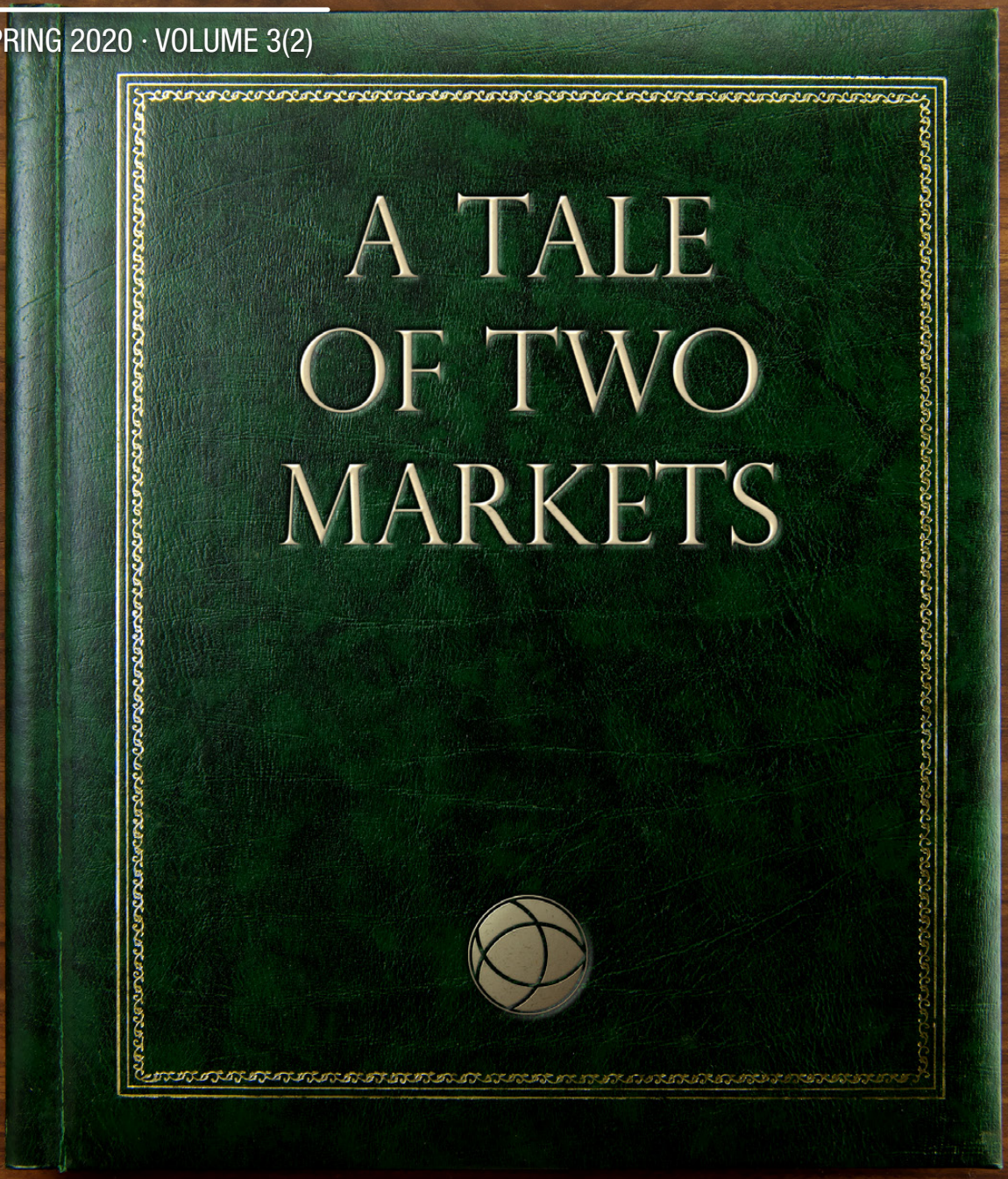
Antitrust Chronicle

JUNE · SPRING 2020 · VOLUME 3(2)



Self-Preferencing

CPI COMPETITION POLICY INTERNATIONAL

TABLE OF CONTENTS

LETTER FROM THE EDITOR

Dear Readers,

What is self-preferencing? The term has entered the antitrust lexicon in the wake of recent investigations into the conduct of large technology companies. In essence, it refers to situations where a company with multiple activities uses its position in one market to favor its activities in another.

But is this something new? Self-preferencing is closely related to other categories of monopolization, notably refusals to supply and discriminatory conduct. The rules governing these categories of conduct have developed over time, with decisionmakers and courts elaborating specific criteria to distinguish abusive conduct from competition "on the merits."

Self-preferencing represents another category of conduct, which overlaps in substance with that covered by the existing rules. Critics of the doctrine argue that self-preferencing is not new – but seeks to prohibit conduct that was previously found to be lawful under the established rules, without coherently explaining why this should be the case. Its proponents point to the fact that abuse of dominance prohibitions are not a *numerus clausus*, and that self-preferencing reflects established concerns as regards anticompetitive leveraging and discriminatory conduct, adapted to the reality of business practices in the digital world.

In any event, it seems that self-preferencing (or at least the debate as regards its scope) is here to stay, either under the existing antitrust rules, or in the form of proposed legislation undergoing consultation in the EU and around the world. The contributions in this Chronicle seek to explore the contours of this concept, how it has been employed in recent practice, and its future. Whatever its outcome, this debate, which is at a critical juncture, will shape the future of antitrust enforcement for decades to come.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

Self-Preferencing: Between a Rock and a Hard Place

By Christian Ahlborn, Will Leslie & Eoin O'Reilly

Following *Google Shopping*, competition authorities in Europe – supported by a flurry of reports on digital competition – have wasted little time establishing self-preferencing in competition law's lexicon. But while self-preferencing looks here to stay, there is little clarity over the legal test which applies and how self-preferencing fits within the established canon of "leveraging" abuses. This article considers where self-preferencing should fit in light of "prior beliefs" as to its likely efficiencies and potential for competitive harm. It further considers how arbitrage of different legal standards by regulators (reverse regulatory arbitrage) can be avoided. These are critical questions as regulators and courts weigh up how to address the alleged harm from self-preferencing without undermining the dynamic efficiency of digital markets.

Hybrid Differentiation and Competition Beyond Markets

By Inge Graef

Hybrid differentiation occurs when a platform discriminates among businesses in a related market in which it is not active itself with the aim to increase or maintain its competitive advantage elsewhere. An example is a platform blocking an app that interferes with its ability to gain revenues through advertising. Hybrid differentiation is particularly relevant where a platform builds an ecosystem or conglomerate around its main activity. As a competitive strategy beyond vertical integration that serves to protect the platform's overall activities and business model, hybrid differentiation is different from the self-preferencing at stake in *Google Shopping*. This paper submits that the assessment of hybrid differentiation requires attention for the broader competitive strategies of dominant platforms going beyond traditional forms of leveraging and the relevant markets in which they operate.

Self-Preferencing – Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)

By Rod Carlton & Rikki Haria

The growth of digital platforms has focused the minds of policymakers and competition authorities across the world on whether stricter enforcement is required against "self-preferencing." Competition authorities are taking an increasingly expansive approach. While the abuse of dominance regime provides competition authorities with a great deal of flexibility, their treatment of self-preferencing as a standalone abuse raises fundamental questions and leaves them unanswered: over and above the gating question of "dominance," where is the dividing line between "competition on the merits" and unlawful commercial practices, and how does the "special responsibility" of dominant firms play into the steps that dominant platforms need to take to ensure they are not crossing that line? There has been increasing pressure to use *ex ante* regulation to tackle self-preferencing. However, here too many unanswered questions remain: is regulation necessary in light of the flexible approach being taken with antitrust enforcement? Which markets (and which companies within those markets) should be subject to such regulation?

What Shall We Do About Self-Preferencing?

By Pedro Caro de Sousa

In recent times, self-preferencing by digital platforms has come to the fore. While it is normal for companies to promote their own products over those of their competitors, and, in many cases, this can lead to efficiencies, a dominant company giving preferential treatment to its own products or services in downstream or related markets (self-preferencing) can raise concerns. Given its potential for pro-competitive effects, it remains challenging to identify the exact circumstances in which self-preferencing is anticompetitive. In addition, a number of the concerns raised by self-preferencing may not relate solely to their potential anticompetitive effects. This means that different tools – including, but going beyond competition law – may be used to address problematic self-preferencing practices.

SUMMARIES

Self-Preferencing – Some Observations on the Push for Legislation at the National Level in Germany

By Silke Heinz

While the debate on self-preferencing as a possible abuse of dominance under EU law is ongoing, various expert reports on antitrust enforcement in the digital economy identified self-preferencing as a competition issue to be tackled and provided several suggestions, including legislation. Germany has proposed draft national legislation, including a special provision prohibiting self-preferencing for companies with a paramount cross-market significance for competition. The proposal follows a hybrid approach, introducing aspects of *ex ante* regulation into competition law. The design raises some issues, notably that it is not limited to digital platforms and does not require any dominance. Due to its two-step approach, it may only render enforcement more effective in the mid-term. It does not resolve the issues of lack of resources at the competition authority or the difficulties to impose effective remedies to terminate infringements. From an EU perspective, a patchwork of different national rules on enforcement against abusive conduct in the digital economy.

Self-Preferencing: A German Perspective

By Florian Wagner-von Papp

Prohibiting self-preferencing should remain the exception. Under current law, the non-discrimination rule in Article 102(c) TFEU is arguably only applicable to self-preferencing in cases where the undertaking is under a regulatory duty not to discriminate. It is possible to find that the prohibition of exclusionary abuses can result a *de facto* prohibition of self-preferencing. However, finding such an abuse must take into account the reasons why the non-discrimination rule does not generally prohibit self-preferencing. Whether this was sufficiently considered in the *Google Search* (*Shopping*) decision is debatable. The article also reports on the Draft Bill in German antitrust law that seeks to introduce a prohibition of self-preferencing that depends on the prior finding of the Bundeskartellamt that the undertaking has a "pre-eminent, market-transcending significance for competition" in a multisided market.

Digital Platforms and Self-Preferencing

By Alessandra Tonazzi & Gabriele Carovano

Due to their global economic significance and their attitude to concentrating economic power, digital platforms have triggered an unprecedented competition policy debate, fragmented and multi-faceted in terms of both actual problems and potential solutions. Doubts concern whether "self-preferencing" behaviors constitute a new self-standing theory of antitrust liability; and, whether this being the case, what "legal standard" should be used to pursue self-preferencing theories. This paper turns the spotlight on these crucial issues. Additionally, the paper considers the digital platforms' regulatory interventions recently announced, evaluates their relationship alongside competition rules and argues that the new regulatory framework, including the introduction of new competition tools, may significantly affect the assessment of conduct by digital platforms, even abuse of dominance cases.

WHAT'S NEXT?

For July 2020, we will feature Chronicles focused on issues related to (1) **Sustainability**; and (2) **Algorithms**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES AUGUST 2020

For August 2020, we will feature Chronicles focused on issues related to (1) **EAB Antipasto**; and (2) **State AGs**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

SELF-PREFERENCING: BETWEEN A ROCK AND A HARD PLACE

BY CHRISTIAN AHLBORN, WILL LESLIE & EOIN O'REILLY[1]



1 Lawyers at Linklaters.

I. INTRODUCTION

Since the first Statement of Objections on *Google Shopping* was announced, competition practitioners, commentators and academics have grappled with the concept of "self-preferencing."[2] What harm is it intended to address? What is the correct legal test? And how does it fit into the established canon of abuses under Article 102 TFEU?

Much ink has been split on whether "self-preferencing" is even an abuse or, as some have suggested, merely an inventive way of circumventing the (high) legal standard for "refusal to supply."[3] Others have pointed out that competitors have always had access to Google search results, and that the indispensability requirement should not be "*extended*" to cover situations where the dominant entity "*actively changed its entire business to drive out competitors*."[4]

Yet, this debate risks being overtaken by events. Even while *Google Shopping* is under appeal before the General Court, the Commission has wasted little time establishing self-preferencing in the lexicon of competition law. Various official reports have endorsed self-preferencing as necessary to address the modern platform economy.[5] Furthermore, the Commission and the Member States have taken steps to entrench self-preferencing in legislation. The Digital Services Act is expected to prohibit major online platforms from "*certain forms of self-preferencing*" with similar initiatives underway in Germany and France.[6]

But while self-preferencing looks here to stay, there is little clarity over the legal test which applies and why. The General Court, which has recently heard the arguments in the *Google Shopping* appeal, now has an opportunity to provide some much needed clarity.[7] This article outlines the key issues facing the General Court and how it may want to approach them.

II. WHAT IS SELF-PREFERENCING?

Self-preferencing occurs where a dominant firm uses an asset to give preference to its own complementary services over those of third parties. The favoring may concern different types of inputs including preferential access to "entry points" for customers and preferential access to data. In *Google Shopping*, the favoring concerned the positioning of Google's comparison shopping service on the *'first general results page in a highly visible place'* whereas in *Amazon Marketplace* the Commission has expressed concerns that Amazon is favoring its retail and private label business through preferential positioning in the "buy box" and access to seller data.[8] Ultimately, self-preferencing is thus a special form of discrimination.

---

2 See Press Release of European Commission, *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android* (available here).

3 See, for example, Bo Vesterdorf, *Theories of Self-Preferencing and Duty to Deal - Two Sides of the Same Coin?*, Competition Law & Policy Debate, Volume 1, Issue 1, February 2015, pages 4-9; and the reply of Nicolas Petit, *Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf.*, Competition Law & Policy Debate 1 CLPD, 2015. See also Pablo Ibanez Colomo, *Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping*, Journal of European Competition Law & Practice, Volume 10, Issue 9, November 2019, Pages 532–551.

4 See Thomas Hoppner, *Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse*, 1 European Competition and Regulatory Law Review (CoRe) Issue 3/2017, pages 208-221.

5 Jacques Cremer, Yves-Alexandre de Montjoye, and Heike Schweitzer, Competition Policy for the digital era, 2019 (available here); Federal Ministry for Economic Affairs and Energy (Germany), *A new competition framework for the digital economy: Report by the Commission 'Competition Law 4.0'*, 2019 (available here); Digital Competition Expert Panel, *Unlocking digital competition*, 2019 (available here).

6 Commission's Inception Impact Assessment for Digital Services Act package: *ex ante regulatory instrument of very large online platforms acting as gatekeepers in the European Union's internal market*, 2020 (available here). See also, Federal Ministry of Economy and Energy (Germany), *Referentenentwurf des Bundesministeriums für Wirtschaft und Energie Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz)*, 2020.

Autorité de la concurrence, *The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges*, 2020.

7 Case T-612/17, *Google and Alphabet v. Commission*, [awaiting judgment].

8 AT. *Google Search*, para. 650; See Commission Press Release, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 2019 (available here).

Competition authorities have, as a starting point, been wary of restricting firms from discriminating between customers. The Commission has only typically brought discrimination cases where discrimination fits as an element into an established pattern of exclusionary conduct.[9] This is because price discrimination is both ubiquitous and frequently pro-competitive. Indeed, the growing use of algorithmic pricing means that pricing for services such as air travel, hotels and car rental fluctuates in real time. Furthermore, firms are in principle able to increase output – and thus welfare – by charging customers according to their willingness to pay.[10] The ubiquitous and pro-competitive nature of discrimination is also seen in multisided markets where different pricing structures on either side are necessary to solve the chicken-and-egg problem of attracting all sides.

The vertical aspects of discrimination in favor of firms' own upstream or downstream products add further layers of complexity: on the one (pro-competitive) hand, discrimination is often a natural consequence of vertical integration with firms seeking to integrate their operations and deliver efficiencies.[11] In this context, discrimination in favor of one's own services is common to almost all markets: enterprises are, at their heart, a combination of tangible and intangible inputs which firms combine to produce a product or service.[12] Self-preferencing is thus inherent to the basic building blocks of undertakings.[13] On the other (potentially anti-competitive) hand, firms may seek to leverage a dominant position into a related market by favoring their related product (resulting in anti-competitive foreclosure of rival third parties dependent on the dominant firm's input).

Finally, neither vertical integration nor discrimination are binary questions. There are different types of vertical integration and discrimination. At one end of the spectrum, total refusal to supply is arguably the most extreme form with a firm opting not to supply the relevant input to *any* third parties ("closed systems"). A firm may also operate a partially closed system by supplying an input to *some* third parties but refusing to supply others. At the other end of the spectrum, vertical integration is open by its nature for many platform businesses with the commercial objective being to attract users to both (or more) sides of the platform ("open systems"). Equally, the intensity of vertical integration varies between firms and industries. Discrimination motivated by vertical integration is likely in many cases to be justified by efficiencies. In that regard, a firm may, for example, eliminate the "double margin" charged in the upstream and downstream markets or deliver significant efficiencies from integration of the business divisions themselves.

III. THE LEGAL TEST FOR SELF-PREFERENCING

Turning to the legal concept, self-preferencing fits under the umbrella of "leveraging abuses" which comprises several distinct forms of abuse where a dominant firm seeks to extend its market power into an adjacent market, each of which has established legal tests. Ignoring the established heads of "leveraging abuses," the Commission veered off the beaten path in *Google Shopping* and adopted "self-preferencing" as a new head of abuse. The new abuse has three conditions:

- The dominant firm must engage in self-preferencing conduct which discriminates against competitors with a significant impact on an important parameter of competition;
- the self-preferencing has a significant impact capable of an anticompetitive effect; and
- there is no objective justification for the difference in treatment.[14]

Defending the decision not to apply an established test, the Commission argued that the conditions to establish one form of abusive conduct do not necessarily apply when assessing another form of conduct, unsurprisingly citing the paragraph in *Teliasonera* where the CJEU found that indispensability is not a requirement for a margin squeeze abuse.[15]

9 See for example Case C-209/1, *Post Danmark A/S v. Konkurrenceradet*, (CJEU, 2012), para. 30.

10 See Frank Ramsey, *A Contribution to the Theory of Taxation*, Economic Journal, 1927.

11 See Pablo Ibanez Colomo, *supra* note 3.

12 See Ronald Coase, *The Nature of the Firm*, Economica, New Series, Vol. 4, No. 16., 1937, pages 386-405.

13 See Alfonso Lamadrid, *Google Shopping Decision – First Urgent Comments*, Chillin'Competition, 2017.

14 *Google and Alphabet v. Commission*, *supra* note 7.

15 Case C-52/09, Teliasonera, para. 55.

IV. WHERE DOES SELF-PREFERENCING FIT?

The Commission's adoption of a "new" head of leveraging abuse is not merely an academic question. There are already a range of specific heads of leveraging abuses, namely: refusal to supply, tying and bundling, margin squeezes and abusive discrimination. The different leveraging abuses – and now self-preferencing – have different legal standards (i.e. the legal threshold to which the Commission must demonstrate that the conduct is abusive). Understanding how self-preferencing "fits" is thus critical to the substantive and administrative coherence of Article 102 TFEU.

A. Potential Overlap with Refusal to Supply and Abusive Discrimination

There are, in the first instance, clear parallels between self-preferencing, and on the one hand, refusal to supply and, on the other, abusive discrimination.[16]

Refusal to supply can be characterized as an extreme form of self-preferencing. But while all refusal to supply cases could be characterized as self-preferencing the same is not true in reverse. Self-preferencing also deals with situations where the dominant company continues to provide access to the relevant input, but on less favorable terms.

Conversely, while all self-preferencing cases can be classified as discrimination, not all discrimination is self-preferencing. Pure "second-line" discrimination, although rarely enforced, concerns situations where a dominant undertaking discriminates between two non-affiliated undertakings.

B. Differing Legal Standards for Self-preferencing and Abusive Discrimination

The fact that self-preferencing straddles refusal to supply and abusive discrimination is all the more salient because the three heads of abuse apply different legal standards:

Refusal to supply applies the "indispensability" standard as established in the seminal cases *Commercial Solvents (1974)* and *Bronner (1994)*. To establish an abusive refusal to supply, the Commission or a private party must demonstrate that: (a) there is an actual or constructive refusal to supply an input; (b) the input is indispensable to compete effectively on the downstream market (i.e., there is no alternative input, even if less advantageous); (c) refusal to supply the input is likely to lead to the elimination of effective competition on the downstream market; (d) the refusal is likely to lead to consumer harm.[17]

Abusive discrimination, in contrast, applies the lower "effects" standard – as set out in *MEO (2018)*[18] – which builds on well-established line of cases, notably *Deutsche Bahn (1997)*,[19] *Tetra Pak (1994)*,[20] *Clearstream (2009)*.[21] To establish abusive discrimination, the dominant firm must have: (a) entered into equivalent transactions with other trading parties; (b) applied dissimilar conditions to those transactions (i.e. discrimination); and (c) the discrimination must place other trading parties at a competitive disadvantage (such that there is an anti-competitive effect).[22]

---

16 We note that a number of commentators have argued that self-preferencing is, alternatively, best understood as a form of tying. See, for example, Benjamin Edelman, 2014, Leveraging Market Power Through Tying and Bundling: Does Google Behave Anti-Competitively? Harvard Business School Working Paper, No. 14-112, 2014; Edward Iacobucci & Francesco Ducci, 2019. *The Google search case in Europe: tying and the single monopoly profit theorem in two-sided markets*, European Journal of Law and Economics, Springer, vol. 47(1); and Fumagalli, Chiara, Massimo Motta, and Claudio Calcagno, Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance, Cambridge University Press, 2018.

17 See in particular Case C-7/97 *Oscar Bronner GmbH* (1998); Joined Cases 6 and 7/73 *Commercial Solvents* (1974); Joined Cases C-241/91 P and C-242/91 P, *Magill* (1995); Case T-201/04 *Microsoft* (2007). Some argue, and the Commission's guidance supports, that there is, or should be, a lower standard for termination of an existing supply arrangement. However, this is not clearly reflected in the case-law nor is it clear whether the standard would significantly differ from the indispensability standard. [See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)].

18 Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* (CJEU, 2018).

19 Case T-229/9, *Deutsche Bahn AG v. Commission* (General Court, 1997).

20 Case T-83/91, *Tetra Pak International SA v. Commission* (General Court, 1994).

21 Case T-301/04, *Clearstream Banking AG and Clearstream International SA v. Commission* (General Court, 2009).

22 See Article 102(c) TFEU and *MEO*, *supra* note 18.

Self-preferencing applies an effects standard manifestly closest to the effects standard elucidated in *MEO* in relation to abusive discrimination. In particular, the test eschews the indispensability and elimination of effective competition elements which, in practice, limit abuse conduct to scenario where firms held a monopoly on input which is critical for downstream competition. Indeed, the reference by the Commission in *Google v. Commission* to "capability" to restrict competition echoes the even lower *"by object"* standard which applies to tying abuses.

