

Is it unlawful to favour oneself?

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ABSTRACT

The leveraging of market power by digital ecosystems and self-preferencing have become fashionable topics nowadays at national, European, and international levels. However, they are not novel issues. This paper argues that we can find the underlying concepts in a number of practices previously identified as abusive, such as tying and bundling, margin squeeze, and refusal to deal. This paper points out that these abuses have certain similarities with self-preferencing. This supports the claim that self-preferencing is likely to be conceivable under EU competition law as a new abuse. The investigations launched by the Commission after the adoption of the Google Shopping decision – such as against Amazon and Apple, the Amazon case of the Italian Competition Authority, as well as the various expert reports, and the legislative proposals that have been put forward in this regard also point in this direction. However, many questions remain when it comes to the legal standards that are applicable to the assessment of whether self-preferencing is abusive in a given situation.

KEYWORDS

Abuse of dominance, leveraging, self-preferencing, digital platforms

1. INTRODUCTION

1.1. The growing importance of the digital economy and the rise of multi-business corporate ecosystems

In 2010, the world's largest company by market capitalisation was Exxon Mobil, followed by the Chinese oil company, PetroChina. Among the first ten companies on the list we can further see

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the Anglo-Saxon mining corporation BHP Billiton, the Brazilian and Dutch oil giants Petrobras and Royal Dutch Shell, and certain banks such as the Industrial and Commercial Bank of China (ICBC) and the China Construction Bank. Two companies active in the digital industry had reached the top ten: Apple and Microsoft, in third and fifth place, respectively.¹

The above snapshot has changed significantly in the past decade due to the digital industrial revolution. In 2021, the biggest companies by market capitalization are mainly active in the ‘digital sector’. Currently, the biggest company is Apple, followed by tech giants such as Microsoft, Amazon, the parent company of Google (Alphabet), Meta (Facebook), Tencent, Alibaba, and Tesla – along with Saudi Aramco, and Berkshire Hathaway.²

Thus it is clear that, in addition to or instead of the former banks and oil giants the ‘digital sector’ is playing an increasingly leading role in the world – and we can only assume that this tendency will be sustained.

Furthermore, we can see that seven out of the ten largest corporations in the world not only operate in the digital sector, but that they also operate as so-called platforms. Platforms – broadly defined – ‘derive their market power from connecting entities together’.³ These cover a wide range of applications or websites, including, inter alia, search engines, online marketplaces, social media platforms, app stores such as Google Play or Apple’s App Store, online price comparison services, as well as platforms for the sharing economy.⁴

It is also a tendency that many of the above-mentioned firms offer more and more products and services to their customers. They are thus becoming multi-business platforms or multi-business corporate ecosystems.⁵

2. THE CHARACTERISTICS OF THE MODERN DIGITAL ECONOMY

Before reviewing the benefits and competition law-related issues associated with the digital economic environment, it is necessary to mention certain features thereof, such as those that are based on platforms and data.⁶ However, digital markets and digital platforms do not have a single specific feature that in itself distinguishes them from traditional sectors; rather, they are characterized by a number of coexisting factors: strong network effects, large economies of scale and scope, the prominent role of data, and huge fixed costs and minimal variable costs, low distribution costs, and in many cases global geographic scope.⁷ These characteristics together influence competition law enforcement and the development of competition policy in the digital age.⁸

¹Financial Times (2010) [link 1](#).

²PricewaterhouseCoopers (2021) [link 2](#).

³Cremer et al. (2019) 13.

⁴European Commission (2022) [link 3](#).

⁵See e.g. the range of products and services offered by Google, Google (2022) [link 4](#).

⁶Cremer et al. (2019) 2.

⁷Stigler Committee on Digital Platforms (2019) 34.

⁸Cremer et al. (2019) 2.



Due to the above characteristics, early economic theories which suggested that the internet will make markets more competitive than ever before, and that this will result in perfect competition, seem to have increasingly been overturned in recent years.⁹ We see that the players present in digital markets have significant market power, which they have managed to maintain for a relatively long time. As a result of this, most internet-driven markets, such as search engines, social networks, operating systems, e-commerce, and car sharing, have become highly concentrated and are dominated by a few players or one single market player.¹⁰

There seems to be a growing consensus that due to the coexistence of these factors digital markets are prone to tipping and that high market concentration can easily develop. As a result, the focus in digital markets is shifting from competition *in* the market to competition *for* the market.¹¹

2.1. The benefits of digital corporate ecosystems

The creation of a multi-business corporate ecosystem and digital platforms within those ecosystems, similarly to the vertical integration of a single business line, can have many benefits. It may be beneficial for companies themselves, their business partners, customers, and for the development of the European single digital market.

First, integration into adjacent and vertical markets can improve the economic efficiency of *companies* themselves as they can reduce their costs and create economies of scale and scope. Through integration companies can diversify their portfolios, and thereby reduce their operational risks. Furthermore, integration may result in the creation of new innovative businesses that generate investments and promote innovation and may reshape whole industries for the benefit of other businesses and customers. See for example, the extent to which the emergence of smartwatches has transformed the traditional watch industry.¹²

Second, integration also has tangible benefits for the *business partners* of digital conglomerates. Digital marketplaces, for instance, provide an opportunity for small- and medium-sized enterprises to access international markets quickly and efficiently, and help reduce their transaction and distribution costs. It is no coincidence that there are now thousands of online platforms in the European Union, and almost half of all SMEs in 2016 were already using online marketplaces to sell their products or provide their services.¹³

Third, integration may also have a positive impact on *customers*, as they can easily access new and innovative products from anywhere online. Using the one-stop-shop services of digital conglomerates, customers are able to reach and take advantage of multiple products or services in the same place. Various online comparison services also make it easier for customers to choose the products or services that work best for them. This also allows them to check where and under what conditions their pre-selected products or services are offered by different market players, thereby helping them to make more informed decisions.

⁹Brown and Goolsbee (2002) 110.

¹⁰Stigler Committee on Digital Platforms (2019) 34.

¹¹Cremer et al. (2019) 23.

