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## **Abuse of Dominance in Digital Markets**

### **Examining Self-Preferencing in the Digital Markets Act: A Case Study on *Google Shopping***

Dissertation to obtain a Master's Degree in Law,  
in the specialty of International and European  
Law

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## **ANTI-PLAGIARISM STATEMENT**

I, Sofia Teruszkin Matias, declare that this dissertation is of my exclusive authorship and that the use of all contributions or texts from others is duly referenced.

Sofia Teruszkin Matias

*“Ex-ante regulation like the DMA should not become the primary tool to foster competition in markets unless special structural impediments to competition, like those present in digital markets, exist.”*

Mario Draghi<sup>1</sup>

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<sup>1</sup> *The future of European competitiveness*, Part B | In-depth analysis and recommendations, p. 304.

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## LIST OF ABBREVIATIONS

<b>ACC</b>	Australian Competition and Consumer Commission
<b>AEC-test</b>	As-efficient-competitor test
<b><i>Apud</i></b>	Cited by
<b>CFREU</b>	Charter of Fundamental Rights of the European Union
<b>CJEU</b>	Court of Justice of the European Union
<b>CMA</b>	Competition and Markets Authority of the United Kingdom
<b>CPS</b>	Core Platform Services
<b>CSS</b>	Comparison Shopping Services
<b>DG COMP</b>	Directorate-General for Competition
<b>DMA</b>	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), OJL 265, 12 October 2022
<b>DMU</b>	Digital Markets Unit
<b>EC</b>	European Commission
<b>ECJ</b>	European Court of Justice
<b>ECN</b>	European Competition Network
<b>EEA</b>	European Economic Area
<b>EU</b>	European Union
<b>FCT</b>	Federal Trade Commission
<b>GC</b>	General Court
<b><i>Ibid.</i></b>	Same source as previous
<b>NCAs</b>	National competition authorities
<b><i>Op. cit.</i></b>	The work cited
<b>PLA</b>	Product Listing Ads
<b>SMEs</b>	Small and medium-sized enterprises
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Consolidated Version of the treaty on the Functioning of the European Union

## **STATEMENT OF THE NUMBER OF CHARACTERS**

The body of this dissertation, including spaces and notes, occupies a total of 182,139 characters.

## ABSTRACT

The traditional EU Competition Law was designed for offline market operations. The digital advancement has brought fundamental changes to the market sphere, both from the consumer and the buyer's side. Modern digital platforms have enabled the upsurge of new actors - gatekeepers - who sustain their market power through network effects combined with economies of scale, high switching barriers, and data-driven operational methods. The new digital economy presents hurdles that traditional frameworks cannot promptly address, thus requiring specific regulatory remedies. This reinforces the necessity of developing appropriate legal instruments to assess and control discriminatory and anti-competitive practices in digital markets.

This research examines how EU Competition Law is evolving in response to market transformations, primarily focusing on self-preferencing practices as a novel theory of harm. The *Google Shopping* case serves as a critical example that demonstrates the need for a detailed context-based evaluation of self-preferencing practices by dominant platforms due to the absence of an established legal test to assess this conduct under Article 102 of the TFEU.

In this context, the DMA represents a new regulatory framework that establishes *ex-ante* rules and imposes specific obligations on gatekeepers, such as prohibiting self-preferencing (Article 6(5)). While the DMA provides faster and more predictable enforcement compared to traditional methods, it also creates new uncertainties regarding its interface with prevailing EU Competition Law. The parallel application of the DMA and pre-existing Competition Law raises issues concerning the distribution of enforcement power and the possibility of double jeopardy (*ne bis in idem*).

Finally, this dissertation concludes that “smart regulation” represents the optimal solution by implementing proactive rules alongside sustained oversight. A hybrid regulatory approach provides the necessary adaptability and focus for modern digital market dynamics, but also requires ongoing evaluation and precise legal guidance from the EC to prevent both excessive EU regulation and *laissez-faire*. It is necessary to reach a compromise between the two in order not to hamper European innovation and competitiveness.

**Keywords:** Competition Law, Digital Economy; Abuse of Dominance, Self-preferencing; Digital Markets Acts, *Non bis in idem*

## RESUMO

O Direito Europeu da Concorrência foi concebido para mercados tradicionais. A transformação digital trouxe alterações substanciais no domínio do mercado, tanto do lado do consumidor quanto do comprador. As plataformas digitais modernas potenciaram o surgimento de novos agentes - *gatekeepers* - que consolidam o seu poder de mercado através de efeitos de rede combinados com economias de escala, elevadas barreiras estruturais e práticas operacionais orientadas por dados. A nova economia digital coloca desafios que os modelos tradicionais não conseguem enfrentar, tornando-se necessária a implementação de novas soluções regulatórias. Tal reforça a urgência de desenvolver instrumentos jurídicos adequados para identificar e mitigar práticas discriminatórias e lesivas da concorrência nos mercados digitais.

A presente dissertação pretende analisar a evolução do Direito Europeu da Concorrência face às transformações ocorridas recentemente no mercado digital, com especial ênfase nas práticas de auto-preferência. A decisão do *Google Shopping* ilustra a necessidade de uma análise detalhada e contextualizada das práticas auto-preferenciais praticadas por plataformas dominantes no mercado dada a inexistência de um critério consolidado para a sua avaliação ao abrigo do Artigo 102.º do TFUE.

Neste contexto, o DMA representa um novo quadro regulatório que estabelece regras *ex ante*, impondo obrigações específicas aos *gatekeepers*, designadamente a proibição da auto-preferência (Artigo 6.º, n.º 5). Apesar de permitir uma aplicação mais célere e previsível face aos métodos tradicionais, o DMA introduz incertezas quanto à sua interface com a legislação concorrencial vigente da UE. A aplicação paralela destas normas suscita questões relativas à distribuição do poder de execução e a possibilidade de dupla punição (*ne bis in idem*).

Esta dissertação demonstra que a “regulação inteligente” constitui a solução ideal, ao combinar regras proativas com uma supervisão contínua e rigorosa. Uma abordagem híbrida permite responder à complexidade dos mercados digitais, exigindo avaliação continuada e orientação por parte da CE para evitar a sobre-regulamentação da UE e o *laissez-faire*. Impõe-se um equilíbrio que não prejudique a inovação nem a competitividade europeias.

**Palavras-Chave:** Direito da Concorrência, Economia Digital; Posição Dominante no Mercado; Auto-preferência; Regulamento dos Mercados Digitais; *Ne bis in idem*

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## 1. INTRODUCTION: COMPETITION LAW IN THE DIGITAL ERA

The digital economy comprises economic and commercial activities that use digital technologies and electronic communications to form a ubiquitous network of transactions through the internet, information and communication technologies<sup>2</sup>. According to the OECD, digital ecosystems consist of “*combinations of interoperating applications, operating systems, platforms, business models and/or hardware, and not all components of the ecosystem must be owned by the same entity*”<sup>3</sup>.

In the present day, economic activity is increasingly mediated by digital platforms, which have reshaped market operations through new intermediation models. This emerging market requires evaluation of gatekeeper dominance and current regulatory effectiveness for competitive preservation. As the European Parliamentary Research Service indicates<sup>4</sup>, digital platforms have had a significant impact on social, economic, and consumer behaviour. This transformation affects both the demand and supply, as platform-based intermediation enables direct communication between buyers and sellers.

For the purpose of this dissertation, a platform will be defined as “*an undertaking that brings together economic agents and actively manages external effects between them*”<sup>5</sup>. By reducing transaction costs and facilitating interactions between businesses and consumers, platforms enable new services and business models through internet-based intermediation<sup>6</sup>.

While these developments have introduced remarkable efficiencies and the potential for global reach, they have also given rise to significant dependencies on a small group of gatekeepers<sup>7</sup>. This has disrupted conventional competition models, concentrating economic

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<sup>2</sup> BISCONTINI, Tyler – *Digital economy*. Ipswich, MA: EBSCO Information Services, 2025. Available at: <https://www.ebsco.com/research-starters/technology/digital-economy>. [Accessed on 17 May 2025].

<sup>3</sup> OECD – *An Introduction to Online Platforms and their Role in the Digital Transformation*, Paris: OECD Publishing, 2019, p. 22. Available at: <https://doi.org/10.1787/53e5f593-en>. [Accessed 11 May 2025].

<sup>4</sup> EUROPEAN PARLIAMENTARY RESEARCH SERVICE – *Online Platforms: Economic and Societal Effects*. Panel for the Future of Science and Technology, Scientific Foresight Unit, PE 656.336, 2021. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS\\_STU\(2021\)656336\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf). [Accessed 5 Apr. 2025].

<sup>5</sup> FRANCK, Jens-Uwe; PEITZ, Martin – *Market Definition and Market Power in the Platform Economy*. Brussels: Centre on Regulation in Europe (CERRE), 2019, p. 13. Available at: [https://cerre.eu/wp-content/uploads/2020/05/report\\_cerre\\_market\\_definition\\_market\\_power\\_platform\\_economy.pdf](https://cerre.eu/wp-content/uploads/2020/05/report_cerre_market_definition_market_power_platform_economy.pdf). [Accessed on 23 Apr. 2025].

<sup>6</sup> OECD, *An Introduction to Online Platforms and their Role in the Digital Transformation*, op. cit., p. 21.

<sup>7</sup> PODSZUN, Rupperecht – *Digital Markets Act: Article by Article Commentary*. Munich: Beck; Baden-Baden: Nomos; Oxford: Hart, 2024, p. 6.

power around a small number of dominant “super-platforms” that control entire ecosystems of interrelated services and products. The economic features have enabled the development of monopolies or “quasi-monopolies” hindering competitors to challenge them. Dominant platforms use their intermediary roles to sculpt market competition, resulting in negative impacts on third-party businesses that depend on their services.

Several features of the digital economy further embroil Competition Law enforcement, including, *inter alia*, strong network effects, extreme returns to scale, multi-sidedness, “winner-takes-all” dynamics<sup>8</sup>, and substantial economies of scope<sup>9</sup> as will be seen further on:

The first undertakings that entered the market gained substantial advantages, allowing them to build market power and enter new markets, further solidifying their position. Hence, competition authorities encounter increasing difficulties as market boundaries become blurred and market power concentrations continue to exceed current Competition Law *know-how*<sup>9</sup>. These concerns are particularly evident in platform-based business models and the monetisation of data serves as an example of a new competitive asset.

When digital platforms act simultaneously as market intermediaries and rule-makers—by setting access conditions, governance structures, and rules for transactions—they acquire the capacity to distort market conditions, frequently to the detriment of competitors. Additionally, these platforms may exploit consumers by leveraging extensive data holdings and behavioural biases.

The possession of extensive personal data by dominant firms creates substantial entry barriers for potential competitors because they use predictive analytics and algorithmic optimisation tools to maintain their market position and block new competitors from entering the market.

Although digital platforms, particularly those operated by the largest technology firms<sup>10</sup>, deliver important efficiencies and spur innovation, their sustained market dominance could produce negative externalities throughout time. These include reduced consumer choice, lower quality, and the manipulation of consumer behaviour through dependency on habitual

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<sup>8</sup> SUFRIN, Brenda; DUNNE, Niamh; JONES, Alison – *EU Competition Law: Text, Cases & Materials*. 8th ed. Oxford: Oxford University Press, 2023, p. 70.

<sup>9</sup> OECD – *Handbook on Competition Policy in the Digital Age*. Paris: OECD Publishing, 2022, p. 13. Available at: <https://doi.org/10.1787/c8c1841b-en>. [Accessed on 6 May 2025].

<sup>10</sup> e.g., Google, Amazon, Facebook, and Apple.

platform usage. High switching costs and limited interoperability exacerbate these dependencies<sup>11</sup>, both for business users and consumers, as multi-homing opportunities diminish<sup>12</sup> and competitive alternatives shrink<sup>13</sup>.

As part of its vision for a digitally fit Europe<sup>14</sup>, the DMA was adopted in September 2022 as the first *ex ante* regulatory instrument<sup>15</sup>, with the aim to “ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular” and harmonise legal obligations across Member States<sup>16</sup>. Simultaneously, the Digital Services Act was also adopted in October 2022<sup>17</sup>, addressing the responsibilities and obligations of digital service providers, with the aim of enhancing user protection, ensuring the removal of illegal content, and strengthening digital accountability.

The main focus of this dissertation is to investigate the appropriate regulatory framework for the digital economy to fulfil Competition Law objectives, namely to protect the free internal market, deliver efficiency, and promote general economic welfare<sup>18</sup>.

In this context, the concentration of power among a few technology giants has sparked doubts about suitable regulatory measures for digital markets' distinctive scale and scope.

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<sup>11</sup> CYRIAC, Noby Thomas – *Big data and the abuse of dominance by multi-sided platforms: an analysis of Art. 102 TFEU*. 1.<sup>a</sup> ed. Baden-Baden: Nomos, 2022, p. 149.

<sup>12</sup> According to the definition provided by BRANDIMARTE and NORDEN – *The evolving concept of market power in the digital economy*, *Competition Law Journal*, Vol. 21, no. 4, 2023, p. 186. Available at: <https://doi.org/10.4337/clj.2022.04.05> [Accessed on 31 May 2025]; multi-homing may be defined as the use of multiple platform services on either side of a multi-sided platform. It constitutes a relevant factor in the assessment of market power, as it reflects the degree to which users perceive these services as substitutes or complements.

<sup>13</sup> EC: Directorate-General for Communications Networks, Content and Technology, German Economic Institute, Open Evidence, PPMI, RAND Europe, BARCEVIČIUS, Egidijus et al. – *Multi-homing: Obstacles, opportunities, facilitating factors – Analytical paper 7*, Luxembourg: Publications Office of the European Union, 2021, p. 15. Available at: <https://data.europa.eu/doi/10.2759/220253> [Accessed on 11 May 2025]. Here, the EC defines multi-homing as “a situation in which users tend to use several competing platform services in parallel.”

<sup>14</sup> EUROPEAN UNION – *A Europe fit for the digital age*. Luxembourg: Publications Office of the European Union, 2022. Available at: <https://op.europa.eu/en/publication-detail/-/publication/b62bb874-28df-11ed-8fa0-01aa75ed71a1/language-en>. [Accessed: 1 Jun. 2025].

<sup>15</sup> EUROPEAN PARLIAMENT; Council of the European Union – *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)*. OJ, L 265/1, 12 Oct. 2022.

<sup>16</sup> Recital 7 and 1(1), DMA.

<sup>17</sup> EUROPEAN PARLIAMENT; Council of the European Union – *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)*. OJ, L 277/1, 27 Oct. 2022.

<sup>18</sup> EUROPEAN PARLIAMENT – *Competition policy*. Fact Sheets on the European Union, Brussels, 2024. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>. [Accessed on 6 Jun. 2025].

The rise of (super) dominant digital platforms has exposed structural deficiencies within the current EU Competition Law framework. The uncontrolled nature of digital markets and CPS has earned them the "wild west" label because of their difficult management<sup>19</sup>.

### 1.1. STRUCTURE OF THE DISSERTATION

This dissertation focuses on self-preferencing as one of the most extensively debated emerging theories of harm in the digital economy. In this respect, the DMA has introduced asymmetric obligations aimed at preventing gatekeepers from engaging in such conduct.

The inclusion of self-preferencing within the DMA raises the question of whether this represents a continuation of, or departure from, the jurisprudence developed under Article 102 TFEU. The *Google Shopping* case is an example of how such practices are assessed under EU Competition Law<sup>20</sup>.

The dissertation follows this specific structure. This first chapter introduces the state of the art of the digital markets and Competition Law. The second chapter investigates the distinctive market features and the propensity of the digital market towards natural monopolies. Chapter 3 addresses why traditional tools, usually employed in typical markets, are not fit for digital platforms. Then, the fourth chapter evaluates a novel theory of harm through an assessment of its competitive advantages. The *Google Shopping* decision is examined in Chapter 5. In due course, Chapter 6 will provide a brief overview of the DMA and analyses the legal effects of its Article 6(5) together with its relationship to established Competition Law principles. The seventh Chapter tackles the principle of *ne bis in idem* in the aftermath of the DMA. Afterwards, Chapter 8 performs a concise evaluation of how different jurisdictions handle self-preferencing to date.

The dissertation examines how the DMA's *ex ante* regulatory framework differs from the case-by-case enforcement model of Article 102 TFEU.

Finally, this subject will undoubtedly remain central to the future development of Competition Law in digital markets. The recent decision on 5 September 2025 by the EC to

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<sup>19</sup> WITT, Anne – *The Digital Markets Act: Regulating the Wild West*. Common Market Law Review, Vol. 60, no. 3, 2023, p.41. Available at: <https://ssrn.com/abstract=4395089>. [Accessed on 5 Feb].

<sup>20</sup> CJEU, Judgment of 10 November 2021, *Google and Alphabet v. Commission*, Case T-612/17, EU:T:2021:763.

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condemn Google for abusive self-preferential practices in the advertising technology sector is a manifestation of such <sup>21</sup>.

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<sup>21</sup> EC, “*Commission fines Google €2.95 billion over abusive practices in online advertising technology*”. Brussels, 2025, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_1992](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1992) [Accessed 12 Sep. 2025].

## 2. THE DIGITAL (PLATFORM) ECONOMY

Digitalisation has brought about unprecedented market power concentration among dominant super-platforms, creating challenges that affect economic systems, social structures and political frameworks. Competition Law, originally designed for traditional (offline) markets, struggles to fully address the distinctive characteristics of digital marketplaces and the novel theories of harm they give rise to.

Leading online platforms function in markets that possess structural elements that stimulate significant market power. These characteristics may not be equally present across all digital markets, but their cumulative effect justifies increased awareness and scrutiny under Competition Law<sup>22</sup>.

Thus, it is important to identify some of the characteristics present in digital markets.

As opposed to traditional industries, digital markets operate within a realm of heightened network effects and significant economies of scale<sup>23</sup>, where consumer, supplier, and advertiser interaction operates within platform ecosystems.

Network effects are implemented where the value of the platform grows for each user it adds on one side of the market (i.e., the consumer) and for each additional user and enhanced participation on the other side of the market (i.e., the advertiser or service provider)<sup>24</sup>.

In this industry, platforms exhibit both direct and indirect network externalities. Direct externalities arise when additional users increase value for others within the same user group, whereas indirect externalities occur when the benefit is generated for a different user group as participation grows<sup>25</sup>.

At the same time, online platforms have a unique ability to connect multiple sides of the market. Despite the absence of a universally accepted definition in the literature, a multi-sided business model may be described as a platform that “*serves more than one customer*

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<sup>22</sup> SUFRIN, Brenda et al., *op. cit.*, p. 1209.

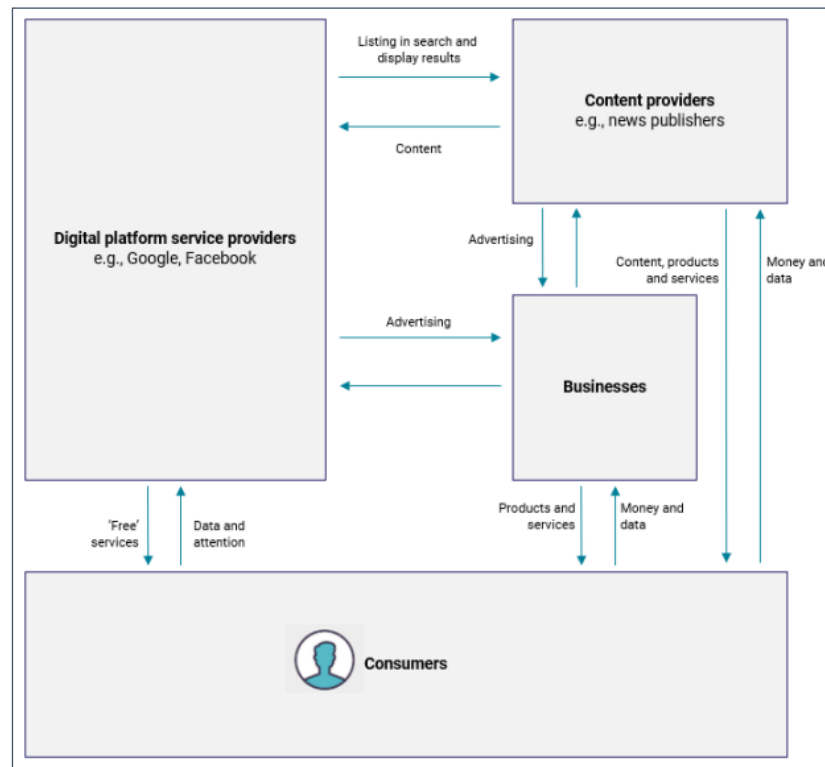
<sup>23</sup> See Recital 61, DMA.

<sup>24</sup> EC – *Case M.8124 – Microsoft/LinkedIn: Commission decision pursuant to Article 6(1)(b) of Council Regulation (EC) No 139/2004*, Brussels, 2016, para. 341. Available at: [https://ec.europa.eu/competition/mergers/cases/decisions/m8124\\_1349\\_5.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf). [Accessed 11 May 2025].

<sup>25</sup> DUCII, Francesco. *Natural Monopolies in Digital Platform Markets*. Cambridge: Cambridge University Press, 2020, p. 26.

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group through different customer groups<sup>26</sup>”. So, there must be at least two separate groups, each belonging to a different side of the market, that rely on the platform.



**Figure 1- Multi-sided nature of advertising-based content platforms**

Another key feature is the platform's extreme scalability. The existence of economies of scale means that the per-unit cost for the output produced declines with the scale of the outputs already produced<sup>27</sup>. In other words, large-scale production reduces average costs, providing a competitive advantage- this is designated by “scale without mass”<sup>28</sup>. Therefore, incorporating commercial or end users into the digital economy results in marginal costs close to zero.

<sup>26</sup> CYRIAC, *op. cit.*, p. 118.

<sup>27</sup> WHISH, Richard – *Competition Law*. 6th ed. Oxford: Oxford University Press, 2009, p. 10. Cited by CYRIAC, Noby Thomas – *Big Data and the Abuse of Dominance by Multi-Sided Platforms: An Analysis of Art. 102 TFEU*. 1st ed. Baden-Baden: Nomos, 2022, p. 144.