C. Does It All Add Up?

The similarities between self-preferencing and abusive discrimination and refusal to supply as well as the differing legal standards applicable to each give rise to the following important questions. First, given that similarities between the standards for self-preferencing and abusive discrimination, why treat self-preferencing as a distinct category? Second, can the different standards between self-preferencing and refusal to supply be justified? Third, how can the arbitrage of legal standards be avoided?

V. HOW TO FIT SELF-PREFERENCING WITHIN THE EXISTING LEVERAGING ABUSES

Addressing these three questions in turn:

A. Distinguishing Self-preferencing and Abusive Discrimination

The Commission's adoption of self-preferencing may reflect both the need to differentiate a narrower subset of discriminatory conduct as potentially more problematic and avoid any ambiguity over the validity of applying abusive discrimination to self-preferencing.

Self-preferencing in the context of dominant online platforms is increasingly considered likely to harm competition given the inherent conflict of interest between the platform as both host and competitor, as well as perception on the part of users that platforms are neutral arbiters.[23] This is consistent with the Commission's cases which have so far focused on dominant platform operators that allegedly control an "open" ecosystem which serves as a gateway into neighboring markets. As Vestager put it candidly, *"Some of these platforms, they have the role both as player and referee, and how can that be fair?"*[24] While these cases could fall within the scope of abusive discrimination, the Commission may want to signal that self-preferencing represents greater potential for competitive harm than previous discrimination cases by attaching a new label.

The Commission may have also wanted to dispel any questions over the legitimacy of applying abusive discrimination – as set out in Article 102(c) – to self-preferencing. Some commentators have previously questioned its applicability contending that the Article 102(c) is manifestly intended to address the (rare) occurrences of pure second-line discrimination rather than exclusionary conduct, which is more properly addressed under Article 102(b).[25] Equally, it is not clear that the conditions of Article 102(c) – which require the application of dissimilar conditions to *'equivalent transactions'* would necessarily cover self-preferencing conduct where – at least in the case of *Google Shopping* – the self-preferencing did not concern transactions *per se* but rather the treatment of third parties under a search algorithm.

B. Distinguishing Self-Preferencing's and Refusal to Supply's Legal Standards

The Commission's adoption of an effects standard for self-preferencing rather than an indispensability standard suggests that intervening to prohibit self-preferencing is regarded as less problematic (or more beneficial) than intervention to mandate refusal to supply. This has two elements.

The selection of different standards reflects, in the first place, a prior belief that self-preferencing carries a higher likelihood of competitive harm and a lower likelihood of counterbalancing efficiencies than refusal to supply. As Advocate General Jacobs outlined in *Bronner*, the rationale behind the high standard for obliging firms to provide "access" to their assets is the *'careful balancing'* of short-term (allocative efficiency) considerations and long-term (dynamic efficiency) considerations.[26] Apart from certain "essential facilities," refusals to supply are generally associated with high dynamic efficiency – and therefore a high error cost of regulatory intervention – which therefore justifies the higher legal

23 https://ec.europa.eu/competition/information/digitisation_2018/contributions/linklaters.pdf.

24 New York Times, *Big Tech's Toughest Opponent Says She's Just Getting Started*, 19 November 2019.

25 Damien Geradin and Nicolas Petit, '*Price Discrimination under EC Competition Law: The Need for a case by case assessment*' GCLC Working Paper (2005).

26 Bronner, AG Op. Jacobs, para. 57

standard. Conversely, the effects standard abusive discrimination reflects the ambiguous effects of price discrimination. As Advocate General Wahl outlined in *MEO* that *'it is well established that a practice of discrimination, and a differential pricing practice in particular, is ambivalent in terms of its effects on competition.'*[27] The two different standards thus reflect underlying degree to which the relevant conduct is likely to be efficient or have anti-competitive effects.

Similarly, the selection of an effects standard also suggests that it is more straightforward to successfully address the competitive harm from self-preferencing than from refusal to supply. The high standard for refusal to supply reflects in part the different nature of the mandatory remedies necessary to address the underlying concern. As Pablo Ibanez Colomo has observed, there is *'a fundamental difference'* between prohibitory (e.g. cease and desist from discrimination) and mandatory remedies (supply the relevant third parties).[28] This is because mandatory remedies are inherently more difficult to implement as they require a competition authority or court to design them (e.g. to impose appropriate access terms and pricing). There is accordingly a greater error cost associated with refusal to supply remedies which justifies the higher standard. Conversely, abusive discrimination intuitively only entails a requirement that the dominant platform treat its affiliates according to these rules (i.e. a *prohibitory* cease and desist). This is in line with the Court's statement in *Van Den Bergh*, which stated that indispensability was only applicable when the remedy required the dominant undertaking to '*transfer an asset or enter into agreements with persons with whom it has not chosen to contract.*'[29]

C. Risk of "Reverse" Regulatory Arbitrage

Finally, "regulatory arbitrage" is often used to refer to a corporate strategy whereby firms use regulatory inconsistencies in order to circumvent unfavorable regulations. In this context, however, we are confronted with a different issue: the potential for regulators to exploit inconsistencies in law in order to avoid more burdensome legal standards.

The risk of reverse regulatory arbitrage primarily arises in relation to the overlap between the two heads of abuse were regulatory authorities to use self-preferencing rather than refusal to supply to take advantage of the former's lower effects standard.

Regulatory arbitrage poses three concerns. First, it runs contrary to the principles of the rule of law. As Tom Bingham, the former Senior Law Lord in United Kingdom observed, '*the law must be accessible and so far as possible intelligible, clear and predictable.*'[30] In other words, dominant firms need to understand *ex ante* what rules are applicable to them.

Second, more practically, it incentivizes authorities at times to pursue the lower standard at the cost of inappropriate remedies. An infamous example is the failed remedies in the Commission's Windows Media Player tying case. In reality, the Commission's concerns in *Microsoft WMP* were Microsoft's failure to "carry" alternative media players, i.e. a *Bronner*-type claim about access to the Windows "distribution network." By framing its concerns as tying, the Commission was able to lower the required standard of harm ("by object/capability" standard rather than the indispensability standard). However, the price of this approach was that the Commission's remedy to cease tying had no impact on competition in the market.[31] Subsequently, when the Commission addressed a very similar set of facts with Internet Explorer, Microsoft agreed to implement a "browser choice screen" which resembled the type of "must-carry" remedy typically associated with refusal to supply cases.[32] This example highlights a further reason to look closely at the remedies in question (in addition to the complexity issue outlined above): the appropriate remedy may help clarifying the type of abuse at issue: if a "must-carry" remedy is the right solution to the problem, then there is a fair chance that this problem is best characterized as a refusal to supply.

Third, and most importantly, regulatory arbitrage carries the risk there is a fundamental mismatch between the standard which the authorities apply and the correct 'priors' (in terms of likely harm and efficiencies) for the conduct in question.

---

27 *MEO*, AG Op. Wahl, para.62

28 Pablo Ibanez Colomo, *supra* note 3.

29 Case C-552/03 P - *Unilever Bestfoods (previously Van den Bergh Foods) v. Commission*, para. 137.

30 Tom Bingham, *The Rule of Law* (Penguin: 2011)

31 See, for example the assessment of Nicholas Economides and Ioannis Lianos, *A Critical Appraisal of Remedies in the EU Microsoft Cases*. Columbia Business Law Review, Volume No. 2, 2010.

32 The Commission's *Google Android* decision, which was also considered under the legal standard for tying, has led to Google agreeing to a similar "choice screen" for search and browsers on Android.

VI. CONCLUSIONS

These three considerations shed some light on how self-preferencing fits, or should fit, between refusal to supply and abusive discrimination. The selection of an effects standard implies, on the one hand, that self-preferencing should not be applied to a "closed system" which would require a mandatory remedy (i.e. a dominant firm is required to provide access which it would not have otherwise given to any third party). Otherwise an indispensability standard would have been more appropriate given the potential implications for long-term investment incentives and the complexity of imposing a mandatory remedy.

It also roots self-preferencing within abusive discrimination, applying to "open" systems where a prohibitory remedy is possible (i.e. where the dominant firm is supplying its own upstream or downstream business as well as third parties).

The question mark remains, however, how self-preferencing will tackle the "hard" cases that straddle the divide. How, if at all, should self-preferencing apply to scenarios where the favoring relates to a "closed" feature of the dominant firm's business? To what extent should self-preferencing apply to scenarios where regulators need to devise remedies for inputs that have not been made available to the market? Furthermore, if self-preferencing should cover these scenarios, is it still appropriate for an effects standard to apply? In particular, how will the Commission seek to weigh the trade-off between the short-term (allocative) efficiencies (from prohibiting self-preferencing) and the long-term (dynamic) efficiencies from potentially distorting investment incentives.

Similar questions arise in relation to regulatory arbitrage. Given that the self-preferencing is decisively rooted as an "effects" abuse, will the EU Courts delineate a clear dividing line between the scenarios to which refusal to supply applies (e.g. "closed" systems) and the scenarios to which self-preferencing applies? Similarly, will the EU Courts limit abusive discrimination to pure second line discrimination to make "space" for self-preferencing or simply allow the two abuses to implicitly overlap given the similar standards?

The answers to these questions, amongst others, will shape the boundaries of the new head of abuse.

HYBRID DIFFERENTIATION AND COMPETITION BEYOND MARKETS

BY INGE GRAEF[1]

1 Inge Graef is assistant professor at Tilburg University, with affiliations to the Tilburg Law and Economics Center ("TILEC") and the Tilburg Institute for Law, Technology, and Society ("TILT"). I would like to thank Francisco Costa-Cabral for his comments on an earlier version of this paper.

I. INTRODUCTION

The *Google Shopping* saga has led to a fierce discussion about the theory of harm condemning self-preferencing by vertically integrated dominant firms as anticompetitive. This paper reflects on another type of discrimination, namely hybrid differentiation, whose effects are maybe even more complex and problematic than those of self-preferencing. Hybrid differentiation occurs when a platform discriminates among businesses in a related market in which it is not active itself in an effort to increase or maintain its competitive advantage within one of its other activities. An example is a platform blocking an app that interferes with its ability to gain revenues through advertising. Hybrid differentiation is particularly relevant where a platform builds an ecosystem or conglomerate around its main activity.

Digital platforms increasingly expand their activities by entering into markets adjacent to their original business, either by growing organically or by acquiring start-ups in neighboring markets. Think of the variety of services offered by Google ranging from online search, maps and mobile operating systems to self-driving vehicles and smart glasses. The acquisitions of Instagram and WhatsApp by Facebook illustrate how the social network provider has diversified its business. These developments give rise to conglomerates[2] or ecosystems[3] consisting of several related services offered by the same provider. While this growth can create efficiencies and improve the user experience, it also creates room for different services to be integrated with one another possibly to the detriment of outside services offered by rivals. The expansion of these conglomerates or ecosystems into more and more activities goes hand in hand with increased opportunity to discriminate against rivals as there will be more competitive interactions due to the many services offered. Beyond the pure self-preferencing that we already know from the *Google Shopping* case, there is also scope for hybrid differentiation to occur because of the interconnectedness between the various services.

Whereas self-preferencing as currently understood (i.e. the favoring of a platform's own activities over those of non-affiliated rivals) occurs in scenarios of vertical integration, this is not the case for hybrid differentiation as considered in this paper. The key difference between hybrid differentiation and self-preferencing is that the exclusionary effects that the platform aims to achieve through hybrid differentiation are not situated in the same market as where the differentiation takes place. In the *Google Shopping* case, the impact of Google's self-preferencing behavior was mainly felt in the market for comparison shopping services in which Google was vertically integrated. However, the main feature of hybrid differentiation is that the platform differentiates between non-affiliated businesses in a market in which it is not present itself in order to exclude competition somewhere else. Hybrid differentiation is a competitive strategy beyond vertical integration to ensure the continued relevance of the platform's overall activities and business model.

This paper explores how to assess the anticompetitive nature of hybrid differentiation and submits that there is a need to look beyond competition in existing markets and traditional notions of leveraging. Section II discusses the notion of hybrid differentiation in comparison with two other forms of differentiation. Section III explores hybrid differentiation in the form of blocking of access to a platform. Section IV focuses on hybrid differentiation through tying of additional services. Section V concludes.

2 Marc Bourreau & Alexandre De Streel, "Digital conglomerates and EU competition policy," March 2019, available at http://www.crid.be/pdf/public/8377.pdf.

3 Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, "Competition policy for the digital era," 2019, p. 30-38, available at http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

II. NOTION OF HYBRID DIFFERENTIATION

Discrimination or differentiation is at the heart of a number of ongoing competition investigations. The European Commission seems to be testing the relevance of its reasoning regarding self-preferencing in search rankings in *Google Shopping* to concerns about preferential access to data in the *Amazon* investigation opened in July 2019.[4] Amazon is under the radar of the Italian competition authority as well, which is examining the allegation that Amazon discriminates on its platform in favor of third-party merchants who use Amazon's logistics services.[5] Beyond the investigation into the behavior of Amazon, the Commission is also looking into a complaint from Spotify against Apple's conduct related to the App Store. This includes the possible discriminatory nature of the 30 percent fee Apple charges as a commission from rival apps like Spotify but not from its own apps like Apple Music.[6] The Netherlands Authority for Consumers and Markets is looking specifically at the position of Dutch apps for news media in Apple's App Store and possible preferential treatment by Apple.[7]

While all of these cases contain elements of discrimination or differentiation, the nature of the conduct and their potential to create competitive harm is different. This paper builds upon the categorization made elsewhere of differentiated treatment into three types, namely pure self-preferencing, pure secondary line differentiation and hybrid differentiation.[8] This distinction serves as an analytical framework to assess the extent to which such practices are abusive under Article 102 of the Treaty on the Functioning of the European Union (TFEU). While this paper focuses on the third type of hybrid differentiation only, to understand its competitive impact it is helpful to illustrate how this notion relates to the other two forms of differentiation.

The three types of differentiation relevant to behavior of digital platforms can be defined as follows:

- "pure" self-preferencing: consisting of behavior whereby a vertically integrated platform treats its affiliated services more favorably than non-affiliated services;
- "pure" secondary line differentiation: occurring when a non-vertically integrated platform differentiates among non-affiliated services in a market in which it is not active itself;
- "hybrid" differentiation: conduct whereby a platform differentiates among non-affiliated services in an effort to favor its own business.[9]

The *Google Shopping* case is of course the key illustration of pure self-preferencing, where Google was fined for displaying its own comparison shopping service more prominently in its general search results to the detriment of rival comparison shopping services.[10] As an example of pure secondary line differentiation, one can think of a hotel booking platform providing hotels that pay higher commission fees with a better ranking in the search results on its platform. This type of differentiation is labelled "pure secondary line differentiation" here by reference to the secondary line injury that it may cause. Secondary line injury occurs when a supplier distorts competition on a downstream market where it is not active by favoring and exploiting some customers over others.[11] Hotel booking platforms like Booking.com or Expedia do not offer hotel rooms themselves and are thus not in competition with the hotels that rely on the platform to reach consumers. When a platform differentiates among non-affiliated customers in a market in which it is not operating itself, the harm is exploitative and thus qualifies as secondary line injury because it affects the platform's downstream customers that are in competition with each other.

4 Press release European Commission, "Antitrust: Commission opens investigation into possible anticompetitive conduct of Amazon," July 17, 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

5 Press release Italian Competition Authority, "A528—Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services," April 16, 2019, available at https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services.

6 Spotify explains its complaint against Apple on this website: https://www.timetoplayfair.com/.

7 Press release Netherlands Authority for Consumers and Markets, "ACM launches investigation into abuse of dominance by Apple in its App Store," April 11, 2019, available at https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store.

8 Inge Graef, "Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence," *Yearbook of European Law* 2019, p. 448-499, available at https://doi.org/10.1093/yel/yez008.

9 Ibid, p. 452-453.

10 Case AT.39740 *Google Shopping*, June 27, 2017.

11 For the distinction between primary and secondary line injury in the context of abuse of dominance, see Pablo Ibanez Colomo, "Exclusionary discrimination under Article 102 TFEU," *Common Market Law Review* 2014, p. 145.

Primary line injury occurs when a supplier forecloses competitors from the market in which it operates itself. Pure self-preferencing thus leads to primary line injury, because the key objective of the platform is to exclude direct competitors such as the rival comparison shopping services in *Google Shopping*. Hybrid differentiation differs from pure self-preferencing because there is no favoring of a platform's own services *vis-à-vis* non-affiliated services. Instead, the differentiation takes place among non-affiliated businesses but indirectly benefits the platform in a different market than the one in which the non-affiliated customers compete. While hybrid differentiation also involves exploitative elements by favoring some customers over others, an exclusionary motive prevails because the platform's ultimate objective is to strengthen its own market position in relation to rivals competing with the platform's activities elsewhere.[12] Such competition elsewhere can constitute challenges against the platform's existing business model more generally. An example is a platform blocking an app that interferes with its ability to gain revenues through advertising (see section III). Or the competition elsewhere can be a third market in which the platform is operating, in addition to the market of the main activity of the platform and the market in which the non-affiliated businesses compete. An example is a platform conditioning a business's ranking on whether additional services are purchased (see section IV).

It is important to note that the three types of differentiation serve as a framework for assessing their anticompetitive nature. The fact that behavior falls within one of the categories therefore does not imply that it breaches Article 102 TFEU. The categorization mainly acts as a tool to select the appropriate lens to test the anticompetitiveness of differentiation. As the impact of hybrid differentiation goes beyond the relevant markets in which the platform is active, it raises particular challenges for competition analysis. To make these concerns more concrete and show how they require competition authorities to look beyond existing relevant markets, two real-world examples are discussed in the following sections.[13]

III. HYBRID DIFFERENTIATION AND BLOCKING OF PLATFORM ACCESS

The most far-reaching decision that a platform can take in its relationship with a business user is to block the latter's access. Such a decision can result in hybrid differentiation. The situation of the app Unlockd *vis-à-vis* Google illustrates this.

Unlockd is an app that provides a different approach to mobile advertising by showing advertising or other content when a user unlocks her phone. In return for viewing ads, content, or offers upon unlocking their smartphone, users earn points they can exchange for mobile credit, data, entertainment or loyalty points.[14] In 2018, Google announced its intention to remove Unlockd's app from the Play Store because of an alleged violation of its terms and conditions that prohibit apps from interfering with the operation of the device or other apps. In May 2018, UK Judge Peter Roth granted Unlockd an interim injunction preventing Google from removing Unlockd's apps made for the UK market.[15] However, due to lack of funding to pursue the proceedings, Unlockd withdrew its claim in February 2019 and was in May 2019 even ordered by the UK Competition Appeal Tribunal to pay Google's costs.[16] The Australian Competition and Consumer Commission has been reported to start legal action against Google for its conduct *vis-à-vis* Unlockd in 2020.[17]

The removal of Unlockd from the Play Store can be qualified as a form of hybrid differentiation, because the reason for Google's decision lies in its interest to protect its own business indirectly. Google is not a direct competitor of Unlockd, as it is not active in the markets in which the app competes. However, Unlockd may make it harder for Google to monetize its activities as advertising forms its main revenue stream. This means that there is an exclusionary motive for Google to block the app.

The blocking of access to a platform can be seen as a disruption of supply. This would mean that the notion of refusal to deal forms the relevant legal framework to assess the anticompetitive nature of such behavior. The difficulty of capturing hybrid differentiation under the con-

12 For a further characterization, see Inge Graef, "Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence," *Yearbook of European Law* 2019, p. 453.

13 The discussion in sections III and IV builds upon the analysis in Inge Graef, "Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence," *Yearbook of European Law* 2019, p. 448-499.

14 See https://www.linkedin.com/company/unlockd-media.

15 *Unlockd v. Google* (2018) Ch D (Roth J), May 9, 2018. See R. English, "Win (for now) for app developer against Google," UK Human Rights Blog, May 18, 2018, available at https://ukhumanrightsblog.com/2018/05/11/win-for-now-for-app-developer-against-google/.

16 *Unlockd v. Google* [2019] CAT 17, May 21, 2019, available at https://www.catribunal.org.uk/sites/default/files/2019-05/1283T_Unlockd_CMC_CAT_17_210519.pdf.

17 Paul Smith, "ACCC to sue Google over Unlockd," Australian Financial Review, November 5, 2019, available at https://www.afr.com/technology/accc-to-sue-google-over-unlockd-20191030-p535u9.

cept of refusal to deal is the current interpretation of the requirement of exclusion of effective competition.[18] The way in which this requirement has been applied in case law so far indicates that the relevant question is whether the dominant firm reserves a downstream market to itself by denying a competitor access to an input. In *Magill*, the Court of Justice noted that the Irish broadcasting stations "reserved to themselves the secondary market of weekly television guides by excluding all competition on that market."[19] Similarly, in *IMS Health*, the Court of Justice argued that the refusal was "such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market."[20]

The *Tiercé Ladbroke* judgment illustrates the limits of this interpretation. The case dealt with a refusal by organizers of French horse races to provide Ladbroke, who was offering betting services in Belgium, with a transmission license for sound and pictures of the French horse races. Apart from the lack of indispensability, the General Court held that the condition of exclusion of effective competition was not met. The organizers of the French horse races were not competing with Ladbroke in the relevant market for the provision of betting services in Belgium. For that reason, they could not be seeking to reserve that related market for themselves.[21] As such, the conduct that a refusal to deal abuse targets is the leveraging of market power from the upstream market, namely the input to which access is requested, to a downstream market in which the dominant firm competes with the access seeker. This would mean that scenarios in which a requesting undertaking needs access to an input in order to enter a market in which the dominant firm is not active (and not planning to be active in the foreseeable future) cannot be captured.[22] Other types of abuse like tying, margin squeeze, and even the self-preferencing at stake in *Google Shopping* likewise focus on leveraging of market power to a market where the dominant firm already operates.

Such a narrow interpretation is becoming especially problematic as the scope for hybrid differentiation will continue to rise. Because platforms expand their activities to related markets, they also have incentives to block access of businesses that are not direct competitors but limit the platform's ability to gain profits elsewhere in its ecosystem or pose a more long-term threat to a platform's underlying business model. The notion of leveraging as developed in cases dealing with more static market settings does not capture this competitive reality of the platform economy. To monitor possible competitive harm, there is a need for competition authorities to look beyond the existing markets in which the dominant firm already competes. By blocking the access of a business, the platform can prevent or delay disruption by new entrants and strengthen its overall control over the room for innovation to occur beyond the markets in which it is present itself.[23] Attention for dynamic effects beyond markets when assessing hybrid differentiation in the form of blocking of platform access is thus key to keep the platform economy competitive and innovative. The same also holds for hybrid differentiation that takes place through tying of additional services to which attention now turns.