¹²Strategy Analytics (2020) link 5.

¹³European Commission (2016) link 6.



Finally, the digital platforms operating across borders throughout Europe also contribute to the completion of the *EU's single digital market*. That said, the importance of digital platforms coupled with the facilitation of cross-border electronic commerce is currently an overarching theme in Europe and plays a pivotal role in the integration of the single European Union digital internal market.¹⁴

2.2. Competition-related concerns in connection with this phenomenon; self-preferencing

However, despite the above-described advantages, there also seems to be a growing consensus amongst competition practitioners that certain conduct of some dominant platforms may have an adverse effect on competition and thus on the economy, as well as harm consumer welfare and stifle innovation. Due to their gatekeeping function and the user attention paid to them, multiplied by the strong network effects present in the digital economy, their size and market power can be significant. This may be further enhanced by high entry barriers due to relatively high fixed costs and the extreme economies of scale and scope inherent in the digital economy.

In light of the above, from a competition law point of view arises the question, *inter alia*, whether the certain conduct of dominant platforms' is capable of foreclosing competitors in neighbouring markets or on the platforms themselves. In this paper, I focus on the abuse of the dominant position of hybrid platforms that are either vertically integrated or that operate in neighbouring markets related to their core activities.¹⁵ In this context, I concentrate on leveraging – i.e. on the behaviour which has an effect on extending market power to neighbouring markets. The extension of market power to neighbouring markets or the foreclosure of competitors from a platform itself may be achieved in many ways. Favouring one's own products or services in some way to the detriment of other users of the platform is one of them.

Thus, the integration into vertical and neighbouring markets and the emergence of new business models creating digital conglomerates have increased the importance of self-preferencing. This novel abuse is mentioned by a number of expert reports.¹⁶ It 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'.¹⁷ Relevant cases giving rise to self-preferencing issues suggests that it applies in the following scenarios. First, there are two either horizontally or vertically related markets in the case at hand. Second, there is some kind of favouring involved in one of the relevant markets at the expense of competitors. Favouring can either be unilateral or reflected in a contractual relationship between a platform and its competitors.¹⁸ This behaviour may in some cases be used by dominant platforms to extend their market power to a neighbouring market not previously dominated by them. However, as *Caffarra* notes¹⁹ different *business models* or as *Jacobides* puts it *platform architecture* and

¹⁴Scott et al. (2018).

¹⁵Linklaters (2018) link 7.

¹⁶Furman et al. (2019) 61., Cremer et al. (2019) 65–67, Stigler Committee on Digital Platforms (2019) 118., Cabral et al. (2021) 13–14.

¹⁷Cremer et al. (2019) 7.

¹⁸Colomo (2020) 5.

¹⁹Caffarra (2019) 3–8.



ecosystem governance do play an important factor in assessing whether undertakings have either the *ability* or the *incentives* to implement self-preferencing strategies.²⁰

3. LEVERAGING AS AN UNDERLYING CONCEPT IN COMPETITION LAW

Even though leveraging the market power of digital ecosystems and, in particular, self-preferencing, have become fashionable topic at national, European, and international levels, these are not novel issues. We can find the underlying concepts present in different established types of abuses. As I point out below, the underlying concept of leveraging, in particular, can be found in European and international case law: in the decisions of the European Commission, and in the judgments of the Court of Justice of the European Union and of the General Court within the scope of Article 102 of the Treaty on the Functioning of the European Union (TFEU).²¹

It is important to note that leveraging, i.e. the extension of an undertaking's dominant position to a neighbouring market, does not constitute in itself an infringement. It does not constitute the sole proof thereof either.²² It is a generic term referring to the impact of a specific conduct on a market other than where the conduct itself takes place. It follows from the above, that leveraging – as such – is not prohibited by 102 TFEU. However, several kinds of leveraging practices had previously been found abusive.²³ In particular, tying and bundling, margin squeeze, refusal to deal, and abusive discrimination. As I point out below, the theories of harm identified in these abuses have certain similarities with the theory of harm identified in the case of self-preferencing.

These cases are particularly interesting as the abuse does not necessarily take place in a market where a dominant position exists. These types of abuses typically take place when the dominant undertaking operates in two or more separate but horizontally or vertically interconnected markets.²⁴ In such cases, the abuse may take place in a related market in which the undertaking does not have a dominant position. In contrast to the above, in other cases the abuse takes place in a market dominated by the undertaking which has an anti-competitive effect in a related market.²⁵

3.1. Tying and bundling

In practices like tying and bundling, the theory of harm can be marked by leveraging.²⁶ According to this, a dominant undertaking can extend its market power from a dominated market to adjacent markets it wishes to dominate by selling products or providing services jointly.²⁷ Leveraging market power by means of tying and bundling may be particularly important and

²⁰Jacobides and Lianos (2021) 16.

²¹Article 102 of the Treaty on the Functioning of the European Union, OJ C 326/47 26.10.2012.

²²Case T-612/17, *Google and Alphabet v Commission*, ECLI:EU:T:2021:763, para. 162.

²³Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763, para. 163.

²⁴Tóth (2014) 281.

²⁵Tóth (2014) 281–82.

²⁶Langer (2007) 19.

²⁷Holzweber (2018) 342–66.



widespread in the digital economy, as the *Microsoft*²⁸ or *Google Android*²⁹ cases have shown.³⁰

In the judgment convicting *Microsoft*, the General Court ruled that the two abuses in question – the refusal to supply, the authorisation of the use of interoperability information, and the tying of the Windows client PC operating system with Windows Media Player – formed part of a leveraging infringement.³¹ According to the General Court, Microsoft used its dominant position ‘on the client PC operating systems market to extend that dominant position to two adjacent markets, namely the market for work group server operating systems and the market for streaming media players’.³²