<sup>28</sup> OECD, *An Introduction to Online Platforms and their Role in the Digital Transformation*, *op. cit.*, p. 23.

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Another feature of digital markets is the exponential growth of available information and services, which, combined with consumers' decreasing tolerance for delays, results in a tendency to avoid wasting time by readily accepting the default options presented<sup>29</sup>.

Additional characteristics of digital markets include asymmetric access to user data, which enables targeted advertising and personalised content recommendations; limited transparency resulting from the complex algorithms employed by large online platforms; and the existence of extensive ecosystems of complementary products and services built around the core offerings of dominant digital firms<sup>30</sup>.

By aggregating and monetising user data, platforms have the ability to engage in behavioural profiling and personalised targeting for advertising and product development, and progressively diversify their products.

Data-dominant undertakings have strengthened access to data, causing a “*snowballing effect on the barriers for potential entrants to enter the market*”<sup>31</sup>. The data-driven business models, often because of zero-price services, create barriers to entry for potential competitors.

Other characteristics are the “lock-in” effects from current users when they become strong users of a platform, simply as a matter of effort, value invested, or because the alternatives are perceived as less attractive. Here, user engagement also becomes a differentiated advantage for the incumbent. Some gatekeepers remove user mobility by creating switching costs, and interoperability barriers, which limit users' ability to migrate to alternative services. This, in turn, reduces the contestability of the market, with new entrants facing considerable difficulty convincing users to abandon the platform they are used to. Indeed, humans are creatures of habit.

The other facet is that (digital) markets with low interoperability have high barriers to entry in terms of business users that can take a significant sunk cost, resulting in overreliance on the gatekeeper's ecosystem over time<sup>32</sup>. Large network and scale effects may lead to 'winner-takes-all' or tipping situations where switching costs prevent users from using multiple

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<sup>29</sup> BRANDIMARTE and NORDEN, *The evolving concept of market power in the digital economy*, *op. cit.*, p. 181.

<sup>30</sup> *Ibid.*

<sup>31</sup> CYRIAC, *op. cit.*, p. 168.

<sup>32</sup> GUIDI, Sara – *Before the Gatekeeper Sits the Law: The Digital Markets Act's Regulation of Information Control*. European Papers, Vol. 8, no. 2, 2023, p. 407.

platforms at the same time<sup>33</sup>. The high switching costs that users and businesses face lead them to single-home, which decreases the window for interoperability and strengthens market concentration. This dynamic process strengthens dominant gatekeepers while making it difficult for new undertakings to enter the market.

With this in mind, several authorities have noted that multi-homing may serve as a competitive test on the durability of market power<sup>34</sup>.

While many of these features can be observed in traditional markets, their cumulative interaction and amplified scale in digital markets increase the risk of Competition Law infringements<sup>35</sup>. When a platform attracts a competitive advantage, it can “snowball” into a larger user base than would be possible when being compared to a competitor and as such increase its barriers to entry and strengthen its incumbent position. This creates strategic barriers for new competitors to enter the market<sup>36</sup>.

Horizontally, platforms can repurpose their operations and connection to their users through their dominant positioning to deliver new goods and services. Vertically, these platform businesses generally tend to identify all aspects of their value delivery model (e.g., search, advertising, logistics, payment) under a common umbrella. These capabilities enable platform envelopment, where a dominant platform uses their market position in one area to enter similar markets and to operate in multiple stages of the process. This increases the platform's value offering but also increases user dependence and limits alternative producers' viability. That being said, this form of integration may give rise to conflicts of interest throughout the value chain, as will be further examined.

Once platform companies achieve a dominant position, with strong positive network effects, they may create such high barriers to entry that market entry becomes practically impossible. Considering their ability to shape user behaviour, the fast-paced evolution of

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<sup>33</sup> Tipping has been defined as “*the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge*”, see KATZ, Michael L.; SHAPIRO, Carl – *Systems Competition and Network Effects*. Journal of Economic Perspectives, Vol. 8, 1994, pp. 93–115; *apud* DAVIES, John; MEUNIER, Valérie; CALANCHI, Gianmarco; STENIMACHITIS, Angelos – *A Missed Opportunity: The European Union’s New Powers over Digital Platforms*. The Antitrust Bulletin, Vol. 67, no. 4, 2022, p. 506.

<sup>34</sup> OECD – *The Evolving Concept of Market Power in the Digital Economy*, OECD Roundtables on Competition Policy Papers, no. 278, Paris: OECD Publishing, 2022, p. 13. Available at: <https://doi.org/10.1787/2cfc4a8-en> [Accessed on 11 May 2025].

<sup>35</sup> BRANDIMARTE and NORDEN, *The evolving concept of market power in the digital economy*, *op. cit.*

<sup>36</sup> CJEU, Judgment of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities (Chiquita Bananas)*, Case 27/76, ECLI:EU:C:1978:22, para. 122.

digital markets and the value associated with “first-mover advantages”, the risks associated are considerable. On top of that, digital platforms are both gatekeepers and rule makers in the digital economy<sup>37</sup>.

These core characteristics, including the competition between platforms, gatekeeping roles, and the amplification of network effects, blur the line between legitimate competition and market power abuse. Undoubtedly, the cumulative effect of these market features calls forth increased scrutiny from a Competition Law perspective.

### 2.1. NATURAL MONOPOLIES

The digital revolution has heightened the potential for natural monopoly formation in digital markets, leading to fluctuating degrees of concentration across different sectors<sup>38</sup>. As DUCCI observes, “*the rise of superstar digital platforms is seen as a particularly prominent manifestation of the role of technological change in fostering concentrated market structures*<sup>39</sup>”.

Indeed, the growing dominance of the platform model, which relies on digital services and the use of data as a key resource for algorithms that enable pairing and forecasting, increases the likelihood that contemporary platforms exhibit characteristics of natural monopolies<sup>40</sup>.

Technological progress fosters market concentration through two main channels: (i) by promoting platform intermediation as the prevailing business model, where large user networks are formed and network externalities further reinforce user attraction; and (ii) by extensively exploiting big data for algorithmic forecasting and user pairing. These dynamics, driven by digitalisation and technological change, enhance the likelihood of natural monopoly formation in digital platform markets<sup>41</sup>.

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<sup>37</sup> SCHALLBRUCH, Martin; SCHWEITZER, Heike; WAMBACH, Achim – *Digital Platforms: Structures, Regulations and Competition Policy*. Competition Policy International (2019), p. 4.

<sup>38</sup> DUCCI, Francesco – *Natural Monopolies in Digital Platform Markets*. Cambridge: Cambridge University Press (2020), p. 5. On p. 37, the author defines a natural monopoly as “the most efficient way to serve the market is through a single firm that can meet the entire demand at a lower cost than several firms operating in the same market.”

<sup>39</sup> *Ibid.*, p. 15.

<sup>40</sup> *Ibid.*, p. 17.

<sup>41</sup> *Ibid.*, p. 19-20.

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Because of this, digital markets are typically more concentrated than traditional markets<sup>42</sup>. When a firm is able to establish a competitive advantage on a platform, it can then quickly accumulate a larger user base, therefore enhancing its position through direct and indirect network externalities, supply-side economies of scale<sup>43</sup>, data access, limited product differentiation, and limited multi-homing opportunities<sup>44</sup>. This not only enhances the platform's competitive advantage but also creates real barriers to entry. As a result, they are more likely to engage in market foreclosure strategically compared to what would typically happen in a traditional market.

All these economic characteristics favour the emergence of natural monopolies, which are typically most efficiently served by a single firm<sup>45</sup>. The structure of markets and firms is increasingly shaped by technological developments, with big data, algorithmic forecasting and matching, and platform intermediation playing a central role in driving concentration within the digital economy<sup>46</sup>. These characteristics create 'winner-takes-most' tendencies and enable the covered firms to extend their market power into adjacent markets.

To put it in a nutshell, the architecture of digital markets is designed to favour market concentration at the expense of competition and consumer welfare. Although the "free" services may appear beneficial, they hinder a complex system of data extraction and behavioural profiling, that strengthens the structural power of dominant platforms.

The digital market forces challenge the fundamental assumptions upon which Competition Law rests, particularly, given that it is difficult to measure price and demands and to define (statistic) market definitions, consumer harm, and barriers to entry.

All in all, this creates concerns over the ability of Competition Law to effectively address market power in the digital economy, has intensified ongoing debates and exposed the limitations of existing competition policy frameworks in dealing with digital platform markets<sup>47</sup>.

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<sup>42</sup> CABRAL, Luís, et al. – *The EU Digital Markets Act.*, *op. cit.*, p. 37.

<sup>43</sup> VAN DEN BOOM, Jasper – *Regulating Competition in the Digital Network Industry: A Proposal for Progressive Ecosystem Regulation* [Doctoral thesis]. Tilburg, Tilburg University, 2023, p. 71. Available at: <https://core.ac.uk/download/574531523.pdf>. [Accessed on 26 Apr. 2025].

<sup>44</sup> DUCCI, Francesco, *Natural Monopolies in Digital Platform Markets*, *op. cit.*, p. 41.

<sup>45</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 178.

<sup>46</sup> DUCCI, Francesco, *Natural Monopolies in Digital Platform Markets*, *op. cit.*, p. 45.

<sup>47</sup> *Ibid.*, p. 2.

### 3. ADAPTING TRADITIONAL COMPETITION LAW TOOLS

The implementation of standard Competition Law mechanisms faces certain restrictions when applied to digital markets. The EC's Impact Assessment Support Study addresses some of them: for example, Article 102 TFEU acts *ex post* and may not necessarily address contestability; enforcement is slow, as demonstrated by the *Google Shopping* case – the EC took 6 years to make a decision –; it is difficult to establish dominance in a multi-sided ecosystem; and the legal thresholds for proving an abuse (including refusal to supply data) are high<sup>48</sup>.

The first limitation is, in fact, the lack of procedural speed. The investigation process within the digital economy sector tends to be lengthy<sup>49</sup>, with the *Google Shopping* case serving as a prime example.

Before a market dominance assessment can be conducted, it is necessary to define the relevant market, in terms of product, geography, and time<sup>50</sup>. Yet, in the context of a multi-sided platform, the question arises whether two sides of a platform require separate consideration as different competitive markets or whether they are part of the same integrated market.

Article 102 TFEU allows for the existence of a dominant position in one market, even if the effects of the abuse are felt in a different market<sup>51</sup>. In *Tetra Park II*, the CJEU acknowledged that Article 102 TFEU may extend to situations where a firm engages in abusive practices in a market where it is not dominant, provided such conduct is linked to leveraging its dominance in another, separate market<sup>52</sup>. In essence, the firm's position of power in one market can be used to secure a competitive edge in a distinct, non-vertically leveraged market.

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<sup>48</sup> EC. Directorate-General for Communications Networks, Content and Technology; SUNDERLAND, Joe et al – *Digital Markets Act – Impact Assessment Support Study*. Luxembourg: Publications Office of the European Union, 2020. Available at: <https://data.europa.eu/doi/10.2759/230813>. [Accessed on 22 Apr. 2025].

<sup>49</sup> OECD – *Ex ante regulation and competition in digital markets*. OECD Roundtables on Competition Policy Papers, no. 272. Paris: OECD Publishing, 2021. Available at: <https://doi.org/10.1787/c83e178d-en>. [Accessed on 6 Feb. 2025].

<sup>50</sup> CJEU, *Volkswagen AG v Commission of the European Communities*, Judgment of 6 July 2000, Case T-62/98, ECLI:EU:T:2000:180, para. 230.

<sup>51</sup> SUFRIN, Brenda et al., *op. cit.*, p. 423.

<sup>52</sup> CJEU, Judgment of 14 November 1996, *Tetra Pak International SA v Commission of the European Communities*, Case C-333/94 P, ECLI:EU:C:1996:436, para. 27.

As the OECD has noted, in the context of market definition of multi-sided platforms, there are two approaches that may be followed, either defining the markets as separated for each customer group or establishing a single market comprising all customer groups<sup>53</sup>. Here, the problem is how to account for the indirect network effects on adjacent markets.

Even so, when assessing abuse of dominance in *Google Shopping*, the EC understood that the relevant markets of the multi-sided platform were the general search services market and the comparison shopping services market<sup>54</sup>.

### 3.1 ZERO-PRICE MARKETS

Adding to the challenge is the question of how to define zero-cost markets within existing parameters for defining relevant markets. On this basis, offering the service free of charge to searchers enlarges the base of users accessible to advertisers and increases the volume of data collected, which can then be used to further improve the platform's algorithms<sup>55</sup>.

Notably, there is some hesitation, especially in certain jurisdictions, that a “market” may exist for the purposes of Competition Law where there is not a monetary transaction. This position is illustrated by the US District Court’s ruling initiated against Google for alleged attempted monopolisation and monopolisation under Section 2 of the Sherman Act, whereby the court held that the “Search Market” could not be considered a market under antitrust law<sup>56</sup>.

Conversely, the *Google Shopping* case provides a significant example of the EC's willingness to treat zero-price markets as relevant for Competition Law purposes. In that case, the EC identified two separate product markets – for general search services and CSS – even though both were provided free of charge to end users<sup>57</sup>. Although these services did not involve any monetary transaction by consumers, they were monetised indirectly: the general

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<sup>53</sup> OECD. Directorate for Financial and Enterprise Affairs. Competition Committee – *Market Definition in Multi-Sided Markets – Note by Sebastian Wismer & Arno Rasek – Hearing on Rethinking the Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets*. DAF/COMP/WD(2017)33/FINAL, Paris (2017), p. 4. Available at: [https://one.oecd.org/document/DAF/COMP/WD\(2017\)33/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)33/FINAL/en/pdf). [Accessed on 6 May 2025].

<sup>54</sup> EC – *Decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 - Google Search (Shopping))*, Brussels, C(2017) 4444 final, para. 154.

<sup>55</sup> DUCCI, Francesco, *Natural Monopolies in Digital Platform Markets*, *op. cit.*, p. 53.

<sup>56</sup> UNITED STATES DISTRICT COURT (N.D. Cal.), Judgment of 16 March 2007, *Kinderstart.com, LLC v Google, Inc.*, WL 831806, 2007-1 Trade Cases P 75,643.

<sup>57</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, para. 154.

search service was monetised through the sale of advertising, while CSS were monetised through fees paid by merchants for product listings and click-throughs. The EC's decision in *Google Shopping* highlights that exclusionary conduct in zero-price environments - like algorithmic self-preferencing - can distort competition by limiting the visibility of competitors and by limiting the choices available to users, for instance.

As highlighted in the 2024 Commission Notice on Market Definition, identifying relevant markets in digital multi-sided platform contexts is even more complex because of indirect network effects among customers that are on different sides of the multi-sided platform, zero-priced offers and interdependent demand between user groups. Particularly, the Notice notes that:

*“[M]ulti-sided platforms may supply a product to a user group at a zero monetary price, or even at a negative price, in order to attract users to products offered on the other sides of the platform and monetise their products on those sides. Zero monetary prices may be an integral part of multi-sided platforms’ business strategy. The fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product<sup>58</sup>”.*

Given that search services are provided at zero monetary cost, monopoly pricing is not the primary concern. Rather, exploitation may occur in other forms, such as reductions in service quality, infringements on privacy, or the improper use of collected data by the search platform<sup>59</sup>.

### 3.2 THE SSNIP TEST

Furthermore, typical Competition Law metrics depend on price-based indicators (e.g., excessive pricing or predatory pricing) to detect anti-competitive behaviour. As a matter of fact, platform-based markets present a challenge because exclusion occurs through non-price mechanisms, namely restrictions on interoperability, discriminatory access to ranking algorithms, and self-preferencing in search and recommendation systems. As such, existing

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<sup>58</sup> EC – *Notice on the definition of the relevant market for the purposes of Union competition law*. OJ, C/2024/1645 (2024), p. 30. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C\\_202401645](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645). [Accessed on 21 Apr. 2025]

<sup>59</sup> DUCCI, Francesco, *Natural Monopolies in Digital Platform Markets*, *op. cit.*, pp. 66-67.

legal frameworks struggle to detect and address abuse in environments where market power is exercised through less visible means.

For example, the SSNIP test is a method for assessing interchangeability in a one-sided market, according to which a small but significant and non-transitory price increase (5-10%)<sup>60</sup> in a given product or service of the hypothetical monopolist will make consumers switch to an alternative purchase from the hypothetical monopolist's market to competing suppliers<sup>61</sup>. The challenge is that, in multi-sided markets, a price increase for a specific stakeholder group may lead to a change in demand not only on that side<sup>62</sup>.

In fact, in digital ecosystems, market dominance is not primarily exercised through pricing conduct but rather through control over data flows, economies of scale, network effects, and substantial barriers to entry, which complicate the delineation of the market itself<sup>63</sup>. Put simply, data is not directly priced at a particular value, thus the SSNIP test is unlikely to apply in this context<sup>64</sup>. In cases involving non-price conduct, price-cost tests are generally unfit to assess whether the behaviour departs from competition based on merit<sup>65</sup>.

In this regard, FRANCK and PEITZ provide a comprehensive conceptual reassessment of market definition tailored to the realities of platform-based markets<sup>66</sup>. In their view, services offered free of charge—such as search engines or social media platforms—can still constitute distinct markets, as long as the activity forms part of a broader economic strategy, such as monetisation through data or advertising<sup>67</sup>. The authors also suggest modifying traditional tools like the SSNIP test for two-sided markets to incorporate cross-group externalities and to reflect interdependent prices. While empirically challenging, they argue that the SSNIP test remains a legitimate conceptual tool for determining substitutability for the purposes of digital ecosystems<sup>68</sup>. These ideas support a more lenient and economically coherent way to define

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<sup>60</sup> EC – *Notice on the definition of relevant market for the purposes of Community Competition Law*, *op. cit.*, paras 15–19 and 40. Here, the EC notes that “[r]easoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance 5% to 10%) are taken into account when they are sufficiently backed by factual evidence.”

<sup>61</sup> CYRIAC, *op. cit.*, p. 97.

<sup>62</sup> OECD, *Market Definition*, *op. cit.*, p. 12.

<sup>63</sup> SUFRIN, Brenda et al., *op. cit.*, p. 320.

<sup>64</sup> CYRIAC, *op. cit.*, p. 115.

<sup>65</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 539.

<sup>66</sup> FRANCK, Jens-Uwe; PEITZ, Martin – *Market Definition and Market Power in the Platform Economy*, *op. cit.*

<sup>67</sup> *Ibid.*, pp. 6-7.

<sup>68</sup> *Ibid.*, pp. 62-67.

the market, which is consistent with the EC's recent enforcement practices and with EU case law.

The “small but significant non-transitory decrease in quality” (SSNDQ) test functions as a proposed replacement for the SSNIP test when evaluating digital markets<sup>69</sup>. However, the SSNDQ test remains underdeveloped for practical implementation<sup>70</sup>.

While price remains a primary parameter of competition, data protection now stands as an essential non-price element, together with other factors<sup>71</sup>. Today, assessments of market dominance need to compulsorily include non-price elements for their continued relevance<sup>72</sup>.

### 3.3 DOMINANCE IN DIGITAL MARKETS

Once the relevant market is established, the next step is to prove that the firm is dominant in that market<sup>73</sup>.

Dominance refers to a position of economic strength that enables an undertaking to act independently of competitors, consumers and customers<sup>74-75</sup>, without needing to fully eliminate competition or have absolute control over the market. In other words, the undertaking in question enjoys substantial market power over a certain period of time<sup>76</sup>. As a result, a dominant undertaking is capable of distorting competition in a manner that favours itself, to the detriment of consumers<sup>77</sup>.

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<sup>69</sup> CJEU, Judgment of 14 September 2022, *Google and Alphabet v European Commission (Google Android)*, Case T-604/18, ECLI:EU:T:2022:541, paras. 176–177.

<sup>70</sup> SUFRIN, Brenda et al., *op. cit.*, p. 129.

<sup>71</sup> SCHULZE, Hendrik – *Exploring the Uncharted Waters of European Competition Law 4.0: An Approach to the Regulation of Abusive Data-Related Behaviors of Dominant Undertakings in the Digital Age*. Baden-Baden: Nomos, 2021, p. 28.

<sup>72</sup> KNAPSTAD, Tone – *Digital dominance: assessing market definition and market power for online platforms under Article 102 TFEU*. *European Competition Journal*, Vol. 20, no. 2, 2023, p. 435. Available at: <https://doi.org/10.1080/17441056.2023.2280334>. [Accessed on 12 Jun. 2025].

<sup>73</sup> See *United Brands Company and United Brands Continental BV v Commission of the European Communities (Chiquita Bananas)*, Case 27/76, para. 65.

<sup>74</sup> EC – *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*. OJ, C 45, 2009, para. 10. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)). [Accessed on 23 Apr. 2025].

<sup>75</sup> CJEU, Judgment of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, ECLI:EU:C:1979:36, paras. 38–39.

<sup>76</sup> EC, *Guidance on Article 82 Enforcement Priorities*, *op. cit.*

<sup>77</sup> *Ibid.*, para. 11.

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Market shares are a good proxy for market power<sup>78</sup>. Nevertheless, even with large market shares, it can still be difficult to establish dominance in practice. The CJEU has been cautious when establishing dominance, preferring not to rely solely on high market shares<sup>79</sup>. It has made clear the importance of conducting a thorough evaluation of all relevant market conditions. By way of example, barriers to entry and customer's multi-homing behaviour are also a method for analysis of the market power<sup>80</sup>. Another example is the combination of economies of scale and sunk costs. Moreover, access to data is now also instrumental in determining a company's dominance in a specific market, as held by the *Bundeskartellamt*<sup>81</sup>.

This challenges the empirical assumption that market power can be wholly assessed based simply on the definition of product and geographic markets. Indeed, the assessment requires additional context-specific evaluations that should consider both user behavioural limitations and the dominant firm's self-reinforcing strategies, e.g., data accumulation and ecosystem integration.

For example, in the *Google Shopping* case, the EC observed that market shares can be calculated using various volume-based metrics, such as, “*per number of queries, users, page views or per number of sessions*”<sup>82</sup>. Market positions with market shares of approximately 90% and higher, with reference to “super-dominance,” as defined in the *Google Shopping* case, have a higher probability of being deemed abusive<sup>83</sup>.