18 The other conditions to hold a refusal to deal abusive are: the indispensability of the input; the prevention of the introduction a new product (relevant for intellectual property protected assets); and the absence of an objective justification. See Joined cases C-241/91 and C-242/91 *Magill*, ECLI:EU:C:1995:98; Case C-7/97 *Bronner*, ECLI:EU:C:1998:569; Case C-418/01 *IMS Health GmbH*, ECLI:EU:C:2004:257; Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289.

19 Joined cases C-241/91 and C-242/91 *Magill*, ECLI:EU:C:1995:98, para 56.

20 Case C-418/01 *IMS Health GmbH*, ECLI:EU:C:2004:257, para 52.

21 Case T-504/93 *Tiercé Ladbroke v. Commission*, ECLI:EU:T:1997:84, par. 133.

22 Reaching the same conclusion in the context of access to data, see Josef Drexl, "Designing Competitive Markets for Industrial Data Between Propertisation and Access," *JIPITEC* 2017, p. 282-283.

23 For a discussion on how competition law should assess competitive strategies aimed at preventing disruptive innovation, see Francisco Costa-Cabral, "Innovation in EU Competition Law: The Resource-Based View and Disruption," *Yearbook of European Law* 2018, p. 305-343.

IV. HYBRID DIFFERENTIATION AND TYING OF ADDITIONAL SERVICES

The investigation of the Italian Competition Authority is an example of how hybrid differentiation can occur by conditioning a business's ranking on whether additional services are purchased. Amazon is allegedly providing improved visibility, higher search rankings and better access to consumers only to merchants that also use its logistics services.[24] Even though some of these merchants may compete with Amazon in the context of its retail activities, the impact of this behavior mainly affects the market for logistics services. By giving less visibility to merchants that do not rely on its logistics services, Amazon is steering merchants to its own services and thereby reduces competition possibly to the detriment of rival providers of logistics services. Amazon thus exploits non-affiliated merchants by favoring some over others in order to obtain a benefit in the market for logistics services where the affected merchants do not compete, but where Amazon wants to strengthen its position. This exclusionary element elsewhere in Amazon's activities is what qualifies its behavior as a form of hybrid differentiation.

Amazon's conduct involves elements of tying or bundling as it is making a merchant's ranking dependent on whether the merchant also purchases Amazon's logistics services for the products and services sold through the platform. A difficulty in applying the notion of tying to Amazon's behavior is that merchants are not required to make use of Amazon's logistics services in order to be able to sell goods through Amazon's platform. In other words, there is no contractual obligation or technical integration between the two services that forces businesses to rely on Amazon's logistics services when using its marketplace services. This while tying normally deals with situations where the purchase of one product is made dependent on the purchase of another product. For instance, Microsoft was fined by the Commission in 2004 for tying Windows Media Player to the Windows operating system by pre-installing its media player on Windows PCs.[25] Similarly, the commitments offered by Microsoft to the Commission in 2009 addressed the technical tying between Internet Explorer and the Windows operating system.[26]

In order to be abusive under Article 102 TFEU, tying requires a form of coercion precluding customers a choice to obtain the tying product without the tied product. Based on the 2007 *Microsoft* judgment of the General Court, the Commission has interpreted the notion of coercion broadly in its *Google Android* decision. Tying was used as the legal framework to assess the anticompetitive effects of Google's requirement to make the licensing of the Google Play Store by Android device manufacturers conditional upon the pre-installation of the Google Search and Google Chrome apps.[27] In this context, the Commission argued that coercion can still exist when the customer is not required to use the tied service or is entitled to use the same product supplied by a competitor of the dominant undertaking.[28]

At the same time, there seems to be a difference between the situation at stake in *Google Android* and the conditioning of the ranking of a business on whether it uses a dominant platform's additional services. In the latter case, businesses can decide not to take a dominant platform's tied service but still make use of its marketplace, while Android device manufacturers could not obtain a license for the Google Play Store if they decided not to pre-install the Google Search and Google Chrome apps. Similarly, device manufacturers were not given a choice with regard to the abuse relating to Android forks that was also analyzed through the notion of tying in *Google Android*. Google namely conditioned licensing of the Play Store and the Google Search app on device manufacturers agreeing not to sell mobile devices running on alternative, non-approved versions of Android.[29] The extent of coercion is thus different here.

Alternatively, one can analyze the behavior as a form of mixed bundling, also referred as a multi-product rebate, where products are made available separately as well, but the sum of the separate prices is higher than the bundled price.[30] In cases where the ranking of a business is made conditional upon its decision to purchase additional services from the platform, the mixed bundling does not lead to a lower bundled price. It is instead the higher quality of the bundled offer through a more favorable placement in the ranking that counts. This benefit can only be obtained by businesses if they rely on the additional services offered by the dominant platform.

---

24 Press release Italian Competition Authority, "A528—Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services," April 16, 2019, available at https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services.

25 Case COMP/C-3/37.792 – *Microsoft*, March 24, 2004 as upheld on appeal in Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289.

26 Case COMP/C-3/39.530 – *Microsoft (tying)*, December 16, 2009.

27 Case AT.40099 – *Google Android*, July 18, 2018, par. 740-753.

28 Case AT.40099 – *Google Android*, July 18, 2018, par. 748 referring to Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289, par. 970.

29 Case AT.40099 – *Google Android*, July 18, 2018, par. 1011-1018.

30 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 [2009] OJ C 45/7, par. 48.

According to the Commission in its *Google Android* decision, the capability of tying to restrict competition can among others be considered by looking at whether the tying "reduces the incentives of users to choose a product from among those of other suppliers than the dominant undertaking."[31] In the *Microsoft* case, the General Court argued that consumers were less likely to use an alternative media player due to the pre-installation of Windows Media Player on the Windows operating system.[32] A similar effect seems present in the context of the *Amazon* investigation. Because merchants are punished for not taking Amazon's logistics services through lower visibility in rankings to consumers, they are induced not to rely on logistics services provided by other market players.

Another issue is whether the tying is liable to foreclose competition in the market for the tied product. If in the *Amazon* case merchants despite the tying still rely on logistics services of other providers, this can offset the foreclosure effect created by Amazon's behavior. Similarly, attention was paid to whether consumers used third party media players and web browsers in the *Microsoft* cases.[33] According to the Commission's Guidance on Article 102 TFEU Enforcement Priorities, a multi-product rebate is anticompetitive "if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle."[34] The ability of rivals in the tied market to compete despite the tying or bundling is thus key.

In addition, the platform may argue that its behavior creates efficiencies for consumers. Amazon could for instance claim that the way it bundles its services creates an improved experience for consumers because it can better ensure the overall quality from sale until delivery. However, the acceptance of such arguments would risk opening the door for dominant firms to bundle all sorts of services to its main activity even if this has a foreclosure effect on rivals. As made clear by the Court of Justice in *UK Generics*, to show that efficiency gains offset negative effects on competition, the dominant firm "has to do more than put forward vague, general and theoretical arguments on that point or rely exclusively on its own commercial interests."[35]

The effects created by what is called hybrid differentiation here are not entirely new and can also be assessed through other means beyond the notion of tying, in particular by reference to the benefits the behavior creates for the dominant firm. A relevant precedent is *British Gypsum*[36] where it was found abusive for a dominant firm to engage in favorable treatment of customers in a horizontally related market where it was not dominant. Depending on whether customers were loyal to it in the main dominated market (the market for plasterboard) by not importing plasterboard from rivals, they qualified for priority deliveries in the related market (the market for plaster).[37] The abusive conduct served to secure the firm's dominant position in the main market. While there are similarities with the situation at stake in *British Gypsum* in particular as regards the way customer loyalty is used to obtain benefits across horizontally connected markets, the objective of the platform's behavior in cases of hybrid differentiation at stake here is different. Most importantly, hybrid differentiation has a two-fold nature. On the one hand, the platform aims to obtain benefits in the non-dominated market where it wants to expand its activities. This makes the behavior more conventional as it constitutes a traditional form of leveraging, whereas the novelty of *British Gypsum* was that the abuse took place in the non-dominated market and the benefits occurred in the dominated market.[38] On the other hand, the platform wishes to protect its competitive advantage over the entire ecosystem that it is building around the main market where it holds a dominant position. Even if the first effect does not turn out to be anticompetitive because of the limited impact in the non-dominated market, the second effect should not be ignored.

Situations can even be considered where both the abuse and the benefits of hybrid differentiation are situated in a part of the platform's activities where it is not dominant. The Court of Justice found such behavior abusive in *Tetra Pak II* under the condition that there were "associative links" between the two markets under investigation, namely the market for aseptic packaging where Tetra Pak was dominant and the market for non-aseptic packaging where Tetra Pak was not dominant and where the abuse and benefits occurred.[39] The restriction to situations

31 Case AT.40099 – *Google Android*, July 18, 2018, par. 750 referring to Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289, par. 1041.

32 Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289, par. 1041: "in the absence of the bundling, consumers wishing to have a streaming media player would be induced to choose one from among those available on the market."

33 Ibid, par. 1049-1077 and Case COMP/C-3/39.530 – *Microsoft (tying)*, 16 December 2009, par. 39-54.

34 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 [2009] OJ C 45/7, par. 59.

35 Case C-307/18 *UK Generics*, ECLI:EU:C:2020:52, par. 166.

36 With thanks to Francisco Costa-Cabral for referring me to this case.

37 Case T-65/89 *British Gypsum*, ECLI:EU:T:1993:31, par. 92-96 as upheld on appeal in C-310/93 P *British Gypsum*, ECLI:EU:C:1995:101.

38 For tables analyzing the links between dominance, abuse and effects in the different markets, see Giorgio Monti, EC Competition Law, Cambridge University Press 2007, p. 193 and Richard Whish and David Bailey, Competition Law, Oxford University Press 2018, p. 213.

39 Case C-333/94 P *Tetra Pak II*, ECLI:EU:C:1996:436, par. 28-30.

with associative links between connected markets is becoming problematic where a platform enters markets that are not closely related to each other but where the platform can still engage in anticompetitive conduct through favorable treatment across activities or by recouping losses elsewhere within its ecosystem.[40]

In *British Gypsum*, the General Court argued that the behavior amounted to the "provision of equivalent services on unequal terms" and had to be regarded as anticompetitive in itself "by reason of the discriminatory purpose which it pursues and the exclusionary effect which may result from it."[41] This provides scope to hold hybrid differentiation abusive where it is based on a discriminatory strategy that is anticompetitive by its nature, although discussions will then likely focus on how to define the equivalence of transactions of a platform with businesses in slightly different positions.

Regarding the competitive assessment as whole, the key point is that the impact of arrangements where a business's ranking is made dependent on whether it purchases additional services from the dominant platform goes beyond the relevant markets at stake. In particular, such arrangements can also influence the ability of potential competitors and new entrants to compete with parts of the ecosystem of the dominant player in the future.[42] This market reality needs to be reflected in competition analysis to ensure that competition at the edges of the platform's activities remains strong. To achieve this, attention should be paid in the competition analysis not only to the effects in the affected relevant markets but also to how the conduct enables a platform to enter an increasing number of related markets. The nature of the underlying strategies for hybrid differentiation should thus be analyzed. Limits to expansion by a platform through practices of differentiation are necessary to ensure that the overall platform economy remains competitive and that there is room for new entrants to challenge the platform in separate segments of its activities.

V. CONCLUSION

The increasing expansion in which digital platforms engage through the creation of conglomerates or ecosystems around their main activity creates room for practices that have been referred to as hybrid differentiation here. Hybrid differentiation occurs when a platform differentiates between non-affiliated customers in order to serve its own interests elsewhere in its ecosystem. The key challenge in terms of the ability to assess the anticompetitive nature of such conduct is that its impact goes beyond the markets in which platform itself is present. Foreclosure effects can have a longer-term impact on the future room for innovation by potential competitors and new entrants.

To adequately monitor competitive harm, there is a need to look at the competitive strategies of dominant platforms going beyond traditional forms of leveraging and the relevant markets in which they operate. Instead, the competitive harm relates to the ability of the platform to prevent or delay disruption, to ward off challenges against its existing business model and to strengthen its control over additional activities within the entire ecosystem.

This also means that regardless of whether the *Google Shopping* decision is confirmed on appeal, challenges remain. The Commission's assessment of the self-preferencing in *Google Shopping* was still confined to existing relevant markets, while hybrid differentiation requires competition authorities to take a more forward-looking approach beyond the boundaries of competition in markets in which the platform already operates. The *Google Android* appeal may provide clarity regarding the application of the notion of tying in an ecosystem where different markets are connected, including search, mobile operating systems and app stores. If platforms no longer compete solely in narrowly defined relevant markets, competition analysis needs to reflect this competitive reality.

40 See Giorgio Monti, EC Competition Law, Cambridge University Press 2007, p. 193-194 who refers to the example of a firm dominant in the market for postal services that enters the market for toothpaste and engages in below-cost pricing for toothpaste by compensating its losses there with its high profits in the market for postal services. Note that the Commission has stated that it may also pursue predatory practices by dominant firms on markets on which they are not yet dominant. See 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 [2009] OJ C 45/7, footnote 39.

41 Case T-65/89 *British Gypsum*, ECLI:EU:T:1993:31, par. 94 as upheld on appeal in C-310/93 P *British Gypsum*, ECLI:EU:C:1995:101.

42 See Marc Bourreau & Alexandre De Streel, "Digital conglomerates and EU competition policy," March 2019, p. 15 who quote Jean Tirole: "A start up that may become an efficient competitor to such firms generally enters within a market niche; it's very hard to enter all segments at the same time. Therefore, bundling may prevent efficient entrants from entering market segments and collectively challenging the incumbent on the overall technology."

SELF-PREFERENCING – LEGAL AND REGULATORY UNCERTAINTY FOR THE DIGITAL ECONOMY (AND BEYOND?)

BY ROD CARLTON & RIKKI HARIA[1]

1 Rod Carlton (partner) and Rikki Haria (senior associate) are members of Freshfields Bruckhaus Deringer's Antitrust Competition and Trade Group. The views expressed in this article are the authors' own.

I. SELF-PREFERENCING IS IN THE SPOTLIGHT IN THE DIGITAL ECONOMY

In principle, an undertaking's expansion into a vertically-related or complementary business area is more likely to have pro-competitive effects than be anti-competitive. Stakeholders commonly agree on the benefits for competition and consumers, including the scope for generating significant efficiencies and reducing transaction costs for consumers.[2]

There has, however, been renewed focus by policymakers and regulators across the world on whether a stricter approach is required in the digital economy. This has, in part, been triggered by the rapid expansion of digital platforms and technology companies into new business areas as they seek to adapt to new technological developments and retain the attention of people and businesses. For example, Google has acquired a range of companies to expand its operations along the entire ad tech stack and enter into a range of new business areas, such as smart home technology and healthcare.[3] Similarly, Amazon has expanded its operations to cover virtual assistants (i.e. Alexa), groceries, music and video streaming, and pharmaceuticals.

Similarly, many digital platforms are used by large numbers of independent sellers of goods and services. For example, Amazon has over 2.5 million active sellers selling their products on its marketplace,[4] Apple and Google each make millions of apps available to consumers on their app stores,[5] and millions of businesses advertise on Google and Facebook.

In this context, "self-preferencing" has emerged as a key area of focus for policymakers and regulators. Self-preferencing involves a digital platform giving preferential treatment to its own products and services when they are in competition with the products and services provided by other companies. Concerns have been raised that this type of behavior may enable large digital platforms to protect their market position in their existing business areas or enter into new business areas in an "anti-competitive" manner, ultimately leading to worse outcomes for consumers and businesses.

The most high-profile investigations into self-preferencing conduct in Europe are:

- *Google Shopping*: in 2017, the European Commission imposed a €2.42 billion fine on Google for practices that amounted to an abuse of Google's dominant position in the general internet search markets by stifling competition in comparison shopping markets. In particular, the Commission held that: "*by giving prominent placement only to its own comparison shopping service and by demoting competitors, Google has given its own comparison shopping service a significant advantage compared to rivals.*"[6] The Commission considered that such practices stifled "competition on the merits" in comparison shopping markets. Google has appealed this infringement decision to the EU's General Court and judgment is pending.

- *Amazon Marketplace*: in 2019, the European Commission opened an investigation into Amazon. Amazon has a dual role whereby: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers. The Commission's press release announcing this investigation notes: "*When providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.*"[7] The investigation is ongoing. If proven, the Commission considers that the practices under investigation breach EU competition rules on anti-competitive agreements between companies (i.e. Article 101 TFEU) and/or the abuse of a dominant position (i.e. Article 102 TFEU). Following a news story in April 2020 reporting that Amazon employees had used data about independent sellers on its marketplace to develop competing products,[8] this is likely to be a focal area for the Commission's investigation.

2 For example, see: (i) the OECD Competition Committee's 2019 session on "Vertical mergers in the technology, media and telecom sector" in which the Secretariat's Background Note states: "*Vertical mergers are traditionally presumed pro-competitive, as they are generally driven by efficiency-enhancing motives*"; and (ii) the European Commission's "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings," [2008] OJ C265/6, paragraphs 13-14: "*The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive* […] *integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold.*"

3 https://techcrunch.com/2019/11/01/google-is-acquiring-fitbit/.

4 https://www.sellerapp.com/blog/amazon-seller-statistics/.

5 https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/.

6 https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

7 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

8 https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

- *Apple*: in 2019, Spotify filed a complaint with the European Commission in relation to Apple's App Store complaining about a 30 percent fee that Spotify and other digital services are required to pay on purchases made through Apple's payment system. As part of this complaint, Spotify noted: "*apps should be able to compete fairly on the merits, and not based on who owns the App Store. We should all be subject to the same fair set of rules and restrictions—including Apple Music*."[9] While the Commission has not publicly opened a formal investigation against Apple, it has reportedly sent information requests to Apple and third parties on this issue.

This article explores two issues that are resulting in considerable legal and regulatory uncertainty for digital companies (and practitioners advising on self-preferencing conduct):

- The "innovative" approach being taken by competition authorities when assessing self-preferencing conduct.

- The push for *ex ante* regulation to deal with self-preferencing in the digital economy.

II. THE "INNOVATIVE" APPROACH BY COMPETITION AUTHORITIES WHEN ASSESSING SELF-PREFERENCING

Self-preferencing by digital platforms is, in effect, a form of "leveraging" behavior. Enforcement action against leveraging behavior is not a novel issue under the competition rules relating to abuse of dominance. Indeed, it is a concept that underpins many different categories of "recognized" abuses. For example, refusal to supply, margin squeeze, discrimination and tying – all of which are "recognized" categories of abuse of dominance – to some degree involve the leveraging of market power from a market where a company is dominant to a vertically-related or neighboring market where that company may not be dominant. By way of example:

- In *Commercial Solvents*, which involved a refusal to supply, the Court stated: "*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.*"[10]

- In *Tetra Pak II* (which involved a number of different practices, including tying), the Commission held that an infringement of Article 102 TFEU could occur where the abuse occurred on a neighboring market to the market where a company was dominant (i.e. to gain an advantage in the neighboring market).[11]

- Abusive discrimination can occur where a vertically-integrated company that is dominant on the upstream market engages in discriminatory conduct that places competitors on the downstream market at a competitive disadvantage (i.e. *vis-à-vis* its own downstream operations). This has been well-explained by AG Wahl in *MEO*[12] and by Ofcom in its recent infringement decision against Royal Mail relating to the supply of bulk mail delivery services.[13]

This takes us to the Commission's *Google Shopping* infringement decision,[14] which is currently under appeal. As noted above, this case involved self-preferencing behavior: Google's algorithms in the general search space allegedly demoted results of rival comparison shopping services, while these algorithms were allegedly not applied in the same way to Google's own comparison shopping service. The Commission concluded that this resulted in traffic being increased to Google's comparison shopping services, not due to "competition on the merits," but because Google had systematically and unduly positioned its own services at the top of its general search results.

In explaining the legal basis for its infringement decision (in response to arguments by Google that the Commission had not established Google's general search services constituted an "essential facility" in line with the refusal to supply case-law), the Commission held: "*It is not*

9 https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/.

10 Joined Cases 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, EU:C:1974:18, paragraph 25.

11 92/163/EEC, Commission Decision of July 24, 1991.

12 Case C-525/16, *MEO — Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, Opinion of Advocate General Wahl, December 20, 2017, paragraphs 77 to 78.

13 CW/01122/01/14, Ofcom, *Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK*, August 14, 2018, paragraphs 5.39 to 5.45.

14 Case AT.39740, *Google Search* (*Shopping*), June 27, 2017 (the "Google Shopping" decision).

novel to find that conduct consisting in the use of a dominant position on one market to extend that dominant position to one or more adjacent markets can constitute an abuse […] *Such a form of conduct constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits.*"[15]

While "leveraging" behavior has underpinned the reasoning behind other "categories" of abuse (as noted above), it is debatable whether – based on existing case law – "leveraging" conduct is a well-established standalone abuse in and of itself.[16]

That said, as is clear from the language of Article 102 TFEU, there is no exhaustive or closed list of conduct that constitutes an abuse of a dominant position. The mere absence of a recognized "category" of abuse relating to leveraging or self-preferencing conduct does not legally preclude the Commission (and EU Courts) from holding that a company's conduct is abusive. Irrespective of whether the General Court rules in favor of the Commission, this case illustrates the Commission's willingness to take a more expansive approach to tackle self-preferencing behavior and utilize Article 102 TFEU in a more flexible way when dealing with large digital platforms and technology companies. The question is whether competition authorities' treatment of self-preferencing as a standalone abuse is a legitimate enforcement innovation in response to the emergence of innovative digital business models.