In its *Google Android* decision, the Commission stated that Google had a dominant position in the markets for general internet search services, licensable smart mobile operating systems, and app stores for the Android mobile operating system.³³ According to the decision currently under appeal before the General Court, Google abused its dominant position by imposing illegal restrictions on Android device manufacturers and mobile network operators in order to strengthen its dominant position in another market it also dominates – the market for general internet search.³⁴ In its decision, among other things, the Commission condemned that Google required Android device manufacturers to pre-install Google Search and Google Chrome as a condition of licensing its application store, Google Play.³⁵ In doing so, Google had unlawfully bundled the above-described products. In a recent study *Cornière and Taylor* presented a novel rationale for bundling in vertical relations – other than entry deterrence – relevant to the *Google Android* case. According to this, in an environment with positive upstream mark-ups, downstream capacity constraints and retail complementarity – i.e. in a scenario where the presence of a product increases the demand for another product – upstream bundling may reduce the willingness of rivals’ to pay slotting fees. Upstream bundling in the context of Google Android may, therefore, relax competition in bidding to be the preselected search engine.³⁶ Perhaps the best counterfactual in connection with this is that Google reportedly pays Apple an estimated 8 to 12 billion US dollars in order to be the default search engine on Apple’s iPhone.³⁷

The relevance and significance of the *Google Android* case is shown by the fact that recently, in October 2020, the U.S. Department of Justice (DoJ) also filed a lawsuit against Google challenging partially the above-described conduct of the company under US antitrust laws as well. The subject matter of the proceeding is partly similar to the *Google Android* case of the European Commission. In particular, the DoJ objected to Google’s tying and other arrangements requiring mobile device manufacturers to preinstall and display certain core applications such as

²⁸Case T-201/04, *Microsoft v Commission*, EU:T:2007:289.

²⁹Commission decision of 18 July 2018 in the case AT.40099 *Google Android*, on appeal: Case T-604/18 *Google and Alphabet v Commission*.

³⁰Edelman (2015) 365–400.

³¹Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, para. 1344.

³²Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, para. 1344.

³³Commission decision of 18 July 2018 in the case AT.40099 *Google Android* para. 439.

³⁴European Commission (2018) link 8.

³⁵European Commission (2018) link 8.

³⁶Cornière and Taylor (2021) 3122–23.

³⁷New York Times (2020) link 9.



Google Play, Chrome, Search, Gmail, Maps, and YouTube in prime locations on Android devices.³⁸ The Department of Justice also challenged that Google's contractual clauses do not allow manufacturers or users to remove these core applications from devices.³⁹ According to the DoJ, Google is illegally seeking to maintain its monopoly on the market for general internet search and search advertising by means of the challenged conduct. Furthermore, it generally uses its 'monopoly profits to buy preferential treatment for its search engine on devices, web browsers, and other search access points', and with the help of these practices Google is continuously creating a self-reinforcing cycle of monopolization.⁴⁰ The significance of the case is shown by the fact that the proceedings are compared to previous particularly high-profile antitrust proceedings, such as the actions brought against AT&T in 1974 or Microsoft in 1998.

As we can see from the above cases, tying and bundling may have a leveraging element in certain scenarios. We can also see that tying – for instance, Microsoft's practice favouring its own media player application on its platform vis-à-vis the other competing products of rivals – has certain similarities to the theory of harm identified in the case of self-preferencing. Some authors therefore argue that self-preferencing can be understood as a form of tying.⁴¹

3.2. Margin squeeze

A leveraging theory of harm can also be found in certain margin squeeze cases. In this context, a vertically integrated undertaking which is dominant in a market essential to the sale of a product or provision of a service may 'charge a price for the product on the upstream market which [...] does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis' and thus foreclose them.⁴² The rationale for such conduct of squeezing the margin of downstream competitors is, inter alia, to protect the position of a dominant undertaking in the upstream market from potential downstream threats.⁴³

From the perspective of assessing the conceivability of self-preferencing under EU competition law, it is worth mentioning an investigation launched by the European Commission against *Deutsche Bahn*.⁴⁴ The Commission was of the view that the company had abused its dominant position in the market for the supply of electricity for rail transport. The subject matter of the proceeding was that Deutsche Bahn's subsidiary applied different tariffs – in relation to the electricity needed in rail transport to undertakings active in rail and passenger transport on Deutsche Bahn's infrastructure – based on the criteria whether they were affiliated with the company.⁴⁵ In this way Deutsche Bahn supported its own subsidiary to the detriment of

³⁸United States Department of Justice (2020) [link 10](#).

³⁹Case 1:20-cv-03010 *United States of America U.S. Department of Justice et al v. Google LLC* paras. 133–43.

⁴⁰Case 1:20-cv-03010 *United States of America U.S. Department of Justice et al v. Google LLC* paras. 133–43.

⁴¹Edelman (2014).

⁴²[Communication from the Commission](#), 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' OJ C 45 24.2.2009. 80.

⁴³Jullien et al. (2014) 2.

⁴⁴Commission decision of 18 December 2013 in the case [COMP/39.678](#), [COMP/39.731](#) and [COMP/39.915 Deutsche Bahn](#).

⁴⁵Commission decision of 18 December 2013 in the case [COMP/39.678](#), [COMP/39.731](#) and [COMP/39.915 Deutsche Bahn](#) para. 63.



non-affiliated competitors. According to the Commission, Deutsche Bahn's conduct presumably constituted unlawful margin squeeze. Eventually, the Commission accepted the commitments submitted by the company and closed the investigation without imposing a fine.

In my view, based on the above case it is clear that the Commission has also pursued previous cases where dominant undertakings favoured their own operations, here under the head of the established abuse – margin squeeze. We can see from the above that practices such as margin squeeze can have similar effects to self-preferencing in certain scenarios. However, as it is far from straightforward to apply margin squeeze to aggregators such as Meta and Alphabet with zero price strategies on specific sides of their platforms, self-preferencing can perhaps fill this gap. In addition, an analysis could be developed for platforms using a subscription fee-based monetization strategy such as Netflix.