As FRANCK and PEITZ have observed, one commonly used measure by competition authorities when assessing competition is the number of unique visitors, which is defined as the number of distinct devices, often identified by their IP addresses, that access a service within a typical reference period, usually on a monthly basis<sup>84</sup>.

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<sup>78</sup> *Ibid.*, paras. 14–15.

<sup>79</sup> *Hoffmann-La Roche*, Case 85/76, paras. 40-42; CJEU, Judgment of 3 July 1991, *AKZO Chemie BV v Commission of the European Communities*, Case C-62/86, ECLI:EU:C:1991:286, para. 61.

<sup>80</sup> EC, *Guidance on Article 82 Enforcement Priorities*, *op. cit.*, paras. 16-17.

<sup>81</sup> BUNDESKARTELLAMT, 6th Decision Division, *B6-22/16 – Facebook, Inc.*, ADMINISTRATIVE PROCEEDINGS, Decision under Section 32(1) German Competition Act (GWB), 6 February 2019, para. 888. Available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html>. [Accessed on 11 May 2025].

<sup>82</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, para. 276.

<sup>83</sup> *Google and Alphabet v. Commission*, Case T-612/17, paras. 182 and 183.

<sup>84</sup> FRANCK, Jens-Uwe; PEITZ, Martin – *Market Definition and Market Power in the Platform Economy*, *op. cit.*, p.71.

## Abuse of Dominance in Digital Markets

Moreover, the Impact Assessment Study identifies potential indicators of gatekeeper status in the EU: user numbers, length of user engagement, and percentage of intermediated transactions. The platform's geographic coverage, as demonstrated by the number of Member States in which it is established, is also an empirical proxy for its impact in the internal market<sup>85</sup>. “*The DMA was adopted to rein in this new type of market power*”<sup>86</sup>.

In a novel way, The Federal Court of Appeal in Canada established dominance through the Toronto Real Estate Board (TREB) case by defining it as sustained control over both price and non-price elements over an extended period of time<sup>87</sup>. The Canadian Competition Act includes network externalities, competition on quality and choice, consumer privacy protection, and innovation in its section 79(4) as an assessment of abuse of a dominant position<sup>88</sup>.

In conclusion, examining the concept of dominance in digital markets means careful consideration of a number of features that are likely to be absent in standard markets, and that were not previously considered.

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<sup>85</sup> EC, *Digital Markets Act – Impact Assessment Support Study*, 2020, p. 104.

<sup>86</sup> ROBERTSON, Viktoria – *The Complementary Nature of the Digital Markets Act and Articles 101 and 102 TFEU*. *Journal of Antitrust Enforcement*, Vol. 12, no. 2, 2024, p. 326. Available at: <https://doi.org/10.1093/jaenfo/jnae013>. [Accessed on 30 Apr. 2025].

<sup>87</sup> DUCCI, Francesco. *Dominance (notion)*. *Global Dictionary of Competition Law, Concurrences*, no. 86011. Available at: <https://www.concurrences.com/en/dictionary/dominance-notion>. [Accessed on 1 Jun.].

<sup>88</sup> CANADA. *Competition Act* (R.S.C., 1985, c. C-34).

#### 4. NEW THEORIES OF HARM: ABUSE OF ECONOMIC DEPENDENCE<sup>89</sup>

The notion of what constitutes an abuse under EU Competition Law is still vague. The open-ended catalogue of abusive behaviours that fit in Article 102 TFEU is currently being amplified. What is more, the particular features of the digital economy structure have led to new methods of detection of artificial foreclosure, even when using the latter provision. Even so, the implementation of this Article encounters pressing hurdles because digital markets operate with unique economic patterns and market structural elements, as seen in Chapter 2.

The judicial system continues to face challenges in applying these rules to digital markets, with recent case law reflecting this. Thus, the criteria for identifying abuse in online environments remain unclear.

In one of the most significant developments in the digital economy, it has become apparent that platforms are able to exploit their position by taking advantage of business users who are highly dependent on their services. This economic dependence, combined with platforms' considerable market power and superior bargaining strength, enables them to impose conditions that may be unfair or exploitative<sup>90</sup>. While the value of these platforms is fundamentally tied to the engagement and prosperity of their users, they are nonetheless able to devise novel forms of exploitation<sup>91</sup>.

The established categories of abuse of dominance, which include tying, refusal to supply, and margin squeeze, do not precisely address the new leveraging strategies in digital markets<sup>92</sup>.

In this context, the discussion takes place about whether traditional instruments like Article 102 TFEU remain suitable for digital market competition regulation and whether the DMA provides better solutions for modern competition.

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<sup>89</sup> Term used by LEE, Sangyun; SCHIBLER, Jan – *Platform Dependence and Exploitation*, Aix-en-Provence, 2019, p. 22 Available at: <https://ssrn.com/abstract=4457845>. [Accessed on 3 Jun. 2025].

<sup>90</sup> *Ibid.*

<sup>91</sup> SUSSER, Daniel – *Exploitation in the Platform Age*. In ROESSLER, Beate; STEEVES, Valerie (eds.). *Being Human in the Digital World*. Cambridge: Cambridge University Press, forthcoming. Available at: <http://dx.doi.org/10.2139/ssrn.5080971>. [Accessed 3 Jun. 2025].

<sup>92</sup> BOSTOEN, Friso – *The General Court's Google Shopping Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*. *Journal of European Competition Law & Practice*, Vol. 13, no. 2, 2022, p. 79. Available at: <https://doi.org/10.1093/jeclap/lpac010>. [Accessed on 23 Nov. 2024].

Notwithstanding these concerns, most of the traditional methods for identifying abusive conduct continue to be highly relevant in digital markets. Indeed, the core principles of Competition Law retain sufficient strength to address many of the challenges posed by the structural characteristics of the digital economy. In fact, they will play an important supplementary role alongside the DMA, as will be analysed later on. Nevertheless, some traditional tools, such as the SSNIP test, are no longer commendable. It has been pointed out that the inherent flexibility of Competition Law renders the development of a distinct regulatory framework for digital gatekeepers unnecessary<sup>93</sup>. This is, however, open to challenge.

Amid these developments, coupling *ex ante* regulatory tools with already established *ex post* instruments is much required. This hybrid method demonstrates potential to handle platform-based market structures and their fast-changing nature. The EU adopted the DMA based on this reasoning. The rapid evolution of digital ecosystems, combined with strong network effects and the data-driven advantages held by certain firms, reinforces the need for customised and adaptable analytical frameworks to detect abuses of dominance in the digital sphere. The sustained dominance of a small number of undertakings within digital markets calls for flexible approaches to assess both exclusionary and exploitative abuses under Article 102 TFEU.

Truly, the established interpretations of abuse and foundational concepts developed under Article 102, together with the extensive body of relevant jurisprudence, continue to hold utmost importance. However, Article 102 does not adequately capture new forms of anti-competitive behaviour that are emerging in digital markets, including killer acquisitions, device and platform neutrality concerns and data-based competitive advantages that defy traditional legal definitions. Certainly, at the time of its writing, this type of market was not even perceived to exist. For this reason, beyond the existing foundations, there is a need to introduce new instruments, especially in the digital sector, which before the DMA was markedly underregulated.

On the other side of the coin, the proliferation of new harm theories may create legal uncertainty and procedural unfairness, particularly when technology companies are involved<sup>94</sup>. Scholars have therefore cautioned against the premature recognition of such

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<sup>93</sup> SUFRIN, Brenda et al., *op. cit.*, p. 71.

<sup>94</sup> SUFRIN, Brenda et al., *op. cit.*, p. 1223.

theories without adequate analytical depth. The introduction of new harm theories before establishing a proper analytical framework creates inconsistent enforcement of Competition Law and generates uncertainty in its application<sup>95</sup>.

Moreover, the EC properly uses Article 102 TFEU to address online platform conduct through innovative applications<sup>96</sup>. In reality, the EU Courts have validated several new approaches to Competition Law enforcement, and many of these cases have been instrumental in the development and formalisation of new theories of harm that are now codified in the DMA.

First, the German Facebook case addressed how the misuse of personal data could reinforce market power, a concern later codified under Article 6(5) DMA<sup>97</sup>. Second, the *Google Android* decision examined the bundling of core platform services, which is now specifically prohibited under Article 5(8) DMA<sup>98</sup>. Third, the Amazon Marketplace investigation focused on the misuse of confidential business data obtained from dependent business users, an issue addressed in Article 6(2) DMA<sup>99</sup>. Through these decisions, competition authorities and courts have contributed to the transformation of emerging theories of harm into concrete regulatory obligations for gatekeepers.

### **4.1 STEERING DECISIONS THROUGH GATEKEEPERS POSITION: L'AUTO-PRÉFÉRENCE**

Gatekeepers are often in a position where both the incentive and the ability exist to steer user behaviour by directing attention toward services from which they generate higher returns<sup>100</sup>. In this vertically integrated configuration, they facilitate transactions between

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<sup>95</sup> IBÁÑEZ COLOMO, Pablo – *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*. Forthcoming in: *World Competition*, Vol. 43, 2020. Available at: <https://ssrn.com/abstract=3654083>. [Accessed on 18 May 2025].

<sup>96</sup> EC – *Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (AT.40099 – Google Android)*, Brussels, C(2018) 4761 final.; EUROPEAN 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 (AT. 40411 - Google Search (AdSense))*, Brussels, C(2019) 2173 final; GC, Judgment of 14 September 2022, *Google and Alphabet v. European Commission*, Case T-604/18, ECLI:EU:T:2022:541 (on appeal); GC, Judgment of 18 September 2024, *Google and Alphabet v Commission (Google AdSense for Search)*, Case T-334/19, ECLI:EU:T:2024:634 (on appeal).

<sup>97</sup> BUNDESKARTELLAMT, Case B6-22/16, *Facebook, Inc., op. cit.*

<sup>98</sup> EC, decision of 18 July 2018, *Google Android*, Case AT. 40099, *op. cit.*

<sup>99</sup> EC – *Decision of 20 December 2022 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement (Case AT.40462 – Amazon Marketplace)*, Brussels, C(2022) 9442 final.

<sup>100</sup> AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC), *Digital Platform Services Inquiry Interim Report no. 7: Expanding Digital Platform Ecosystems*, Canberra, 2023, p. 130. Available at:

business users, consumers, and third-party retailers while simultaneously competing with those same business users on their own marketplaces. This structure creates both the incentive and ability to steer user behaviour, for instance, by ranking their own services more prominently, thereby limiting the visibility of rival offerings. Self-preferencing has emerged as one of the most widely discussed theories of harm in the digital economy.

Recent economic studies have proven that numerous platforms function as regulators in addition to their intermediary role by controlling market access and competition dynamics<sup>101</sup>. Digital platforms operate under dual business models that enable them to support third-party seller transactions and promote their own branded products on the same marketplace. The business models of Amazon, Apple App Store, and Facebook Marketplace allow third-party providers to reach consumers, but they also compete with these sellers through their own products.

Self-preferencing has been at the centre of the EC's investigations<sup>102</sup>, leading some to consider it as a potential new theory of harm in digital markets. In *Google Shopping*, the EC identified a new form of leveraging abuse whereby the dominant firm engaged in the deliberate manipulation of its online search algorithm to favour its own service over those of competitors.

The practice of vertical integration is facing increasing criticism because experts are now demanding stronger antitrust measures to evaluate its competitive threats<sup>103</sup>.

One of the methods by which economies of scope can be employed by platforms is through self-preferencing its products or services when competing along with third parties using the platform. The regulation of marketplace platforms creates a structurally concerning situation when the platform - or another service provided under the same umbrella - simultaneously competes as a provider of its own services. Specifically, the question is

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<https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-25-reports/digital-platform-services-inquiry-september-2023-interim-report>. [Accessed on 17 May 2025].

<sup>101</sup> EC: Directorate-General for Competition; DE MONTJOYE, Yves-Alexandre; SCHWEITZER, Heike; CRÉMER, Jacques – *Competition Policy for the Digital Era*. Luxembourg: Publications Office of the European Union, 2019, p. 6. Available at: <https://data.europa.eu/doi/10.2763/407537>. [Accessed on 4 May 2025].

<sup>102</sup> EC, decision of 20 December 2022, *Amazon Marketplace*, Case AT. 40462, *op. cit.*, and *Amazon Buy Box*, Case AT.40703; AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, 9 December 2021, *Case A528*. Available at: <https://www.agcm.it/media/comunicati-stampa/2021/12/A528-chiusura>. [Accessed on 10 May 2025].

<sup>103</sup> See SALINGER, Michael. A. – *Self-Preferencing*. The Global Antitrust Institute Report on the Digital Economy, 2020. Available at <http://dx.doi.org/10.2139/ssrn.3733688>. [Accessed on 8 June 2025].

whether the products or other services that the platform as a provider offers are treated significantly differently than the products provided by third-party business users.

Notwithstanding, the debate persists about whether self-preferencing should be recognised as an independent theory of harm or whether it is still premature to qualify it as such.

Self-preferencing can be defined as “*giving preferential treatment to one’s own products or services when they are in competition with products and services provided by other entities using the platform*”<sup>104</sup>.

Pursuant to the EC 2024 Draft Guidelines on exclusionary effects, “[s]elf-preferencing consists of a dominant undertaking actively giving preferential treatment to its own products compared to those of competitors, mainly by means of non-pricing behaviour”<sup>105</sup>.

According to the EC press release, it involves “*giving illegal advantage*”<sup>106</sup>. Self-preferencing is recognised by some as a distinct category of abusive conduct, which does not fall within the boundaries of legitimate competitive behaviour based on merit<sup>107</sup>.

“*For a dominant player, self-preferencing consists in generating biases that impair the process of competition by the merits on a related market*”<sup>108</sup>.

Digital platforms use self-preferencing as a competitive approach to direct users toward their products; this practice frequently harms third-party sellers operating in the same marketplace<sup>109</sup>.

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<sup>104</sup> DE MONTJOYE, Yves-Alexandre; et al., *Competition Policy for the Digital Era*, *op. cit.*, p. 7.

<sup>105</sup> EC, *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*, Brussels, 2024, para. 156; and *Google and Alphabet v. Commission*, Case T-612/17, para. 240.

<sup>106</sup> EC – *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*. Brussels, 2017. Available at: [https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip\\_17\\_1784/IP\\_17\\_1784\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_17_1784/IP_17_1784_EN.pdf). [Accessed on 17 May 2025].

<sup>107</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, para. 649.

<sup>108</sup> BOUGETTE, Patrice; BUDZINSKI, Oliver; MARTY, Frédéric M. – *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses*. GREDEG Working Paper No. 2022-01, forthcoming in *The Antitrust Bulletin*, 2022, p. 5. Available at: <https://ssrn.com/abstract=4028770>. [Accessed 10 May 2025].

<sup>109</sup> HAGIU, Andrei; TEH, Tat-How; WRIGHT, Julian. – *Should Platforms Be Allowed to Sell on Their Own Marketplaces?*. *RAND Journal of Economics*, Vol. 53, no. 2, 2020, p. 309. Available at: <https://ssrn.com/abstract=3606055>. [Accessed 9 Mar. 2025].

The definition of self-preferencing faces challenges because experts cannot agree on its core effects, but the term usually connects to consumer manipulation and biased decision-making<sup>110</sup>.

Other scholars define “favouring” as an extensive category of business practices. Such conduct may manifest through search ranking manipulation, privileged access to data, preferential treatment in platform functionalities, tying, bundling, or margin squeeze<sup>111</sup>. On that basis, self-preferencing can take many forms aside from leveraging, such as indirect predatory behaviours and exploitative abuse<sup>112</sup>. That is to say, it may involve influencing consumer behaviour, distorting auction processes, or a combination of both over time<sup>113</sup>.

It is also acknowledged that the spectrum of conduct encompassed by the notion of self-preferencing suggests that it may not be readily subsumed under the familiar categories of abusive behaviour, but instead calls for a flexible, case-by-case assessment. While its prohibition has been expressly codified in new *ex ante* instruments such as the DMA, its legal qualification under Article 102 TFEU remains subject to context determination<sup>114</sup>.

Under Article 102 TFEU, self-preferencing is not inherently abusive *per se* and requires an effects-based assessment<sup>115</sup>. In its ruling, the EC framed self-preferencing as an effect-based theory of harm<sup>116</sup>. In some instances where the platform holds a position of dominance, self-preferencing by a vertically integrated digital platform may be an abuse where there is no pro-competitive justification<sup>117</sup>.

Despite the adoption of the DMA, it remains a legally unsettled and economically multifaceted phenomenon. Although prohibited for designated gatekeepers, self-preferencing

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<sup>110</sup> ETRO, Federico – *e-Commerce platforms and self-preferencing*. Journal of Economic Surveys. 38 (2024), p. 1517. Available at: <https://doi.org/10.1111/joes.12594>. [Accessed on 10 Jun. 2025].

<sup>111</sup> DUQUESNE, Guillaume; BOWMAN, Thomas; DE BERNARD, Thibaut; PRASAD, Kadambari; ARMSTRONG, Paul – *What constitutes self-preferencing and its proliferation in digital markets*, Global Competition Review, Digital Markets Guide, Compass Lexecon, 4th ed., 2024. Available at: <https://globalcompetitionreview.com/guide/digital-markets-guide/fourth-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets>. [Accessed on 31 May 2025].

<sup>112</sup> BOUGETTE, Patrice, et al, *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses*, *op. cit.*, p. 3.

<sup>113</sup> EC, *Draft Guidelines on the application of Article 102*, *op. cit.*, para. 159.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, paras.339-340; 438- 441; 606.

<sup>116</sup> SUFRIN, Brenda et al., *op. cit.*, p. 552.

<sup>117</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, paras. 331, 333, 337, 338.

constitutes, for other undertakings, a type of conduct whose anticompetitive nature depends on a thorough assessment of its effects. To date, there is no universal prohibition of self-favouring.

It is a well-established principle that firms are not under a general obligation to share their competitive advantages with rivals. The effects of “favouring” are, in my view, highly dependent on the specific features of the relevant market, particularly for undertakings that are not designated as gatekeepers within the meaning of the DMA.

Likewise, the EC stated in its 2024 Draft Guidelines that, for self-preferencing to amount to an infringement of Article 102 TFEU, all relevant circumstances must be taken into account, in particular whether it departs from competition on the merits and whether it is capable of generating exclusionary effects<sup>118</sup>. At its core, the issue concerns a restriction of access<sup>119</sup>. Moreover, the Guidelines acknowledge that undertakings may avoid liability under Article 102 TFEU by demonstrating an objective necessity defence<sup>120</sup>. None of this is reflected in the DMA, which has, for that reason, been subject to criticism.

Self-preferencing does not constitute a restriction of competition *by object* and, as such, its classification as an anticompetitive practice requires a more nuanced assessment. Its recognition as a well-founded theory of harm depends on a clear demonstration of its actual or potential anticompetitive effects within the relevant market context<sup>121</sup>.

The dual role of platform operator and service provider may, in principle, constitute a legitimate return on the investment made in the platform’s infrastructure. However, it becomes problematic where the platform holds a dominant position in the relevant market, particularly where such a position allows it to distort upstream competition to the detriment of both competitors and consumers. In certain circumstances, self-preferencing may distort downstream markets to such an extent that the preferential treatment becomes excessive and ultimately harmful to competition. It is precisely this form of self-preferencing that should not be permitted.

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<sup>118</sup> EC, *Draft Guidelines on the application of Article 102*, *op. cit.*, paras. 157 and 160.

<sup>119</sup> *Ibid.*, para. 163.

<sup>120</sup> *Ibid.*, paras. 167-171.

<sup>121</sup> SUFRIN, Brenda et al., *op. cit.*, p.348.

In general, tech giants have built digital ecosystems around their vertically integrated CPS with the objective of maximising user engagement in their ‘economic orbits’<sup>122</sup>, consolidating their data advantages and bundling complementary services. This model of economic organisation provides markets capacity to collect vast amounts of data, encourages the bundling of complementary services and consequently provides them with the capacity to extract revenue. Their influence impacts more than just economic conduct, enabling them to shape consumption behaviour, social behaviour, and also potentially public discourse.

Therefore, it is important to emphasise that digital platforms may exploit “myopic buyers” – those who primarily rely on recommended products – by favouring their own offerings in product rankings<sup>123</sup>. This practice can divert sales from third-party sellers and increase platform profits, whereas “sophisticated buyers”, who consider a broader range of alternatives, are less influenced by such biases. Consequently, the distinction between myopic and sophisticated buyers is essential to fully understand the effects of self-preferencing on consumer welfare<sup>124</sup>.

In markets, the gatekeeper – as quasi-regulator – ought to bear the burden to show that the self-preferencing behaviour does not cause downstream product markets with long-term exclusionary effects.

### 4.2 SELF-PREFERENCING: A REVIEW OF THE LITERATURE

Researchers remain uncertain whether pro-competitive benefits prevail when digital platforms employ self-preferencing.

There is a widespread debate among scholars as to whether current policy solutions for biased algorithms have a positive impact on consumers. Multiple empirical and legal studies have shown that algorithmic self-preferencing competitive effects depend on particular circumstances and lead to different results.

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<sup>122</sup> MARSDEN, Philip; PODSZUN, Rupprecht. *Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement*. 2020, p. 14.

<sup>123</sup> ETRO, Federico, *e-Commerce platforms and self-preferencing*, *op. cit.*, p. 1523.

<sup>124</sup> ZENNYO, Yusuke – *Platform encroachment and own-content bias*. *The Journal of Industrial Economics*, Vol. 70, no. 3, 2022, pp. 684–710. Available at: <https://doi.org/10.1111/joie.12301>. [Accessed on 1 May 2025]; and LEE, Kwok Hao., & MUSOLFF, Leon. (2025). *Entry into two-sided markets shaped by platform-guided search*, mimeo. Princeton University. Available at: <https://lmusolff.com/papers/TwoSidedMarketsPlatformGuidedSearch.pdf>. [Accessed on: 10 June 2025].

Nevertheless, the prohibition of self-preferencing faces several criticisms. One of them is its excessive protection of competitors, which sometimes harms both consumer welfare and innovation. Some authors contend that banning established self-preferencing practices could lead to redistributive goals that benefit particular business interests at the expense of consumer welfare and innovation<sup>125</sup>.

Critics maintain that, for vertically integrated undertakings, favouring one's own affiliates constitutes a natural and legitimate business practice, which often does not result in harm to consumers and has long been an inherent feature of such business models.