The expansive approach taken by the Commission creates considerable legal uncertainty. Previous cases involving "leveraging" behavior have been linked to other categories of abuse, where there are helpful criteria (and guidance) on what divides permissible behavior from abusive behavior. Take "refusal to supply" cases as an example: the case-law has evolved over time to clarify that access to the upstream product must be "indispensable" for a rival to compete in the downstream market for a competition law problem to arise under Article 102 TFEU. In policy terms, "indispensability" (as opposed to mere convenience or desirability) aims to safeguard investment incentives for innovation in products or facilities. And in terms of legal compliance and justiciability, "indispensability" aims to provide an objectively verifiable litmus test - both for owners of facilities and access seekers to those facilities. Similarly, in its ongoing appeal of the *Google Shopping* decision, Google has provided the following example: "*a dominant undertaking's practice of setting low prices cannot, on its own, be considered abusive. It would only be abusive if an additional feature departing from competition on the merits were identified that could be classified as predatory pricing.*"[17]

However, the approach being taken by the European Commission (and other competition authorities) to tackle self-preferencing as a standalone abuse seems to rest on "competition on the merits" as the relevant litmus test. In the context of the ongoing appeal in the *Google Shopping* case, the Commission has reportedly articulated a three-step test for determining when the conduct of a dominant company treating its own service differently to the way it treats a rival's similar service can be abusive: (i) the difference in treatment has a significant impact on an important parameter of competition (e.g. traffic in the case of *Google Shopping*); (ii) the significant impact is capable of having an anti-competitive effect; and (iii) the dominant company has no objective justification for the difference in treatment.[18]

While this may make sense from a theoretical perspective (and underpins the Commission's willingness not to be tied to "categories" of abuse and focus more on whether conduct has anti-competitive effects), this three-step test provides little guidance to dominant platforms on the line between permitted conduct and prohibited conduct. This is exacerbated by recent comments from the Commission suggesting it should be subject to a lower standard of proof to demonstrate conduct in tech markets is anti-competitive.[19] This uncertainty may result in potentially dominant digital platforms taking an unduly conservative approach to their commercial conduct. This in turn risks stifling innovation, particularly in light of the recognized efficiencies and pro-consumer benefits that have been delivered by firms in the digital economy.

Seen also from the perspective of legal advisers to independent businesses who use digital platforms to compete in downstream or neighboring markets, the Commission's approach makes it very difficult to assess on the facts whether their client has a compelling complaint. Third party complaints to competition authorities need to be cogently argued and evidenced in order to stand any chance of gaining traction, let alone priority. A vague legal test risks deterring potential complainants from allocating the significant resources and time required to press their case with the authorities.

15 Paragraph 649 of the Google Shopping decision.

16 For example, Competition Law & Policy Debate, *Theories of self-preferencing and duty to deal – two sides of the same coin?*, Bo Vesterdorf, February 2015.

17 https://eulawlive.com/app/uploads/t_612_17_report_for_the_hearing_1581528569.pdf, paragraph 313.

18 https://globalcompetitionreview.com/article/1214512/eu-lays-out-test-for-abusive-self-preferencing.

19 Margrethe Vestager recently commented: "*if the bar for the requisite standard of proof with respect to anticompetitive conduct is set too high, it may result in under-enforcement to the detriment of consumers*" and that enforcers should strive to "*find the right balance between accuracy and administrability*" (American Bar Association Antitrust Virtual Spring Meeting, April 17 - May 1, 2020).

In light of the above, the challenge for competition authorities is to publish practical guidance that more clearly delineates what constitutes anti-competitive self-preferencing, similar to the approach used for other recognized "categories" of abuse (such as refusal to supply, margin squeeze, predatory pricing, and rebates).

From the perspective of practitioners, one can only hope that the General Court's judgment in *Google Shopping* and any decisions stemming from the Commission's ongoing investigations (such as *Amazon Marketplace*) will provide a coherent and clear framework for companies to assess self-preferencing behavior.

III. THE PUSH FOR REGULATION TO DEAL WITH SELF-PREFERENCING IN THE DIGITAL ECONOMY

There has been increasing pressure amongst regulators and policymakers to use *ex ante* regulation to tackle self-preferencing behavior. As noted by Professors Ennis and Fletcher, a number of expert reports (some of which were government-commissioned) "*give weight to the important 'gatekeeper' or 'bottleneck' role that can be held by digital platforms*."[20] This is used as part of the justification for some of these expert reports to recommend *ex ante* regulation to complement *ex post* antitrust enforcement for issues such as self-preferencing. For example:

- Report of the Digital Competition Expert Panel commissioned by the UK Government (the "DCEP Report"):[21] the DCEP Report recommends establishing "*a digital platform code of conduct, based on a set of core principles* [which] *would apply to conduct by digital platforms that have been designated as having a strategic market status*."[22] Some of the principles suggested for this code of conduct relate to self-preferencing, namely: (i) "*business users are provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis*"[23] – the DCEP Report considers that it would be inconsistent with this principle for a platform to give "*undue preferential prominence on its webpages to its own integrated services*";[24] and (ii) "*business users are provided with access to designated platforms on a fair, consistent and transparent basis*"[25] – the DCEP Report considers that a behavior that is inconsistent with this principle is "*an online marketplace* […] *excluding or suspending rival sellers from its platform to give its own product or service an advantage*."[26]

- Special Advisers' report to the European Commission (the "Special Advisers' Report"):[27] while the Special Advisers' Report does not go far as recommending *ex ante* regulation, it seeks to achieve a similar outcome through reversing the burden of proof for *ex post* antitrust enforcement. The Special Advisers' Report notes: "*In a market with particularly high barriers to entry and where the platform serves as an intermediation infrastructure of particular relevance, we propose that, to the extent that the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets. The dominant platform would then need to prove either the absence of adverse effects on competition or an overriding efficiency rationale*."[28]

Regulators and policymakers have, in turn, been discussing more fundamental changes to the legal framework applicable to the digital economy, including how to tackle self-preferencing behavior. For example:

- Inspired by the DCEP Report, in its Interim Report for its market study into online platforms and digital advertising, the UK Competition and Markets Authority (the "CMA") has proposed an enforceable Code of Conduct (potentially applying only to online platforms with "strategic market status") is set up to govern such platforms' relationships with advertisers, publishers, consumers and other third parties. The CMA has indicated that this Code of Conduct could cover self-preferencing behavior. For example, a principle being considered by the CMA

20 Sean F. Ennis & Amelia Fletcher, *Developing international perspectives of digital competition policy*, March 31, 2020.

21 Report of the Digital Competition Expert Panel (Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley and Philip Marsden), *Unlocking Digital Competition*, 2019.

22 Page 9 of the DCEP Report.

23 Box 2.A on page 61 of the DCEP Report.

24 Box 2.B on page 64 of the DCEP Report.

25 Box 2.A on page 61 of the DCEP Report

26 Paragraph 2.36 of the DCEP Report.

27 Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era*, 2019.

28 Page 66 of the Special Advisers' Report.

under a Code of Conduct is that "*platforms should not give particular prominence or preferential terms to their own services in terms of how they are presented to users on the core platform, or in terms of how they design the information provided to customers and users.*"[29]

- The German Federal Ministry for Economic Affairs and Energy has proposed an amendment to the Act against Restraints of Competition. The draft proposal provides that the Bundeskartellamt would be able to designate a firm as being an "*undertaking of paramount significance for competition across markets*" on the basis of specified criteria, namely its dominance on one or more markets, its financial strength or access to other resources, its vertical integration and its activities on related markets, its access to data and/or the importance of its activities for third parties' access to supply and sales markets. The Bundeskartellamt could then prohibit such an undertaking from engaging in a variety of specified activities, unless they can be objectively justified, with the burden of proof lying with the undertaking in question. Such specified activities include self-preferencing – i.e. "*treating the offers of competitors differently from its own offers when providing access to supply and sales markets.*"[30]

- Margrethe Vestager, Executive Vice-President for the European Commission's digital agenda and the Commissioner for Competition, has also suggested that *ex ante* regulation may be needed for "digital gatekeepers." Such regulation would set out clear-cut prohibitions and obligations on digital gatekeepers.[31] The Commission is consulting with stakeholders on what such regulation should look like – as part of this, it is engaging experts to conduct a study on concrete issues posed by digital gatekeepers and whether regulation is required to tackle such issues, with the terms of reference for this study showing that self-preferencing is a key issue being considered.[32]

However, there remain a number of unanswered questions for policymakers to consider before seeking to tackle self-preferencing through *ex ante* regulation.

First, is *ex ante* regulation actually needed to tackle self-preferencing behavior? In light of the innovative approach being taken by the Commission when investigating self-preferencing behavior through *ex post* competition enforcement (as set out above), it remains unclear why *ex ante* regulation is required and what additional type of conduct such regulation would seek to prevent.

Second, if the desire to impose regulation stems from the perceived need to ensure regulators can act quickly to resolve self-preferencing behavior in markets that are susceptible to "tipping" and enduring market power, this begs the question: which markets (and which companies within those markets) should be subject to such regulation? Common to most of the reports and policy proposals noted above is the concept that a regulatory prohibition on self-preferencing would not apply to all dominant companies, but instead to a subset of companies (some of which may not be dominant in a competition law sense) that hold some form of "strategic market status" or important "gateway" or "bottleneck" position. However, there remains considerable uncertainty around how regulators will determine in an evidenced, consistent, proportionate, and fair way which companies fall within such definitions.

For example, the DECP Report noted that: "*a key component of this system is to develop a clear legal test for the characteristics of a company's market position above which regulatory powers are appropriate – termed in this review a strategic market status. This needs to be carefully designed to identify where companies operating platforms are in a position to exercise potentially enduring market power, without granting an excessively broad scope and bringing within the bounds of regulation those companies who are effectively constrained by the competitive market.*"[33] As part of this, the DECP Report states: "*this should be along the lines of identifying digital markets where strategic market status may materialise due to characteristics including significant direct or indirect network effects, limited offsetting effects of multi-homing and differentiation, and significant sources of non-contestability.*"[34] Looking at social media, content and messaging platforms, for example, the CMA's Interim Report itself acknowledges extensive multi-homing by users, while market developments demonstrate ample evidence of the frequent entry and expansion of differentiated services (e.g. Snapchat, TikTok, Zoom, and Telegram). Given these factors, it remains unclear that any regulatory regime prohibiting self-preferencing should apply to platforms whose core business is providing social media, content and messaging services.

29 CMA's Interim Report in its online platforms and digital advertising market study, December 2019, Appendix I, pages I11 to I12.

30 For an unofficial English translation, see https://www.d-kart.de/wp-content/uploads/2020/02/GWB10-Engl-Translation-2020-02-21.pdf.

31 American Bar Association Antitrust Virtual Spring Meeting, April 17 - May 1, 2020.

32 https://globalcompetitionreview.com/article/1226098/vestager-eu-may-introduce-competition-rules-for-%E2%80%9Cdigital-gatekeepers%E2%80%9D.

33 Paragraph 2.116 of the DECP Report.

34 Paragraph 2.115(i) of the DECP Report. This is also recognized in a 2019 report by the Stigler Center (Scott Morton, Bouvier, Ezrachi, Jullien, Katz, Kimmelman, Melamed & Morgenstern, *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, Stigler Center for the Study of the Economy and the State, 2019): "*"bottleneck power" describes a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly*" (page 32).

Moreover, if the competition concern lies in tackling situations where a company is an important "gateway" to other businesses, this could be relevant to many different types of digital businesses (e.g. app stores, marketplaces, classifieds websites / apps, etc.), and even non-digital markets.

Third, who bears the burden of proof in relation to self-preferencing behavior? Many of the proposals noted above in effect imply a blanket ban on self-preferencing save to the extent that a dominant player can prove that any such conduct is objectively justified. Given the very limited circumstances in which competition authorities have accepted an objective justification defense in abuse of dominance investigations, this places a very high burden of proof on dominant platforms. Further consideration is needed as to whether this legal framework would fairly reflect the pro-competitive benefits and efficiencies that come from vertical integration, expansion into complementary business areas, and innovation by digital platforms.

There are no easy answers to these questions. And dominant firms undeniably have a "special responsibility" not to behave in an anti-competitive manner. But given the importance of these unanswered questions, further debate and consideration are needed to ensure policymakers do not adopt regulatory approaches that harm competition and innovation in the digital economy.

WHAT SHALL WE DO ABOUT SELF-PREFERENCING?

BY PEDRO CARO DE SOUSA[1]

1 OECD - Competition Division (Paris). The present note expresses the author's personal opinion. It does not reflect the position of the OECD, or any of its Members.

I. INTRODUCTION

It is normal for companies to promote their own products over those of their competitors, and, in many cases, this can lead to efficiencies. However, a dominant company giving preferential treatment to its own products or services in downstream or related markets (self-preferencing) can raise concerns. Despite its ingrained flexibility, competition law is limited to addressing behavior that proves anticompetitive in specific circumstances, and is unable to address many other concerns that self-preferencing may give rise to. Even when self-preferencing is anticompetitive, it is important to evaluate whether a regulatory reaction would be preferable, e.g. because it is faster, more effective and can foster legal certainty.

In recent times, self-preferencing by digital platforms has come to the fore. This note will address the question of how best to address self-preferencing in this sector.

The next section will look at the difficulties of determining when self-preferencing conduct is anticompetitive. Given that competition law is loath to impose a generic duty not to favor one's own products in the digital sphere, the main challenge concerns the identification of limiting principles that can provide guidance as to when self-preferencing is anticompetitive. The difficulties of such an exercise are apparent in the reactions to the *Google Shopping* decision (the "Decision") by the European Commission ("Commission").[2]

A second section will look at other avenues to address problematic self-preferencing conduct, by reviewing suggestions on how to deal with such practices contained in studies on competition law and the digital economy commissioned by competition authorities and governments. These studies display widespread unease with simply relying on competition enforcement to deal with self-preferencing, and offer a plethora of alternatives – some suggesting changes to the competition regime, others advancing openly regulatory options, many threading a middle path. The direction of travel seems to be towards paying increasing attention to self-preferencing in the digital realm, but with different mechanisms being adopted around the world.

II. THE LIMITS OF ANTICOMPETITIVE SELF-PREFERENCING

A. The Google Decision

It is uncontroversial under EU law that abuses can be committed in a market other than where the infringing company is dominant.[3] Acts whereby a company dominant in one market uses its market power to commit an abuse in another market typically fall under the wide umbrella of "leveraging" practices.

In *Google Shopping*, the Commission sanctioned Google for self-preferencing – i.e. granting more favorable positioning and display to Google's comparison shopping service in its general search results pages when compared to competing comparison-shopping services.[4] This led to decreased traffic for competing shopping services, while increasing traffic for Google's own service.[5] In the Commission's view, the importance of traffic volume for comparison shopping services,[6] and the fact that Google Search results accounted for a large proportion of their traffic and could not be effectively replaced by other sources,[7] meant that these effects were anticompetitive. This was particularly so because the conduct made it more difficult for competing comparison shopping services to reach a critical mass of users that would allow them to compete against Google, which therefore foreclosed competitors in the market for comparison shopping services.[8]

2 Case 39740 *Google Search (Shopping)*.

3 Case C-333/94 P, *Tetra Pak v. Commission*, EU:C:1996:436, paragraph 25; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, paragraph 85.

4 Andrea Amelio, Thomas Buettner, Cyril Hariton, Gábor Koltay, Penelope Papandropoulos, Geza Sapi, Tommaso Vallett & Hans Zenger "Recent Developments at DG Competition: 2017/2018," (2018) Review of Industrial Organization 1, p. 6; General Court, Report for the Hearing in Google Shopping, para. 59.

5 *Id.* para. 67.

6 *Id.* para. 66.

7 *Id.* para. 68.

8 *Id.* paras.641- 642; Andrea Amelio, Thomas Buettner, Cyril Hariton, Gábor Koltay, Penelope Papandropoulos, Geza Sapi, Tommaso Vallett & Hans Zenger "Recent Developments at DG Competition: 2017/2018," (2018) Review of Industrial Organization 1, p. 7.

The Decision also held that the Commission was under no duty to prove that anticompetitive effects occurred.[9] Instead, it sufficed to demonstrate that the conduct was merely capable of having, or likely to have, foreclosure effects,[10] regardless of its success in practice.[11] In other words, the Commission merely had to demonstrate that the conduct created a possibility that Google's competitors *might* cease to compete or would have *reduced incentives* to innovate.[12] This occurs not only where market access is made impossible for competitors, but also where the conduct of the dominant undertaking is capable of making that access more difficult, thus interfering with the structure of competition on the market.[13]

B. The Debate

Following the adoption of the Decision, a debate sprung up about the exact circumstances under which self-preferencing is anticompetitive. Some argued that, in practice, the Decision imposed a duty on digital platforms not to discriminate in favor of its own products. Others argued that the Decision was strictly limited to the facts, which in this case led to anticompetitive effects. In between these extremes, many authors elaborated theories of harm that sought to explain why Google's conduct might be abusive.

1. A General Duty not to Self-Favor?

The Decision has been criticized for opening the door to a quasi-regulatory duty not to favor one's own products. These criticisms build on claims that the Decision is based on "traditional theories of unlawful leveraging."[14] However, "leveraging abuse" is an umbrella term covering different types of unilateral practices that foreclose competition. The case law typically identifies specific features that distinguish the conduct at issue from competition on the merits, such as deteriorations in quality, margin squeezing, or a refusal to supply an indispensable input. Importantly, leveraging can produce a number of pro-competitive effects, flowing from efficiencies related to the one-monopoly-profit theorem, technological interdependence, protecting goodwill and reputation, or economies of joint production or sale.[15] Absent the identification of specific features that make the conduct anticompetitive, it becomes very hard to distinguish between lawful and unlawful conduct, particularly since self-preferencing is a normally accepted business practice.[16]

Focusing solely on whether the practice amounts to self-preferencing leveraging could put any dominant company on notice about the antitrust risks of adopting a commercial strategy favoring its own goods and services. It has been said that this does not fit well with traditional categories of exclusionary abuse, in particular because it would amount, in practice, to a general duty on dominant companies not to favor their own goods and services. However, competition law remedies must be proportionate to the harm and address the anticompetitive effects of the practice under analysis.[17] As such, the imposition of such a general duty, absent a finding that self-preferencing is always anticompetitive, is hard to square with competition law principles. Authors who read the Decision in this way often conclude that it is more akin to sectoral regulation than to a competition intervention.[18]

---

9 Andres Caro "Leveraging market power online: the Google Shopping case," (2019) Competition Law Journal 17(1) 49, p. 50.

10 Decision, para. 601, for the need to demonstrate anticompetitive foreclosure effects; and para. 606, where it is held that "*the Commission is not required to prove that the Conduct has the actual effect of decreasing traffic to competing comparison shopping services and increasing traffic to Google's comparison shopping service. Rather, it is sufficient for the Commission to demonstrate that the Conduct is capable of having, or likely to have, such effects.*"

11 Case T-321/05, *AstraZeneca*, EU:T:2010:266, paragraph 347, confirmed on appeal in Case C-457/10 P, *AstraZeneca v. Commission*, EU:C:2012:770, paragraphs 109 and 111. See also Case T-286/09, *Intel v. Commission*, EU:T:2014:547, paragraph 186 (and case law cited therein).

12 Decision, paras. 594-595.

13 Decision, para.339, referring to Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, paragraph 63; Case T-286/09 *Intel v. Commission*, EU:T:2014:547, paragraphs 88, 149 and 201.

14 Concurrences (2019, hors de serie) "The Google Shopping Decision," 155, p. 155. According to this paper, at p. 158, the Decision invokes leveraging at para. 649.

15 Louis Kaplow "Extension of Monopoly Power through Leverage," (1985) Colum. L. Rev. 85 515, p. 517-519.; Ward S. Bowman "Tying Arrangements and the Leverage Problem," (1957-1958) Yale L.J. 67 19, p. 24-29; Michael D. Whinston "Tying, Foreclosure, and Exclusion," (1990) Am. Econ. Rev. 80 837; Christian Ahlborn, David Evans, Jorge Padilla "The antitrust economics of tying: a farewell to per se illegality," (2004) Antitrust Bulletin; Spring (49) 287. See also the European Commission's Report on Competition Policy for the Digital Era, p. 6.

16 This concern is compounded by the fact that, as was acknowledged by the Commission's own economists, "*the Decision does not discuss directly Google's incentive to foreclose.*" See Andrea Amelio, Thomas Buettner, Cyril Hariton, Gábor Koltay, Penelope Papandropoulos, Geza Sapi, Tommaso Vallett and Hans Zenger "Recent Developments at DG Competition: 2017/2018," (2018) Review of Industrial Organization 1, p. 10.

17 Article 7(1) of Regulation 1/2003. The difficulty in identifying a competition remedy that would work in the context of the Decision has been remarked upon by many – see German Report "A new competition framework for the digital economy," p. 74.

18 See the literature mentioned in OECD (2018) *Implications of E-commerce for Competition Policy* DAF/COMP(2018)3, p. 38; and, more recently, Christian Bergqvist "Discrimination and Self-favoring in the Digital Economy," arguing that the case implements a rule akin to Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

2. A Pure Effects Analysis?

At the other extreme, the Decision has been defended as having correctly focused, as is often the case in unilateral conduct cases, on whether the individual (leveraging) practice foreclosed competition in this specific instance.[19] However, while such an argument may succeed at framing the Decision within a traditional competition framework, it does so at the cost of raising a number of conceptual and practical issues.

Conceptually, and since foreclosure does not require the absolute exclusion of all competitors from the market, such an approach gives rise to threshold questions regarding the point at which business practices become unlawful. When does a reduction in the competitors' ability to compete become serious enough to be anticompetitive? Does it suffice for conduct by a dominant company to make it harder for competitors to compete? Or must the conduct prevent competitors from competing effectively, or even excludes them from the market in practice?[20] These are important questions that underpin wider debates about how to identify anticompetitive unilateral practices, e.g. the need to deploy the as efficient test in Article 102 TFEU cases.