3.3. Abusive discrimination

Under Article 102 (c) of the Treaty on the Functioning of the European Union discrimination between customers may amount to an abuse. In the wording of the Treaty an abuse, in particular, may consist of 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.⁴⁶ It may thus seem straightforward that this non-discrimination obligation enshrined in the Treaty can also provide a clear basis for condemning certain forms of self-preferencing.⁴⁷ On this note, it is also worth mentioning that the Commission condemned a rebate scheme granted by Irish Sugar to its customers based on Article 102 (c) TFEU.⁴⁸ According to the decision, Irish Sugar granted discounts to its customers in the industrial sugar market on the basis of whether they were its competitors in the retail sugar market.⁴⁹ The decision was partially upheld by the General Court, which ruled that the discriminatory rebates applied by Irish Sugar constituted an abuse of a dominant position.⁵⁰

Legal scholars seem to agree to a large extent on the point that Article 102 (c) should be invoked primarily in the context of pure 'secondary line' discrimination.⁵¹ Secondary line discrimination refers to situations when a non-vertically integrated dominant company engages in discrimination vis-à-vis non-affiliated undertakings. However, as shown by for instance the Irish Sugar case, price discrimination has also been applied in combination with an exclusionary abuse containing a leveraging element.⁵² This was partially a situation of 'primary line' injury as the dominant firm applied different prices to its own customers with the aim to hurt competitors in the sugar business.

In my view, thus, following this line of case law regarding abusive discrimination may also create a basis for condemning self-preferencing in an exclusionary setting. In addition, self-

⁴⁶Article 102 of the Treaty on the Functioning of the European Union OJ C 326/47 26.10.2012.

⁴⁷Petit (2015a) 4–5.

⁴⁸Commission decision IV/34.621, 35.059/F- 3 *Irish Sugar plc* OJ L 258 22.9.1997.

⁴⁹Commission Decision IV/34.621, 35.059/F-3 *Irish Sugar plc* OJ L 258 22.9.1997, paras. 74–76, 143, 145–50, and 158.

⁵⁰Case T-228/09, *Irish Sugar plc v Commission*, ECLI:EU:T:2011:170, paras. 162–63.

⁵¹Geradin and Petit (2005) 9.

⁵²Geradin and Petit (2005) 14.



preferencing may help clarify the distinction between primary and secondary line discrimination. Article 102 (c) TFEU could apply to discrimination vis-à-vis non-affiliated undertakings (secondary line discrimination), while self-preferencing could capture abusive discrimination containing a leveraging element (primary line discrimination).

3.4. Refusal to deal

The concept of leveraging market power may also be found in refusal to deal cases. As the Commission notes in its Guidance paper competition problems in this regard typically arise when there is a conflict of interest between upstream dominant firms and their downstream customers – i.e. the dominant undertaking is active on a downstream market.⁵³

In the *Commercial Solvents* case, the CJEU found that the undertaking concerned occupied a dominant position on the market for the production of the raw material of ethambutol.⁵⁴ It held furthermore, that the company had abused its dominance on the above-mentioned market by ceasing to supply raw materials to a previous customer, thereby excluding it from the market simply because it had extended activities to that neighbouring market.⁵⁵ The Court stated that ‘an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition’.⁵⁶

In a similar vein – for example, in the *Sea Containers v Stena Sealink* case – the Commission decided that ‘an undertaking which occupies a dominant position in the provision of an essential facility [...] and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services’ infringes competition law.⁵⁷ The Commission held furthermore that

‘refusal of access to an essential facility to a competitor can of itself be an abuse [where] the dominant undertaking reserves the product or service to, or discriminates in favour of, its own downstream operation at the expense of competitors on the downstream market’.⁵⁸

The Commission finally added that an ‘undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility [...] may not discriminate in favour of its own activities in a related market’.⁵⁹

⁵³Communication from the Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ OJ C 45 24.2.2009. 76.

⁵⁴Joined Cases 6 and 7–73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, ECLI:EU:C:1974:18, para. 22.

⁵⁵Joined Cases 6 and 7–73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, ECLI:EU:C:1974:18, para. 25.

⁵⁶Joined Cases 6 and 7–73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, ECLI:EU:C:1974:18, para. 25.

⁵⁷Commission Decision IV/34.689 *Sea Containers v Stena Sealink* para. 66.

⁵⁸Commission Decision IV/34.689 *Sea Containers v Stena Sealink* para. 66.

⁵⁹Commission Decision IV/34.689 *Sea Containers v Stena Sealink* para. 66.



The above examples show that it is particularly controversial to distinguish refusal to deal cases, particularly constructive refusal to deal, and self-preferencing, and that practices amounting to constructive refusals may have in certain contexts similar effects to self-preferencing.

4. SELF-PREFERENCING AS A NEW ABUSE OF DOMINANT POSITION

In my view, the concepts presented above support my hypothesis that self-preferencing is likely to be conceivable under certain specific circumstances in EU competition law as a new abuse of dominance as it fits into the European competition law framework based on the notion of leveraging. This position is further supported by the judgment of the General Court in the *Google and Alphabet v Commission* case in which the Court largely upheld the Commission's contested *Google Shopping* decision.⁶⁰ In support of the above, I argue that the underlying theory of harm addressed by self-preferencing can also be found in the decision-making practice of the European Commission and in the jurisprudence of the Court under Article 102 TFEU.⁶¹

4.1. Google Shopping

The most important decision on the subject was taken in June 2017 by the Commission in the *Google Shopping* case⁶², which was largely upheld on appeal by the General Court in the case *Alphabet v Commission*.⁶³ The Commission found that Google had a dominant position in the European Economic Area (EEA) in the national markets for general internet search services.⁶⁴ Ultimately, after a seven-year-long investigation the Commission fined the company for abusing its dominant position in the market for general internet search by 'the more favourable positioning and display, in Google's general search results pages, of Google's own comparison shopping service compared to competing comparison shopping services'.⁶⁵ In doing so, according to the decision, Google provided an illegal advantage to its own comparison shopping service (a service vertically integrated into its general search) compared to other competing comparison shopping services.⁶⁶ According to the Commission, Google's strategy for promoting its own comparison shopping service was manifest in two ways. On the one hand, the undertaking systematically positioned and displayed its own comparison shopping service more favourably in general search-results pages compared to competing comparison shopping services. On the other hand, Google demoted rival comparison shopping services in general search results. However, Google's own service was not subject to Google's general search algorithm. Thus, the aforementioned demotion did not apply to Google Shopping.⁶⁷

⁶⁰Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763.

