DMA; third, in instances where it is not entirely clear that a given problematic conduct is covered by the DMA.[475]

Another commentator has argued that when the practices of a gatekeeper infringe Articles 5 to 7 of the DMA, the Commission is likely to pursue such cases under the rules provided for by the DMA instead of under the abuse of dominance provisions. Notwithstanding this fact, it has been noted that the vast majority of abuse of dominance investigations of the European Commission do not concern gatekeepers of core platform services, and therefore Article 102 TFEU cases will continue to play a role in the enforcement against digital platforms in the future. In addition to that, the scope of the Articles 5 to 7 of the DMA is limited, so that also gatekeepers will continue to be subject to abuse of

[473] Cani Fernández, 'A New Kid on the Block: How Will Competition Law Get along with the DMA?' <https://academic.oup.com/jeclap/article-abstract/12/4/271/6224264> accessed 3 May 2024.

[474] Konstantina Bania, 'Will DMA Proceedings Make Competition Law Obsolete? No They Won't' (*The Platform Law Blog*, 10 November 2023) <https://theplatformlaw.blog/2023/11/10/will-dma-proceedings-make-competition-law-obsolete-no-they-wont/> accessed 3 May 2024.

[475] Damien Geradin, 'What Will Be the Role of EU Competition Law in a Post-DMA Environment ?' (*The Platform Law Blog*, 2 February 2021) <https://theplatformlaw.blog/2021/02/02/what-will-be-the-role-of-eu-competition-law-in-a-post-dma-environment/> accessed 3 May 2024.

dominance investigations by the European Commission for other conduct.[476] It has also been submitted by another author that the DMA will complement the enforcement of EU competition law mainly with respect to public enforcement given that the DMA offers a workaround for the challenging aspects of art. 102 TFEU cases dealing with platforms and the DMA could gradually replace the need for initiating parallel art. 102 TFEU cases by the Commission. According to this author, however, a shift towards the enforcement of DMA as an alternative rather than complementary route may have a quasi-cannibalization effect in the case of private enforcement.[477]

Monti has submitted that the DMA is a *lex specialis* and this would compel the Commission to apply only the DMA, when the same conduct is regulated by both competition law and the DMA. Therefore, the expectation is that the Commission is not going to apply Article 102 to address conduct which it has regulated under the DMA. However, Monti also acknowledges that there is an argument in favour of the application of competition law to supplement the DMA, which is the backward looking and unsystematic list of prohibitions in the DMA combined with the slow procedure for upgrading the DMA. In this context, the application of a more robust competition law can supplement the list of prohibitions in the DMA.[478]

The thesis of this thesis is that, as a policy choice, the DMA should be applied to self-preferencing as restrictively as possible. The analysis of the enforcement of the various provisions has confirmed this position. Indeed, the DMA could be used to attack the most egregious forms of self-preferencing, which, on the basis of the enforcement experience of the European Commission and of the national competition authorities clearly have anti-competitive effects. Legally speaking, competition law provisions and provisions on abuse of economic dependence would remain applicable to the conducts of the concerned undertakings. Hence, these sets of rules could be used to correct potential under-

[476] Jan Blockx, 'The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices' (2023) 14 Journal of European Competition Law & Practice 325.
[477] Daniel Mandrescu, 'The DMA and EU Competition Law: Complementing or Cannibalizing Enforcement? - Lexxion' (*Competition Blogs*, 8 March 2022) <https://www.lexxion.eu/en/coreblogpost/the-dma-and-eu-competition-law-complementing-or-cannibalizing-enforcement/> accessed 3 May 2024.
[478] Monti (n 341), p. 17.

enforcement of the DMA and to address concerns such as fairness, which are better addressed through these different sets of rules.

Whether this will be the outcome of the enforcement practice in the realm of self-preferencing remains to be seen, and it will be something to look out for in the next years.

Fascinating times ahead.