A related practical implication of this approach is that focusing solely on foreclosure equates with pursuing a pure effects approach. The problem with this – and the reason why pure effects approaches are actually quite rare in practice, despite the rhetoric surrounding them – is that it becomes extremely hard to derive decision rules from an analysis that merely focuses on whether a discrete practice had foreclosure effects in specific circumstances. Such an approach requires a pure in-depth effects test in every case. A logical inference of such a minimalist interpretation would be that, while the Decision confirms that self-preferencing can be anticompetitive in some cases, it does not attempt to provide guidance about when this might be the case – which is particularly striking given the widespread alarm about how common self-preferencing by digital companies has become. This interpretation of the Decision has even led some authors to go as far as to hold that the Decision did not reveal a legal theory of harm explaining under which circumstances self-preferencing is abusive.[21]

3. Just Another Theory of Harm?

In between these extremes, many authors proposed narrower theories of harm to frame the Decision – and identify its limiting principles. Some proposals were even adduced by interveners supporting the Decision before the General Court. For example, the German government argued that Google's practice was misleading, and thus did not amount to competition on the merits and artificially prevented competition based on the quality of the algorithm used to carry out specialized shopping searches.[22] Another intervener postulated that the problem with Google's conduct was that it had no economic rationale other than to foreclose competition on the secondary market.[23]

Many other explanations have been suggested in academic writings. A first set of theories of harm focuses on refusals to supply and the "essential facility" doctrine. In the past, the European Court of Justice has identified a narrow set of circumstances under which the essential facility doctrine may be applicable, namely when the refusal to grant access to a facility or input is likely to prevent any competition in a downstream market, access is indispensable, and access is denied without any objective justification.[24] Applied in the context of online search, this would require proof that: (a) achieving certain ranking results is objectively necessary in order for businesses to compete effectively; (b) Google's strategy of favoring its own services through visual prominence was likely to eliminate effective competition in a downstream search market; (c) the refusal to treat all results without discriminating between them led to consumer harm.[25] These suggestions have been criticized on the grounds that the Decision's reasoning does not rely on these doctrines, and the Commission has repeatedly argued that this was not the theory of harm underpinning the Decision.[26]

19 Andrea Amelio, Thomas Buettner, Cyril Hariton, Gábor Koltay, Penelope Papandropoulos, Geza Sapi, Tommaso Vallett & Hans Zenger "Recent Developments at DG Competition: 2017/2018," (2018) Review of Industrial Organization 1, p. 9, 12.

20 I believe that Niamh Dunne "Dispensing with Indispensability," (2020) Journal of Competition Law & Economics 16(1) 74, p. 100, raises a similar point as regards the Decision in terms of uncertainty regarding the nature of the advantages required for the conduct to be anticompetitive.

21 Edward Iacobucci & Francesco Ducci "The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-Sided Markets," (2018) European Journal of Law and Economics 47 15, p. 18. At p, 19, the authors note that "*In contrast, the Commission has made explicit a theory of harm based on tying between Android devices and Google search and Chrome browser in the Android decision.*"

22 General Court, Report for the Hearing, para. 323-324.

23 *Id.* para. 326.

24 Case C-7/97 *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, ECLI:EU:C:1998:569, para 41. Bo Vesterdorf, "Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin," (2015) Competition Law & Policy Debate 1(1) 4, argued that this was the only circumstance under which self-preferencing could infringe Art 102 TFEU.

25 Robert Bork, George Sidak "What does the Chicago school teach about internet search and the antitrust treatment of Google?" (2012) Journal of Competition Law and Economics 4 663; M. Lao, "Search, essential facilities and the antitrust duty to deal," (2013) Northwestern Journal of Technology and Intellectual Property 11 275.

26 Decision, para. 651; General Court, Report for the Hearing, paras. 300, 303.

Another suggestion is that the Decision adopts an *ad hoc* theory of harm concerning constructive refusal to feature rival services in Google's search engine. This would be akin to a *Commercial Solvents*-type refusal to continue a course of dealing, which does not require that the facility be indispensable.[27] This latter suggestion links to a second type of proposed theories of harm: unlawful discrimination.

A number of authors have argued that the Decision pursues a theory of discriminatory leveraging. Some argue that it is unlawful for an essential digital infrastructure to "leverage" its dominance into an adjacent segment by discriminating in favor of its own subsidiary products against other trading partners.[28] Others suggest that the Decision reflects a replacement of the indispensability requirement for a heightened, and platform-specific, "special responsibility" not to discriminate in favor of its own products. This platform-specific duty is linked not only to the undertaking's position as a dominant undertaking, but also to its "gatekeeper" role within the wider digital ecosystem.[29]

Other discrimination-based analyses move away from essentiality, refusal to supply and their analogues, and focus squarely on the Treaty's prohibition on applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[30] This prohibition has been predominantly applied in settings where vertically-integrated dominant firms seek to advantage their downstream operations at the expense of rivals. Several cases display a clear theory of abusive self-preferencing – even if thus far they were restricted to incumbents in liberalized sectors.[31] There are also cases that could be said to identify discriminatory self-favoring with anticompetitive effects – even if those cases mostly rely on traditional bases for identifying exclusionary conduct, such as the existence of abusive exclusivity arrangements.[32]

Approaches to self-preferencing based on discrimination have also attracted their share of concern. Attempting to evaluate discrimination in the results of a search page is said to be inherently fraught, given that a search algorithm is by definition a means to discriminate, rank and pick winners based on some selected metrics. Applying a purely discrimination-based approach to search pages has also been said to be akin to granting a very wide discretion to competition authorities in regulating self-preferencing in the digital realm.[33] Such an approach raises concerns similar to those flowing from the creation of a general duty not to engage in self-preferencing by competition agency fiat, so it is unsurprising that some authors who interpreted the decision as adopting a discrimination-based theory of harm have also concluded that it implements a quasi-regulatory approach to self-preferencing discrimination by digital platforms.[34]

A third approach sees the Decision as a variation on more traditional exclusionary abuses such as margin squeeze or tying, which do not require the dominant undertaking to be an essential facility. Under margin squeeze, for example, the low ranking and consequent lack of attention given to a website may foreclose its access to consumers, increase its advertising costs and generally inflate its costs and prices, thereby reducing the competitive pressure on the platform's own product or service. It has been suggested that the test under such a theory of harm should be whether a dominant platform could offer its own product and effectively compete for end-users if it had to pay the price that it charges as-efficient-rivals for prominence.[35] As regards tying, it has been argued that Google is able to induce selection of its tied good (i.e. shopping services) merely by granting it visual prominence in its general search pages. If the effect of inducement is similar to coercion in such circumstances, and inducement can occur via the exploitation of *status quo* biases, Google's conduct can be said to amount to tying leading to the foreclosure of national markets for comparison shopping services (and also for the general search market). This, in turn, has consequences

27 Pablo Ibáñez Colomo "Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping," (2019) Journal of European Competition Law & Practice, 10(9) 532, p. 541, 548. In short, the author argues that refusal to supply cases such as *Oscar Bronner* merely involve a "passive refusal" to deal with a rival. Google Shopping is instead more like cases of active termination of a course of dealing, such as *Commercial Solvents* and *CBEM-Télémarketing*.

28 OECD (2018) *Implications of E-commerce for Competition Policy* DAF/COMP(2018)3, p. 37.

29 Niamh Dunne "Dispensing with Indispensability," (2020) Journal of Competition Law & Economics 16(1) 74, 99-102.

30 Apparently adopting this approach, see Thomas Hoppner, Felicitas Schaper, and Philipp Westerhoff "Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs," (2018) Journal of European Competition Law & Practice 9(10) 627, p. 629-630, 638.

31 See Nicolas Petit "Theories of Self-Preferencing under Article 102 TFEU: A Reply To Bo Vesterdorf," p. 3-4 – listing Case T-229/94 *Deutsche Bahn AG v. Commission* ECR [1997] II-1689; Case C-242/95 *GT-Link A/S and De Danske Statsbaner (DSB)* ECR [1997] ECRI–4449; Commission Decision COMP/39.388 *German Wholesale Electricity Market* (E.ON).

32 E.g. Case T-65/98 *Van den Bergh Foods Ltd v. Commission* [2003] ECR II-465. See Christian Bergqvist "Discrimination and Self-favoring in the Digital Economy," and Nicolas Petit "Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf," p. 7.

33 Edward Iacobucci & Francesco Ducci "The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-Sided Markets," (2018) European Journal of Law and Economics 47 15, p. 20-21.

34 See footnote 18 above.

35 Friso Bostoen "Online platforms and vertical integration: the return of margin squeeze?" (2018) Journal of Antitrust Enforcement 6 355, p. 374; OECD (2020) Line of Business Restrictions DAF/COMP/WP2(2020)1.

such as a reduction of innovation, lower quality of search and reduced consumer access to relevant service.[36]

A variant of this approach suggests that Google's self-preferencing amounts to unlawful platform envelopment. Under this novel exclusionary theory of harm, anticompetitive behavior can occur when the digital platform enters another platform market and combines its own functionality with those of companies in that market. The digital platform therefore creates a multi-platform bundle that leverages shared user relationships and/or common components. This can be anticompetitive in certain circumstances, including self-preferencing,[37] particularly when a platform that is dominant in one market distorts the terms of trade in the target market by bending its rules in the origin market in favor of its own products or services in the target market. The main potential anticompetitive effects of such practices relate to market foreclosure of as-efficient companies operating only in the target market as a result of the anticompetitive leveraging of market power in the origin market.[38]

A common element to all these proposals is that they try to determine a set of circumstances in which self-preferencing will be unlawful under competition law. The sheer number of proposals indicates that there are many ways in which self-preferencing may prove to be anticompetitive. However, this raises a number of questions. First, are we only concerned with anticompetitive self-preferencing? If we are worried about other types of self-preferencing, how should we deal with them? Relatedly, given how widespread are concerns about digital self-preferencing, do we believe that antitrust enforcement is the best option to address such practices even when they are anticompetitive, or are there more effective intervention mechanisms that we should deploy?

III. NORMATIVE PROPOSALS IN AGENCY STUDIES INTO COMPETITION LAW IN THE DIGITAL AGE

The competition community has seen a flurry of studies on the digital economy, many published or commissioned by competition authorities themselves. A number of these studies discuss how best to address self-preferencing, and proposed solutions along a continuum from facilitating competition enforcement to adopting a purely regulatory approach. These solutions, most of which require legal changes, can be usefully categorized into three broad types.[39]

A. Making Competition Enforcement Easier

The most prominent example of a report suggesting the use of competition enforcement to address self-preferencing is the EU Experts Report, which proposes two main changes to make such – and other – competition enforcement more effective. First, within the existing framework, competition enforcement should recognize market power accruing to digital platforms that are "unavoidable trading partners" (also called "intermediation power").[40] The other change would be to reform the error-cost framework governing competition enforcement by making changes to the burden and standard of proof in the context of highly concentrated markets characterized by strong network effects and high barriers to entry. In particular, the Report suggests placing the burden of proof for showing pro-competitiveness on the incumbent in such circumstances.[41] This has implications for enforcement against self-preferencing in the digital sphere. Competition law does not impose a general prohibition of self-preferencing on dominant firms. Self-preferencing must generally be shown to be anticompetitive under an effects test. However, the Report's proposal mean that dominant digital platforms in markets with particularly high barriers to entry which serve as an intermediation infrastructure of particular relevance would bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets.[42]

Suggestions along these lines have been made elsewhere. The French competition authority has also expressed a preference for competition enforcement to deal with self-preferencing, while suggesting the adoption of measures that would make enforcement more effective in

36 Edward Iacobucci & Francesco Ducci "The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-Sided Markets," (2018) European Journal of Law and Economics 47 15. More generically, see Nicolas Petit "Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf," p. 5-7.

37 Other types of platform envelopment include bundling and virtual bundling.

38 Daniele Condorelli and Jorge Padilla on "Harnessing Platform Envelopment through Privacy Policy Tying"; OECD (2020) Conglomerate Effects in Mergers DAF/COMP(2020)2.

39 Some reports did not address the issue, or merely noted that self-preferencing can amount to an abusive practice: see Autoridade da Concorrência "Digital ecosystems, Big Data and Algorithms," p. 69-70.

40 European Commission's Report on Competition Policy for the Digital Era, p. 49.

41 *Id.* p. 51.

42 *Id.* p. 61.

the digital sphere. Among the possibilities it listed to this end, the *Autorité* suggested that the essential facilities doctrine could be extended to markets where there are gatekeepers / where interoperability is important.[43] The *Autorité* also suggested that competition authorities could be empowered to act specifically against "structuring" platforms, even when they are not dominant, particularly as regards certain "problematic" conduct, such as discriminating between services provided in the platform. A presumption of harm could also apply to such conduct.[44] The BRICS report also suggested utilizing the principle of special responsibility for platforms to preserve competition by creating a level playing field for downstream and connected markets.[45] It also suggests that many conducts, including failing to display similar business users on equal term in search results or on product/services comparison sites, could amount to *per se* abuses in certain circumstances.[46]

B. Quasi-Regulatory Competition Rules

This last report shows how small is the step from reversing the burden of proof to adopting quasi-regulatory provisions against self-preferencing. This is also apparent in a number of studies about how to adapt competition law to the digital age.

The Japanese Digital Platforms Reports suggests looking into whether competition law needs to be updated to reflect the fact that digital platforms are essential facilities to whom special duties should attach. Furthermore, the JFTC suggested that it would need to take a close look at a number of potentially problematic practices, including whether digital platform operators give themselves or their related companies preferential treatment by, for example, manipulating search algorithms. This last practice may be unlawful either as an exclusionary practice or as an unlawful interference in a competitor's transactions.[47]

In Germany, an expert report proposed taking into account intermediary power when assessing relative dominance, and extending existing protections for small and medium enterprises ("SMEs") against exclusionary practices by companies with significant market power to all companies.[48] Another report suggested imposing some clear-cut prohibitions on dominant online platforms. This could be achieved through an EU Platform Regulation that both fleshes out and supplements competition law.[49] This Regulation would apply to dominant online platforms with certain minimum revenues or users, and would specify rules of conduct inspired by competition law – including a prohibition on these platforms to favor their own services when compared to third-party providers, unless such preferencing is objectively justified.[50] Draft amendments to Germany's competition law similarly suggest empowering the Bundeskartellamt to prohibit undertakings with paramount significance for competition across markets (i.e. digital platforms) from treating competitors differently from their own services without objective justification.[51]

In the UK, the House of Lords Select Committee recommended imposing special obligations on online communications platforms that act as gatekeepers for the internet, to ensure that they act fairly.[52] The Furman Report, prepared at the request of the Government, suggested subjecting companies with strategic market statuses[53] to a code of competitive conduct. Such a code would regulate, for example, instances of platforms giving preferential treatment to their own upstream or downstream products and services, e.g. by means of a search function that gives their own services an unfair advantage over its rivals in downstream markets through the ranking or presentation of results. The code would require platform users to be provided with prominence, rankings and reviews on a fair, consistent, and transparent basis.[54] The Furman Report further recommended the creation of a digital markets unit with an ongoing monitoring role and the power to enforce legally binding decisions

43 Contribution de l'Autorité de la concurrence au débat sur la politique de concurrence et les enjeux numériques, p. 5.

44 *Id.* p. 7-9.

45 Digital Era Competition: A BRICs Review, p. 43, 548-549.

46 *Id.* p. 624-625.

47 Japan Fair Trade Commission "Digital Platforms Report," Chapter 2.

48 Report on Modernising the law on abuse of market power (English Summary), paras. 3-4, 6.

49 Report "A new competition framework for the digital economy," p. 49.

50 *Id.* p. 50-51.

51 Article 19A (2) of Germany's Ministry of Economics draft for the 10th amendment to the German competition act.

52 House of Lords "Regulating in a digital world," para. 171.

53 I.e. companies with enduring market power over strategic bottleneck markets.

54 Report of the Digital Competition Expert Panel "Unlocking Digital Competition," p. 55-62.

and penalties for contraventions of the code[55] – something that was accepted in principle by the Competition and Markets Authority ("CMA").[56]

The UK Government has now set up a digital markets taskforce, housed in the CMA and headed by a senior CMA official, with the goal of advising the government on the practical application of measures set out in the Furman Report. This includes devising a potential methodology to designate digital platforms with "Strategic Market Status," and advising on the form that a code of conduct to promote competition could take.[57]

The competition authorities of Belgium, Luxembourg and the Netherlands have suggested allowing competition authorities to impose non-punitive behavioral remedies against dominant digital platforms *ex-ante*, such as requiring the adoption of non-discriminatory rankings. These remedies would not be imposed solely in reaction to competition violations, even if they should follow and be closely inspired by competition law.[58]

C. Regulation

Many of the proposals above are clearly influenced by regulatory considerations, and reflect existing regulatory instruments that set out non-discrimination principles in areas touching the digital realm.[59] However, these Reports shy away from openly calling for regulation or the creation of a specialized regulatory body. Instead, they suggest that these rules are natural extensions of competition law and that competition authorities can take over these competences. Occasionally, they also touch on the possibility of creating a specialized body in the future.

The main exception to this is the U.S. The Stigler Report not only recommended imposing special regulation on bottleneck digital companies, but also called for the setting up of a special regulator which would be responsible, *inter alia*, for imposing non-discrimination requirements and interoperability requirements on those companies.[60] Similarly, the U.S. Congressional Research Service Report suggested the adoption of sectoral regulation prohibiting self-preferencing by digital platforms, or even prohibiting digital monopolists from entering adjacent markets.[61]

IV. CONCLUSIONS

Self-preferencing raises significant concerns in the digital sphere, particularly when pursued by large digital platforms. This note mapped out the ongoing debate about how best to address these concerns.

It is submitted that the analysis above revealed two main difficulties that these efforts face. First, given its potential for pro-competitive effects, it is challenging to identify the exact circumstances in which self-preferencing is anticompetitive. In addition, a number of the concerns raised by self-preferencing may not relate solely to their potential anticompetitive effects.

Second, it is still unclear how best to address problematic self-preferencing practices – even those that are anticompetitive. The studies discussed above make suggestions that go from merely trying to ensure that competition law is enforced in a timely manner, to prohibiting all self-preferencing by certain companies. A related question concerns which agency should enforce the rules that might be adopted as regards self-preferencing. These different suggestions reflect local traditions and concerns about the effectiveness of enforcement given local institutional constraints. It is also possible, and perhaps likely, that they reflect diversity in local objectives when dealing with digital self-preferencing which may go beyond the difference in goals of competition regimes around the world.[62] This, however, is a matter for a different paper.

---

55 *Id.* p. 62-63.

56 CMA's Digital Markets Strategy, p. 11.

57https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference--3.

58 Joint Memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital work, p. 5-6.

59 In Europe, this includes Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access, [2015] OJ L310/1 (Net Neutrality); the European Electronic Communications Code (EU) 2018/1972; and 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 OJ L 186.

60 Final Report of Stigler Committee on Digital Platforms, p. 32-33.

61 U.S. Congressional Research Service "Antitrust and Big Tech," p. 35-36.

62 ICN (2007), Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies; OECD "Public Interest Considerations in Merger Control," DAF/COMP/WP3(2016)3.

SELF-PREFERENCING – SOME OBSERVATIONS ON THE PUSH FOR LEGISLATION AT THE NATIONAL LEVEL IN GERMANY

BY SILKE HEINZ[1]

1 The author is a partner at law firm Heinz & Zagrosek mbB in Cologne, Germany. For transparency reasons, the author discloses that she has represented a complainant against Amazon in the German Amazon proceedings. The views expressed are her own.

I. INTRODUCTION

Self-preferencing is a prominent topic in the area of abuse of dominance in the digital economy. It typically means a (vertically integrated) dominant platform giving its own products and services preferential treatment over those of its rivals on the platform. The European Commission first applied this theory of harm in *Google Search*, finding that Google positioned and displayed more favourably, in its general search results pages, its own comparison shopping service compared to competing comparison shopping services.[2] The concept has also featured in other proceedings, notably in the ongoing Amazon proceedings at Commission level[3] and to some extent in the Amazon proceedings in Germany.[4]

Google Search has triggered a controversial debate in the competition community on how, whether, and when it should be considered abusive.[5] The debate is not over yet: After almost seven years of proceedings the Commission issued the decision in 2017. Google's appeal with the European Court is still pending. The oral arguments took place in February 2020, and there should be a ruling this year. However, the saga will presumably continue to the Court of Justice.

The reality of competition policy has overtaken this debate: various expert reports on competition policy and the digital economy published in 2018/019 have identified self-preferencing as a serious competition issue in the digital economy, notably in digital ecosystems, i.e. when operated by so-called digital gatekeepers. The reports view self-preferencing in certain scenarios as a possible abuse of dominance under Art. 10 2 TFEU[6] or clearly identify self-preferencing as a competition issue to be tackled[7]. They call for changes, either under the existing rules or by changing abuse of dominance rules or through a new regulatory regime (see below). In the meantime, Germany has published a draft legislative proposal on national competition law, including specific rules on self-preferencing (see below).

This article looks at the possible deficiencies in current antitrust enforcement identified in the reports that triggered legislative action, before presenting and analyzing the draft legislation in Germany, notably asking whether it will render antitrust enforcement against abusive self-preferencing more effective.

2 European Commission, decision of June 27, 2017, Case AT.39740.

3 Regarding the selection of the winners of the Amazon "Buy Box" and the impact of Amazon's potential use of competitively sensitive data collected from competing marketplace sellers for that, see Commission press release of July 17, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

4 In the context of platform rules for user reviews of sellers and products, see Federal Cartel Office case B2–88/18, case summary of July 17, 2019, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/17_07_2019_Case_Summary_Amazon.html.

5 Se e.g. Bo Vesterdorf, Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin, 1(1) Competition Law & Policy Debate, 4 (2015); Nicolas Petit, Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vestedorf, 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253; Pinar Akman, The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law, Journal of Law, Technology and Policy, 2017, 301; Thomas Höppner, Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse, 1 CoRe (2017) (3), 208; Inge Graef, Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence, Yearbook of European Law, (38) 2019, 448.

6 See expert report for the European Commission by Crémer/de Montjoye/Schweitzer, Competition policy for the digital era, April 4, 2019 ("EU expert report"), p. 7; and report for the German Ministry for Economic Affairs and Energy by Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, August 28, 2018 ("German report on modernization of abuse control") p. 102/103, in particular combined with the exploitation of information asymmetries.

7 See Furman/Coyle/Fletcher/McAuley/Marsden, Unlocking digital competition, Report of the Digital Competition Expert Panel, March 13, 2019 ("Furman report") p. 58, 60; ACCCC, Digital Platforms Inquiry, final report, June 2019, p. 12; report of Kommission Wettbewerbsrecht 4.0 for the German Ministry of Economic Affairs and Energy on the development of EU competition law, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, September 9, 2019 ("German report competition law 4.0"), p. 53.

II. DEFICINCIES IN CURRENT ANTITRUST ENFORCEMENT?

The expert reports show that the initial experience with cases in complex digital platform markets left the impression that traditional antitrust enforcement might not be effective in the digital economy, in which network effects, huge returns to scale and big data lead to sometimes irreversible results.[8]

It should be noted that enforcement difficulties in the digital economy did not only occur at EU, but also at national level: for example, in Germany, the Düsseldorf Court of Appeals still found in 2015 that a platform side without any financial remuneration relation between platform and user could not be viewed as a market in terms of competition law. This ruled out treating a zero-price platform side as a separate market, including finding a dominant position therein.[9] The situation only changed through legislation that entered into force in June 2017.[10]

This illustrates the initial learning curve for cases in multi-sided digital platform markets. Indeed, the Commission has become faster. It rendered a decision in *Google Android* after approximately three years, and in *Google AdSense* after less than three years.[11] The FCO took approximately three years to terminate the Facebook proceedings,[12] and appeal proceedings (interim relief) are still pending.[13] The FCO's closed proceedings against Amazon in record time after approximately eight months in 2019 – but the proceedings ended without a formal decision or formal commitments.[14] The Commission Amazon case will be an important test on how efficient proceedings in a case involving self-preferencing can be under the current regime.