⁶¹See e.g.: *Petit* (2015a) 3.

⁶²Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)*.

⁶³Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763.

⁶⁴Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* paras. 271. et al.

⁶⁵Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* 76.

⁶⁶European Commission (2017) [link 11](#).

⁶⁷European Commission (2017) [link 11](#)., Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 344.



According to the Commission, the above practice falls outside of competing on the merits and made it impossible for competitors to compete on a level playing field. In my opinion, this statement reflects the doctrines of *fairness* and *level playing field* as goals of competition law and policy and it is a practical manifestation of such doctrines. This is also underlined by the fact that *fairness* along with *level playing field* have also been mentioned in connection with digitalization in a number of statements and press releases in recent years by Commissioner Margrethe Vestager.⁶⁸ This shows that the ‘European approach’ towards competition – i.e. the protection of the competitive process, the structure of the market, and the long-term interests of consumers – have been associated with fairness and level playing field. This has led to strong enforcement in the EU and to the establishment of a new abuse – self-preferencing – based on the long-existing concept of leveraging and on the notion of equal treatment. Perhaps these factors played a role in the different outcome of the investigation against Google by the Federal Trade Commission in the United States in which Google’s conduct in question was accepted as a product improvement.⁶⁹

Furthermore, in the view of the European Commission, Google’s behaviour deprived European consumers from having a real *choice* when searching for products online through Google’s general search engine. In my view, this is also a wording of principle. It refers to the doctrines of the German Ordoliberal or Freiburg School, which had and apparently still have a fundamental influence on competition law enforcement in Europe. In contrast to the current U.S. approach, this represents much stronger interference in the unilateral conduct of dominant firms. The European Commission has also rejected Google’s defence in this regard that consumers have more choice than ever before due to the internet and the proliferation of online marketplaces. This is marked by a phrase used by Larry Page, one of Google’s founders, that ‘competition is one click away’.⁷⁰ In this regard, in my view the decision follows in part a relatively new behavioural antitrust approach shaped by behavioural law and economics.⁷¹ According to this approach, the main question is not whether competition is just a click away, but *where* consumers actually click. That said, as to the effects of the conduct, the Commission found that Google’s unlawful practices had led to a very significant and lasting loss of traffic for its competitors.⁷² In contrast, the traffic of Google’s own price comparison service had increased significantly.⁷³ Specifically, rival comparison shopping services appeared on average on the fourth page of the general search-results.⁷⁴ According to the Commission, placement is particularly important in case of general search and is of crucial importance in relation to traffic. As identified by the decision, 95% of users click on one of the results listed on the first page of general search results when browsing on a PC.⁷⁵ Furthermore, 35% of all clicks go to the first-ranked link on the general search-results page. This proportion is even larger on devices other

⁶⁸See e.g.: Commissioner Vestager (2021) [link 12.](#), Commissioner Vestager (2020) [link 13.](#)

⁶⁹Federal Trade Commission (2013) [link 14.](#)

⁷⁰Forbes (2012) [link 15.](#)

⁷¹Fletcher (2019).

⁷²Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 462. et al.

⁷³Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 489. et al.

⁷⁴European Commission (2017) [link 11.](#)

⁷⁵Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 457.



than PCs such as mobile phones or tablets with smaller screens. In these cases, the top three results on general search-result pages receive about 70% of clicks.⁷⁶ Links at the top of the second page of search results only receive about 1% of clicks.⁷⁷

The Commission rejected, furthermore, Google's defence that the company had no obligation to subsidize its own competitors by granting them a prominent placement in search results.⁷⁸ In that regard, the Commission therefore rejected the application of the standard of proof established by the case-law of the Court of Justice in refusal to deal cases. Thus, the Commission ruled out the application of the so-called 'essential facilities doctrine'. The Commission took a different path to framing the Google Shopping case. We can see that although the word leveraging is not even mentioned or cited in the decision, it is an underlying, salient theory of harm. The Commission based its finding of the infringement solely on the allegedly unlawful leveraging of market power, which was achieved by self-preferencing.⁷⁹ In the view of the Commission, this was in itself sufficient to establish an infringement, since it made it impossible for competitors to compete on a level playing field and therefore denial of equal opportunity in itself constituted an abuse.

The decision concludes that Google's above-described conduct is contrary to the requirement to 'competition on the merits' as 'competitors should be able to compete on the merits for the entire market and not just for a part of it' and thus was found to be abusive.⁸⁰

4.2. Recently launched investigations

Even though the Google Shopping decision is currently under appeal before the Court of Justice⁸¹ the European Commission has launched more investigations to assess similar unilateral practices. In my view, this also confirms that self-preferencing is likely conceivable as a new type of abuse of dominance within the framework of European competition law. This is also an indication that competition authorities are likely to pursue more investigations in the future in connection with these kinds of practices, which also underpins the importance of the issue and its conceivability under EU competition law.

4.3. Apple app store practices

First, the European Commission, after assessing the allegations of Spotify, which lodged a complaint with the Commission against Apple in March 2019, launched formal antitrust proceedings against the company in June 2020.⁸² The investigation addresses whether Apple's practices vis-à-vis app developers and concerning the distribution of apps via the App Store violate EU competition rules. The investigation focuses on Apple's self-preferencing practice via its so-called '*In-app purchase system*'.⁸³

⁷⁶Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 124, footnote 541.

⁷⁷Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* table 19.

⁷⁸See e.g.: *Vesterdorf (2015)* 4–9.

⁷⁹Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* paras. 334. and 649.

⁸⁰Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 339.

⁸¹[Case C-48/22 P Google and Alphabet v Commission \(Google Shopping\)](#).

⁸²European Commission (2020) [link 16](#).

⁸³European Commission (2020) [link 16](#).