Concerns regarding self-preferencing are longstanding; the presence of private label products in supermarkets is just an illustration<sup>126</sup>. Some authors draw comparisons with the practice of private-label shelf placement in supermarket stores, which is generally not regarded as problematic under Competition Law<sup>127</sup>. On this view, self-preferencing may reflect ordinary vertical integration rather than abusive conduct per se, unless actual anticompetitive effects can be demonstrated. However, the specific features of digital markets may justify a stricter approach, given their stronger tendency toward tipping, network effects, and market concentration.

A strand of the literature suggests that imposing liability in such situations may discourage firms from pursuing innovation in product design, thereby limiting the benefits that consumers could otherwise obtain from such advancements<sup>128</sup>.

Following an extensive investigation into Google's search practices in 2013, the U.S. Federal Trade Commission (FTC) concluded that "*product design is an important dimension*

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<sup>125</sup> PORTUESE, Aurelien – *The Taxonomy of Self-Preferencing*. Information Technology & Innovation Foundation, 2021, pp. 18-19. Available at: <https://www2.itif.org/2021-self-preferencing-taxonomy.pdf>. [Accessed on 8 Jun. 2025].

<sup>126</sup> TIROLE, Jean – *Competition and the industrial challenge for the digital age*. Annual Review of Economics, Vol. 15, 2023, pp. 586–587. Available at: <https://doi.org/10.1146/annurev-economics-090622-024222>. [Accessed on 10 Jun. 2025].

<sup>127</sup> AMERICAN BAR ASSOCIATION. HOVENKAMP, Herbert – *Antitrust and Self-Preferencing*, *Antitrust*, Vol. 38, no. 1, 2023, p. 7. Available at: <https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2023/vol-38-issue-1/antitrust-and-self-preferencing.pdf> [Accessed on 31 May 2025].

<sup>128</sup> SALINGER, Michael A., *Self-Preferencing*, *op. cit.*, p. 510.

*of competition and condemning legitimate product improvements risks harming consumers*<sup>129</sup>”.

For instance, PABLO IBÁÑEZ COLOMO advocates that self-preferencing should not be deemed *prima facie* illegal<sup>130</sup>. He draws attention to the potential dangers of labelling self-preferencing as presumptively unlawful because this approach could damage the detailed legal and economic assessment needed for each individual case. Building on this idea, self-preferencing can be considered an expression of competition on the merits when a firm provides preferential treatment to its own affiliate in specific situations<sup>131</sup>. Challenging self-preferencing may even amount to questioning a product’s design or the very structure of a business model, as self-preferencing may occur, for example, through innovation in product design or interface configuration.

PABLO IBÁÑEZ COLOMO also argues that self-preferencing does not form a well-defined category because it encompasses a wide list of behaviours that vary significantly in nature and effects<sup>132</sup>.

VESTERDORF recalls that, under EU Competition Law, an obligation to grant access to competitors arises only where the dominant undertaking controls an indispensable or essential facility<sup>133</sup>. Absent such a duty to deal, any (self-)favouring conduct or discriminatory treatment vis-à-vis competitors cannot, in itself, constitute an abuse of dominance under Article 102 TFEU. VESTERDORF further argues that a dominant undertaking has the right to take legitimate commercial actions – including advertising, promotional strategies, product placement, and product design – to enhance its position in the market and take advantage of economies of scale. In his view, such conduct constitutes competition on the merits and does not amount to anticompetitive foreclosure, even if that means less-advantaged competitors exit the market.

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<sup>129</sup> US Federal Trade Commission (FTC) – *Closing Letter to Google Inc.*, Matter Number 111 0163, 2013. Available at: <https://www.ftc.gov/legal-library/browse/cases-proceedings/closing-letters/google-inc>. [Accessed on 8 June 2025].

<sup>130</sup> IBÁÑEZ COLOMO, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, *op. cit.*, p. 37.

<sup>131</sup> *Ibid.*, pp. 5-10.

<sup>132</sup> IBÁÑEZ COLOMO, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, *op. cit.*, pp. 16-19.

<sup>133</sup> Vesterdorf, Bo – *Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?*, *Competition Law & Policy Debate*, Vol. 1, no. 1, 2015, pp. 4–9. Available at: <https://ssrn.com/abstract=2561355> [Accessed on 31 May 2025].

What's more, ZENNYO presents an economic model suggesting that algorithmic self-preferencing by digital platforms can benefit consumers by incentivising lower commission fees for third-party sellers<sup>134</sup>. This, in turn, enables lower prices, attracting more consumers and sellers. The underlying rationale is that self-preferencing increases the platform's expected profit per consumer, encouraging it to expand participation by enhancing price competitiveness and marketplace attractiveness.

Among others, HAGIU, TEH, and WRIGHT contend that excluding platforms from selling their own goods is expected to lower consumer surplus and societal welfare in general<sup>135</sup>. The ability of platforms to systematically favour their own products over those of competitors creates an environment where independent sellers may be disincentivised from investing in innovation<sup>136</sup>, knowing that their visibility and success within the marketplace are subject to the platform's discretion<sup>137</sup>. However, according to the authors, a full ban on dual-role platforms would be excessively restrictive, as platforms are often well-positioned to deliver certain products efficiently. Removing this capacity could result in the loss of integrated services and scale economies, which may ultimately harm consumers. Rather than a blanket prohibition, they propose more proportionate alternatives, such as targeted bans on self-preferencing and imitation, that could promote fair competition without undermining the operational benefits of platform integration<sup>138</sup>.

Conversely, several contributions in the literature have flagged self-preferencing as a concern and argue that it warrants stricter regulatory intervention.

A contrasting body of scholarship suggests that “favouring” may lead not only to vertical foreclosure<sup>139</sup> but also exploitative economic dependence. In the academic discourse,

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<sup>134</sup> ZENNYO, Yusuke, *Platform Encroachment and Own-Content Bias*, *op. cit.*

<sup>135</sup> HAGIU, Andrei; et al., *Should Platforms Be Allowed to Sell on Their Own Marketplaces?*, *op. cit.*

<sup>136</sup> SCHWEITZER, Heike; GUTMANN, Frederik - Unilateral Practices in the Digital Market: An Overview of EU and National Case Law. Concurrences, 2021. Available at: <https://www.concurrences.com/fr/bulletin/special-issues/unilateral-practices-in-the-digital-market/unilateral-practices-in-the-digital-market-an-overview-of-eu-and-national-case> [Accessed on 16 Jun. 2025].

<sup>137</sup> HAGIU, Andrei; et al., *Should Platforms Be Allowed to Sell on Their Own Marketplaces?*, *op. cit.*, p. 302.

<sup>138</sup> *Ibid.*, p. 319.

<sup>139</sup> According to MOTTA, Massimo – *Self-preferencing and foreclosure in digital markets: theories of harm for abuse cases*. Barcelona: Barcelona School of Economics, Working Paper, 1374, 2022, p. 2. Available at: <https://bse.eu/research/working-papers/self-preferencing-and-foreclosure-digital-markets-theories-harm-abuse-cases>. [Accessed on 10 Jun. 2025]; a “[v]ertical foreclosure refers to a situation where a firm which owns an

it has been suggested that self-preferencing can lead to indirect forms of horizontal foreclosure, sometimes described as crowding-out<sup>140</sup>. Some also maintain that self-preferencing can lead to exploitative abuses<sup>141</sup>, since the platforms can behaviourally pressure business users into purchasing ancillary services or entering contracts for enhanced visibility. The platform effectively extracts value from business users, as they become dependent.

For instance, KHAN contends that, particularly in digital markets, there should be a structural separation across all stages of the value chain<sup>142</sup>. Rather than merely prohibiting specific business practices, this approach prescribes organisational structures designed to prevent conflicts of interest. She argues that the risks and costs associated with information appropriation are significantly higher in digital environments, which renders conduct-based remedies largely ineffective and makes structural remedies all the more essential.

In this line, it has also been argued that vertical separation across platform and commerce layers contributes to the continuous improvement of consumer welfare, particularly by enhancing price competition. For that purpose, concerns have been raised that self-preferencing, particularly in contexts of low commission rates, may enable market segmentation by sellers and result in weakened competitive pressure, ultimately harming overall welfare and diminishing consumer surplus<sup>143</sup>.

Other scholars have pointed out that self-preferencing should be classified as an inherently anti-competitive practice, endorsing inclusion on a ‘blacklist’ of prohibited actions that are automatically disallowed without the need for additional assessment<sup>144</sup>. In some instances, self-preferencing is obvious; however, it is often more concealed, making detection

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input denies it (or makes it less compatible or more difficult to use, or significantly raises its price of access) to an independent firm which makes use of it, typically in competition with a downstream affiliate of the input owner”.

<sup>140</sup> BOUGETTE, Patrice, et al, *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses*, *op. cit.*, p. 5.

<sup>141</sup> *Ibid.*, p. 4.

<sup>142</sup> KHAN, Lina M. – *The Separation of Platforms and Commerce*. Columbia Law Review, Vol. 119, no. 4, 2019. Available at: <https://www.columbialawreview.org/content/the-separation-of-platforms-and-commerce/> [Accessed on 18 May 2025].

<sup>143</sup> KITAKA, Yuta; SATO, Susumu – *Dual-Role Platforms and Self-Preferencing: Sequential Search Approach*, 2022, p. 3. Available at: <https://ssrn.com/abstract=3736574>. [Accessed on 10 May 2025].

<sup>144</sup> CABRAL, Luís; HAUCAP, Justus; PARKER, Geoffrey; PETROPOULOS, Georgios; VALLETTI, Tommaso; VAN ALSTYNE, Marshall - *The EU Digital Markets Act: A Report from a Panel of Economic Experts*. Luxembourg: Publications Office of the European Union, 2021, p. 13. Available in: <https://publications.jrc.ec.europa.eu/repository/handle/JRC122910>. [Accessed 1 Nov. 2024].

one of the most challenging and data-intensive tasks for regulators overseeing online platforms<sup>145</sup>.

In a different view, it is also said that self-preferencing is not necessarily a strategic choice for those dual-role platforms that would like to maximise profits in the digital market. Whereas, a monopolistic platform will have monopoly profits associated with vertical integration as a stand-alone option, maintaining a marketplace creates other potential long-term value. A platform could just decide to raise commission fees on third-party sellers – which would then be passed to consumers –, and therefore create profit, without changing any algorithms or recommendation systems<sup>146</sup>. In these cases, the incentive for self-preferencing is diminished, once again underlining that it is not necessarily part of platform logic, but instead reflects wider strategic objectives.

In that regard, FRANCK and PEITZ contend that dual-role platforms might engage in self-preferencing when monetisation based on fees is constrained<sup>147</sup>. This occurs, for example, when seller fees are zero, or when uniform fees are applied across broad categories of products. In these situations, platforms do not have the ability to minimise a consumer's search cost for first-party products to extract revenue through pricing; rather, the preferred ranking of these products would be an algorithmic way of achieving price discrimination.

As emphasised by TIROLE, contemporary digital platforms exhibit an unprecedented capacity to prioritise their own brands in consumer recommendations. These platforms gather large amounts of data pertaining to third-party offerings before choosing to replicate the most successful ones. The marketing and sales strategies used by these platforms create significant harm to competing brands because they do not have other ways to promote their outputs<sup>148</sup>.

Evidently, there is no clear consensus within the legal literature on this matter. In my view, “favouring” constitutes an inherent consequence of the integration of distinct functions within a vertically integrated business model under common ownership. Particular attention

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<sup>145</sup> *Ibid.*

<sup>146</sup> As suggested by FRANCK, Jens-Uwe; PEITZ, Martin, in *The Digital Markets Act and the Whack-A-Mole Challenge*. *Common Market Law Review*, Vol. 61, 2024, p. 32. Available at: <https://ssrn.com/abstract=4509422>. [Accessed on 10 May 2025].

<sup>147</sup> *Ibid.*, pp. 32-33.

<sup>148</sup> *Ibid.*

is paid to this issue in the context of digital markets, whose structural features set them apart from traditional industries, thereby placing Competition Law in largely uncharted territory.

Consistently, the *Competition Policy for the Digital Era* report affirms that when a dominant platform exercises a regulatory function, it should bear the burden of demonstrating that its self-preferencing conduct does not produce long-term exclusionary effect<sup>149</sup>.

On the one hand, such behaviour can enhance efficiency, promote healthy competition, and stimulate innovation. On the other hand, the practice of self-preferencing poses obstacles when dominant firms use their market power in one sector to give preference to their products/services in related markets while using this practice to defend their position in the market. This enables dominant firms to engage in anticompetitive discriminatory conduct by blocking new market entrants and preventing fair competition, resulting in inferior products for consumers<sup>150</sup>.

That is to say, in my opinion, that self-preferencing does not automatically equal 'competition on grounds other than merit' because it requires thorough examination to identify only its negative impacts. All the relevant circumstances of the case should be assessed, instead of relying on general presumptions of unlawfulness. Where case law is ambiguous, adopting a pragmatic and 'workable effects-based approach' is essential to uphold the effectiveness of Article 102<sup>151</sup>.

The central question, in line with the objectives of Competition Law, is whether users are actually receiving the most relevant search results. The truth is users experience difficulty distinguishing paid advertisements from organic search results because they believe the top results represent the most trustworthy information. Paid placements provide benefits to advertisers, but some users view these ads as blocking unbiased organic results which leads to user dissatisfaction when seeking authentic information. The primary goal focuses on protecting consumer welfare.

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<sup>149</sup> DE MONTJOYE, Yves-Alexandre; et al., *Competition Policy for the Digital Era*, *op. cit.*, p. 7.

<sup>150</sup> OECD - *Monopolisation, Moat Building and Entrenchment Strategies*, Working Party No. 3 on Co-operation and Enforcement, 2024, pp. 16-17. Available at: [https://one.oecd.org/document/DAF/COMP/WP3\(2024\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2024)1/en/pdf). [Accessed on 1 Nov. 2024].

<sup>151</sup> SCHWEITZER, Heike; DE RIDDER, Simon – *How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses*. *Journal of European Competition Law & Practice*, 2024, Vol. 15, no. 4, p. 242. Available at: <https://doi.org/10.1093/jeclap/lpae033>. [Accessed on 12 June 2025].

## Abuse of Dominance in Digital Markets

The manner algorithmically generated information appears to consumers through gatekeeper interfaces or online choice architectures directly affects their decision-making process. Research indicates that users tend to select information from the top search results, thus making their placement essential for consumer engagement<sup>152</sup>.

Ultimately, it is not possible to assess the repercussions of self-preferencing on competition without performing a case-specific evaluation of the design and operation of the algorithms, competitive context, and market features relating to a relevant market<sup>153</sup>.

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<sup>152</sup> PAN, Bing; HEMBROOKE, Helene; JOACHIMS, Thorsten; LORIGO, Lori; GAY, Geri; GRANKA, Laura – *In Google We Trust: Users' Decisions on Rank, Position, and Relevance*. *Journal of Computer-Mediated Communication*, Vol. 12, no. 3, 2007, pp. 801–823. Available at: <https://doi.org/10.1111/j.1083-6101.2007.00351.x>. [Accessed. 1 Nov. 2024].

<sup>153</sup> OLIVEIRA, Dário – *Self-Preferencing in Brazil: Should We Regulate Before We Understand?* International Center for Law & Economics, 2025. Available at: <https://laweconcenter.org/resources/self-preferencing-in-brazil-should-we-regulate-before-we-understand/> [Accessed on 2 Jun. 2025].

## 5. THE GOOGLE SHOPPING SAGA

Google represents an emblematic case of a gatekeeper leveraging its position in horizontal search to extend market power into adjacent markets such as product comparison services.

To better understand this, search results can be categorised into two main types<sup>154</sup>. First, there are general search results, which are typically presented as blue hyperlinks on the results page. Second, there are specialised search results, which relate to Google's dedicated search services and are often displayed in a more visually prominent format. An example of such a specialised service is Google's CSS, a market in which Google does not hold a dominant position.

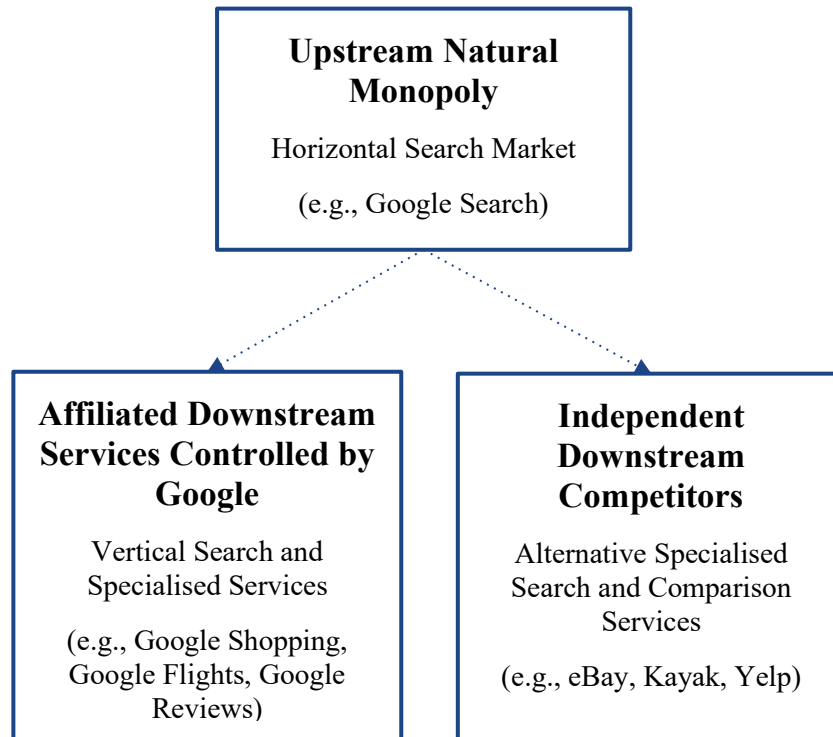
In this context, Google combines its general-purpose horizontal search engine with affiliated vertical services, such as Google Shopping, thereby reinforcing its competitive advantage across multiple markets. This vertical structure of search platforms, as exemplified by Google's integration of horizontal and vertical search functions, is depicted in **Figure 1**.

Google transformed its basic two-sided platform connecting users and advertisers into a diverse ecosystem of video streaming, price comparison, translation, and cloud services through its strategic advertising pricing and algorithmic adjustments<sup>155</sup>.

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<sup>154</sup> SUFRIN, Brenda et al., *op. cit.*, p. 274.

<sup>155</sup> SUFRIN, Brenda et al., *op. cit.*, pp. 68-69.



**Figure 2- Upstream and Downstream Structure of Horizontal Search Markets**

In particular, the development of horizontal search engines demonstrates how technological advancements in platform markets lead to natural monopolies. Developing search algorithms and data infrastructure requires significant fixed costs, yet the cost of serving additional users or advertisers is almost nothing, which leads to significant supply-side economies of scale. Simultaneously, growing user activity generates data that improves algorithmic performance, reinforcing economies of scale and scope. Multiple factors contribute to this concentration: Google has surpassed its original competitors through its investments, innovations, improved ranking algorithms, and effective advertisement targeting<sup>156</sup>. The multisided platform model, which provides free search services to users while generating revenue from advertising, creates powerful indirect network externalities between users and advertisers, thus reinforcing concentration<sup>157</sup>.

<sup>156</sup> *Ibid.*, p. 57.

<sup>157</sup> DUCCI, Francesco, *Natural Monopolies in Digital Platform Markets*, *op. cit.*, p. 159.

## Abuse of Dominance in Digital Markets

Since 2008 Google has held a (super) dominant position in general internet search in the EEA, as it has typically held greater than 90 percent market share<sup>158</sup>. The market share of Google exceeds 85% in the world market from May 2024 to May 2025, according to **Figure 3**. In opposition, the market share of Bing, Yandex, Yahoo!, and Baidu remains slight.



**Figure 3- Search Engine Market Share Worldwide**

Google is subject to enhanced obligations under EU Competition Law because of its dominance in the search engine market to prevent any actions that would harm fair market competition. The surplus responsibility requires Google to prevent any practices that harm competitors or limit consumer options because it functions as the main gateway for users and businesses.

Following this line of reasoning, as D'AMICO and BALASINGHAM stated, Google holds an even greater responsibility, since

*“Greater responsibility not to impair effective competition is imposed on undertakings that are not only super-dominant, but also have a gatekeeper position in the market, which can be due to a statutory monopoly, exclusive rights or other market characteristics. These are markets in which, without equality of opportunity being guaranteed by the gatekeeper, equally-efficient competitors cannot compete<sup>159</sup>”.*

<sup>158</sup> Except for the Czech Republic, that was in 2011.

<sup>159</sup> *Ibid.*

By controlling both organic search rankings and paid advertisement placements, this gatekeeper is in a strategic position to distort competition on multiple levels. Businesses fight to achieve favourable positions in organic results and purchase premium advertising slots, but the platform reduces the organic rankings of rival services and limits their advertising visibility while uplifting its own services.

The *Google Shopping* case explained the operational dynamics of super-dominance under Article 102 TFEU and illustrated its enforcement in digital market environments<sup>160</sup>.

### 5.1. THE EC DECISION ON GOOGLE SEARCH (SHOPPING)

The proceedings were triggered by third-party complaints alleging harm resulting from Google's conduct<sup>161</sup>.

Google had designed the result page of its general internet search engine (Google search) in a way that favoured its own CSS – Google Shopping- while placing rival CSS websites at a competitive disadvantage<sup>162</sup>. Google Shopping included paid advertisements among the relevant search results, featuring them in a salient and visually favoured position at the top of the page. The undertaking employs a twofold approach: first, by placing *Google Shopping* results in a more prominent position than those of competitors, and second, by downgrading competitor rankings in search results through a correction algorithm<sup>163</sup>. The disputed actions concerned Google systematically reducing rival CSS visibility in its general search results<sup>164</sup>, through algorithmic adjustments and the use of plain hyperlinked listings,

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<sup>160</sup> D'AMICO, Alessia Sophia; BALASINGHAM, Baskaran – *Super-dominant and super-problematic? The degree of dominance in the Google Shopping judgement*. European Competition Journal, Vol. 18, no. 3, 2022, p. 630. Available at: <https://doi.org/10.1080/17441056.2022.2059962>. [Accessed on 13 June 2025].