Notwithstanding this evolution, the expert reports still saw deficiencies and mostly pleaded for change, pointing out a variety of reasons. The EU expert report generally found the existing rules under Article 102 TFEU to be sufficiently flexible to deal with cases in the digital economy and argued for adapting the rules in practice (evolutionary approach). On self-preferencing, the report identified the current effects-based test as applied in practice as main obstacle to effective enforcement and suggested reversing the burden of proof in certain situations: i.e. for vertically integrated digital platforms in markets with high barriers to entry, where the platform serves as an intermediation structure of particular relevance and performs a regulatory function. In these cases, the platforms should bear the burden of proof that self-preferencing "has no long-run exclusionary effects on product markets."[15] The report also explicitly mentioned the challenges for adequate remedies in self-preferencing cases and floated the idea of restorative remedies.

The German report competition law 4.0 suggested going beyond the existing dominance rules and introducing a new EU platform regulation. It found that the questions around the theory of harm in *Google Search* were still unresolved and viewed the case law evolution as too lengthy. Moreover, the report did not consider a solution as feasible whereby the Commission simply changed the application of Article 102 TFEU without legislation.[16] The report suggested the regulation should include a general prohibition for dominant digital platform companies to engage in self-preferencing of its own services compared to those of third parties.

The earlier German report on modernization of abuse control had noted that the existing (national and EU) abuse of dominance rules are designed for case-by-case enforcement and thus less suited for intervention against infringements that occur frequently and at a broader scale, due to the applicable high burden of proof, but stopped short of suggesting legislative change at national level.[17]

8 See for example German report competition law 4.0, p. 50.

9 As a result, when the Federal Cartel Office ("FCO") reviewed a complaint by German publishers against Google, it could not conclude that there was a general search engine market, see FCO decision of September 8, 2015, B6–126/14, *Google/VG Media*. The FCO had to revert to the online advertising market instead. *Google Search* could thus not have been brought in Germany.

10 New Section 18 (2a) Act Against Restraints of Competition.

11 Commission decision of July 18, 2018, Case AT 40099 – Google Android. The Commission issued the decision in Google Adsense on March 20, 2019, see Commission press release https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770. Even though these cases do not strictly concern self-preferencing as a theory of harm but more traditional approaches like tying and exclusivity agreements.

12 FCO, decision of February 6, 2019, B6–22/16.

13 The FCO lost in interim relief proceedings (against its decision ordering Facebook terminating the infringement) in 2019, and the Federal Court is supposed to hear that case (still interim relief) in June 2020.

14 See *supra* note 3.

15 See p.7.

16 Publishing new guidance would not bind the courts, and just having one case as a basis for new guidance might not be sufficient, see p. 54.

17 It pondered the possibility of introducing a regulatory example in the national abuse of dominance rules on self-preferencing (in the context of abuse of information asymmetries by digital platforms) for clarification purposes, but ultimately left the question open, see p. 111.

The Furman Report went further and saw the need for a regulatory approach at national level:

> […] antitrust enforcement, […], moves too slowly and, intentionally, resolves only issues narrowly focused on a specific case. In digital markets this has not established clear and generalisable rules and principles to give businesses certainty about the boundaries of acceptable competitive conduct.

The Furman Report suggested developing a new regime, i.e. a code of conduct applicable only to companies with "strategic market status," providing these with clear general guidance for admissible conduct. In a first step, these companies would be identified as addressees of the code of conduct. In a second step, infringements of the principles of the code of conduct could be pursued.[18] The report proposed that the code consider specific forms of self-preferencing unfair: an online marketplace excluding or suspending rival sellers from its platform to give its own product or service an advantage, or a platform that contains a search function giving an unfair advantage to its own services over its rivals in downstream markets through the ranking or presentation of results.[19]

Interestingly, none of these reports explicitly mentioned a possible lack of specialized resources at the authority level (national or EU)[20] – even though that is what practitioners often point out as another important aspect of lengthy proceedings. In addition, *Google Search* showed how difficult it may be in practice for a competition authority to effectively bring an infringement to an end and to impose a functioning remedy. Two years following the prohibition decision and the order for Google to provide equal treatment to rival comparison shopping services the Commission is still monitoring the implementation.[21] In its Amazon proceedings, the FCO has also experienced some difficulties in the context of the (soft) commitments' implementation and how complex the monitoring of this process can be.

III. PROPOSED LEGISLATION IN GERMANY

Following the various reports, Germany was first to pursue legislative changes. The Ministry for Economic Affairs and Energy published the official draft legislation to change German national competition law on January 24, 2020.[22] The amendment is part of a general amendment of the Act Against Restraints of Competition ("ARC"), but includes new rules on abuse control with a view to digital markets.[23]

A. Status Quo on Self-Preferencing Under National Abuse of Dominance Rules

The concept of self-preferencing is currently not explicitly mentioned in German competition law. The prohibition to abuse dominance (Section 19 ARC) inter alia prohibits a dominant undertaking to directly or indirectly impeding another undertaking in an unfair manner (unfair impediment) or directly or indirectly treating another undertaking differently from other undertakings without any objective justification (discrimination).

There are no final precedents on self-preferencing under German competition law yet. While it seems that self-preferencing could not qualify as a (pure) discrimination case,[24] it may qualify as an unfair impediment.[25] Indeed, the German report on modernization of abuse control expressed the view that a dominant vertically integrated platform's self-preferencing in connection with information asymmetries and exclusion-

18 Annex D, Strategic recommendations A and C.

19 P. 60/61.

20 The Furman Report suggested to create a new digital market unit in order to enforce the new rules, which may be an indirect acknowledgement that the current resources at the level of the CMA would not be sufficient. Of course, this may also be influenced by Brexit and the general need to increase resources in this context.

21 See E-003869/2019, Answer given by Executive Vice-President Vestager (EP Parliamentary Question), February 10, 2020.

22 https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?__blob=publicationFile&v=10.

23 See also Thomas Weck, The New Abuse Rules in the German Competition Act – What's in it for the EU?, CPI column, April 14, 2020, https://www.competitionpolicyinternational.com/the-new-abuse-rules-in-the-german-competition-act-whats-in-it-for-the-eu/.

24 The notion of "different treatment" requires that the relevant comparison covers similar undertakings. However, pursuant to precedents there is no similarity if the comparison involves another undertaking on one side and a group company/affiliate on the other. Thus, merely treating group companies at downstream level advantageously compared to third parties (self-preferencing) is not considered as a discrimination under German law, see Markert in Immenga/Mestmäcker, Wettbewerbsrecht GWB, 5. Auflage 2014, § 19 Rn. 121, German report on modernization of abuse control, p. 99, with further references.

25 Impediment is broadly defined as any conduct that objectively impairs a third party's opportunities to compete. This requires an actual and not only potential adverse effect, but in practice the bar has typically not been overly high, see Bechtold/Bosch, GWB, Kommentar, 9. Auflage 2018, § 18, Rn. 8. The focus of the review in practice is often the required balancing of interests, in order to determine whether the impediment is indeed unfair.

ary effects on rivals on downstream markets can amount to an unfair impediment under existing rules.[26] In addition, the Federal Cartel Office ("FCO") took issue with Amazon's platform rules on externally generated product reviews, i.e. that Amazon prohibited their posting or removed these from the marketplace, unless they were generated by Amazon's own external review program, but the FCO terminated proceedings without a final decision.[27]

B. The Draft Proposal on Self-Preferencing

Draft Section 19a ARC contains special rules on abusive conduct for undertakings that are active in multi-sided markets and networks and that have a "paramount cross-market significance" ("pcms") for competition.

1. The Draft Legal Provision

The provision follows a two-step approach: the FCO first needs to issue a decision finding that a specific undertaking has a pcms for competition. The criteria include: a dominant position in one or more markets; financial strength or access to other resources; vertical integration and activities in other related markets; access to competitively relevant data; the significance of its activities for the access of third parties to procurement and sales markets, as well as the influence caused by this on the business activities of third parties (draft Section 19a (1)). The criteria are not cumulative.

In a second step, the FCO can prohibit specific conduct for the undertaking identified as having a pcms for competition. The specific conduct is listed in five regulatory examples (draft Section 19a (2) no.1-5), which are exhaustive. The first regulatory example provides that it is prohibited for undertakings with a pcms for competition "when acting as an intermediary for access to procurement and sales markets, to treat the offers of competitors differently compared to its own offers."[28] The prohibition decision can be combined with the first step in a single decision.

Section 19a (2) stipulates at the end that there is an exception if the conduct in question is objectively justified. The burden of proof for the justification is with the undertaking concerned. In addition, the rules on interim measures are applicable.[29]

2. The Draft Proposal's Explanatory Statement

The explanatory statement provides additional input.[30] It confirms that the list of pcms criteria is not exhaustive, and they do not need to be met cumulatively. The finding of pcms rather requires an overall assessment of all relevant aspects in a case.

On process: the statement explains the decision on a pcms is within the FCO's discretion and would likely need to be limited in time. The statement considers a period of five to ten years as appropriate, because the duration should enable effective intervention against the undertakings concerned, possibly even in several proceedings pursuant to draft Section 19a (2), and undertakings with a pcms would likely have a very strong and permanent position.

The statement clarifies that draft Section 19a (2) no.1 indeed targets self-preferencing (even though the term is not mentioned) as a prohibited discrimination. The explanations refer to *Google Search* for the competitive harm self-preferencing can cause in digital markets (market foreclosure and restrictions for rivals to develop and market innovative offers based on competition on the merits). There is an assumption that self-preferencing by undertakings with a pcms, that are integrated in vertical or conglomerate markets, may add to further strengthening or expanding their cross-market power.

---

26 P. 111.

27 The FCO was concerned that because Amazon's own review program was only available for Amazon retail, this would put independent sellers at a disadvantage through rerouting the supply flow towards Amazon's own retail activities. Amazon justified the conduct with consumer protection concerns (fake reviews). Amazon undertook to gradually open its own review program also for certain sellers, see FCO case summary, supra note 3.

28 Roughly, the other examples prohibit to impede competition in markets where it is not yet dominant; use data for making market entry more difficult; demand terms and conditions that allow the use of data of others; make portability of data more difficult; withhold information from other companies about their success in markets, see for the summary and overall analysis Podszun/Brauckmann, Germany's Pressing Ahead: The Proposal for a Reformed Competition Act, CPI column of November 6, 2019, https://www.competitionpolicyinternational.com/germanys-pressing-ahead-the-proposal-for-a-reformed-competition-act/.

29 The draft legislation also proposed to lower the conditions for imposing interim measures.

30 P. 78 of the draft proposal. It is rather short on self-preferencing, with just one paragraph.

The high potential for competitive harm is also one of the reasons given for the reversal of the burden of proof. The explanations clarify that this seems to go beyond having to merely prove an objective justification: in essence the new rules set out the assumption that the conduct in question is abusive and prohibited – and while the addressees can rebut the assumption by demonstrating an objective justification, any *non liquet* will be to their detriment.[31]

In the second step, i.e. after finding a pcms for competition, the FCO cannot only prohibit specific conduct, but also order the addressee to terminate the infringement (including restorative measures) or accept remedies.[32] These are administrative proceedings, i.e. they cannot lead to a fine. The FCO can only impose a fine if the addressee were to violate the FCO's second-step decision (see draft Section 81 (2) no. 2 lit. a ARC).

C. Analysis and Comments

The following reviews first how the draft proposal combines suggestions from the various reports, before commenting on the provision's design and the question whether it will render enforcement more effective.

1. Combination of Different Concepts

The proposed rules follow a patchwork approach – they are a combination of the concepts suggested in the various reports. The proposal combines competition law with special regulation, creating a hybrid set-up with elements of both an *ex ante* regulatory approach and of case-by-case enforcement. It is clear, though, that the FCO will be competent to enforce the new rules as part of its competition law powers.

Draft Section 19a does not apply to dominant undertakings – as the German report competition law 4.0 suggested – but to undertakings that fall within a newly defined category of pcms for competition, which in principle seems similar to the concept of undertakings with "strategic market status" in the Furman Report. (There is, however, an important difference on whether the concept requires dominance, see below.) In addition, the draft proposal also follows the latter's suggestion of a two-step procedural approach.[33] This "carve-out" from the general abuse of dominance control also marks a difference to the EU expert report (which a priori limited itself to looking at the existing framework of EU competition rules.)

On the other hand, the prohibition of self-preferencing is broad and of a general nature (and does not even mention the term self-preferencing), which is more in line with the German report competition law 4.0. The Furman Report was much more specific and detailed in outlining the type of self-preferencing conduct for platforms to be considered as unfair and generally prohibited (see above).

Regarding the reversal of the burden of proof: here the draft seems to implement the suggestion of the EU expert report, i.e. that the platform should bear the burden of proof that self-preferencing has no long-run exclusionary effects (see above). In fact, draft Section 19a (2) no.1 seems to go further: it reads like a *per se* prohibition of any different treatment of the platform's offers and of those of competitors, without any link to a resulting impairment or exclusionary effect on competitors – subject to an objective justification. However, unlike enforcement of Article 102 TFEU, the FCO's decision under draft Section 19a (2) cannot lead to a fine. (A sanction is only possible if the addressee were to violate the second-step decision.)

2. Comments on the Design of the New Provision

The draft proposal received many comments from the different stakeholders, of course with varying positions in substance. In practice, it seems that new rules, including on self-preferencing, will come, so questioning the wisdom of introducing legislation might almost seem obsolete. But the design has raised many questions. Some selected concerns are set out below.[34]

One obvious question is why the draft provision does not mention "digital platforms." Draft Section 19a only requires the addressee to have activities in "multi-sided markets and networks." However, the deficiencies of traditional antitrust enforcement that triggered the proposed legislation relate to the particularities of the digital economy. It is questionable whether the new rules are really necessary for non-digital markets.

31 P. 80. The explanations also note that the requisite information for proving an objective justification are typically within the sphere of the addressees.

32 P. 76.

33 Something which the German report on EU competition law explicitly rejected.

34 For a more comprehensive set of comments, see for example the submission of Studienvereinigung Kartellrecht to the Ministry for Economic Affairs and Energy: https://www.studienvereinigung-kartellrecht.de/sites/default/files/stellungnahmen/73a15d4c84c8c2c30822454ada3ed1fa/200214_stuv_stellungnahme_digitalisierung_missbrauchsaufsicht_10_gwb_novelle_bmwi.pdf.

Another concern is that dominance is one of several possible conditions for a pcms, but it is not a mandatory requirement. This renders the possible scope of application of the new rules much broader than what the various reports identified as an increased risk for competition in the digital economy:[35] The current wording allows finding a pcms even if the undertaking has no dominant position in any market. And the new provision is not limited to preventing leveraging a dominant position into other markets, which seems to contradict the draft proposal's own general explanations.[36] Ultimately, intervention in digital ecosystems below the level of dominance in any market is difficult as it might stifle innovation.

As mentioned, the prohibition of self-preferencing is designed as a *per se* prohibition of different treatment of an addressee's own products with rivals' product offers. In contrast, the other regulatory examples in draft Section 19a (2) no-2-5 all contain a reference to impeding competitors or adverse effects. The explanations do not offer any reasons for the stricter approach towards self-preferencing.

The very broad scope, combined with the far-reaching reversal of the burden of proof and the lack of a limitation for the validity of the decision on a pcms for competition in the law, may trigger questions as to the requisite legal clarity and appropriateness of the rules.

3. Will Antitrust Enforcement Against Self-Preferencing Become More Effective?

One major deficiency identified was the long duration of proceedings. As seen, lately the cases in the digital economy lasted about three years, without judicial review. It is unclear whether the new approach would be much quicker overall, at least in the near future. Finding a pcms for competition would likely be as complex as finding a dominant position (and establishing additional activities in downstream or adjacent markets relevant for self-preferencing) under existing rules. The second step, i.e. issuing a decision to prohibit self-preferencing, might indeed be quicker, given the reversal of the burden proof. In fact, the FCO has expressed the hope that under the new rules it would be easier and quicker to obtain relevant information from addressees than today.[37] And the FCO could base several prohibition decisions (step two) against one addressee based on the same single decision finding pcms, which would "streamline" enforcement.

However, the two-step concept means that addressees can presumably appeal the first step separately – which might delay the second step considerably. It can be expected that the initial decisions finding a pcms will be appealed up to the Federal State Court, which means a delay of at least three years or more.[38] Even if the FCO combines the first and second step, it is likely that the first final decisions will take several years.[39] That is of course to some extent normal if new legislation is introduced. But the various concerns raised by the broad approach (see above) may well render the cases unnecessarily more susceptible to lengthy judicial review. Ultimately, the new regime may thus only work effectively in the mid-term.

The broad and very general scope of the prohibition to engage in different treatment of third parties' offers and the addressee's own offers seems to fall short of providing clear-cut *ex ante* guidance on which concrete conduct is prohibited in practice for the companies concerned. There might be numerous differential treatments applied by potential addressees – willingly or unwillingly. It will thus depend on how the second step decision will detail each prohibition decision. That means enforcement of draft Section 19a (2) no. 1 will ultimately continue to be a case-by-case exercise, something which was perceived as a deficiency in some reports (see above) and which contains an element of *ex post* enforcement.

This leads to the issue of effective remedies: enforcement of the new rules will still face the challenge on how to effectively end possible infringements against the prohibition decisions taken in the second step. In practice it may already be a similar challenge to issue a decision in the second step, which clearly identifies the prohibited conduct in more details. The experience in *Google Shopping* shows that simply ordering equal treatment – which is the other side of the coin of the prohibition set out in draft Section 19a (2) no.1 – may not be sufficient to properly end the infringement (see above).

The issue is to some extent linked to the question of sufficient resources, and additional specialized resources for the digital economy.

35 The German report on EU competition law suggested to introduce a prohibition of self-referencing for dominant companies (p.54); the concept of strategic market position in the Furman Report is linked to dominance, see p. 42, 59.

36 Which say that the new rules target companies that do not only have a dominant position in individual platform or network markets, but additionally have resources and a strategic position, enabling them to exercise significant influence over third parties' business activities and to continuously expand their own activities into new markets and industries (p.75).

37 See FCO comments on draft proposal, published February 25, 2020, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Referentenentwurf_10_GWB_Novelle.html.

38 If by the time the first step has been finally decided, the validity of the decision on a pcms would have expired, this could lead to an ongoing game of first step and judicial review.

39 In particular including interim relief proceedings.

While this may be an annoying (because costly) implementation detail from the legislator's perspective, it can have a massive impact in practice. The proposal does not really address this problem. (A heretic thought: maybe increasing the budget and employing more specialists would render antitrust enforcement more effective more swiftly and easily than the introduction of the new regime.) While the FCO says it has already employed specialists, it might still be necessary to substantially increase the resources. It may be helpful to create new specialized data science units – parallel to or as part of the chief economist units that were created when the more economic approach was implemented.

Some consider the draft legislation as insufficient in light of the large tech companies' persisting market power and argue for "real" *ex ante* sector-specific regulation and a specialized administrative entity with effective oversight powers (like in telecoms), including on self-preferencing practices.[40] It is clear that the current approach aims at keeping self-preferencing conduct within the realm of competition law and under the control of the FCO – at least for now. The effectiveness of the new powers in practice will decide whether this attempt will be successful.

Finally, from a European perspective, the approach to push for national legislation would not seem to render enforcement more effective. While national abuse of dominance rules may be stricter than EU competition law (Article 3(2) Reg. 1/2002), in digital markets national boundaries lose their significance, and it would be better to have a level playing field in the EU, including on the rules on self-preferencing. If other Member States follow suit and introduce their own, slightly different national legislation, the enforcement of abuse of dominance in the digital economy will become even more of a patchwork. This is not desirable from a policy standpoint, nor for potential complainants or defendants.

One of the reasons for Germany to push forward may have been the expectation (and experience) that national legislation is easier to achieve than new rules at EU level with 27 Member States. The draft proposal adds political pressure on the EU and the Commission to move as well on possible new legislation. Commissioner Vestager indeed recently indicated that the Commission considers introducing *ex ante* regulation for digital platform gatekeepers, with a focus on preventing the tipping of markets.[41] However, it is unclear whether the Commission would opt for a full regulatory approach in the end.[42] It will be interesting to follow the development in this area, including during Germany's presidency starting in mid-2020.

40 See for example Thomas Höppner/Jan Markus Weber, Die Modernisierung der Missbrauchskontrolle nach dem Referentenentwurf für eine 10. GWB-Novelle, K&R 2020, 24.

41 See for example the coverage in Global Competition Review on April 24, 2020, on the Commissioner's comments in the context of the ABA Spring Meeting, Vestager: EU may introduce competition rules for "digital gatekeepers."

42 It seems that the Commission will now first outsource a study on the gatekeeping power of digital platforms, including on self-preferencing practices, and the question whether *ex ante* regulation is required to complement competition law, see for example coverage in PaRR on May 11, 2020, EC launches digital platforms 'gatekeeping' assessment tender.

DIGITAL PLATFORMS AND SELF-PREFERENCING

BY ALESSANDRA TONAZZI & GABRIELE CAROVANO[1]

1 Alessandra Tonazzi is Director of the International and European Affairs Division at the Autorità Garante della Concorrenza e del Mercato ("AGCM"). The opinions expressed in this paper are solely those of the author and cannot be interpreted as reflecting those of the Autorità Garante della Concorrenza e del Mercato. The authors can be contacted at Alessandra.Tonazzi@agcm.it. Gabriele Carovano is a PhD candidate at King's College London. The author can be contacted at Gabriele.Carovano@kcl.ac.uk.

I. INTRODUCTION

Digital platforms have taken the spotlight in the competition policy debate due to their significance to the global economy and their attitude to concentrating economic power.

Due to the roles of big data, network effects, economies of scope and scale, etc., digital platforms tend to be self-reinforcing, and to lead to winner-takes-all or winner-takes-most scenarios. Because of these features, digital platforms, in addition to catching the attention of many academics, governments, and regulators worldwide, are also disorienting them.