As mentioned above, the proceeding was initiated based on a complaint from one of Apple's competitors, Spotify. According to the complainant, while Apple is acting as a platform through its App Store for third-party business partners, it is also offering services that compete with them, such as in the case of Spotify in the market for online music streaming services. As a result of this, Spotify claims that Apple is 'acting as both player and referee and tilting the rules in its favour' and thereby is in breach of EU competition rules.⁸⁴ Allegedly, the most significant restriction for application developers and distributors is the mandatory obligation to use exclusively Apple's *In-app purchase system*. However, the use of Apple's *In-app purchase system* is accompanied by the requirement to pay a fee of approximately 30% of subscription fees to Apple.

Another limb of the investigation is that Apple is restricting the ability of application developers and distributors to inform their app users about alternative purchasing options available to them outside Apple's *In-app purchase system*. While Apple allows users to access content outside of the App Store, such as on the app developer's website, the contractual terms prevent them from informing users of such alternative purchasing options. In the preliminary view of the Commission, this could prevent customers from taking advantage of alternative and perhaps cheaper purchasing options.⁸⁵

Rakuten's subsidiary Kobo, an e-book and audiobook distributor, also filed a complaint against Apple in March 2020 partially in connection with the above practice. Kobo also challenges that Apple is preferring its own e-book and audiobook business over those of its competitors on its platform.⁸⁶

Based on the above, it may at first sight seem straightforward that the above-described conduct could amount to a practice very similar to the one condemned by the Commission in its Google Shopping decision. However, as always, the situation is of course more complex when it comes to the details. The fact that the 30% fee associated with the App Store when using Apple's *In-app purchase system* applies not only to products and services where Apple is present with a competing product or service, but also applies to other digital services sold through the App Store further complicates the investigation. Thus, the fee applies, for example, to the popular dating application Tinder, which is not (yet) in competition with any products offered by Apple. Based on the Statement of Objections issued against the company, it seems that the Commission is focusing the investigation on self-preferencing in the narrower sense, and framing the case solely based on an exclusionary theory of harm.⁸⁷ However, it remains to be seen whether the investigation will be extended more widely to the exploitation of business partners, or possibly perhaps on alleged predatory pricing.

In addition to the above, Apple's conduct vis-à-vis app developers was also subject to litigation in the United States. Epic Games, the developer of the popular video game Fortnite, filed a lawsuit against Apple in California in August 2020. In its action, Epic Games partially challenged the conduct under investigation in Europe. In September 2021 the District Court of Northern California delivered its judgment effectively allowing Epic Games to inform users

⁸⁴Spotify (2019) [link 17](#).

⁸⁵European Commission (2020) [link 16](#).

⁸⁶The Verge (2020) [link 18](#).

⁸⁷European Commission (2021) [link 19](#).



regarding alternative payment options but the district court did not ultimately conclude that Apple is a monopolist under US antitrust laws.⁸⁸

4.4. Amazon

Two years after the adoption of the Google Shopping decision, in addition to the above investigation against Apple, the European Commission launched a formal antitrust investigation against Amazon in July 2019.⁸⁹ The subject matter of the investigation is assessing whether the conduct of Amazon – i.e. the alleged use of sensitive business information from independent third-party retailers hosted on the company's digital marketplace – infringes EU competition rules.⁹⁰ So, the dual role of Amazon is the central issue of the investigation. Accordingly, on the one hand Amazon acts as a platform and operates a digital marketplace through which third parties can sell their products or provide their services. However, Amazon as a retailer also offers products and provides services that compete with the products and services of these business partners.⁹¹ Due to its dual role, as described above, it is under investigation whether Amazon uses commercially sensitive data from its competitors to its own advantage while also providing a digital marketplace services to its competitors. Such commercially sensitive data may include, for example, the number of transactions of retailers, and their temporal and geographical scope.⁹²

In this regard, the Commission is examining the agreements between Amazon and merchants that allow Amazon's retail division to learn about, analyse, and use third-party merchant data. The Commission is also examining possible effects on competition of this data usage based on these agreements. The Commission has seemingly prioritized this investigation as it sent its Statements of Objections to Amazon on 10 November 2020, only after a one-year formal investigation.⁹³

Furthermore, at the same time the Commission initiated another formal antitrust proceeding against the company.⁹⁴ The subject matter of the new proceeding is that the company may artificially favour its own retail business over its competitors on its platform. Allegedly, Amazon may also favour sellers that use Amazon's own logistics and shipping business. In this context, the Commission will in particular examine the basis on which the company selects so-called 'Buy Box' winners and allows resellers to sell their products to users that participate in the Amazon Prime loyalty program.⁹⁵ A similar investigation that has been concluded by the Italian Competition Authority against Amazon which resulted in a fine of more than 1 billion euros. The authority found that Amazon holds a dominant position in the Italian market for intermediation services on marketplaces and abused its dominant position in the above market by

⁸⁸Case 20-cv-05640-YGR *Epic Games, Inc. v. Apple Inc.*

⁸⁹Case AT.40462 *Amazon Marketplace* of the European Commission.

⁹⁰European Commission (2019) [link 20](#).

⁹¹European Commission (2019) [link 20](#).

⁹²European Commission (2019) [link 20](#).

⁹³European Commission (2020) [link 21](#).

⁹⁴Case AT.40703 *Amazon Buy Box* of the European Commission.

⁹⁵European Commission (2020) [link 21](#).



favouring its own logistics service. The use of Amazon's logistics business was a precondition for resellers to participate for instance in the Amazon Prime loyalty program and thus to gain visibility and increase sales on the platform.⁹⁶

5. THE LEGAL TEST FOR SELF-PREFERENCING

The legal assessment of whether self-preferencing is anti-competitive in a certain situation is controversial given the multi-purpose nature of the conduct, and since it affects basic elements of competition and of European law. It affects, amongst other areas, the freedom of ownership, freedom of enterprise, the right to choose trading partners, and the right of companies not to subsidize their competition.