CONCLUSION

The present thesis has provided clarity on the analysis of self-preferencing conducts of digital platforms and an original interpretative solution for self-preferencing conducts of digital platforms, within the multi-faceted legislative framework potentially applicable to such conducts.

To this end, Chapter I of the thesis has provided an overview in order to set the scene for the analysis. In particular, this chapter has analysed the main features of digital markets and the business models of digital platforms, in particular those that give rise to leveraging concerns. This chapter has also addressed the research question of whether the analysis of conducts and in particular of self-preferencing should be different in the online world than in the offline world. The research has found that the specific features of digital platforms only impact on the magnitude of the effects of self-preferencing conducts and on their plausibility but do not require different tests or framework of analysis. Self-preferencing conducts indeed produce effects only in an extremely limited set of circumstances, which are rarely plausible outside of digital markets.

Chapter II has then provided a critical analysis of the antitrust assessment of self-preferencing conducts. In particular, this chapter has delved into a possible definition of self-preferencing, which can be defined as a discrimination in relation to an essential input that likely gives rise to anti-competitive effects. The chapter has then analysed in detail the effects of self-preferencing and has found that the effects of self-preferencing are no different from those that have traditionally been dealt with through other categories of abuse. Having found that the analysis of self-preferencing often rests on the concept of "competition on the merits", the thesis has then applied the leading tests in this respect and has found that there is no reason to depart from the as-efficient-competitor test and that this can be applied also to conducts that are only *implicitly* pricing conducts. The thesis has then applied this analysis to the Google Shopping judgment, which is the only judgment of the EU courts that has dealt with self-preferencing so far, and found that the EU General Court should have analysed the case according to

the appropriate analytical framework for margin squeeze and constructive refusal to supply. The thesis found that first, indispensability of the input should have been established. Second, the conduct required an analysis of whether the conduct led to the elimination of effective competition in the related market, with the AEC test and principle. Third, the existence of objective justifications should have been assessed. Chapter II of the thesis has also analysed the other two main instances of self-preferencing, i.e. self-preferencing through the use of non-public data and through platform fee discrimination and found that the same framework of analysis could have been applied.

Chapter III of the thesis has analysed self-preferencing under the Digital Markets Act. The thesis has started from an analysis of the premises of the Digital Markets Act to delve into the concepts of Core Platform Service, gatekeeper and the ex-ante application of this instrument. Moreover, Chapter III of the thesis has analysed and defined the concepts of contestability and fairness and found that these objectives are overarching to what can be accommodated under competition laws. In light of this analysis, the thesis has suggested a restrictive interpretation of the obligations in the Digital Markets Act relating to self-preferencing. The thesis has also underlined the fact that the implementation of the obligations in the Digital Markets Act relating to self-preferencing should be based on compliance and not on enforcement, as this is the main aspect that will determine the success (or lack thereof) of the Digital Markets Act.

Chapter IV includes an analysis of how the antitrust and regulatory aspects of self-preferencing should co-exist as well as an analysis of the interplay between national and European laws. In particular, this chapter analysed the relationship between competition law, the DMA, and the other legislative provisions potentially applicable to the relevant conducts, also in light of the principle of *ne bis in idem*. Moreover, the chapter analysed the interplay between European law and national laws that have the same goals or address the same conduct. The research has found that the DMA should be applied restrictively, given that the other rules will continue to apply.

The research as a whole has found that the analysis of self-preferencing should not be any different in digital markets than in the offline scenario. Indeed,

the only difference is that the limited instances in which self-preferencing is problematic will rarely materialize outside of digital markets. Hence, the difference is in the frequency of enforcement, not in the framework of analysis of these conducts. The research has also found that self-preferencing should generally be applied restrictively, both under antitrust laws and under the Digital Markets Act. Moreover, caution should be exercised when applying the relevant provisions as these can give rise to over-enforcement and conflicts, between competition law and regulation and between EU law and national laws.

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