<sup>161</sup> FISCHER, Eva; HORNKOHL, Lena; IMGARTEN, Nils – *Discriminatory Leveraging Plus – The Standard for Independent Self-Preferencing Abuses after Google Shopping (C-48/22 P)*. European Papers – A Journal on Law and Integration, Vol. 10, no. 1, 2025, pp. 25-44. Available at: <https://ssrn.com/abstract=5058274> or <http://dx.doi.org/10.2139/ssrn.5058274> [Accessed on 27 May 2025].

<sup>162</sup> DEUTSCHER, Elias – *Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU*. European Papers, Vol. 6, no. 3, 2021, p. 1346. Available at: <https://www.europeanpapers.eu/europeanforum/google-shopping-quest-for-legal-test-for-self-preferencing>. [Accessed on 1 Jun. 2025].

<sup>163</sup> BOUGETTE, Patrice; GAUTIER, Axel; MARTY, Frédéric – *Business Models and Incentives: For an Effects-Based Approach of Self-Preferencing?* Journal of European Competition Law & Practice, 2022, p. 2. Available at: <https://orbi.uliege.be/bitstream/2268/288874/1/lpac005.pdf>. [Accessed on 1 Nov. 2024].

<sup>164</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 184, “[...] the practices at issue enabled Google to highlight its own comparison shopping service on its general search results pages while leaving competing comparison shopping on those pages, which, in principle, is not consistent with the intended purpose of a general search service.” (emphasis added).

while simultaneously promoting its own products, by applying distinct ranking criteria and more visually engaging formats<sup>165</sup>.

As the EC pointed out in its *Google Shopping* decision, the undertaking operates as an intermediary in both the intermediation market, where it provides general search results, and in downstream specialised markets, such as comparison shopping, local reviews, and other vertically integrated markets of services<sup>166</sup>.

In its defence, Google contended that the preferential display of its own CSS was driven by efforts to innovate and improve user experience. The undertaking further argued that these changes enhanced the relevance of search results and reflected legitimate competition on the merits<sup>167</sup>, rather than exclusionary purpose.

The EC found that the joint application of these two discriminatory practices gave Google an illegal advantage that was not based on the merits of its services, but rather as a result of its exclusionary conduct. The EC concluded that Google abused its dominant position in the market for general online search services and its specialised product search services by consistently favouring its paid and organic search results over those of competing specialised services<sup>168</sup>.

In a nutshell, the decision by the EC was driven by the noticeable traffic redirection, the engaging nature of the sponsored boxes, and the high incidence of user clicks. According to the EC, Google's conduct has led to a reduction in traffic from Google search to competing CSS<sup>169</sup>. This has caused traffic and market shares of competing search websites to decline, potentially reducing their, and also Google's, incentive to innovate and reducing the ability of consumers to access the best-performing CSS<sup>170</sup>.

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<sup>165</sup> *Ibid.*, paras. 59-62; 168-169; 175-178.

<sup>166</sup> *Ibid.*, paras. 42-52.

<sup>167</sup> The concept of competition on the merits is just a “*rhetorical tool, to imply that it is necessarily abusive*”, and should not be turned into a practical concept, see LAMADRID, Alfonso; IBÁÑEZ COLOMO, Pablo – *On the Article 102 TFEU Guidelines (V): competition on the merits as an irritant*. Chillin'Competition. Available at: <https://chillingcompetition.com/?s=merits>. [Accessed on 11 Sep. 2025].

<sup>168</sup> RIZZUTO, Francesco – *Self-preferencing that is discriminatory as a new type of abuse of dominance following the Google Shopping ruling of the Court of Justice of the European Union?* European Competition Law Review (ECLR), London: Thomson Reuters, Vol. 46, no.1, 2025, pp.1-2.

<sup>169</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, paras. 61, 68, 169, 196, 393, 394.

<sup>170</sup> PERSCH, Johannes – *Google Shopping: The General Court takes its position*. Kluwer Competition Law Blog, 2021. Available at: <https://competitionlawblog.kluwercompetitionlaw.com/2021/11/15/google-shopping-the-general-court-takes-its-position/?output=pdf>. [Accessed on 3 Feb. 2025].

The EC's legal qualification of Google's conduct was marked by inconsistency, shifting between the concepts of favouring and leveraging. Crucially, when it came to establishing the legal standard, the EC grounded its reasoning in leveraging<sup>171</sup>. Several scholars have disagreed with the EC's legal qualification, noting that leveraging is typically regarded as a category of abuse, an "umbrella term" for several forms of abuses, including refusal to supply, margin squeeze and tying, rather than an independent form itself<sup>172</sup>.

The infringement decision required Google to cease its abuses and provide equal treatment to competing CSS with its own, in terms of their display on the general search result pages<sup>173</sup>. Considering all of the above, in June 2017, the EC imposed a record-breaking fine on Google LLC and Alphabet Inc., the parent company of the group that owns the subsidiary, in a total of 2,424,495,000 € for abusing its dominant position by prominently placing its own CSS at the top of search results, while simultaneously downgrading ranking competing services<sup>174</sup>.

### 5.2. JUDGMENT OF THE GENERAL COURT

In November 2021, the GC essentially confirmed the EC's assessment and rejected most of Google's defences. The judgment confirms that favouring conduct may constitute an abuse of dominance in specific circumstances, albeit such conduct not being generally considered abusive.

Google systematically promoted its own CSS in prominent positions on the results page, while algorithmically lowering the visibility of rival CSS, which led to a substantial decline in traffic to competing platforms<sup>175</sup>. Results from third-party CSS were systematically

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<sup>171</sup> BOSTOEN, Friso, *The General Court's Google Shopping Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*, *op. cit.*, p. 76.

<sup>172</sup> O'DONOGHUE, Robert; PADILLA, Jorge – *The Law and Economics of Article 102 TFEU*, 3 ed., Hart Publishing, 2020, p. 307; MONTI, Giorgio – *EC Competition Law*, Cambridge University Press, 2007, pp. 186–195; CROCIONI, Pietro – *Leveraging of Market Power in Emerging Markets: A Review of Cases, Literature, and a Suggested Framework*, *Journal of Competition Law & Economics*, Vol. 4, 2007, p. 454; *apud* BOSTOEN, Friso, *The General Court's Google Shopping Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*, *op. cit.*, p. 76.

<sup>173</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, para. 699.

<sup>174</sup> EC. *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*. Brussels, 2017. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1784](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784). [Accessed on 1 May 2025].

<sup>175</sup> *Google and Alphabet v. Commission*, Case T-612/17, paras.184, 261, 282, 283, 286, 287, 300.

differentiated from Google's own results in their treatment and presentation, even if they were more relevant for the query.

In its ruling, the GC clarified that ‘leveraging’ encompasses a range of distinct practices<sup>176</sup>. The Court chose to legally qualify Google’s conduct as ‘favouring’ and reframed the abuse as discrimination<sup>177</sup>, while deliberately avoiding the term “self-preferencing”. It has been suggested that this omission was intended to shift the focus from the subject of the conduct to its object – namely, the discriminatory treatment involved<sup>178</sup>. This shift highlights the focus on discriminatory treatment, which involves both promoting Google’s own services and downgrading competitors<sup>179</sup>.

The GC held that Google favoured its own CSS under three particular conditions: (i) the significance of Google traffic in CSS; (ii) users' behaviour, which tends to focus primarily on the top search results perceived as most relevant when searching online; and (iii) the notable absence of viable alternatives for redirected traffic from Google's general results pages<sup>180</sup>.

In its public offering statement, Yelp, a vertical search platform, stated:

*“Google in particular is the most significant source of traffic to our website accounting for more than half of the visits to our website from Internet searches during the nine months ended September 30, 2011. Our success depends on our ability to maintain a prominent presence in search results for queries regarding local businesses on Google. Google has removed links to our website from portions of its web search product, and has promoted its own competing products, including Google’s local products, in its search results. Given the large volume of traffic to our website and the importance of the placement and display of results of a user’s search, similar actions in the future could have a substantial negative effect on our business and results of operations<sup>181</sup>”.*

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<sup>176</sup> *Ibid.*, para. 163.

<sup>177</sup> BOSTOEN, Friso, *The General Court’s Google Shopping Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*, *op. cit.*, p. 75.

<sup>178</sup> *Ibid.*, p. 81.

<sup>179</sup> FISCHER, Eva et al., *Discriminatory Leveraging Plus*, *op. cit.*

<sup>180</sup> *Google and Alphabet v. Commission*, Case T-612/17,, paras. 166-175.

<sup>181</sup> YELP Inc. – *Registration Statement (Form S-1)*. U.S. Securities and Exchange Commission, 2011 *apud* SALINGER, Michael A. – *Self-Preferencing*, *op. cit.*

Due to the undertaking's significant market position, third-party firms compete to secure higher placements in its ranking, thereby increasing the likelihood of attracting greater click-through traffic.

The Court expanded on this point, noting that “[c]oncerning the application of adjustment mechanisms, the Commission noted that those algorithms did not apply to Google’s comparison shopping service despite the fact that it had numerous characteristics in common with competing comparison shopping services that would have made it prone to the same demotions in the generic results<sup>182</sup>”. This selective treatment amounts, in itself, to a discriminatory practice.

User surveys and behavioural data support that the vast majority of users rarely go beyond the first page of results which means the importance of preferential ordering becomes relevant from a competition point of view<sup>183</sup>.

Furthermore, the GC’s reasoning was also influenced by several “plus factors”, including the natural monopoly characteristics of the market, features akin to those of an essential facility, and Google’s strategic shift from an open platform model to a more closed one<sup>184</sup>.

Google's dominance in a sector with high barriers to entry requires the undertaking to take extra responsibility for avoiding competition distortion. Its sophisticated access to user data and its power to steer user attention strengthen its position and further restrict competitors from effectively competing. The search engine operates as a platform that directs traffic to maximise advertising revenue instead of remaining a neutral intermediary.

A general search engine operates through its capability to allure and present information from various external sources. The platform benefits from its diverse content which improves both its search results and credibility. Therefore, as the Court noted, Google's self-preferencing conduct is abnormal<sup>185</sup>. In theory, such exploitation within an established

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<sup>182</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 61; and EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, para. 382.

<sup>183</sup> DEAN, Brian – *How People Use Google Search (New User Behavior Study)*. Backlinko, 2025. Available at: <https://backlinko.com/google-user-behavior>. [Accessed on 14 Mar. 2025].

<sup>184</sup> BOSTOEN, Friso, *The General Court’s Google Shopping Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*, *op. cit.*, pp. 81-84.

<sup>185</sup> *Google and Alphabet v. Commission*, Case T-612/17, paras. 176-179.

user base is self-defeating and economically irrational. However, the practice suggests otherwise.

In sum, the Court found that Google's conduct had a damaging impact on competition. This finding set the stage for a broader discussion on the duty of equal treatment and the evolving interpretation of abuse under Article 102 TFEU.

**a) Legal Reasoning and Assessment of Anticompetitive Effects.**

The applicant contended that the EC had not established anticompetitive effects<sup>186</sup> but did not present a robust counterfactual scenario<sup>187</sup>. The GC confirmed the findings of anticompetitive effects, primarily due to a significant reduction in traffic directed to competing CSS, which undermined their ability to compete effectively in the market<sup>188</sup>. In doing so, the Court highlighted the dominant undertaking's special responsibility to avoid distorting competition in the market<sup>189</sup>.

According to the decision, the EC has to prove that “(...) *a practice cannot be categorised as abuse of a dominant position unless it is demonstrated that there is an anticompetitive effect, or at the very least a potential anticompetitive effect* (...)”- emphasis added<sup>190</sup>.

Thus, demonstrating potential effects is sufficient for this purpose, and the EC is not required to establish actual effects. This standard avoids imposing an impractical evidentiary burden on competition authorities.

However, the GC annulled the EC's findings regarding national markets for general search services due to insufficient evidence of potential harm. Ultimately, the burden of proof lies with the EC to demonstrate anticompetitive effects, after which the dominant firm may rebut the allegations<sup>191</sup>.

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<sup>186</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 376.

<sup>187</sup> As explained by DI GIOVANNI BEZZI, Raffaele – *Anticompetitive Effects and Allocation of the Burden of Proof in Article 102 Cases: Lessons from the Google Shopping Case*. *Journal of European Competition Law & Practice*, Vol. 13, no. 2, 2022, p. 119. Available at: <https://doi.org/10.1093/jecclap/lpac011>. [Accessed 13 Jun. 2025], counterfactual is defined as “*the hypothetical alternative market outcome that would have prevailed in the absence of the abusive conduct*”.

<sup>188</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 527.

<sup>189</sup> *Ibid.*, para.150, 152, 157, 165.

<sup>190</sup> *Ibid.*, para. 438.

<sup>191</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 378, 457- 459.

The applicant further argued that the EC should have applied an AEC-test. The GC rejected this, noting that the AEC-test applies solely to pricing practices, not to discriminatory ranking practices<sup>192</sup>. This implies that the AEC test is not universally required under Article 102 TFEU<sup>193</sup>.

### **b) Duty of Equal Treatment?**

The *Google Shopping* case addressed whether firms with a dominant vertically integrated position have an obligation not to discriminate in favour of their own operations to the detriment of other competitors (i.e., “search bias”).

The Court defined self-preferencing as a form of discriminatory abuse under Article 102 TFEU, aligning it with the EU’s principle of equal treatment – a cornerstone of EU law ensuring a level playing field through equal opportunities. Be that as it may, mere unequal treatment is insufficient; establishing an infringement requires proof of material harm to the competitive process<sup>194</sup>.

Concisely, the Court characterised self-preferencing as “*a form of abusive discriminatory access*”<sup>195</sup>, grounding its analysis in established jurisprudence<sup>196</sup>. The case involved accusations that Google used its search engine dominance to promote its CSS service above competitors within search results thus practicing vertical discrimination. The approach follows the precedent of *DEUTSCHE TELEKOM v COMMISSION* which established equal treatment principles as essential for abuse assessment<sup>197</sup>.

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<sup>192</sup> *Ibid.*, para. 538.

<sup>193</sup> FISCHER, Eva et al., *Discriminatory Leveraging Plus*, *op. cit.*

<sup>194</sup> *Ibid.*, pp. 80-81; High Court of Justice of England and Wales, Judgment of 12 February 2016, *Streetmap.EU Limited v Google Inc*, EWHC 253 (Ch); District Court of Amsterdam (Rechtbank Amsterdam), Judgment of 21 March 2018, *VBO Makelaar v Funda*, Case C/13/528337, NL:RBAMS:2018:1654.

<sup>195</sup> MORBEL, Fatma Ceren – *The Essential Facilities Doctrine: How Does It Intersect with the Digital Markets Act?*. Market and Competition Law Review, Vol. 5, no. 1, 2021, p. 431 Available at: <https://doi.org/10.34630/mclawreview.2021.05.01.005>. [Accessed 25 May 2025].

<sup>196</sup> CJEU, Judgment of 4 September 1997, *GT-Link v De Danske Statsbaner*, Case C-242/95, ECLI:EU:C:1997:376, para. 41; CJEU, Judgment of 24 October 2002, *Aéroports de Paris v Commission*, Case C-82/01 P, ECLI:EU:C:2002:617, para. 114; CJEU, Judgment of 7 October 1999, *Irish Sugar v Commission*, Case T-228/97, ECLI:EU:T:1999:246, para. 140.

<sup>197</sup> CJEU, Judgment of 14 October 2010, *Deutsche Telekom AG v European Commission*, Case C-280/08 P, ECLI:EU:C:2010:603, para. 175.

“[F]or the sake of completeness”, the GC compared this to internet access providers, appealing to Regulation No 2015/2120<sup>198</sup> which sets out obligations in relation to open and non-discriminatory internet access<sup>199</sup>.

Critics argue that “search neutrality” lacks legal or economic foundations, asserting that vertical firms have no duty to assist competitors<sup>200</sup>. For instance, some scholars view this principle as a utopia<sup>201</sup>, noting that Regulation 2015/2120 does not extend to general search engines.

For Article 102(c) TFEU to be applicable, two conditions must be met: (i) the application of different conditions to analogous transactions with separate trading partners; and (ii) the establishment of competitive harm. While the GC came close enough to finding both elements were satisfied in the *Google Shopping* case, it avoided formal reliance on Article 102(c)<sup>202</sup>. In reality, traditional interpretations of Article 102(c) focus on price-based discrimination and transactions with “other trading parties,” excluding a firm’s own downstream operations<sup>203</sup>.

To comply with the ruling, platforms must adopt neutral criteria for displaying services, ensuring unbiased selection algorithms. However, monitoring such criteria in practice poses significant challenges. Moving forward, this precedent may justify broader applications of equal treatment principles to other digital market abuses.

### c) *Bronner Doctrine*

Pursuant to the *Bronner* test<sup>204</sup>, a refusal to grant access or supply may constitute an abuse of a dominant position where: (i) such refusal is liable to eliminate all competition from

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<sup>198</sup> 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 and Regulation (EU) No 531/2012. Official Journal of the European Union, L 310.

<sup>199</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 180.

<sup>200</sup> AGUILERA VALDIVIA, Eduardo – *The Scope of the ‘Special Responsibility’ upon Vertically Integrated Dominant Firms after the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Related Business?* World Competition, Vol. 41, no. 1, 2018, pp. 43–68. Available at: <https://kluwerlawonline.com/journalarticle/World+Competition/41.1/WOCO2018003>. [Accessed 11 May 2025].

<sup>201</sup> MORBEL, Fatma Ceren, *The Essential Facilities Doctrine*, op. cit., p. 9.

<sup>202</sup> This article is mentioned only once in the Commission’s decision: see *Google and Alphabet v. Commission*, Case T-612/17, para. 239.

<sup>203</sup> BOSTOEN, Friso, *The General Court’s Google Shopping Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse*, op. cit., pp. 78-79.

<sup>204</sup> CJEU, Judgment of 26 November 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others*, Case C-7/97, ECLI:EU:C:1998:569.

the relevant market for the undertaking requesting access; (ii) there exists no objective justification for the denial; and (iii) the infrastructure in question is indispensable for the applicant's business activity, insofar as no actual or potential substitutes exist<sup>205</sup>.

In the *Google Shopping* case, the applicant argued that the case should have been assessed under the essential facilities doctrine and that the EC ought to have shown a refusal to supply in line with the conditions set out in *Bronner*<sup>206</sup>. Conversely, the EC characterised Google's behaviour as a form of leveraging, rather than treating it as a refusal to supply.

The GC acknowledged that Google's results page shared features similar to those of an essential facility<sup>207</sup>, but ultimately held that the *Bronner* criteria did not apply, as the conduct involved differentiated treatment, not outright refusal<sup>208</sup>. Also, the GC distinguished Google's practices from those examined in *Bronner*, noting that competing CSSs were, in fact, displayed within the general search results<sup>209</sup>. Overall, the GC clarified that the *Bronner* criteria apply only in cases involving an explicit refusal to supply, where the exclusionary effects result directly from that refusal itself<sup>210</sup>.

In practical terms, Google functions as a "quasi-essential facility" in the sense that, although it may not be strictly indispensable for competition in the relevant market, it remains irreplaceable from the perspective of rival firms<sup>211</sup>.

Recent case law confirms that *Bronner* sets a high threshold and is only applicable in explicit refusal to deal cases<sup>212</sup>.

In summary, the GC mostly upheld the EC's decision, finding that Google abused its dominant position by promoting its own CSS in its search results but partially annulled the decision for certain national markets where effects were not established.

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<sup>205</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 213.

<sup>206</sup> EC, decision of 27 June of 2017, *Google Search (Shopping)*, Case AT.39740, *op. cit.*, para. 645.

<sup>207</sup> PODSZUN, Rupperecht, *Digital Markets Act: Article by Article Commentary*, *op. cit.*, pp. 8-9; and *Google and Alphabet v. Commission*, Case T-612/17, para. 224.

<sup>208</sup> *Google and Alphabet v. Commission*, Case T-612/17, paras. 233 and 238.

<sup>209</sup> *Ibid.*, para. 240.

<sup>210</sup> *Ibid.*, para. 232.

<sup>211</sup> MORBEL, Fatma Ceren, *The Essential Facilities Doctrine*, *op. cit.*, p. 431.

<sup>212</sup> Opinion of Advocate General Medina, 5 September 2024, *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato*, Case C-233/23, ECLI:EU:C:2024:694, para. 38.

Finally, Google challenged the fine's calculation on the grounds that the underlying theory of harm was novel and lacked precedent<sup>213</sup>. The Court, however, did not accept this reasoning. Therefore, the fine was not annulled.

### 5.3. THE APPEAL

Afterwards, Google, together with its parent company Alphabet, submitted an appeal to the ECJ for the annulment of the EC's decision.

The appellants submitted that Google's conduct constituted a refusal to supply and should, accordingly, be examined under the *Bronner* criteria. The ECJ, however, held that the case rather involved “*access to Google's general results pages under non-discriminatory conditions*<sup>214</sup>”. The ECJ clarified that the applicability of the *Bronner* conditions was justified by the particular circumstances of that case, which involved “*a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct*<sup>215</sup>”.

The ECJ therefore accepted that the conduct in question amounted to differential treatment rather than a refusal to supply, as access to CSS had already been provided<sup>216</sup>. The Court clarified that Google was rightly deemed to have prevented CSS, which competed with its own CSS, from obtaining equivalent visibility on its general search results pages, thereby failing to provide equal treatment<sup>217</sup>.

The appellants also relied on the remedies provided in the contested decision, which led the ECJ to confirm that the GC did not require Google to grant access to the boxes. Instead, as established by the GC, the EC merely ordered Google to bring the infringing conduct to an end, leaving it with several options to comply with that obligation<sup>218</sup>.

In addition, the ECJ endorsed the AG's Opinion, which stated that the display boxes do not constitute a distinct infrastructure separate from the general results page<sup>219</sup>.

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<sup>213</sup> *Google and Alphabet v. Commission*, Case T-612/17, para. 598.

<sup>214</sup> *Google LLC and Alphabet Inc. v European Commission.*, Case C-48/22 P, para. 103.

<sup>215</sup> *Ibid.*, para. 90.

<sup>216</sup> *Ibid.*, para. 99.

<sup>217</sup> *Ibid.*, para. 97.