In the above circumstances, due to the controversial nature of self-preferencing, the legal test applied in the assessment for deciding whether a conduct under investigation constitutes an infringement of competition law is thus crucial. This is particularly true due to the similarities between mechanisms that hybrid platforms use to favour their affiliates. As we have seen above, these may take many forms such as tying or refusal to deal. It is therefore crucial that the criteria to condemn self-preferencing is legally sound. Otherwise there is a risk of applying the same legal test to assess practices that are fundamentally different or to the contrary to apply different legal standards to very similar practices. This may lead to legal uncertainty or to framing cases by authorities in an arbitrary manner based on the legal standards applicable to them.⁹⁷

That said, the Commission argued in the Google Shopping case that 'the legal characterisation of an abusive practice does not depend on the name given to it, but on the substantive criteria used in that regard'.⁹⁸ Furthermore, as the different leveraging abuses show, certain similarities can be identified between self-preferencing and other traditional abuses of European competition law related to the extension of market power, such as unlawful refusal to deal, or tying and bundling, or margin squeeze. However, these different leveraging abuses do not necessarily involve the same legal test. This is a strong argument from the perspective of the conceivability of self-preferencing under EU competition law as a new abuse to which a distinct legal test is applicable. This is further supported by the judgment of the CJEU in the TeliaSonera case, where the court stated that it cannot be inferred from the case-law that the legal test applicable to abusive refusal to supply also applies 'when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous'.⁹⁹ Thus, according to the CJEU, indispensability is not a requirement, for instance, for a margin squeeze practice to be abusive. This line of reasoning has been upheld by the General Court as well when distinguishing self-preferencing from refusal to deal.¹⁰⁰

But, the question remains: where does self-preferencing fit in the established framework of Article 102 TFEU?

⁹⁶Italian Competition Authority (2021) [link 22](#).

⁹⁷Colomo (2020) 4.

⁹⁸Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* para. 335.

⁹⁹Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 55.

¹⁰⁰Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763, paras. 229–47.



Is self-preferencing in fact a different kind of abuse compared to refusal to deal? In my view comparing self-preferencing to certain types of conditional rebates requiring quasi exclusivity from the buyer shows the nature of the conduct and its relationship to refusal to deal. In fact, self-preferencing may be used by a dominant undertaking instead of refusing to deal as a more sophisticated, indirect way of achieving similar objectives.

I present this similarity on the basis of drawing an analogy between self-preferencing and conditional rebates. Similarities can be identified between self-preferencing and conditional rebates in the sense that conditional rebates may have the same or similar effects to exclusivity *agreements as self-preferencing may have to refusal to deal*. As we have seen in the *Intel* case, certain types of conditional rebate schemes may be used by a dominant undertaking to lever market power from the non-contestable part of the market to the contestable part of that market without the need to conclude an exclusivity agreement.¹⁰¹ That said, a rebate system applied by a dominant undertaking amounting to an unavoidable trading partner may be suitable for obtaining that part of a given customer's demand that could also be realistically taken over by a smaller competitor which is alone unable to serve the whole demand of that customer.¹⁰² This allows the dominant undertaking using a conditional rebate system to extend its dominance to the contestable part of the demand without having to conclude an exclusivity agreement. Foreclosure can therefore be a salient theory of harm in conditional rebate systems with a leveraging effect as well.¹⁰³ Self-preferencing may also cause foreclosure and can also have the same leveraging effect on a separate, contestable neighbouring market in certain circumstances. By giving preferential treatment to its own product or service a dominant platform can make it more difficult for the providers it hosts to operate effectively on the platform. This could lead to the foreclosure of rivals, as stated by the European Commission in its *Google Shopping* decision.¹⁰⁴

Can thus refusal to deal be understood as an extreme form of self-preferencing? According to the views of some, the answer to this question is affirmative. But while all cases involving a practice when a dominant firm refuses to supply rivals can be characterized as self-preferencing, the same is not the case the other way around – i.e. in a situation where a dominant firm continues to supply rivals, but does so on less favourable terms.¹⁰⁵

Or, as some commentators argue, can self-preferencing perhaps constitute a form of tying? According to this view, Google search and Google's additional services embedded in search results are distinct products,¹⁰⁶ and Google's practice of requiring users to accept additional services of Google when using its search engine in fact constitutes a tie, as users can only obtain search results together with additional services offered by Google.¹⁰⁷

Self-preferencing, as the term suggests, can also be understood as discrimination. However not every discrimination case amounts to self-preferencing. Furthermore, it is questionable

¹⁰¹Case C-413/14 P *Intel v. Commission*, ECLI:EU:C:2017:632, para. 122., *Petit* (2015b) 10–15.

¹⁰²Case C-413/14 P *Intel v. Commission*, ECLI:EU:C:2017:632, para. 122.

¹⁰³Nicolas *Petit* (2015b) 10–15.

¹⁰⁴Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)* paras. 591–594.

¹⁰⁵Ahlborn (2020) 4.

¹⁰⁶Edelman (2014) 8.

¹⁰⁷Edelman (2014) 7.



whether Article 102 (c) should be applied in a setting different from pure secondary line discrimination, which concerns situations when a dominant undertaking discriminates between two non-affiliated undertakings without exclusionary intent or effect.¹⁰⁸

The answers to these questions are crucial, as the legal tests applying to these abuses are significantly different. The question who bears the burden of proof and to what extent under this assessment is also particularly important in connection with this new abuse. In order to establish a refusal to deal case, pursuant to the case-law of the European Court of Justice in cases such as *Commercial Solvents*, *Magill*, *Bronner* or *IMS Health*, the European Commission first must demonstrate that the practice in question amounts to an outright or to a constructive refusal to supply an input. Second, it is necessary that the input to which the customer seeks access is indispensable for competing effectively on a downstream market. Third, it is also necessary to show that refusing to supply the input is likely to lead to the elimination of effective competition on a downstream market. Finally, as to the effects of the practice, one needs to show that it is likely to lead to consumer harm.¹⁰⁹

In contrast to the above, the standard of proof applied in cases of abusive discrimination is significantly lower and a simple effect-based standard is applied in such cases. In order to establish an abusive discrimination case, one needs to show that a dominant undertaking: first, entered into equivalent transactions with its trading parties; second, applied dissimilar conditions to those equivalent transactions; and third, that the behaviour placed those trading parties at a competitive disadvantage.¹¹⁰ In its decision delivered in *MEO* the CJEU held that the finding of a competitive disadvantage

‘does not require proof of actual quantifiable deterioration in the competition situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that [the] conduct is such as to affect that situation’.¹¹¹

The legal test and standard of proof applied in tying could be even lower when in order to establish an abuse it is sufficient to show that the conduct in a given setting is capable of having an anti-competitive foreclosure effect.¹¹²

However, the Commission did not pursue an established head of leveraging abuse in the *Google Shopping* case, but rather chose a different path and adopted the decision based solely on self-preferencing as a new head of abuse.¹¹³ Seemingly the Commission applied a similar standard in the case of self-preferencing as the standards established in the case of abusive discrimination and tying. That said, pursuant to the *Google Shopping* decision, self-preferencing is not abusive *per se* and thus it is subject to an effect-based analysis. Therefore, in order to

¹⁰⁸Geradin and Petit (2005).