The competition policy debate on digital platforms is fragmented and multi-faceted in terms of both actual (or would-be) problems and potential solutions. The positions in the debate range from calling for more competition[2] to arguing that unrestricted competition can backfire, spiraling into a race to the bottom incapable of delivering the expected benefits.[3] While some propose to expand the scope of competition law, by introducing new standards complementary to consumer welfare, others go in the opposite direction, advocating for traditional, purely economics-based antitrust enforcement.[4] Some others, again, conscious of the limits of competition enforcement in dealing with digital markets, advocate for complementary regulatory intervention, limited to a subset of players with "strategic market status."

In the context of these general policy discussions, competition authorities are taking different approaches to tackling competitive concerns arising from the conduct of digital platforms. At times authorities raise the criticism that the current "balancing of error costs" is mistakenly tilted in favour of under enforcement.[5]

In this complex and lively debate, so-called "self-preferencing" is one of the topics that has attracted particular attention. Specifically, it has been questioned (i) whether "self-preferencing" amounts to be a new self-standing theory of antitrust liability or not; (ii) if so, what is the "legal standard" to pursue self-preferencing theories (i.e. under what circumstances does self-preferencing by a dominant firm amount to an abuse of dominance?); and (iii) whether competition enforcement is sufficient to tackle the challenges of self-preferencing conduct, or whether a regulatory intervention is needed.

II. FIFTY SHADOWS OF SELF-PREFERENCING: A PRELIMINARY CLASSIFICATION

Generally speaking, "self-preferencing" refers to an undertaking treating itself, its services, or its subsidiaries favorably compared to its treatment of rival external competitors or costumers.[6] While on the surface any self-preferencing conduct seems retraceable to a unique common figure as long as "dissimilar conditions" are applied to "equivalent transactions," from a competition law perspective, it is worth differentiating at least between three discrimination types: (i) pure self-preferencing; (ii) pure secondary line differentiation; and (iii) hybrid differentiation.[7]

In "pure" self-preferencing scenarios, the self-preferencing firm is vertically integrated and the firm itself is the direct beneficiary of the more favorable treatment in the downstream market.[8] By contrast, in "pure" secondary line differentiation scenarios, the discriminatory firm is not vertically integrated but, nonetheless, it directly benefits from its discriminatory conduct in its upstream market.[9] In hybrid scenarios, regardless

2 See Herbert Hovenkamp & Carl Shapiro, "Horizontal Mergers, Market Structure, and Burdens of Proof," Faculty Scholarship, (2018).

3 See M.E. Stucke, A. Ezrachi, Competition Overdose, *Harper Collins Publishers*, 2020.

4 See Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, May 15, 2020, available at https://gai.gmu.edu/wp-content/uploads/sites/27/2020/05/house_joint_antitrust_letter_20200514.pdf.

5 See UK Report Digital Competition Expert Panel (2019), "Unlocking digital competition," available at https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; the EU report "Competition Policy for the digital era," available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; the U.S. Stigler Center report, Stigler Committee on Digital Platforms, 2019, available at https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E.

6 See the EU report "Competition Policy for the digital era," available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

7 I. Graef, differentiated treatment in platform-to-business relations: EU competition law and economic dependence, Yearbook of European Law, Vol. 0, No. 0 (2019), pp. 1-52.

8 See the EU *Google Shopping* case (AT.39740 *Google Search (Shopping)*, June 27, 2017), and probably the EU *Amazon* case (AT.40462 *Amazon*, 17 July 2019), and the Italian *Google* case (Case A529).

9 Case C-525/16 MEO, ECLI:EU:C:2018:270, para 34-36. See also Robert O'Donoghue, 'The Quiet Death of Secondary-Line Discrimination as an Abuse of Dominance: Case C-525/ 16 MEO', (2018) 9(7) Journal of European Competition Law & Practice, 443.

of whether the self-preferencing/discriminatory firm is vertically integrated, the self-preferencing/discriminatory firm benefits only indirectly from its discriminatory conduct in a market different from that in which the discrimination takes place. Consequently, the anticompetitive effects of the discriminatory conduct take place primarily in a market in which the discriminated subjects are not active themselves.

This paper, focusing on the European legal framework, will only deal with "pure" self-preferencing and "hybrid" differentiation conduct where the discriminatory firm is vertically integrated. From the above classification, it can be seen that while all "self-preferencing" conduct contain a certain discriminatory component, not all discriminations result in self-preferencing. A discriminatory conduct, to qualify as "self-preferencing," needs to be executed by a vertically-adjacently integrated firm, regardless from whether the benefits resulting from the discriminatory conduct are directly (either upstream or downstream) or indirectly (in a third-adjacent-market) perceived by the discriminatory firm. It follows that self-preferencing does not have a pure "vertical" dimension, but it can also have a horizontal significance.

III. SELF-PREFERENCING VS. LEVERAGING: "ASKING THE RIGHT QUESTIONS"

The limited number of cases (some still ongoing)[10] and the absence of Court decisions make it difficult to determine (i) whether self-preferencing constitutes a new and independent theory of competition law liability under Article 102 TFEU, and (ii) which legal test to use to assess the lawfulness of self-preferencing conduct.

Whereas self-preferencing might cause anticompetitive effects, it is reasonable for an undertaking to preference (to a certain extent) its downstream services as a means to boost efficiencies, economies of scales, and recoup upstream investments. The efficiency arguments for self-preferencing are indeed similar to those that traditionally apply to vertical integration. Although this approach may differ in the digital economy, it is unclear and debated where the line should be drawn between pro-competitive and anti-competitive self-preferencing conduct.[11]

In debating the issue, some have argued that self-preferencing conduct by a dominant firm should be classified as abusive under Article 102 TFEU only insofar as it amounts to a "refusal to deal/supply."[12] In other words, the assessment of self-preferencing depends on the "refusal to supply test," including the indispensability criterion, as established in *Oscar Bronner*[13] and later jurisprudence. Additionally, the same scholarship highlights the difference between requiring a dominant undertaking not to treat its competitors "less favorably" and an obligation to grant terms that are "identical" to those offered to itself. As result, even where certain infrastructure is deemed "essential to compete," the dominant firm's duty to grant access to that infrastructure should only go as far as to allow the access seeker to be "commercially viable" and not to provide terms exactly "identical" to those provided to the infrastructure owner's own services.

Others have argued that aside from a "refusal to deal," there are several legal bases under which self-preferencing conduct may have competition law relevance, such as traditional leveraging theories including discrimination, tying, margin squeezes or even unfair pricing[14]. Against such a multitude of legal tests for self-preferencing conduct, some have warned against their instrumentalization. Since the requirements to establish an abuse vary from one test to another, there is a risk that formal legal labels attributed to a given practice can be pigeonholed to frame the claim in a utilitarian manner, for instance to avoid "indispensability."

The debate risks remaining academic since in practice there is little case law that has explicitly addressed it yet. Even in the EU *Google Shopping* case, the EC did not characterize Google's conduct as "self-preferencing," instead describing it as a "leveraging practice," arguing that it constitutes "a well-established, independent, form of abuse falling outside the scope of competition on the merits."[15] While this is uncontro-

10 Among others, at European level see Cases AT.39740 *Google Search* (Shopping), June 27, 2017; AT.40462 *Amazon*, July 17, 2019; at national level see: (i) Italian cases A528—*Amazon*: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services' (Press release, April 16, 2019) https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possibleabuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services; A529—*Google*: investigation launched against Google for alleged abuse of a dominant position' (Press release, May 17, 2019) https://en.agcm.it/en/media/pressreleases/ 2019/5/ICA-investigation-launched-against-Google-for-alleged-abuse-of-a-dominantposition; (ii) Dutch Apple case (see ACM press release, ACM launches investigation into abuse of dominance by Apple in its App Store, available at https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store.

11 The EU Report, for instance, has proposed flipping the burden to platforms to show that self-preferencing has '*no long-run exclusionary effects*' and '*either the absence of adverse effects on competition or an overriding efficiency rationale*'.

12 B. Vesterdorf, Theories of self-preferencing and duty to deal – two sides of the same coin, 1(1) Competition Law & Policy Debate, 4 (2015).

13 Case C-7/97, *Oscar BronnerGmbH & Co. KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569.

14 N. Petit, Theories of self-preferencing under Article 102 TFEU: a reply to Bo Vesterdorf, ORBi, 2015.

15 Case AT.39740 *Google Search* (Shopping), June 27, 2017, para. 649.

versial, it remains the case that "leveraging" is a general term, often used for various strategies (like tying, refusing to deal, or predatory pricing, etc.) that a dominant firm may use to extend its power from one market to another.[16]

Notwithstanding the remaining halo of uncertainty, the debate has the merit, among other things, of affirming that self-preferencing conduct may be abusive under Article 102 TFEU regardless of the applicability of the essential facility doctrine, although it does not automatically infer that self-preferencing constitute a new and independent theory of harm. All of the examples in European case law falling within the third "hybrid differentiation" category are grounded in already existing legal tests. Arguing that self-preferencing constitutes a new and independent theory of harm would expand the perimeter of application of EU competition law also to conduct that is not prosecutable under existing legal theories, i.e. conduct that despite having a discriminatory component, does not satisfy any of the existing theories of harm (refusal to deal, discrimination, tying, margin squeeze, unfair pricing, etc.). Notably, a new theory of harm will allow competition authorities ("CAs") to prosecute "pure" self-preferencing conduct or those practices that fall within the "hybrid" category, which are currently not pursuable.[17] In online "pure" self-preferencing cases, for example, the indispensability requirement could be substituted with other parameters testing the proportionality and reasonability of the self-preferencing conduct *vis-à-vis* the lawful aim that the dominant firm has publicly declared pursuing to its costumers/consumers.

Another, and interesting way of looking at the role that the indispensability factor should play in assessing self-preferencing is the suggestion that one should look at the nature of the remedies. If they are proactive (i.e. requiring a positive obligation) the indispensability requirement should be considered part of the legal test.[18] Such a conclusion would be consistent with *Google shopping* where the Commission did not require indispensability because ending the infringement did not involve imposing a duty on Google to "transfer an asset or enter into agreements with persons with whom it has not chosen to contract"[19] but simply dictated a principle to be followed, without imposing a modality to implement it.[20]

However, this suggestion does not seem entirely convincing. Using the case-specific needed remedy to classify the alleged anticompetitive conduct, would be as if in medicine, diseases were classified on the basis of adoptable treatments. If a drug is beneficial to several diseases, it does not make the latter identical in their characteristic features nor their differentiation useless. Unsurprisingly, the promoters of the "nature of the remedies criteria" end up arguing in favor of keeping the indispensability requirement as a proxy to balance the *ex ante* and *ex post* dimensions of competition[21] to reduce interventions that would harm firms' incentives to invest and innovate. Reasoning this way will lead to a scenario where the more complex the nature of the remedies needed to terminate an alleged anticompetitive conduct, the higher the standard of proof for authorities and claimants, and the lower would be the chances of having certain investigations commenced or certain conduct prosecuted. Such conclusions seem particularly unacceptable in digital markets, given the complexity of their dynamics and the information asymmetries existing between tech-giants, on the one hand, and CAs and claimants, on the other.

Depending on decisional practice and case law developments, "self-preferencing cases" may evolve in different directions. If a strict approach is adopted – basically requiring an "essential facility" scenario – the number of "self-preferencing cases" could be very limited. A second alternative would be to include "self-preferencing conduct" in a traditional theory of harms, without introducing a new "self-preferencing theory," although this would require clarifying existing conditions and legal tests to assess abusive conduct. Such second alternative, in a more earth-breaking format, might even result in the fusion of all existing "legal categories" in a single, overarching "leveraging test" whose elements would need to be clearly defined without "indispensability" been one of them. Finally, the existing case law might be supplemented by the addition of self-preferencing among existing "legal categories." To determine the perimeter of the application of the new "self-preferencing test," however, a clear delimitation and classification of "abusive conduct" would be needed to avoid confusion and legal uncertainty.

In the authors' view, while it seems appropriate not to require indispensability in online "pure" self-preferencing cases, there are multiple conditions that would still be needed and assessed to ensure that competition on the merits is not mistaken for abusive conduct. Among these conditions, significant are: (i) the assessment of firms' market power (mindful that in digital markets, this assessment will probably go beyond

16 See Giorgio Monti, EC Competition Law (Cambridge: Cambridge University Press, 2007), 186.

17 Similarly, on this point, see I. Graef, differentiated treatment in platform-to-business relations: EU competition law and economic dependence, Yearbook of European Law, Vol. 0, No. 0 (2019), pp. 1-52; J. Drexl, 'Designing Competitive Markets for Industrial Data Between Propertisation and Access' (2017) JIPITEC, 257, 283–4.

18 P. Ibáñez Colomo, Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping (December, 2019). Forthcoming, *Journal of European Competition Law & Practice*.

19 Case AT.39740 Google Search (Shopping), 27, June 2017, para. 651.

20 *Ibid*, para. 697-705.

21 The importance of considering both the ex-ante and ex-post dimensions of competition is emphasised in E. Elhauge, 'Defining Better Monopolization Standards' (2003) 56 *Stanford Law Review* 253.

traditional structural approaches based on market shares); (ii) the analysis of the competitive variables at stake; (iii) the impact of the alleged abusive conduct on such variables; (iv) the existence of anticompetitive effects; and (v) the absence of objective justifications. Whether this kind of assessment requires a new label, however, is for the EU Courts to say.

IV. REGULATION: YES OR NO?

This paper would not be complete without discussing other initiatives that could affect the legality of self-preferencing by digital platforms, that is the introduction of a new regulatory framework to address some competition law issues in digital markets that competition enforcement alone cannot solve.

Multiple regulatory interventions are currently being discussed in Europe and include different tools that would impose legal obligations on digital "gatekeepers." If digital platforms' responsibilities have to be expanded beyond the perimeter of Article 102 TFEU, some conduct – including self-preferencing – might fall within the scope of the new regulatory framework recently announced by the EC in one of its latest communications.[22] Particularly, EU Commission Vice President Vestager, has recently highlighted her intention to review the fitness of EU competition rules for the digital age and explore the possibility of introducing *ex ante* rules within the context of the Digital Services Act package to ensure that markets dominated by tech platforms remain fair and contestable.[23]

Besides, some pieces of regulation have been already adopted with respect to platform-to-business relations. Significant in this sense is the regulatory intervention made on June 14, 2019, when the EU adopted its Regulation on fairness and transparency in platform-to-business relations (the so-called "P2B Regulation").[24] Notwithstanding this regulatory intervention, antitrust enforcement can still complement and expand the regulation. Indeed, although Regulation 1150/2019 refers to "fairness," the majority of its provisions addresses transparency.[25] Less than a month after its adoption, business-users' protections were substantially expanded by the commitments required by the German Bundeskartellamt[26] and the Austrian Bundeswettbewerbsbehörde[27] on July 17, 2019, when both CAs simultaneously closed their abuse of dominance proceedings against Amazon.[28]

These developments show that antitrust and regulation should not be rivalry and exclusionary but rather complementary.[29] One might argue that neither could competition alone solve some of the structural problems presented by digital markets (especially when markets are "tipping" and enforcement might intervene too late), nor could regulation nudge market forces as effectively as competition. Additionally, if public-utility regulation is ineffective, limited in scope, and permanent, competition enforcement also has several drawbacks (i.e. it is time consuming, resource-intensive, and not always definitive), that are dramatically accentuated in digital markets. The solution, therefore, seems to be in the middle. The problem, however, is how to best balance competition and regulation.

---

22 European Commission, Shaping Europe's Digital Future, February 2020, available at https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

23 F. Cunningham, Europe's digital roadmap indicates two-pronged approach to platform economy and competition rules, available at https://www.twobirds.com/en/news/articles/2020/global/europes-digital-roadmap-indicates-two-pronged-approach-to-platform-economy-and-competition-rules.

24 Regulation (EU) 2019/1150 of the European Parliament and of the Council of June 20, 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.

25 Regulation 1150/2019 only offers some provisions to protect business users. See: (i) Article 3(2), which imposes a notice period before a platform can modify its terms and conditions; (ii) Article 4, which mandates platforms to provide a statement of reasons when restricting, suspending, or terminating its services to a business user; (iii) Article 4, which offers business users the opportunity to obtain clarifications within the framework of an internal complaint-handling procedure regarding the facts and circumstances that caused the restriction, suspension, or termination of the platform's service (a procedure which Article 11 makes obligatory, except for small enterprises).

26 See Bundeskartellamt's press release, 17-07-2019, Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html.

27 See Austrian Federal Competition Authority report, Amazon.de Marketplace, Available at https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf.

28 Among the most interesting achievements of such proceedings, noteworthy are: (i) Amazon's withdrawal of Luxembourg as the exclusive jurisdiction for EU claims, thus allowing sellers to act against Amazon in their domestic courts; (ii) Amazon's dropping of its so-called 'parity-requirement clauses' under which sellers had to provide products of quality as high as those used in other sale channels; (iii) Amazon's concession to equalize the reviews of third-party-sellers with its own private-label brands, by extending to third-party-sellers its Vine reviewing program, which was initially available only for its private-label brands.

29 See OECD Workshop on regulation and competition in light of digitalisation, January 31, 2018, summary available at https://one.oecd.org/document/DAF/COMP/M(2018)4/en/pdf.

Keeping this question in mind, any regulation should take into account the aims of competition authorities and experts to preserve the correct functioning of markets and not to undermine innovation incentives. This contribution, for competition authorities, is not something new as they are regularly in dialogue with sector regulators and providing suggestions on how regulatory measures should not be disproportionate with respect to their objectives or unnecessarily restrict competition. Some have suggested the interesting idea that new forms of so-called "participative antitrust" or "regulatory antitrust" should be developed, whereby the private sector, industry representatives, regulators, and antitrust authorities jointly develop and evaluate short-term regulations.[30]

It is interesting to note that the discussion about a new and improved regulatory framework for digital platforms also includes the possible introduction of new competition tools. Although it is not clear yet what forms these new tools would take (structural interventions, special access obligations, etc.), this approach might blur the complementary nature of competition enforcement and regulation, tilting the balance towards a regulatory approach. In this new framework, the extent and limits to the enforcement of abuses of dominance might also be affected.

As result, regulatory interventions are welcomed and necessary to the extent that they strike the correct balance between competition and regulation. It follows that regulation's scope must be proportionate and reasonable *vis-à-vis* its intended objectives. Otherwise, by excessively marginalizing antitrust enforcement, the risk of sub-optimal outcomes is inevitable since, as shown above, the performance and effectiveness of the each depends on the other.

V. CONCLUSIONS

While some academic contributions and public enforcement actions have shed some light on "self-preferencing conducts," decisional practice concerning "self-preferencing cases" still needs elucidation. The picture might get clearer as more decisions are issued by competition authorities and Courts. At the same time, the announced changes in the regulatory framework for digital platforms, including the introduction of new competition tools, may significantly affect the assessment of conduct by digital platforms, even abuse of dominance cases.

30 See J. Tirole, OECD, Global Forum on Competition, Roundtable on "Competition under fire," Paris, 2019, available at http://www.oecd.org/competition/globalforum/competition-under-fire.htm.

SELF-PREFERENCING: A GERMAN PERSPECTIVE

BY FLORIAN WAGNER-VON PAPP[1]

1 Professor of Private and Business Law (including Contract Design) at the Helmut Schmidt University of the Federal Armed Forces in Hamburg, Germany, wagnervf@hsu-hh.de.

I. INTRODUCTION

Whether a dominant undertaking's self-preferencing constitutes an abuse was central to the *Google Search (Shopping)* case:[2] is the preferential ranking of Google's (or Alphabet's) own comparison shopping service on the Search Engine Result Page ("SERP") an abuse? The question is, however, by no means confined to the *Google Shopping* case, and will continue to come up especially in multisided markets, where a positive feedback loop — once started by self-preferencing — may crowd out competitors regardless of the competitive merits.

The issue is multifaceted. First, one can ask whether self-preferencing can and should be allocated to one of the existing categories of abuse (and accordingly be subject to the requirements established for that specific abuse), whether it should be considered an "unnamed" abuse – and if so, what the test for identifying the abuse should be –, or whether it is no abuse at all (see Section II below).

Second, if one considers the current law to be inapplicable or at least insufficiently clear, there is a question whether self-preferencing should be made illegal *de lege ferenda*, be it by specifying it to be an abuse in competition law or prohibiting it in regulation. Germany is currently considering an amendment to its Act against Restraints of Competition ("ARC") which would give the Bundeskartellamt the power to prohibit self-preferencing by decision where the Bundeskartellamt has entered a finding that an undertaking active on multi-sided markets has "pre-eminent, market-transcending significance for competition" (see Section III below).

Third, one has to distinguish the conceptual question whether self-preferencing can be an abuse from the question how to identify self-preferencing, in particular in areas where subjective assessments are involved in finding the order of preference.

II. DOES SELF-PREFERENCING FALL UNDER ANY OF THE ESTABLISHED CATEGORIES OF ABUSE OR UNDER THE GENERAL PROHIBITION OF AN ABUSE?

A. Discrimination

Given that self-preferencing entails differential treatment of oneself and others, the obvious starting point would be an application of the non-discrimination clause. In the EU, Article 102(c) TFEU provides: "Such abuse may, in particular, consist in: … (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." Similarly, the equivalent in German law in § 19(2) no. 1 ARC provides: "An abuse occurs, in particular, where a dominant undertaking … directly or indirectly treats another undertaking differently from similar undertakings without an objective justification."[3] The question is, however, whether the non-discrimination rule applies to differential treatment within a vertically integrated undertaking vis-à-vis third-party undertakings competing on a downstream (or upstream) market.

German courts have explicitly rejected a comparison between how the dominant undertaking treats itself (including companies belonging to the same group of companies or "undertaking" in the European sense of a single economic entity) and how it treats third-party undertakings; self-preferencing is explicitly excluded from the non-discrimination rule in § 19(2) no 1 ARC, because other undertakings are not "similar" to the dominant undertaking (including the group of companies that belong to the same single economic entity).[4]

---

2 Commission Decision of June 27, 2017, Case AT.39740, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf; see, e.g. Christian Bergqvist & Jonathan Rubin, *Google and the trans-Atlantic antitrust abyss*, Concurrences N° 3-2019, 1. For my own preliminary view before the decision was handed down, and for further references to earlier literature, see Florian Wagner-von Papp, *Should Google's Secret Sauce be Organic?* Melbourne Journal of International Law 16 (2015), 608. The decision has changed my view with regard to the extent of multi-homing; but as the discussion below will make clear, I am not yet entirely satisfied with the transparency of the standard established for abusive self-preferencing.