<sup>218</sup> *Ibid.*, paras. 98-99.

<sup>219</sup> *Ibid.*, paras. 105-106.

## Abuse of Dominance in Digital Markets

It was further clarified that, for Article 102 TFEU to be applicable, it must be demonstrated that the impugned conduct produces, or is capable of producing, anticompetitive effects, either actual or potential, whether the abuse affects the primary market in which the dominant position is held or a neighbouring market<sup>220</sup>.

It was additionally confirmed that a conduct may constitute an abuse of dominance not only when it leads, or may lead, to the exclusion of equally efficient competitors from the relevant market, but also when it creates barriers that prevent potential rivals from entering the market in an incipient phase. As the ECJ confirmed in *European Superleague Company*<sup>221</sup>, the legal assessment must consider both the nature of the conduct and the competitive structure of the affected markets<sup>222</sup>.

As a side observation, the Court remarked that several of the arguments made by the Court *a quo*, such as the abnormality of Google's conduct, its superdominance, and reference to a non-discrimination obligation found under Regulation 2015/2120, were not part of the reasoning of the EC<sup>223</sup>. These considerations were, to a certain extent, not determinative for establishing the existence of abusive conduct in the present case, thereby underscoring the principle of limited judicial review.

Google subsequently contended that the GC incorrectly concluded that the obligation to perform a counterfactual assessment rested on it, arguing further that the EC had merely established potential, rather than actual, anticompetitive effects, and that the abusive conduct remained abstract<sup>224</sup>. The ECJ made it clear that the GC was correct in finding that the EC had established that the practices at issue resulted in a reduction of general search traffic for almost all CSS providers<sup>225</sup>. Additional factors considered by the ECJ included the essential character of the traffic generated by the undertaking's general search service for downstream competitors, the well-documented user behaviour whereby consumer attention is predominantly focused on the highest-ranking results, and the consequential competitive harm

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<sup>220</sup> *Ibid.*, para. 165.

<sup>221</sup> CJEU, judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011.

<sup>222</sup> *Google LLC and Alphabet Inc. v European Commission.*, Case C-48/22 P, paras. 166-167.

<sup>223</sup> *Ibid.*, paras. 195; 198.

<sup>224</sup> *Ibid.*, para. 210.

<sup>225</sup> *Ibid.*, para. 226.

stemming from the diversion of such traffic in favour of the dominant undertaking's own services<sup>226</sup>.

Furthermore, the Court added that the burden lies with the undertaking raising the defence to substantiate its claims and to effectively challenge the EC's assessment regarding the potential or actual effects of its conduct<sup>227</sup>. The Court further elaborated that, as the GC observed, identifying a credible counterfactual scenario may, in the present case, be “*an arbitrary or even impossible exercise*”<sup>228</sup>. It would therefore impose an excessive burden on the EC to require it to examine every possible counterfactual scenario in all cases<sup>229</sup>. From an evidentiary perspective, the ECJ managed to adopt a balanced approach, reaffirming that while the burden of proof lies with the EC, this burden may be discharged by relying on a flexible standard that allows the use of circumstantial or indirect evidence. The Court further acknowledged that such evidence does not need to be conclusive in isolation, but may be assessed as part of a coherent body of indicia, which, when considered together, are capable of establishing the existence of anticompetitive effects<sup>230</sup>.

The final ground of appeal concerned Google's claim that the EC had failed to assess whether the conduct at issue was capable of foreclosing equally efficient competitors<sup>231</sup>. The underlying issue was whether Article 102 TFEU imposes an obligation to assess the capability of the conduct to foreclose as-efficient competitors of the dominant undertaking<sup>232</sup>. The Court went on to explain that the application of that test was not required and was not germane to the present case<sup>233</sup>. The AEC test constitutes a voluntary tool that may be applied at the EC's discretion, depending on the circumstances of the case, or by the parties to the infringement proceedings.

The appeal was entirely dismissed, with the Court upholding both the reasoning of the GC and the AG's opinion, and the fine was confirmed.

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<sup>226</sup> *Ibid.*, paras. 244-245; 267.

<sup>227</sup> *Ibid.*, paras. 224; 227-230.

<sup>228</sup> *Ibid.*, para. 231.

<sup>229</sup> *Ibid.*, para. 228.

<sup>230</sup> FISCHER, Eva et al., *Discriminatory Leveraging Plus*, *op. cit.*

<sup>231</sup> *Google LLC and Alphabet Inc. v European Commission.*, Case C-48/22 P, para. 252.

<sup>232</sup> RIZZUTO, Francesco, RIZZUTO, Francesco, *Self-preferencing that is discriminatory as a new type of abuse*, *op. cit.*, p. 9.

<sup>233</sup> *Google LLC and Alphabet Inc. v European Commission.*, Case C-48/22 P, paras. 267-269.

To sum up, this decision confirms that the EC is not required to prove that anticompetitive effects have actually materialised, but rather that potential anticompetitive effects are sufficient to establish an abuse. Furthermore, the judgment clarifies that the *Bronner* criteria apply under a high threshold and only in situations comparable to the specific circumstances of that case. Similarly, the ECJ found that it was not necessary to apply the AEC-test. Instead, within the EC's margin of discretion, all relevant circumstances must be assessed, requiring concrete elements capable of demonstrating the effects of the conduct at issue.

Be that as it may, self-preferencing does not amount to a restriction of competition by object<sup>234</sup>. Indeed, the Courts acknowledged the possibility of rebutting its anticompetitive effects through a proper demonstration of objective justification or efficiency gains. This decision established an effects-based approach in the examination of self-preferencing under Article 102 TFEU.

The ECJ endorsed the GC's conclusions on September 10, 2024<sup>235</sup>. The ruling is definitive and the dispute, which started at least 14 years ago, has finally come to an end – at least in this sector.

### 5.4. CONCLUDING REMARKS

Following these decisions, EU Competition Law prohibits any conduct that aims to or results in unfair competitor disadvantage through discriminatory general search result treatment that blocks or could hinder competitor access to secondary or specialised online markets<sup>236</sup>.

The Courts upheld that Google's self-favouritism infringed Article 102; however, they failed to establish what elements are required for there to be a breach of such provision.<sup>237</sup>

Other academics infer from the decision the existence of three criteria: (i) the undertaking must hold significant market power; (ii) the specific market characteristics, such as high barriers to entry and control over key infrastructure by the dominant undertaking, must

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<sup>234</sup> FISCHER, Eva et al., *Discriminatory Leveraging Plus*, *op. cit.*

<sup>235</sup> CJEU, Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P, ECLI:EU:C:2024:726.

<sup>236</sup> *Ibid.*, p. 10.

<sup>237</sup> DEUTSCHER, Elias, *Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU*. *op. cit.*, p. 1348.

be present; and (iii) whether the dominant undertaking can demonstrate efficiency gains resulting from its conduct or whether such conduct can be objectively justified<sup>238</sup>.

The stakeholders need additional guidance to understand which elements encompass the unlawful practice. The *Google Shopping* ruling does not clarify whether the GC established a new universal rule against self-preferencing by dominant firms or if its findings were limited to the specific case facts.

The new approach enables false positive results, in other words, it may lead to legitimate competition being mistakenly labelled as abusive<sup>239</sup>. Still, the Court's emphasis on contextual analysis provides a safeguard against overapplication.

PABLO SOLANO DÍAZ argues that the *Google Shopping* and *Android Auto*<sup>240</sup> judgments reflect a shift toward a unified test for exclusionary abuse under Article 102 TFEU, centred on whether the conduct departs from competition on the merits and is capable of foreclosing equally efficient competitors<sup>241</sup>. He emphasises the importance of assessing the content and context of the conduct to determine its objective aims. In certain cases, artificiality or foreclosure effects may even be presumed without requiring a counterfactual or the AEC-test, provided the dominant firm retains the right to rebut.

Nonetheless, the lack of explicit guidance from the Court has drawn criticism for fostering inconsistency and undermining legal certainty. It was contended that this reflects a “*more economic approach towards a more holistic fairness oriented assessment*”<sup>242</sup>.

A group of academics consider self-preferencing as a convenient label that can be, in principle, addressed under existing Competition Law, particularly Article 102 TFEU. They hold that, even after the *Google Shopping* ruling, no legal test or analytical framework for

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<sup>238</sup> RIZZUTO, Francesco, *Self-preferencing that is discriminatory as a new type of abuse*, *op. cit.*, p. 11.

<sup>239</sup> *Ibid.*, p. 79.

<sup>240</sup> CJEU, Judgment of 25 February 2025, *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato*, Case C-233/23, ECLI:EU:C:2025:110.

<sup>241</sup> SOLANO DÍAZ, Pablo – *A Hopeful Reading of Android Auto and Google Shopping. Content, Context and Equally Efficient Competitors: Google and Alphabet (C-48/22 P)*. EU Law Live, Competition & State Aid, 2024. Available at: <https://eulawlive.com/op-ed-a-hopeful-reading-of-android-auto-and-google-shopping-content-context-and-equally-efficient-competitors-google-and-alphabet-c-48-22-p/>. [Accessed on 25 May 2025].

<sup>242</sup> SUFRIN, Brenda et al., *op. cit.*, p. 336.

assessing self-preferencing was established, hence, casting doubts on its legal qualification and enforcement boundaries<sup>243</sup>.

In any event, the case fulfils an important role in testing the limits of legal tests established under Article 102 TFEU and it also brings to the surface important questions about when courts are justified in adapting or reinterpreting competition rules to keep pace with fast-changing and aggressive market behaviours.

Several scholars attempted to frame the findings of the EC in *Google Shopping* into existing substantive legal frameworks based on predefined legal tests under Article 102 TFEU<sup>244</sup>.

JUSTIN LINDEBOOM characterises the ruling as “merits-based reasoning”, which builds upon the existing legal content of Article 102 TFEU, and where courts dynamically interpret Article 102 TFEU to address novel abuses<sup>245</sup>. Accordingly, this approach is required to adjust Competition Law to digital market realities.

Academics still warn against fusing legitimate competition (e.g., outperforming rivals through innovation) with abusive conduct. Of course, not every exclusionary effect is detrimental to the competitive process<sup>246</sup>. Thus, legitimacy has to be understood through a number of normative principles such as systemic coherence, anticompetitive intent, procedural legitimacy, and the ability for legal reasoning to reflect general rules that could be applicable beyond the specific case<sup>247</sup>.

PHILIP MARSDEN advocates for structural remedies that ensure that competitor CSSs are visible, capable of earning traffic, and positioned to compete on the merits. This could

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<sup>243</sup> COLANGELO, Giuseppe, *Antitrust unchained: the EU’s case against self-preferencing*. GRUR International, Vol. 72, no. 6, 2023, p. 556. Available at: <https://doi.org/10.1093/grurint/ikad023> [Accessed: on 18 May 2025].

<sup>244</sup> According to VESTERDORF, Bo, *Theories of Self-Preferencing and Duty to Deal*, *op. cit.*, pp. 4–9.

<sup>245</sup> LINDEBOOM, Justin – *Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on Google Shopping*. Journal of European Competition Law & Practice, Vol. 13, no. 2, 2022, pp. 65–67. Available at: <https://doi.org/10.1093/jecclap/lpac008>. [Accessed on 23 Nov. 2024].

<sup>246</sup> CJEU, Judgment of the Court 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, Case C-209/10, ECLI:EU:C:2012:172, para. 22.

<sup>247</sup> LINDEBOOM, Justin, *Rules, Discretion, and Reasoning According to Law*, *op. cit.*, p. 73.

involve bringing a dedicated CSS tab to the forefront of the search results page and making it the default, alongside Google’s own results<sup>248</sup>.

In general, the EC’s decision was found to be in line with previous case law, particularly in relation to different types of leveraging practices<sup>249</sup>.

It is important to mention that the EC, GC and ECJ did not use the term “self-preferencing” in its decisions but instead used “favouring” to describe the conduct.

The concept of “self-preferencing” as a distinct category has been developed mainly through academic discussion rather than being formally recognised in legal texts or decisions—not even the DMA employs this terminology. The term is widely used in legal circles but is devoid of a clear and serves instead as a loosely applied umbrella concept for a range of practices and concerns<sup>250</sup>.

It is true that certain forms of self-preferencing, particularly those involving prominence and visibility, are difficult to accommodate within existing legal frameworks, and especially worrisome in digital markets. In my view, the widespread concept of the self-preferencing has not yet been firmly embedded, as no established legal test exists beyond the *Google Shopping* ruling. The DMA has constituted a step towards greater legal clarity.

On the whole, the decision does not impose a blanket ban on self-preferencing, emphasising instead the need for a case-by-case analysis. The *Google Shopping* ruling illustrates courts’ role in adapting Competition Law to digital markets. The case supports a customised effects-based method of self-preferencing, but its narrow application prevents it from establishing legal precedent.

Future court decisions will establish whether this case marks a fundamental change in doctrine or if its effects stay limited to the particular circumstances of the case at hand.

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<sup>248</sup> MARSDEN, Philip – *Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (and How to Fix it)*. *Journal of European Competition Law & Practice*, Vol. 11, no. 10, 2020, p. 560. Available at: <https://doi.org/10.1093/jeclap/lpaa050>. [Accessed 23 Dec. 2024].

<sup>249</sup> *Google and Alphabet v. Commission*, Case T-612/17, paras. 194-197.

<sup>250</sup> DUQUESNE, Guillaume, et al., *What constitutes self-preferencing*, *op.cit.*

## 6. THE DMA: A SYNOPSIS

Modern markets have shifted from being solely economic arenas to societal spaces where the rights and interests held by market actors – individual users, gatekeepers, business users and end users – any of which may conflict with wider public interests<sup>251</sup>. To this end, the DMA seeks to delineate the obligations of dominant actors providing digital services; it does so targeting a small set of actors within the larger group of dominant actors: *les géants du numérique*<sup>252</sup>. Its primary purpose is to promote fundamental rights and public interests in relation to digital services, particularly protection regarding contestability and fairness in the internal markets of the gatekeepers<sup>253</sup>.

The regulation functions as an *ex ante* instrument, which, combined with its lower threshold than Article 102 TFEU, provides a faster tool to address anti-competitive behaviour in digital markets. As provided for in the DMA, enforcement authorities are not required to undertake a conventional market definition exercise, nor is it necessary to establish a firm's market position or to demonstrate the effects of specific conduct on consumer welfare, as would be required under Article 102 TFEU<sup>254</sup>. Instead, the Act introduces the concept of a gatekeeper, which employs objective, quantifiable thresholds to identify undertakings with systemic relevance. As stipulated in Article 3(1) of the DMA, an undertaking is classified as a gatekeeper where:

*“(a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future”.*

For an undertaking to qualify as a gatekeeper under the DMA, it must provide at least one of the CPS listed in Article 2(2) and either meet the quantitative thresholds set out in Article 3(2), or, as a result of a market investigation, be designated as exercising a significant

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<sup>251</sup> NEVES, Inês — *No enforcement without representation: how participatory democracy can strengthen the Digital Markets Act*. European Competition Journal, Vol. 20, no.3, 2024, p. 676.

<sup>252</sup> Représentation de la Commission européenne en France. *L'Europe régule les géants du numérique*, 2024. Available at: [https://france.representation.ec.europa.eu/informations/leurope-regule-les-geants-du-numerique-2024-05-16\\_fr](https://france.representation.ec.europa.eu/informations/leurope-regule-les-geants-du-numerique-2024-05-16_fr). [Accessed on 3 Feb. 2024].

<sup>253</sup> According to Recitals 32, 33, 65, and Article 1(1), DMA.

<sup>254</sup> ZIMMER, Daniel – *The DMA: An ex ante evaluation*. In Dossier – The Digital Markets Act. Competition Law Review (Concurrences), no. 3, 2022, p. 6.

intermediation role between business users and end users, holding a well-established and durable position, and exerting substantial influence on the internal market<sup>255</sup>.

The DMA follows a two-stage process. Initially, an undertaking is designated by the EC as a gatekeeper pursuant to Article 3. An undertaking is conferred gatekeeper status solely in relation to the particular CPS identified in the EC's designation decision, and the corresponding obligations are limited to those specified services<sup>256</sup>. After the designation, the gatekeepers must comply with the DMA within six months<sup>257</sup>.

However, the Act is not flawless. It is worth briefly highlighting certain aspects.

The Act has faced several criticisms, including its uniform application across heterogeneous sectors, the multiplicity of its objectives, and the substantial resource demands it entails, particularly in terms of staffing and sustained financial expenditure<sup>258</sup>.

To begin with, this regulation emerged in a context where existing legal frameworks prove insufficient to cope with the specific features of digital markets and the market power of naturally monopolistic actors, ultimately seeking to foster healthy competition<sup>259</sup>.

The legislative process leading to the adoption of the DMA evolved in parallel with competition enforcement in digital markets under Article 102 TFEU and, to a large extent, drew on the decisions adopted in that context, as seen in Chapter 4.

In addition, the DMA was adopted on the basis of Article 114 TFEU, forming part of the shared competence for the internal market, and not under Article 103 TFEU, which is intended for enforcement of the competition provisions<sup>260</sup>.

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<sup>255</sup> See Article 3(8) and 17 DMA.

<sup>256</sup> MORENO BELLOSO, Natalia; PETIT, Nicolas – *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*. *European Law Review*, Vol. 48, 2023, p. 11. Available at: <https://ssrn.com/abstract=4411743>. [Accessed on 22 Nov. 2024].

<sup>257</sup> Article 6(10), DMA.

<sup>258</sup> BRANKIN, Sean-Paul; TREACY, Pat – *The DMA: Challenges for the Regulator as well as the Regulated*. In: *Dossier – The Digital Markets Act*. *Competition Law Review (Concurrences)*, no. 3, 2022, pp. 19-20.

<sup>259</sup> Recital 5, DMA.

<sup>260</sup> CAPPALÀ, Marco; COLANGELO, Giuseppe – *Applying ne bis in idem in the Aftermath of bpost and Nordzucker: The Case of EU Competition Policy in Digital Markets*. *Common Market Law Review*, Vol. 60, no. 2, 2023, pp.12-13. Available at: <http://dx.doi.org/10.54648/cola2023026>. [Accessed on 29 Apr. 2025].

The DMA's hybrid character – straddling Competition law and *ex ante* regulation<sup>261</sup> – remains a subject of debate. The legal foundation of the Act rests on Article 114 TFEU and its declared goals relate to the internal market, albeit its core principles match existing EU Competition Law principles and judicial decisions. The DMA stands apart from conventional competition instruments because it prioritises contestability and fairness instead of undistorted competition as its core objective<sup>262</sup>. Indeed, the DMA's preamble establishes a clear distinction between its objectives, but it remains uncertain whether the underlying purposes differ<sup>263</sup>.

Moreover, while certain NCAs have sought a more expansive role in the enforcement process<sup>264</sup>, the DMA assigns exclusive enforcement competence to the EC<sup>265</sup>. Within this framework, NCAs are limited to a subsidiary function, thereby safeguarding the uniform and consistent application of the DMA across all Member States<sup>266</sup>. This centralised approach represents a significant departure from the enforcement structure established for Articles 101 and 102 TFEU under Regulation 1/2003, where NCAs are accorded a principal and autonomous role<sup>267</sup>.

Research indicates that the DMA may unintentionally harm European SMEs who depend on gatekeeper platforms because higher complexity and compliance expenses could restrict their market entry and expansion opportunities<sup>268</sup>.

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<sup>261</sup> MORENO BELLOSO, Natalia; PETIT, Nicolas, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*. *European Law Review*, *op. cit.*, p. 34.

<sup>262</sup> *Ibid.*, p. 27.

<sup>263</sup> LAROUCHE, Pierre; DE STREEL, Alexandre – *The European Digital Markets Act: A Revolution Grounded on Traditions*. *Journal of European Competition Law & Practice*, Vol. 12, no. 7, 2021, p. 545; *apud* BEEMS, Belle – *The DMA in the Broader Regulatory Landscape of the EU: An Institutional Perspective*. *European Competition Journal*, Vol. 19, no.1, 2022, p. 10. Available at: <https://doi.org/10.1080/17441056.2022.2129766>. [Accessed on 3 Jun. 2025].

<sup>264</sup> European Competition Network – *The role of National Competition Authorities in strengthening the Digital Markets Act (DMA)* [Joint paper]. Lisbon: Autoridade da Concorrência, 2021. Available at: <https://www.concorrenca.pt/sites/default/files/DMA%2520-%2520Paper%2520conjunto%2520da%2520ECN.pdf>. [Accessed on 23 Apr. 2025].

<sup>265</sup> Article 20 and 30, DMA.

<sup>266</sup> Recital 90 and articles 1(7) and 38(7), DMA.

<sup>267</sup> SUFRIN, Brenda et al., *op. cit.*, p. 1240.

<sup>268</sup> CATALYST RESEARCH DIGITAL MARKETS ACT WORKING GROUP – *Misfire: How the Digital Markets Act Will Unwittingly Hurt European Small Businesses*, 2021. Available in: <https://ecommerceinstitut.de/wp-content/uploads/2021/07/DMA-Working-Group-Report-ECI.pdf>. [Accessed on 1 Nov. 2024].

## 6.1. SELF-PREFERENCING IN THE DMA: “INTRA-PLATFORM COMPETITION<sup>269</sup>”

Article 6(5) of the DMA prohibits gatekeepers from favouring their own products or services in ranking<sup>270</sup> over third parties and from presenting information in a manner that may mislead users<sup>271</sup>. This provision also includes indirect ranking manipulation, i.e., related crawling and indexing<sup>272</sup>. Since gatekeepers determine what is collected, categorised, or placed, it is consistent for the relevant legal provision to extend to these activities.

The obligation therefore requires the gatekeeper to apply the same ranking methods and parameters to its own products as well as to those of third-party business users<sup>273</sup>.

Recital 52 reinforces that gatekeepers must not engage in preferential treatment by legal, commercial, or technical means, and must apply ranking criteria consistently to both their own and third-party products. The obligation thus requires unbiased ranking methods and parameters, aligning with principles set out in the P2B Regulation<sup>274</sup>.

Delving deeper, the prohibition under Article 6(5) of the DMA covers subtler forms of discriminatory treatment resulting from the design of ranking models or access structures<sup>275</sup>. This raises questions concerning information asymmetries that confer an advantage on their own services. Compliance may require technical and functional separation between a gatekeeper’s CPS and its vertically integrated businesses to prevent implicit advantages<sup>276</sup>.