¹⁰⁹Joined Cases 6 and 7–73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, ECLI:EU:C:1974:18., Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)*, ECLI:EU:C:1995:98., [Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.](#), ECLI:EU:C:1998:569.

¹¹⁰Ahlborn (2020) 5.

¹¹¹[Case C-525/16 MEO](#), ECLI:EU:C:2018:270, para. 37.

¹¹²Whish and Bailey (2018) 711.

¹¹³Ahlborn (2020) 4.



establish an infringement, it is necessary to show at least potential anti-competitive effects of the conduct in question. As to the effects of the conduct the Commission relied on three specific circumstances: the importance of traffic generated by Google search, user behaviour when searching online, and the fact that Google search cannot be effectively replaced by other sources of traffic.¹¹⁴ However, somewhat to the contrary to the last point, according to the General Court, it was not necessary for the Commission to prove that Google possesses an essential facility to which access is indispensable to be able to compete in a downstream market.¹¹⁵

Based on the above, self-preferencing appears to require three conditions in order to be found abusive as per the General Court. First, the dominant undertaking must discriminate vis-à-vis its competitors, having an adverse impact on competition. Second, the conduct must have at least potential anticompetitive effects. And last but not least, there must be no objective justification for the different treatment.¹¹⁶

6. CONCLUSION

In my paper, I have argued that the sound principles and the well-established theoretical background of European competition law are adaptable to tackling the challenges posed by the emergence of digital platforms and ecosystems. These principles enable competition authorities and courts to assess the specific features of the digital economic environment, such as extreme economies of scale and scope, network effects, other barriers to entry, and the pivotal importance of data. Applying pre-existing principles and theories of harm to new practices – such as self-preferencing – empower enforcers and private parties to tackle leveraging by vertically integrated hybrid platforms.

Given that there is no exhaustive list of abuses under Article 102 TFEU, it is possible to condemn new abusive practices. Thus, it is also possible to condemn certain forms of self-preferencing of dominant undertakings. However, it is essential that any practice shall be assessed in line with the case-law of the European Court of Justice in abuse of dominance cases. In this respect, the possibility of condemning self-preferencing as an abusive practice is highly controversial and particularly disputed among competition practitioners across the globe.¹¹⁷

I have argued that self-preferencing is likely to be conceivable under European competition law as a new abuse based on the long-existing concept of leveraging market power. In my view, self-preferencing is likely to be endorsed by not only the General Court but also by the Court of Justice, since it is in accordance with certain line of its case-law. I also expect more scrutiny in this field, as this is in line with the recently emphasized policy objectives of promoting fairness and a level playing field. As a result of this, I expect that self-preferencing practices will continuously be a priority of the European Commission. I also expect that not only the Commission but also the competition authorities of the Member States of the European Union as well as of the UK will pay particular attention to the leveraging of the market power of digital giants through self-preferencing. Cases against Google and Amazon by the French and Italian

¹¹⁴Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763, paras. 169–74.

¹¹⁵Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763, paras. 212–49.

¹¹⁶Case T-612/17 *Google and Alphabet v Commission*, ECLI:EU:T:2021:763.

¹¹⁷See e.g.: Akman (2017) 301.



competition authorities also point into this direction. Furthermore, I suppose that this phenomenon will also play an increasingly important role in US antitrust policy and enforcement.¹¹⁸

However, the ‘academic’ question of whether self-preferencing fits into the framework of Article 102 TFEU seems to be overtaken by ‘real-life’ events: the identification of self-preferencing as a problem in the digital economic environment by various competition and economic expert reports across the globe, the launch of a number of new investigations by the Commission and national competition authorities, and the legislative proposals that have been put forward in the EU and in the UK (or have already been adopted, such as in Germany).

I conclude that the ‘European approach’ to abuse of dominance, which takes into consideration the protection of the competitive process, the structure of markets, and not only the short-term but also the longer-term interests of customers, results in strong enforcement and has ultimately led to the establishment of a new abuse of dominant position: self-preferencing. However, in line with the so-called ‘more economic approach’ proposed by the Commission in abuse of dominance cases, it is necessary for the Commission to examine all the relevant factors and circumstances of an alleged abuse on a case-by-case basis and prove that the conduct in each situation is (at least) capable of foreclosing rivals. To the contrary, self-preferencing is proposed to be a prohibited practice in the draft Digital Markets Act, and already outlawed in Germany.¹¹⁹

Nevertheless, many questions remain when it comes to the legal standard applicable to self-preferencing. It is thus crucial to establish who bears the burden of proof and to what extent in order to prove an alleged infringement. In particular, it is yet to be confirmed by the Court of Justice whether it will be required that a dominant undertaking is in possession of an essential facility or a gateway position. The judgment of the General Court reviewing the Commission’s *Google Shopping* decision shed some light on this. But the ultimate answer in defining the boundaries of application of self-preferencing is expected to be decided by the Court of Justice in the case C-48/22 P *Google and Alphabet v Commission*.

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¹¹⁸U.S. House of Representatives (2020).

¹¹⁹Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) Brussels 15.12.2020 COM(2020) 842 final, and Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz) Teil I Nr 1 Bundesgesetzblatt Jahrgang 2021.



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