Article 6(11) complements this by obliging gatekeepers to provide third-party search engines with access to ranking, query, click, and view data on fair, reasonable, and non-

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<sup>269</sup> Expression used by MORENO BELLOSO, Natalia and PETIT, Nicolas, in “*The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*”, *op. cit.*, pp. 17-19.

<sup>270</sup> Article 2(22), DMA.

<sup>271</sup> See Section 19a(2) No. 1a of the German Competition Act (GWB), which broadly prohibits all forms of self-preferencing by undertakings of “paramount significance for competition across markets”, and it is not limited to rankings. Available at: [https://www.gesetze-im-internet.de/englisch\\_gwb/](https://www.gesetze-im-internet.de/englisch_gwb/). [Accessed on 10 May 2025].

<sup>272</sup> *Crawling* refers to the automated discovery and retrieval of updated web content, while *indexing* involves storing and organising that content to make it searchable and usable for ranking purposes.

<sup>273</sup> PODSZUN, Rupperecht, *Digital Markets Act: Article by Article Commentary*, *op. cit.*, p. 174.

<sup>274</sup> EUROPEAN UNION. *Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance)*. Official Journal of the European Union, L 186/57.

<sup>275</sup> See article 6(2) and Recital 52, DMA: “[...] *To ensure that this obligation is effective and cannot be circumvented, it should also apply to any measure that has an equivalent effect to the differentiated or preferential treatment in ranking.*”

<sup>276</sup> PODSZUN, Rupperecht, *Digital Markets Act: Article by Article Commentary*, *op. cit.*, pp. 177-178.

discriminatory (FRAND) terms<sup>277</sup>. This supports the DMA's overarching objective of promoting contestability and fairness within digital markets<sup>278</sup>.

Besides, Article 6(5) include conducts such as search engines favouring their own integrated services (as in the *Google Shopping* case), online marketplaces privileging their own products in buy box criteria, app stores ranking their own apps higher, and virtual assistants promoting only the operator's services.

The provision targets the natural conflict of interest when platforms act as both intermediaries and competitors, potentially distorting competitive neutrality. While such conduct is already prohibited under general Competition Law for dominant firms, the DMA introduces a specific obligation. Legitimate justifications may exist, such as objective product relevance, but absent such justification, both Article 102 TFEU and the DMA presume a conflict of interest.

Recent enforcement actions illustrate ongoing challenges. In March 2025, the EC issued preliminary findings to Alphabet regarding non-compliance with the DMA's self-preferencing prohibition in Google Search and the Play Store, despite Alphabet's reported changes<sup>279</sup>. The preliminary findings formally notify Alphabet of the EC's view that the company is not in compliance with its obligations under the DMA.

Looking ahead, multilateral platforms may adopt alternative monetisation models to offset limitations imposed by the prohibition of self-preferencing under Article 6(5) DMA. As noted by FRANCK and PEITZ, these strategies may include, *inter alia*: four possible avenues for evasion: (1) *increasing fees for third-party seller*; (2) *implementing product- or service-specific fees, at more granular levels*; (3) *abandoning organic ranking in favour of an advertisement-based ranking system*; and (4) *selectively contracting with preferred third-party sellers under exclusive bilateral contracts and shutting off first-party offers*<sup>280</sup>. The problem underneath is that each of these activities could replicate the economic effects of self-preferencing without formally violating Article 6(5) DMA. Consequently, the EC should

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<sup>277</sup> STALLA-BOURDILLON, Sophie; LAZAROTTO, Bárbara da Rosa – *Search queries and anonymisation: How to read Article 6(11) of the DMA and the GDPR together?* European Law Blog, 2024. Available at: <https://www.europeanlawblog.eu/pub/2uxr4anu/release/1>. [Accessed on 2 May 2025].

<sup>278</sup> Recital 61, DMA.

<sup>279</sup> EC – *Digital Markets Act: Commission sends preliminary findings to Alphabet on non-compliance with rules on self-preferencing and steering in Google Search and Google Play*, Brussels, 25 Mar. 2025. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_811](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_811). [Accessed on 25 May 2025].

<sup>280</sup> *Ibid.*, pp. 33-37.

closely monitor such developments and assess whether such conduct constitutes circumvention under Article 13(4). The authors also caution that this may trigger a “whack-a-mole” hurdle: gatekeepers have every incentive to alter their behaviours to achieve the same outcome, prompting regulators to constantly react<sup>281</sup>.

### 6.2. NON-DISCRIMINATIVE RANKINGS<sup>282</sup>

Article 6(5) requires gatekeepers to disclose their ranking criteria, which helps users understand how to improve their platform performance through transparent practices<sup>283</sup>. Nonetheless, gatekeepers may select parameters that, while ostensibly objective, still favour their own offerings<sup>284</sup>. For example, prioritising price as a ranking criterion could benefit a gatekeeper’s lower-priced products, introducing subjectivity into the process.

A number of scholars have raised concerns regarding the enforceability and clarity of Article 6(5) DMA.

BRANKIN and TREACY argue that the obligation for gatekeepers to ensure transparent ranking, particularly when it involves complex machine-learning systems, may be technically unfeasible, as the functioning of such algorithms is often opaque even to their developers<sup>285</sup>. In addition, compliance mechanisms under Article 6 are procedurally ambiguous: gatekeepers must propose their measures, while the EC is not obliged to provide binding guidance<sup>286</sup>.

However, detecting and monitoring self-preferencing remains gradual and costly. The effectiveness of Article 6(5) will depend on whether its measures prove more effective than previous competition remedies. Scholars such as CARUGATI advocate for the appointment of independent, rotating external auditors to avoid influence from the gatekeepers and increased collaboration with NCAs developing technological oversight tools<sup>287</sup>.

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<sup>281</sup> *Ibid.*, p. 3.

<sup>282</sup> Expression used in DE STREEL, Alexandre (coord.); BOURREAU, Marc; FEASEY, Richard; FLETCHER, Amelia; KRÄMER, Jan; MONTI, Giorgio – *Implementing the DMA: Substantive and Procedural Principles*. Brussels: Centre on Regulation in Europe (CERRE), 2024. Available at: <https://cerre.eu/wp-content/uploads/2024/01/CERRE-BOOK-IMPLEMENTINGDMA.pdf>. [Accessed on 14 Feb. 2025].

<sup>283</sup> *Ibid.*, p. 106.

<sup>284</sup> CARUGATI, Christophe, CARUGATI, Christophe, *How to Implement the Ban on Self-preferencing*, *op. cit.*

<sup>285</sup> BRANKIN, Sean-Paul; TREACY, Pat, *The DMA: Challenges for the Regulator as well as the Regulated.*, *op. cit.*, pp. 18-19.

<sup>286</sup> Article 8(1) and (3), DMA.

<sup>287</sup> CARUGATI, Christophe – *How to Implement the Ban on Self-preferencing in the Digital Markets Act*. Bruegel Policy Contribution, Issue 22/2022, 2022, pp. 10-11. Available at: <https://ssrn.com/abstract=4366700>. [Accessed on 10 May 2025].

From my perspective, a blanket prohibition on self-preferencing in rankings may overlook potential benefits and risks being disproportionate, as not all such conduct is inherently unlawful or harmful. The *Google Shopping* case demonstrated the importance of effects-based analysis, but the DMA replaces it with a categorical approach, taking a completely different stance.

### 6.3 THE LIFE EXPECTANCY OF THE DMA

Recent scholars highlight that participatory mechanisms are essential to ensure the DMA remains legitimate and effective over time, and that the EC should favour a collaborative and deliberative approach over a strictly punitive one, to build trust and ensure better compliance<sup>288</sup>. Accordingly, limited to bilateral engagement with gatekeepers risks regulatory capture and may undermine the DMA's public interest objectives.

BRANKIN and TREACY suggest that enforcement will likely require an iterative and resource-intensive process, complicated by both institutional capacity constraints and reliance on existing Article 102 TFEU jurisprudence<sup>289</sup>.

The DMA's fixed structure may prove insufficiently adaptable to the rapidly changing digital economy<sup>290</sup>. Alternative regulatory approaches, such as market investigation instruments, could have provided greater flexibility but were not adopted<sup>291</sup>.

LAROCHE and DE STREEL argue that to prevent the DMA from becoming rigid – a risk they refer to as “fossilisation” – mechanisms such as anti-circumvention clauses and delegated acts should be effectively applied, EU lawmakers have introduced mechanisms such as a broad anti-circumvention clause and the possibility for the EC to update obligations through delegated acts (Articles 12 and 13 DMA)<sup>292</sup>. In the long-term, they argue that the

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<sup>288</sup> NEVES, Inês, *No enforcement without representation: how participatory democracy can strengthen the Digital Markets Act*, *op. cit.*, p. 694.

<sup>289</sup> BRANKIN, Sean-Paul; TREACY, Pat, *The DMA: Challenges for the Regulator as well as the Regulated.*, *op. cit.*, p. 19.

<sup>290</sup> DAVIES, John; MEUNIER, Valérie; CALANCHI, Gianmarco; STENIMACHITIS, Angelos. – *A Missed Opportunity: The European Union's New Powers over Digital Platforms*. *The Antitrust Bulletin*, Vol. 67, no. 4, 2022, pp. 517–518. Available at: <https://doi.org/10.1177/0003603X221126128>. [Accessed on 28 Apr. 2025].

<sup>291</sup> *Ibid.*, 520.

<sup>292</sup> LAROCHE, Pierre; DE STREEL, Alexandre. *A compass on the journey to successful DMA implementation*. In: *Dossier – The Digital Markets Act*. *Competition Law Review (Concurrences)*, no. 3, 2022, p. 29.

DMA's success will depend on whether a cooperative, rather than adversarial, relationship can be established between the EC and the designated gatekeepers.

In addition, Article 23 DMA introduces a supplementary enforcement mechanism by empowering the EC to carry out inspections. This is expected to improve the overall enforcement<sup>293</sup>.

MARSDEN and PODSZUN argue that a market investigation regime in the EU would allow authorities to analyse the structure and dynamics of entire markets without relying on preconceived assumptions<sup>294</sup>. Accordingly, the authors recommend institutional safeguards, including the creation of an independent investigative panel and the involvement of external experts, thereby strengthening objectivity and technical precision in the assessment process.

In a highly insightful report, CRÉMER and others propose recommendations to strengthen DMA enforcement. Three of the authors' recommendations stood out as particularly noteworthy<sup>295</sup>. First, shift institutional focus within the EC towards gatekeeper-specific expertise, with investigators possessing deep knowledge of each platform's business model to ensure accurate compliance and early detection of circumvention. Then, handle Article 11 reports as key enforcement tools, requiring verifiable technical and economic data, records of behavioural changes, and detailed legal justifications; vague or incomplete reports should indicate potential non-compliance. In third place, the establishment of a "compliance culture" which requires the EC to engage stakeholders openly while defining expectations and promoting voluntary compliance to integrate into their governance structure for effective and predictable regulation.

The EC should implement these recommendations to enhance procedural transparency, strengthen accountability, and enable robust, evidence-based compliance assessment. It should also address resource constraints and procedural burdens to create clear compliance benchmarks and guidance for gatekeepers, which will facilitate DMA enforcement.

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<sup>293</sup> *Ibid.*, pp. 37-38.

<sup>294</sup> MARSDEN; PODSZUN, *Restoring Balance to Digital Competition*, 2020, pp. 58-87.

<sup>295</sup> DE STREEL, Alexandre; CRÉMER, Jacques; HEIDHUES, Paul; DINIELLI, David; KIMMELMAN, Gene; MONTI, Giorgio; PODSZUN, Rupperecht; SCHNITZER, Monika; SCOTT MORTON, Fiona M – *Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust*. Yale Tobin Center for Economic Policy, 2022. Available at: <http://dx.doi.org/10.2139/ssrn.4314848>. [Accessed on 6 Jun. 2025].

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The Act's future value will depend on how well its review mechanisms function to adapt to changing digital market conditions, which were designed to ensure responsiveness to evolving digital market dynamics<sup>296</sup>. Market investigations preceding reviews must incorporate insights from Competition Law proceedings and other relevant developments.<sup>297</sup>

To address this, a hybrid approach combining Competition Law enforcement with flexible, *ex ante* obligations is necessary. The traditional competition tools function as reactive measures, which prove insufficient. Regulatory frameworks need to stay flexible to protect market entry opportunities and innovation. However, the EC encounters major obstacles in achieving its mandate. Its capacity hinges on its technical expertise, judicial support, ability to balance enforcement rigor with legal certainty, and, lastly, budgetary support – a concern even acknowledged in DMA Recital 106.

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<sup>296</sup> Recitals 69, 77, 79, 80, 97, DMA.

<sup>297</sup> Article 19(1), DMA.

## 7. THE PRINCIPLE OF “DOUBLE JEOPARDY”

At first glance, the DMA is perceived to be an ancillary regulatory instrument to reinforce the existing EU Competition Law framework<sup>298</sup>. In practice, there is a degree of substantive overlap between the DMA and the existing EU Competition Law, particularly in relation to certain obligations imposed on designated gatekeepers.

MARTIN D’HALLUIN stresses that the DMA implements similar, but broader and categorical prohibitions against practices addressed by Article 102 TFEU<sup>299</sup>. The regulatory standard established by Article 6(5) of the DMA goes beyond traditional Competition Law because it prohibits gatekeepers from giving preference to their own ranking, crawling, and indexing operations.

The overlapping provisions create legal uncertainty about enforcement grounds which could lead to problems when applying the *ne bis in idem* principle<sup>300</sup>. This principle protects individuals from facing multiple punishments or trials for the same illegal actions<sup>301</sup>.

Multiple member states have updated their national laws to regulate platform-related abuses, outside the scope of the DMA, namely the Section 19a of the GWB in Germany and economic dependency measures against large platforms in Italy<sup>302</sup>. Consequently, the simultaneous enforcement and applicability of the DMA alongside EU and national competition laws escalate the possibility of multiple proceedings for *idem* behaviour, each under a different legal regime.

The resulting multilevel or “polycentric” enforcement system, in which investigative and sanctioning powers are shared between NCAs and centralised EU institutions, gives rise to parallel enforcement and, potentially, double prosecution<sup>303</sup>. Regulation No 1/2003 enables parallel proceedings in Competition Law, and the DMA does not preclude concurrent

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<sup>298</sup> See Recitals 10 and 11, and Article 1(6), DMA.

<sup>299</sup> D’HALLUIN, Martin. *The DMA: An Ambitious Act with Countless Challenges*. In: Dossier – The Digital Markets Act. *Competition Law Review (Concurrences)*, no. 3, 2022, pp. 13-14.

<sup>300</sup> See the definition of *ne bis in idem* in CJEU, 15 October 2002, Case C-238/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, EU:C:2002:582, para 59.

<sup>301</sup> Article 50 of the Charter of Fundamental Rights of the EU, Article 6(1) and (3) TFEU, Article 54 of the Convention Implementing the Schengen Agreement, and Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>302</sup> CAPPALÀ, Marco; COLANGELO, Giuseppe, *Applying ne bis in idem, op. cit.*, p. 12.

<sup>303</sup> KOZAK, Malgorzata; PETERS, Veerle – *Double Jeopardy of Article 102 TFEU and the DMA: The Challenges of a Multi-Level Enforcement System*, 2024, p. 2. Available at: <https://ssrn.com/abstract=5066143>. [Accessed on 30 Apr. 2025].

application with Article 102 TFEU, allowing both instruments to be enforced where appropriate<sup>304</sup>.

### 7.1. *BPOST* AND *NORDZUCKER*

The *ne bis in idem* principle, or protection against double jeopardy, provides that no individual may be prosecuted, judged, or sanctioned more than once for the same conduct. While rooted in criminal law, this principle also applies to other areas of law deemed sufficiently comparable in nature. In fact, established case law confirms that this principle is applicable to proceedings involving the imposition of fines under the competition provisions of the Treaty<sup>305</sup>.

Recent CJEU case law, particularly the *bpost* and *Nordzucker* decisions, has clarified the application of *ne bis in idem* within EU Law. The Court has shifted from a threefold test (identity of facts, perpetrator, and protected legal interest) to a twofold criterion: (i) a prior final decision (the ‘bis’ condition), and (ii) the same material conduct involving the same person (the ‘idem’ condition)<sup>306</sup>. *Mutatis mutandis*, for the *ne bis in idem* principle to apply, two final decisions must exist, both relating to the same conduct<sup>307</sup>. The legal classification of the facts and the nature of the protected legal interest are now only relevant at a later stage, when assessing whether a second set of proceedings may be justified.

The requirement of *idem factum* is met only when the underlying material conduct is strictly identical, and not “merely similar<sup>308</sup>”. This is determined by assessing the territory, the relevant product market, and the time period in which the alleged infringement took place as reaffirmed in *Nordzucker*<sup>309</sup>, and the earlier *Toshiba* ruling<sup>310</sup>.

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<sup>304</sup> Recital 22 of Regulation No 1/2003; CJEU, Judgment of 14 February 2012, Case C-17/10, *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže*, EU:C:2012:72, paras. 81-82.

<sup>305</sup> CJEU, Judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others v. Commission*, Case C-238/99 P, EU:C:2002:582, para 59; *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže*, Case C-17/10, para. 94; CJEU, Judgment of 22 March 2022, *Bundeskartellamt v. Nordzucker AG and Others*, Case C-151/20, EU:C:2022:203, para 32; CJEU, Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, Case C-617/17, EU:C:2019:283, para 28.

<sup>306</sup> *Nordzucker*, C-151/20, para 33.

<sup>307</sup> See CJEU, Judgment of 22 March 2022, *bpost SA v Autorité belge de la concurrence*, C-117/20, ECLI:EU:C:2022:202, para. 34; *Nordzucker*, C-151/20, para 39; *Menci*, C-524/15, para 36.

<sup>308</sup> *bpost SA*, C-117/20, paras. 33 and 36.

<sup>309</sup> *Nordzucker*, C-151/20, para. 41.

<sup>310</sup> *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže*, Case C-17/10, para. 103.

In determining whether two proceedings concern the same material facts for the purposes of the *ne bis in idem* principle, it is necessary to assess the actual or potential competitive effects of the conduct, together with the temporal and territorial scope within which those effects manifested<sup>311</sup>. The identity of facts thus depends not merely on the formal qualification of the behaviour, but on a substantive analysis of its impact in a defined period and a specific market.

Once a restriction of double jeopardy is found (assessing the *bis* and the *idem*), it must be assessed *ex post* whether it is justified under Article 52(1) CFREU. For such a restriction to be legitimate, it must have a legal basis, respect the essence of protected rights, and adhere to proportionality. Importantly, the legislation involved must serve distinct purposes – if they share the same objective, a restriction cannot be justified<sup>312</sup>. The analysis requires determining if the DMA and Competition Law strive for shared objectives. The *ne bis in idem* principle will most likely prevent duplicate enforcement actions if the CJEU determines that the Act and Article 102 TFEU have complementary aims. Sooner or later, EU courts need to demystify this matter to establish legal certainty.

Scholars have welcomed the CJEU's clarification in *bpost* and *Nordzucker*, noting that the effects-based approach enhances legal certainty by narrowing the scope of *idem*, which had lost its practical relevance, and focusing on substantive competitive effects<sup>313</sup>. However, some critics argue that the requirement for a “perfect identity” of conduct is overly formalistic and may be difficult to meet in complex enforcement scenarios, potentially undermining the fundamental character of *ne bis in idem*<sup>314</sup>.

In response to these developments, the DMA now includes provisions addressing *ne bis in idem*<sup>315</sup>, and formalises cooperation between the EC and NCAs via the ECN<sup>316</sup>.

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<sup>311</sup> ZELGER, Bernadette – *The Principle of ne bis in idem in EU Competition Law: The beginning of a new era after the ECJ's decisions in bpost and Nordzucker?*, Common Market Law Review, Vol. 60, No. 1, 2023, pp. 255-256. Available at: <https://ssrn.com/abstract=4657375>. [Accessed on 29 Apr. 2025].

<sup>312</sup> *bpost*, Case C-117/20, para. 43; *Nordzucker and Others*, Case C-151/20, paras. 52 and 57.

<sup>313</sup> ZELGER, Bernadette, *The Principle of ne bis in idem*, *op. cit.*, p. 256.

<sup>314</sup> CAPPALÀ, Marco; COLANGELO, Giuseppe, *Applying ne bis in idem*, *op. cit.*, p. 20.

<sup>315</sup> Recital 86, DMA.

<sup>316</sup> Article 38, DMA.

## 7.2. CONFLICT OF LAWS

In this context, different conflicting enforcement scenarios may arise, namely: (i) the EC can choose to apply both Article 102 TFEU and the DMA to the same infringement; or (ii) the EC can enforce the DMA while a NCA enforces Article 102 TFEU; or (iii) a national digital regulation with similar content<sup>317</sup>. Each scenario listed raises concerns about the possibility of duplicating proceedings initiated by different authorities.

There is a prohibition for member states from imposing additional obligations on designated gatekeepers, under Article 1(5) of the DMA, while national legislatures maintain competence over CPS beyond the DMA's scope. Furthermore, Article 1(6) establishes that the Act does not hinder with the application of EU or national Competition Law, demonstrating the intricate relationship between the legislation currently applicable to CPS. The complex nature of this system creates doubts about how different authorities will align their actions and whether parallel litigation will exist in the future.

The simultaneous enforcement activities between national authorities and EU bodies may lead to inefficient resource management and excessive enforcement, or conversely, create enforcement gaps because authorities choose to postpone their actions<sup>318</sup>. The risks can be reduced through effective information exchange under Article 38(1) of the DMA, which enables coordinated and complementary enforcement.

To avoid fragmentation of the digital internal market, the DMA entrusts exclusive enforcement powers to the EC<sup>319</sup>, with NCAs assisting in inspections and investigations and providing consultative input through the Digital Markets Advisory Committee<sup>320</sup>. The EC is also authorised to engage with national courts, upon request and provide in legal proceedings<sup>321</sup>. Article 38 embeds enforcement within the ECN, enabling cooperation and information exchange, while a high-level group facilitates structured dialogue between the ECN and regulatory experts<sup>322</sup>.

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<sup>317</sup> Article 38(7), DMA, and Article 5 of the Regulation No 1/2003.

<sup>318</sup> ROBERTSON, Viktoria, *The Complementary Nature of the Digital Markets Act and Articles 101 and 102 TFEU op. cit.*, p. 328.

<sup>319</sup> Recitals 6, 7, 9 and Article 1(5), DMA.

<sup>320</sup> Articles 21(5), 22(2), 23(3), 41 and 50, DMA.

<sup>321</sup> Article 39, DMA.

<sup>322</sup> Article 40 and Recital 93, DMA.

The DMA demands coordination and cooperation between NCAs and the EC<sup>323</sup>, with the latter retaining discretion over engagement. Once the EC initiates proceedings, ongoing national investigations must be discontinued, affirming its role as the primary enforcement authority<sup>324</sup>. Strikingly, the ECN has published a joint statement outlining how NCAs can contribute to strengthening the enforcement of the DMA<sup>325</sup>. The document demonstrates that multiple NCAs have advised legislators about the miscalculation of the assigned load and legal intricacies that come with implementing the DMA, both in its core content and procedural aspects.

Another possibility is for the EC to maintain exclusive regulatory authority for core functions while delegating supervisory responsibilities to NCAs in order to benefit from their local market knowledge. Removing supervisory powers from NCAs would create an enforcement risk because they possess superior capabilities to identify gatekeeper activities within their national scale. Definitely, a coordinated approach, maintaining the EC's principal power while allowing NCAs to perform supervisory functions through organised cooperation structures, would be more effective.

Efficient, case-specific collaboration among enforcement authorities is essential to prevent duplication, inconsistent results, and fragmentation in DMA implementation. Competition authorities must coordinate closely in both timing and scope, supported by appropriate legal frameworks. The final text of the DMA, adopted post-*bpost* and *Nordzucker*, designates the ECN as the coordination platform for DMA and Competition Law enforcement, safeguarding the *ne bis in idem* principle<sup>326</sup>.

### **a) Conflict between the DMA and Article 102 TFEU – *lex specialis derogat legi generali***

When an undertaking is designated as a gatekeeper under the DMA and engages in blacklisted conduct, the EC may address the infringement under the DMA as an abuse of

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<sup>323</sup> Articles 1(7) and 37, DMA.

<sup>324</sup> Articles 21(5) and 38, DMA.

<sup>325</sup> EUROPEAN COMPETITION NETWORK – *Joint Paper of the National Competition Authorities of the European Union on the Enforcement of the Digital Markets Act*. (2021). Available at: [https://competition-policy.ec.europa.eu/system/files/2023-04/Joint\\_EC\\_N\\_statement\\_on\\_the\\_revised\\_MDN.pdf](https://competition-policy.ec.europa.eu/system/files/2023-04/Joint_EC_N_statement_on_the_revised_MDN.pdf). [Accessed on 1 May 2025].

<sup>326</sup> BEEMS, Belle, *The DMA in the Broader Regulatory Landscape*, *op. cit.*, p. 19.

dominance pursuant to Article 102 TFEU, or, where appropriate, through both enforcement mechanisms<sup>327</sup>.

Some scholars have argued that the DMA functions as a *lex specialis* within the broader framework of EU Competition Law<sup>328</sup>, with Competition Law serving as a residual mechanism for practices outside the DMA's scope.

In this context, the CJEU has already clarified the following:

“(…) it must be stated that public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned (...)”<sup>329</sup>.

In such cases, coordination is essential to ensure effective enforcement when parallel proceedings arise<sup>330</sup>.

### **b) Conflict Between National Provisions and DMA-Like Provisions**

A key question is whether national laws regulating digital platforms' market power constitute the implementation of EU law within Article 51 CFREU. This provision limits the Charter's application to member states when implementing Union law, which is critical for determining whether Charter rules, such as *ne bis in idem* under Article 50, apply.

Section 19a GWB differs from the DMA as a national measure not aimed at protecting the internal market. As CAPPAI and COLANGELO observe, the application of the *Siragusa* test, which assesses whether national measures fall within the scope of EU law despite not directly implementing a specific EU provision, remains controversial in this context<sup>331</sup>.

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<sup>327</sup> ROBERTSON, Viktoria, *The Complementary Nature of the Digital Markets Act and Articles 101 and 102 TFEU op. cit.*, p. 327.

<sup>328</sup> BANIA, Konstantina – *Fitting the Digital Markets Act in the Existing Legal Framework: The Myth of the “Without Prejudice” Clause*. *European Competition Journal*, Vol. 19, no. 1, 2022, p.117. Available at: <https://doi.org/10.1080/17441056.2022.2156730>. [Accessed on 30 Apr. 2025]; KOZAK, Malgorzata; PETERS, Veerle, *Double Jeopardy of Article 102 TFEU and the DMA, op. cit.*, p. 10.

<sup>329</sup> *bpost*, C-117/20, para. 49.

<sup>330</sup> Articles 1(7), 37, 38, DMA.

<sup>331</sup> CAPPAI, Marco; COLANGELO, Giuseppe, *Applying ne bis in idem, op. Cit.*, pp.12-15.

The assessment evaluates both the characteristics of national rules and their unique objectives outside the scope of EU law, even when they indirectly impact EU-regulated areas<sup>332</sup>.

As seen in Chapter 6, the DMA finds its legal basis in Article 114 TFEU, which allows for internal market functioning rules harmonisation instead of Article 103 TFEU, which deals with EU Competition Law enforcement. As a result, the DMA is not formally characterised as a Competition Law instrument, despite addressing many of the same regulatory concerns and it introduces per se obligations for designated gatekeepers, meaning that these rules apply automatically, without requiring a case-by-case market analysis or allowing undertakings to invoke efficiency defences, unlike Article 102 TFEU.

By selecting Article 114 TFEU as the legal basis, the EU legislator established a regulatory instrument that remains institutionally and substantively distinct from the Union's Competition Law framework. As highlighted by CAPPALÀ and COLANGELO, this choice “*may reveal itself to be a double-edged sword leading to unintended consequences*”<sup>333</sup>.

The DMA's economic rationale has been debated, particularly the lack of an efficiency defence for gatekeepers<sup>334</sup>. More flexible, effects-based frameworks allow authorities to weigh economic costs and benefits before imposing obligations<sup>335</sup>, whereas the DMA applies obligations uniformly to all designated core platform services.

In sum, if national rules fall outside Article 51(1) CFREU, the safeguards of Article 50 do not apply, consequently permitting parallel proceedings. If the CJEU finds substantive alignment, Article 50 would apply, potentially blocking subsequent DMA enforcement for the same facts and legal interest.

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<sup>332</sup> CJEU, Judgment of 6 March 2014, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, Case C-206/13, EU:C:2014:126, para. 25.

<sup>333</sup> CAPPALÀ, Marco; COLANGELO, Giuseppe, *Applying ne bis in idem*, *op. Cit.*, p.15.

<sup>334</sup> MONOPOLKOMMISSION – *The Digital Markets Act: Assessment and Recommendations for Reform*. Special Report 82, 2021, paras. 130-167. Available at: [https://www.monopolkommission.de/images/PDF/SG/sr\\_dma\\_fulltext.pdf](https://www.monopolkommission.de/images/PDF/SG/sr_dma_fulltext.pdf). [Accessed on 9 May 2025]; CERRE – *The Digital Markets Act: A First Assessment*. 2021, p. 22. Available at: [https://cerre.eu/wp-content/uploads/2021/01/CERRE\\_Digital-Markets-Act\\_a-first-assessment\\_January2021.pdf](https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf). [Accessed 9 May 2025].

<sup>335</sup> PODSZUN, *Digital Markets Act*, *op. cit.*, p. 7.

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As a last resort, Article 1(6) of the DMA operates as a precedence clause, and Articles 101 and 102 TFEU, as primary law, take precedence over the DMA.

## 8. COMPARATIVE APPROACHES TO SELF-PREFERENCING

Globally, competition policy is evolving to confront the concentration of market power and the growing dominance of “tech titans”<sup>336</sup>. A number of countries have made efforts to tackle the competitive challenges stemming from this conduct.

Germany became one of the first countries to enact a sector-specific legislation in this matter when it passed its initial laws in 2021. Section 19a of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) gave the *Bundeskartellamt* proactive powers to oversee businesses that have “*paramount significance for competition across markets*”<sup>337</sup>. However, as the DMA is a more recent instrument and directly applicable within a Member State, further analysis of the national framework is not necessary.

At the EU level, a “Brussels Effect” initiated a regulatory trend across multiple jurisdictions<sup>338</sup>. Unquestionably, the EU has developed a global regulatory movement<sup>339</sup>.

The EU regulatory model targets structural competition issues in digital markets across Europe<sup>340</sup>. The “one-size-fits-all” method of this model fails, however, for emerging markets. These jurisdictions operate under distinct economic frameworks which combine modern digital economies with underdeveloped institutional frameworks. They lack the ability to enforce substantial regulatory requirements on large digital firms that have not entered or established operations in their territories.

There is an emerging global trend towards the regulation of self-preferencing.

In Australia, the ACCC recognised self-preferencing by digital platforms with market power as a competition threat that enables these platforms to give unfair advantages to their

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<sup>336</sup> Term used by *The Economist*, “How to tame the tech titans”, 18 January 2018. Available at: <https://www.economist.com/leaders/2018/01/18/how-to-tame-the-tech-titans>. [Accessed on 31 May 2025].

<sup>337</sup> Bundeskartellamt – *Rules for the Digital Economy: Extended abuse control (Section 19a GWB)*. Available at: [https://www.bundeskartellamt.de/EN/Digital\\_economy/RulesDigital\\_economy/rulesdigialeconomy\\_node.html](https://www.bundeskartellamt.de/EN/Digital_economy/RulesDigital_economy/rulesdigialeconomy_node.html). [Accessed on 5 Jun. 2025].

<sup>338</sup> BAUER, Matthias; PANDYA, Dyuti; SHARMA, Vanika – *EU export of regulatory overreach: the case of the Digital Markets Act (DMA)*, ECIPE, 2025, p. 5. Available at: <https://ecipe.org/publications/eu-export-of-regulatory-overreach-dma/>. [Accessed on 3 Jun. 2025].

<sup>339</sup> BRADFORD, Anu. – *The Brussels Effect: how the EU rules the world*. Oxford: Oxford University Press, 2020.

<sup>340</sup> *Ibid.*, pp. 17-18.

products or services at the expense of rival businesses<sup>341</sup>. Australia is developing a new regulatory framework for digital platforms modelled after the DMA, which includes rules for major platforms to curtail self-preferencing<sup>342</sup>.

The U.S. authorities waited before taking formal actions. Various legislative attempts have been made in recent years by lawmakers to enact laws that target self-preferencing practices carried out by dominant digital platforms. The Open App Markets Act became the first legislative attempt to halt app store operators from showing preference to their applications while restricting third-party developers in August 2021<sup>343</sup>.

The American Innovation and Choice Online Act (AICOA) emerged as a significant proposal when it was first introduced in October 2021<sup>344</sup>. It sought to forbid large technology companies from employing discriminatory practices that give their outputs an advantage over competitor offerings. The rejected legislation indicates that U.S. regulatory bodies are apprehensive about platform bias.

Recently, the U.S. government shifted its focus from enacting legislation to conducting direct enforcement actions against self-preferencing and exclusionary conduct by major digital platforms, starting with Google. The Department of Justice, together with state attorneys general, initiated high-profile antitrust cases against Google that resulted in court decisions proving the undertakings' illegal behaviour in the search and digital advertising market<sup>345</sup>.

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<sup>341</sup> AUSTRALIAN COMPETITION AND CONSUMER COMMISSION – *Digital Platform Services Inquiry*. Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services. 2022, p. 39. Available at: <https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25/september-2022-interim-report>. [Accessed on 10 Jun. 2025].

<sup>342</sup> AUSTRALIAN GOVERNMENT – *Regulating digital platforms: Government response to the ACCC's Digital Platform Services Inquiry*. Canberra: Department of the Treasury, 2024. Available at: <https://treasury.gov.au/consultation/c2024-547447>. [Accessed on 10 Jun. 2025].

<sup>343</sup> UNITED STATES CONGRESS – *Open App Markets Act (S.2710)*. 117th Congress (2021–2022). Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2710>. Accessed 1 May 2025.

<sup>344</sup> UNITED STATES CONGRESS – *S. 2992 – American Innovation and Choice Online Act*. 117th Congress, 2021. Section 3.9. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2992>. [Accessed 9 May 2025].

<sup>345</sup> UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA – *United States of America et al. v. Google LLC*, Memorandum Opinion, 05 Aug. 2024. Available at: <https://www.justice.gov/opa/pr/departments-justice-prevails-landmark-antitrust-case-against-google>. [Accessed: 10 June 2025]; UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA – *United States of America et al. v. Google LLC*, Memorandum Opinion, April 2025. Available at: <https://www.justice.gov/archives/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>. [Accessed on 10 Jun. 2025].

Although there isn't a strictly equivalent to the DMA in the U.S. legal system yet, the Sherman Antitrust Act stands as the primary legal instrument for the U.S. to fight exclusionary conduct by dominant firms. In particular, the Sherman Act Section 2 enables authorities to challenge self-preferencing when it leads to monopoly power maintenance and harms competition rather than benefiting the firm alone<sup>346</sup>.

The CMA in the UK has demonstrated substantial worry about dominant digital platforms using self-preferencing to harm competition. The 2020 CMA market study of online platforms and digital advertising revealed that major platforms use their power to promote their own services and products above those of competitors, which leads to ineffective competition in these markets<sup>347</sup>. The UK has implemented its own *ex ante* regulatory regime through the Digital Markets, Competition and Consumers Act 2024 (DMCC)<sup>348</sup>. The DMCC establishes a regime of obligations for digital companies that have been designated as having “Strategic Market Status”- similar to the gatekeepers' designation in the EU. Section 20(3)(b) is particularly relevant to the issue of “favouring”, establishing that requirements may be imposed for the purpose of preventing a designated undertaking from:

*“using its position in relation to the relevant digital activity, including its access to data relating to that activity, to treat its own products more favourably than those of other undertakings”.*

The DMCC empowers the CMA to intervene proactively prevent SMS-designated enterprises from using their Strategic Market Status for their own benefit, including not unduly favouring their own products or services through superior access to data<sup>349</sup>. This aspect of the DMCC provided the CMA with enforcement powers over conduct that is functionally

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<sup>346</sup> HANLEY, Daniel – *How Self-Preferencing Can Violate Section 2 of the Sherman Act*. Competition Policy International Antitrust Chronicle, 2021. Available at: <https://ssrn.com/abstract=3868896>. [Accessed on 10 Jun. 2025].

<sup>347</sup> COMPETITION AND MARKETS AUTHORITY – *Online platforms and digital advertising market study*. Final report. 2020. Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>. [Accessed on 10 Apr. 2025].

<sup>348</sup> United Kingdom – *Digital Markets, Competition and Consumers Act 2024*, c. 13, enacted on 24 May 2024. Available at: <https://www.legislation.gov.uk/ukpga/2024/13/enacted> [Accessed on 31 May 2025].

<sup>349</sup> EGERTON-DOYLE, Verity; HUNTER, James – *The UK's new digital markets regime: unfettered discretion and power for the CMA*. Kluwer Competition Law Blog, 2024. Available at: <https://competitionlawblog.kluwercompetitionlaw.com/2024/10/07/the-uks-new-digital-markets-regime-unfettered-discretion-and-power-for-the-cma/> [Accessed on 1 Jun. 2025].

equivalent to that covered by Article 6(5) DMA, which focuses on the discriminatory treatment and competitive distortion risk posed by vertically integrated digital platforms.

In Japan the *Act on Promotion of Competition for Specified Smartphone Software*, adopted on 12 June 2024<sup>350</sup>, prohibits designated providers of mobile operating systems, app stores, browsers, and search engines from engaging in self-preferencing or unreasonably discriminatory treatment in areas such as search rankings and app store practices<sup>351</sup>. Enforcement is overseen by the Japan Fair Trade Commission, with the aim of promoting fair and free competition within mobile ecosystems.

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<sup>350</sup> JAPAN FAIR TRADE COMMISSION – *The JFTC notifies the European Commission of the adoption of the commitment decision regarding app store practices*. Tokyo: JFTC, 2024. Available at: <https://www.jftc.go.jp/en/pressreleases/yearly-2024/June/240612.html>. [Accessed 10 April 2025].

<sup>351</sup> WAKUI, Masako – *[International Development] The Smartphone Act: Japan's new legislation that regulates Google and Apple*. *Journal of European Competition Law & Practice*, 2025. Available at: <https://doi.org/10.1093/jeclap/lpaf007>. [Accessed on 4 May 2025].

## 9. CONCLUSION

The Future of European Competitiveness report reveals that the Union needs coordinated actions across three vital domains to sustain its worldwide economic position: improving innovation capabilities, protecting industrial competitiveness from decarbonisation objectives, and developing strategic autonomy through independent critical sectors for semiconductors and raw materials<sup>352</sup>. The global economy has shifted to innovation-based growth which creates an existential threat to European future competitiveness. Accordingly, the EU must undergo complete policy redesign alongside sustained financial support to defend its economic security, technological freedom, and market position<sup>353</sup>.

The adoption of the DMA denotes a new chapter for the EU, by introducing an *ex ante* instrument to monitor digital platform markets that were unregulated<sup>354</sup>. The Act seems to create market opportunities for EU-based firms and SMEs by expanding their competitive market access. However, the EC needs to achieve an equilibrium between maintaining fair competition rules and preserving the EU's position as an innovation hub, especially given the recent targeting of American “tech titans”.

The digital economy has utterly redesigned market structures, resulting in the emergence of a small number of gatekeepers retaining substantial market power. The concentration of economic power through network effects, economies of scale, high switching costs, and lock-in effects has created significant barriers to entry and new obstacles for Competition Law enforcement. Article 102 TFEU demonstrates its inability to deal with the cemented dominance that exists in platform-based markets.

The backbone principles of EU Competition Law, including Article 102 TFEU, remain solid yet require specific refinements to address digital market features. The *Google Shopping* case demonstrates the challenges of defining markets and evaluating anticompetitive effects in multi-sided digital platforms, particularly when assessing new theories of harm such as self-preferencing. As this case demonstrated, self-preferencing by dominant undertakings may

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<sup>352</sup> DRAGHI, Mario – *The Future of Competitiveness in Europe: Part A | A Competitiveness Strategy for Europe Report*, September 2024. Available in: [https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961\\_en](https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en). [Accessed on 4 May 2025].

<sup>353</sup> *Ibid.*

<sup>354</sup> SKARA, Gentjan.; MUÇOLLARI, Oriona.; HAJDINI, Bojana – *Adapting the Competition Policy for the Digital Age: Assessing the EU's Approach*. *Laws*, Vol. 13, no. 5, 2024, p. 16. Available at: <https://doi.org/10.3390/laws13050064>. [Accessed on 7 Apr. 2025].

constitute an abuse of dominance under Article 102 TFEU, but its assessment must be evidence-based and context-driven, avoiding *per se* categorical prohibitions at an early stage that could inadvertently dampen innovation and, hence, competition.

Ensuring that third-party competitors enjoy a level-playing field is a thorny assignment. This process cannot be managed through rigid or purely mechanical means, as it must account for agile market dynamics, technological advancements, and strategic behaviour by undertakings<sup>355</sup>.

The successful realisation of this new vision requires a thorough reevaluation of current strategies aimed at restraining dominant market players. A noteworthy, yet often overlooked, example is Australia's dual system, which combines empowering weaker parties through collective bargaining with the enforcement of mandatory codes of conduct in markets characterised by significant power asymmetries<sup>356</sup>. It is time to explore different methods tailored to the unique features of the modern economy.

A reasonable regulatory strategy – combining *ex ante* regulation through the DMA with *ex post* enforcement under Articles 101 and 102 TFEU and established case law – offers the most functional response to the emerging hurdles of digital markets. The solution must remain responsive and empirically-sensitive, ensuring that any intervention is justified by a demonstrable restriction or distortion of competition, rather than by simply assigning a formal designation to certain practices. This is the concept of "smart regulation" in the digital economy.

As demonstrated, the digital sector demands diligent regulatory oversight, institutional coordination, and precise legal frameworks for assessing self-preferencing practices and other conducts flagged as potentially hazardous. Regulatory reforms need to establish clear definitions of prohibited conduct and offer operational solutions to prevent the creation of vague or overly broad restrictions that lack clear justification and may have negative repercussions. Simply codifying existing case law (or parts of it) does not effectively address

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<sup>355</sup> ANDRIYCHUK, Oles – *The DMA Plus: Expanding a Pro-Competition Approach to Digital Markets to Other Policies – A Case of Net Neutrality*. European Competition Law Review, Vol. 45, no. 6, 2024. Available at: <https://biblioteca.concorrencia.pt/cgi-bin/koha/opac-retrieve-file.pl?id=1ffbf68163a61578b59d950be2a90d18>. [Accessed on 2 Jun. 2025].

<sup>356</sup> SMITH, Rhonda; HEALEY, Deborah – *Attacking concentration: market power in the digital space*. European Competition Journal, Vol. 20, no. 2, 2023, pp. 295–314. Available at: <https://doi.org/10.1080/17441056.2023.2280328>. [Accessed on 12 Jun. 2025].

dominance abuses by powerful digital platforms or restore competitive market dynamics, leaving essential competition concerns inconclusive<sup>357</sup>.

In conclusion, the progress of the EU's digital market regulation will depend on competition authorities and regulators adapting traditional legal tools to modern market conditions, coordinating the new regulatory frameworks with those previously in operation within the legal system, and developing specific guidance for each situation. Effective competition, innovation, and consumer welfare depend on a dynamic integrated approach that will arm Europe for the digital era.

The rapidly changing environment requires immediate regulatory advancement through well-defined criteria that support meaningful actions. Regulators must play an essential role in establishing specific and useful guidelines on self-preferencing to differentiate problematic competitive practices from non-problematic ones. To that end, the EC needs to maintain continuous communication with designated gatekeepers to address the significant technical challenges associated with monitoring diverse digital services.

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<sup>357</sup> MARS DEN, Philip, *Google Shopping for the Empress's New Clothes*, *op. cit.*, p. 560.

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## FIGURES

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