3 Author's translation. The German wording is: "Ein Missbrauch liegt insbesondere vor, wenn ein marktbeherrschendes Unternehmen …. ein anderes Unternehmen … ohne sachlich gerechtfertigten Grund unmittelbar oder mittelbar anders behandelt als gleichartige Unternehmen."

4 Bundesgerichtshof, June 29, 1982, KVR 5/81, Neue Juristische Wochenschrift (NJW) 1982, 2775, 2776 — *Stuttgarter Wochenblatt*; Bundesgerichtshof, February 10, 1987, KZR 6/86, NJW 1987, 3197, 3198/3199 – *Freundschaftswerbung*; Bundesgerichtshof, 31 January 2012, KZR 65/10, WuW 2012, 501 = WuW/E DE-R 3549 = NJW 2012, 2110 — *Werbeanzeigen* (where the dominant producer of Yellow Pages made available the prices for ad placements to its subsidiary and its own agents at an earlier time than to competing ad agencies; the Federal Court of Justice rejected "similarity" of the third-party ad agencies with the subsidiary and agents belonging to the dominant single economic entity); see also Bundesgerichtshof November 12, 1991 KZR 2/90, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1992, 199, 201 — *Aktionsbeiträge*. For further references see, e.g. Volker Emmerich, *Der gleichartigen Unternehmen üblicherweise zugängliche Geschäftsverkehr*, Neue Zeitschrift für Kartellrecht 2015, 114, 115; Heike Schweitzer, Justus Haucap, Wolfgang Kerber & Robert Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen (Nomos 2018) 124/125; Andreas Fuchs, in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds.), Wettbewerbsrecht (6th edn 2020) § 19 GWB para. 103.

One of the earlier decisions on this issue handed down by the Federal Court of Justice concerned a scenario not unlike a brick-and-mortar version of *Google Search (Shopping)* in that a dominant undertaking provided free ad space to a subsidiary: In *Stuttgarter Wochenblatt*, a "free" (i.e. ad-financed) newspaper that was considered to have a dominant position offered free ad space to a 100 percent-owned subsidiary which operated a travel agency.[5] The Federal Court of Justice held that the subsidiary was not "similar" to the competing travel agencies. It reasoned that the free goods or services provided by the parent undertaking to a subsidiary cannot constitute an abuse, because the parent could just as well make the subsidiary pay for the goods or services, and then absorb the loss within the group of companies.[6]

Under German case law, a duty to treat other undertakings equal to one's own affiliates exists only where there is a (usually sector-specific) regulatory obligation not to discriminate between companies belonging to the same group and third-party undertakings.[7]

In the jurisprudence of the European Court of Justice, there appear to be no equally explicit statements that the non-discrimination rule does not apply to differential treatment between a person belonging to the same single economic unit and third-party undertakings. *Heike Schweitzer et al*. claim that the European courts have never applied the non-discrimination rule in such cases, opting for the general rules on exclusionary abuses instead.[8]

However, the *European Commission* stated in the decision *HOV SVZ/MCN* that "where an undertaking in a dominant position on a market uses its dominant position to impose discriminatory conditions in respect of equivalent transactions on a second market, thus promoting its own services, this constitutes an abuse within the meaning of Article 86 of the Treaty [now Article 102 TFEU]," and found discrimination in the meaning of (now) Article 102(c) TFEU to exist where Deutsche Bahn ("DB") applied lower tariffs for transport between Germany and German ports (the "northern journeys") than for transport on the "western journeys" between Germany and Dutch or Belgian ports, leading to an increased use of intra-German routes served exclusively by *DB/Transfracht*.[9] As Nicolas Petit notes,[10] this decision was affirmed by the Court of First Instance, which concluded that "DB imposed dissimilar conditions for equivalent services, thus placing the other parties operating on the western journeys at a disadvantage in competition with itself and its subsidiary Transfracht."[11]

Furthermore, the European Court of Justice stated in *GT-Link:* "The fact that a public undertaking which owns and operates a commercial port waives those duties on its own ferry services and reciprocally on those of some of its trading partners is likewise capable of constituting an abuse, in so far as with regard to the public undertaking's other trading partners it involves application of dissimilar conditions to equivalent transactions, within the meaning of Article 86(c) [now Article 102(c)]."[12] While this quotation is not entirely unambiguous because it does not make clear whether the Court would also have applied Article 102(c) if the port owner had waived the duties only for on its own ferry services (and not also on some of its third-party trading partners), there is no reason why waiving the duties on its own ferry services should be mentioned if only the discrimination amongst the trading partners were considered objectionable.

Nicolas Petit concedes that such cases are rare and that the facts underlying these cases "may well have featured an essential facility," but notes that the reasoning was not explicitly based on the essential facility doctrine and that "the presence of bottleneck industries seemed at best circumstantial."[13]

---

5 Bundesgerichtshof, June 29, 1982, KVR 5/81, NJW 1982, 2775, 2776 — *Stuttgarter Wochenblatt*.

6 *Ibid*.

7 See, e.g. OLG Düsseldorf October 14, 2009, VI-U (Kart) 4/09, WuW 2010, 222, 224/225 = WuW/E DE-R 2806, 2808/2809 para. 56 — *Trassennutzungsänderung* (stating both the rule that usually the dominant undertaking comprising the entire single economic entity is not a "similar" undertaking, and the exception for the railway sector); Emmerich, n. 4, *at* 215. Only apparently broader is the statement in Bundeskartellamt May 24, 2016, B9-136/13, WuW 2016, 503, 505 para 37 — *DB Fahrkartenvertrieb*, which seems to indicate that differential treatment between an affiliated company and a competitor could more broadly be discriminatory in the meaning of § 19(2) no. 1 ARC where, exceptionally, the "advantageous treatment of an affiliated company results in a discrimination against a competitor" ("*Demgegenüber kann in Ausnahmefällen eine Verpflichtung zur Gleichbehandlung mit sich selbst bestehen, wenn eine Besserstellung eines Konzernunternehmens zu einer Diskriminierung eines Wettbewerbers führt*"). The logic of this sentence is entirely circular if one disregards the reference to the commentary by *Nothdurft* (Jörg Nothdurft, in Langen & Bunte (eds.), Kartellrecht Kommentar (12th edn, Luchterhand 2014) § 19 GWB para. 211 f. (now, in the 13th edn. 2018: para. 304, with cross-references to paras 84, 323 [*sic*; should be 326], and 451); *Nothdurft* refers to the exceptional regulatory duties not to discriminate (with numerous further references to the case law); and in *DB Fahrkartenvertrieb*, the regulatory duty not to discriminate was grounded in the necessary cooperation between the Deutsche Bahn and its competitors in ticketing.

8 Schweitzer et al., n. 4, at 125.

9 Commission Decision of March 29, 1994, IV/33.941 [1994] Official Journal L 104/34 [248] - HOV SVZ/MCN.

10 Nicolas Petit, *Theories Of Self-Preferencing Under Article 102 TFEU: A Reply To Bo Vesterdorf*, available at https://ssrn.com/abstract=2592253, under I.A.1.

11 Judgment of the Court of First Instance of October 1997 21, Case T-229/94 (*Deutsche Bahn AG v. Commission*) [1997] ECR II-1695 [93].

12 Judgment of the Court of Justice of July 17, 1997, Case C-242/95 (*GT-Link A/S v. De Danske Statsbaner (DSB)* [1997] ECR I-4449 [41].

13 Petit, n. 10.

However, if there were a *general* duty not to discriminate between terms offered to subsidiaries in vertically integrated undertakings on the one hand and competitors on the other hand, the more differentiated approach to margin squeezes would be nullified:[14] any price discrimination between the vertically integrated undertaking and its competitors (at least if not objectively justified) would automatically be an abuse under Article 102(c). As this is clearly not the case, there must be an additional factor that excludes the application of the non-discrimination rule.

Petzold has suggested that only exploitative but not exclusionary aspects of discrimination should fall under Article 102(c) TFEU; but he concedes that various statements in the case law are incompatible with this interpretation.[15] Additionally, Petzold suggests that discrimination between the vertically integrated undertaking and its competitors on the downstream market should not fall under Article 102(c) TFEU, but again has to concede that cases like *GT-Link* appear to undermine this general argument.[16]

Perhaps I am unduly influenced by the German case law, and I am aware of the impermissibility of transferring categories established in national law to European law, but it seems to me that the presence of a situation in which there is an at least quasi-regulatory relationship between the dominant undertaking and downstream third-party competitors (often in the context of former state monopolies and essential facilities) is not entirely coincidental to the European courts' application of the non-discrimination rule to the cases mentioned above. Indeed, it seems to me to be a defining feature of these cases. Petit concedes that this is *de facto* a feature of the cases in which the European institutions applied the non-discrimination rule. Petzold notes that cases that have applied the non-discrimination rule to vertically integrated undertakings may not be capable of being generalized because they all concerned (former) public undertakings or undertakings with special or exclusive rights.[17]

It is true, as Petit points out, that the courts in these cases did not apply the duty to deal test before finding an infringement of the non-discrimination rule; nor did they mention sector-specific regulation as an element of the non-discrimination rule. However, while it is perfectly legitimate to use the list of examples in Article 102 TFEU as a way to categorize and systematize the case law, the ultimate issue is not whether there is discrimination, but whether there is an abuse. The assessment whether there is an abuse has to take into account how much scope remains for competition despite the presence on the market of a dominant undertaking. Where there is a natural monopoly, it is not a good idea to hope for competition in the market to develop spontaneously; if one wants competition, one has to go either for competition for the market or for competition on the downstream (or upstream) market. Where competition on an up- or downstream market is all one can hope for, it makes sense to prohibit discrimination to the extent that it would distort competition on the downstream market as well. Similar considerations apply to incumbents, often former state monopolists, on liberalized markets with sector-specific regulation, such as railways, telecommunications, or postal markets; while here competition may develop at least on those partial markets that are not characterized by natural monopolies, any additional discriminatory measures applied by the incumbent vis-à-vis its competitors may stifle the development of the residual competition otherwise possible.

While *every* dominant position requires that the market be not easily contestable, there is a spectrum between bare dominance of an undertaking scraping above 40 percent market share in a market with *some* entry barriers on the one hand, and a full-fledged natural monopoly or incumbent in a network industry on the other hand. It is true that the case law rarely distinguishes these situations explicitly from each other: "dominance is dominance is dominance" does not quite have the same ring as "a rose is a rose is a rose," but the law seems to impose the special responsibility to all dominant undertakings alike (very occasional references to "super-dominance" notwithstanding). And yet, it seems to me that the courts, in deciding cases, do take into account *how* contestable the dominant position is, and that special rules may apply in the context of former state monopolies or regulated sectors. It would be better if these considerations, which appear to underlie the decisions implicitly, were made explicit.

In conclusion, it seems to me that vertically integrated undertakings need not, in general, offer the same or similar conditions to third parties as they do to themselves and their affiliates. The exceptions to this general rule are public undertakings and undertakings that are subject to a regulatory regime that entails non-discrimination. While the European case law (in contrast to German case law) does not explicitly state this particular combination of rule and exception, this interplay of rule and exception does seem to explain satisfactorily both the results of the cases in which the European courts found a discriminatory abuse *and* the cases in which Article 102(c) was not even mentioned even though a vertically integrated undertaking afforded preferential treatment to one of its affiliates compared to downstream competitors.

14 Friedrich Wenzel Bulst in Langen & Bunte Kartellrecht Kommentar Vol II (13th edn Luchterhand 2018) Article 102 para. 212.

15 Daniel Petzold Die Kosten-Preis-Schere im EU-Kartellrecht (Nomos 2012) 158–163.

16 Petzold, n. 15, *at* 163–167.

17 Petzold, n. 15, *at* 165 in footnote 632 (noting that these are also the cases for which German law makes an exception, see above n. 7).

Other than in these exceptional instances, the non-discrimination rule of Article 102(c) TFEU does not apply. However, a de facto duty not to discriminate could still result from other case categories of exclusionary abuses.

B. Refusal to Deal

Bo Vesterdorf has argued that in the absence of an essential facility as defined in *Bronner*, there can be no duty not to discriminate between the dominant undertaking and competitors;[18] and, he argues, even application of the restrictive essential facility principle does not (always) require equal treatment.[19] It seems to me that for the reasons outlined above, it is true that where an essential facility is concerned, a duty not to discriminate seems to be much easier to justify. The relevant questions then become what degree of dissimilar conditions can still be tolerated without distorting competition on the up- or downstream market and what preferential conditions may be accepted in order to reward investment in the essential facility or the taking of risks.

The term "essential facilities doctrine" has some baggage; like the U.S, Supreme Court, I consider the relevant question to be whether there is a duty to deal or not, which does not necessarily require recourse to the essential facilities doctrine. But apart from this terminological issue, I agree with Vesterdorf's assessment that if the vertically integrated undertaking does not have a duty to deal with third parties, then the imposition of dissimilar terms should not as such constitute an abuse.[20]

Application of the refusal to deal cases (instead of the general non-discrimination rule) also means that in the definition of the obligations the extent to which the dominant undertaking has made investments and taken risks can be considered.

C. Tying and General Abuse – The Google Search (Shopping) Case

As explained above, the non-discrimination rule in Article 102(c) TFEU does not apply outside the ambit of regulatory obligations (see above A.) and for the most part the duty not to discriminate between an affiliated person within the same single economic entity, on the one hand, and a third-party undertaking, on the other, should be restricted to refusal-to-deal cases (above B.).

However, as Petit notes, the application of rules on other types of abuses, such as tying or even unnamed general exclusionary abuses, may also lead to obligations that may, de facto, approximate a non-discrimination obligation. An abuse exists where a dominant undertaking "through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators [and this] has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition."[21] Exclusionary conduct may be abusive even if it does not fall into any of the categories contained in the list of examples in Article 102 TFEU or of the categories established in case law.

The Commission in the *Google Search (Shopping)* case did not commit to the application of any particular form of abuse, but instead highlighted the exclusionary effects of Google's Panda modification to the search algorithm, and that Google leveraged its dominant position to the market for comparison shopping.[22]

In principle, there are no methodological objections to such an approach. The reason why I feel slightly uncomfortable is instead that ranking search results is inherently a somewhat subjective task: what is the "best" search result? Google's argument was that the Panda change to the algorithm was intended to demote webpages with non-original content. In principle, this is a legitimate objective because many webpages with non-original content are not meritorious (objectively "bad" search results); but it is certainly true that Google's comparison shopping service benefited — coincidentally or perhaps not so coincidentally — from this change.

18 Bo Vesterdorf, *Theories of self-preferencing and duty to deal – two sides of the same coin?* Competition Law & Policy Debate Vol. 1(1) (February 2015), available at http://ssrn.com/abstract=2561355, at 6–7.

19 *Ibid.* at 7–8.

20 This is the same reason for which I find the US approach to margin squeezes more persuasive than the European approach (although I would exceptionally be somewhat more accepting of potentially exclusionary effects of above-cost predation). See Florian Wagner-von Papp, *Brauchen wir eine Missbrauchskontrolle von Unternehmen mit nur relativer oder überlegener Marktmacht: Novellierung der allgemeinen Missbrauchskontrolle*, in Florian Bien (ed.), Das deutsche Kartellrecht nach der 8. GWB-Novelle (Nomos 2013) 95, 136–143. *Nicolas Petit* (n. 10) shares this view in principle, but notes that the European case law on margin squeeze demonstrates that in the current interpretation of the law, the Court of Justice finds an abuse even in the absence of the conditions of a refusal to deal or predatory pricing. This is correct; but I find it difficult to extrapolate from a rule that lacks a principled rationale.

21 Court of Justice of the European Union of March 27, 2012, Case C-209/10 (*Post Danmark A/S v. Konkurrencerådet*) ECLI:EU:C:2012:172 [24].

22 Commission in *Google Search (Shopping)*, n. 2, paras. 331 *et seq.* (see esp. para. 335).

The question is: to what extent is Google prevented from favoring its own services? What if it favors its own services because they are (a) objectively or (b) at least subjectively better on the merits than the services of its competitors?

And here we come back to the considerations on the non-discrimination rule. The reason why we generally do not apply this rule to preferential treatment within the single economic entity is that (1) the preferential treatment could also be achieved by treating the single economic entity's own services similar to third parties but instead forgo payment indirectly; and (2) that even the dominant undertaking is not generally required to further its competitors' cause (see above A.).

Here, Google could have used the space it uses for advertisements to promote its own comparison shopping services and so achieved a prominent placement.[23] It is difficult, then, to treat as an abuse the promotion of its own services more prominently than other comparison websites without more. It seems that the abusive nature of the conduct only comes about because Google's algorithm may have promoted Google's own services not *transparently*: search users were, in the Commission's view, not sufficiently informed that the algorithm would self-preference Google's own services.[24] If true, this may indeed distort competition in that users will not recognize the reduction in quality of the search engine (provided ranking criteria are deteriorated by a promotion of Google's own services) and therefore fail to switch to "better," i.e. neutral search engines.[25] To a large extent, the persuasiveness of the assessment of Google's conduct as abusive turns on the statement: "As for the Shopping Unit, while the 'Sponsored' label may suggest that different positioning mechanisms are used, that information is likely to be understandable only by the most knowledgeable users."[26]

III. THE REFORM OF THE GERMAN ARC AND THE PROHIBITION OF SELF-REFERENCING

Currently, the 10th Amendment of the German ARC is being discussed. The Ministry's Draft Bill[27] recommends the introduction of a new § 19a, under which the Bundeskartellamt may declare an undertaking which operates to a substantial degree on multisided and network markets to have a "pre-eminent, market-transcending significance for competition." According to the draft's wording ("may declare") and the interpretative notes, the Bundeskartellamt has discretion whether to enter such a declaration.[28]

Factors to be considered in this assessment are to be the undertaking's dominant position on one or several markets, its access to resources, its degree of vertical integration and activity on related markets, its access to competitively relevant data, and its significance for access of third parties to up- or downstream markets and the influence this position has on the business activity of third parties.[29]

After this declaration has been made, or at the same time,[30] the Bundeskartellamt may, by decision, prohibit, among other things, self-preferencing when it comes to mediating access to up- or downstream markets (§ 19a(2) no. 1 in the Draft Bill's version), provided the conduct is not objectively justified. This prohibition is, unsurprisingly, based on the Commission's *Google Search (Shopping)* decision and the recommendation of the "Commission Competition Law 4.0."[31]

---

23 The payment consists in the opportunity costs of using its own ad space. Wagner-von Papp, n. 2, *at* 640–641.

24 See Commission in *Google Search (Shopping)*, n. 2, paras. 534–536. See also the transparency requirements in 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 [2019] Official Journal L 186/57, and Jean Tirole, *Competition and the Industrial Challenge for the Digital Age* (April 3, 2020), available at https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/competition_and_the_industrial_challenge_april_3_2020.pdf (doubting that mere transparency requirements are sufficient to avoid anticompetitive harm from self-preferencing, but acknowledging that vertically integrated platforms "cannot treat equally a rival offering that is inferior to its own" and concluding without a firm policy recommendation for self-preferencing).

25 For the probably limited scope for distortion see Wagner-von Papp, n. 2, *at* 642–643.

26 *Ibid*. para. 536.

27 Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), as of January 24, 2020, 09:32.

28 *Ibid*. p. 77. For proportionality reasons, the interpretative notes suggest that the finding should usually be time-limited to between 5 and 10 years.

29 § 19a(1), 2nd sentence, nos. 1–5 in the Draft Bill's version.

30 Fifth sentence of § 19a(2) of the Draft Bill ("The decision under paragraph 2 may be combined with the declaration under paragraph 1").

31 Interpretative notes to the Draft Bill, p. 78, referring to the 10th recommendation of the Commission Competition 4.0: Bundesministerium für Wirtschaft und Energie, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft — Bericht der Kommission Wettbewerbsrecht 4.0 (September 2019), available (in German) at https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.pdf?__blob=publicationFile&v=12, p. 6.

The provision seeks to provide greater legal certainty by making a prohibition decision dependent on a declaration of the undertaking's "pre-eminent, market-transcending significance."[32] The fact that the prohibition by decision may be combined with the declaration of this pre-eminent position slightly reduces this benefit; but it is only breaching the prohibition decision that may result in a fine[33] – in other words, the conduct is only prohibited for the future. However, § 19a(3) in the Draft Bill's version clarifies that §§ 19 and 20 of the ARC (the general prohibition of abuses of dominant positions and the prohibition of abuses by undertakings with only relative or predominant market power) remain applicable. The new § 19a in the Draft Bill's version therefore does *not* result in a safe harbor until the declaration and prohibition decision have been issued.

This is not the place to analyze in depth the new provision, whose fate in the legislative process is not yet certain anyway. The intention of facilitating quick intervention in multisided markets is understandable, as is the recognition that the focus on particular relevant markets may in some instances not reflect the true distortive influence that can be exercised by undertakings in multisided markets. It will remain to be seen, however, whether introducing yet another, not particularly well-defined position with "special responsibilities" will really bring greater clarity. The approach of prohibiting borderline critical conduct only for the future seems to me to be commendable in principle (just as the *Motorola* SEP decision[34] in my view rightly abstained from imposing a fine). Leaving open the possibility of the application of §§ 19, 20 ARC largely destroys this effect; but on the other hand, it is understandable that the legislator is unwilling to give undertakings that engage in the conduct enumerated in § 19a(2) carte blanche if the conduct constitutes at the same time an abuse of a dominant position.

IV. CONCLUSION

Prohibiting self-preferencing should remain the exception. Under current law, the non-discrimination rule in Article 102(c) TFEU is arguably only applicable to self-preferencing in the exceptional cases where the undertaking is under a regulatory duty not to discriminate. It is possible to find that the prohibition of exclusionary abuses can result in de facto obligations not to discriminate and therefore a de facto prohibition of self-preferencing. However, finding such an abuse must take into account the reasons why the non-discrimination rule does not generally prohibit self-preferencing: the possibility of achieving the same effect by other – unobjectionable – means, and the absence of a general duty of even the dominant undertaking to further its competitors' causes. I continue to have some reservations whether this was sufficiently considered in the *Google Search (Shopping)* decision; at least, the decision should have made clearer what the precise factors were that led the Commission to find that self-preferencing was abusive (was it, as I and others have speculated, the fact that search users were misled about the distortion of the search result ranking that came about through self-preferencing? If so, when is a ranking that depends on subjective assessments of quality distorted? And when is such a distortion made sufficiently transparent to prevent a finding of abuse if a "sponsored" label does not suffice?).

In principle, the approach in the Draft Bill for a 10th Amendment to the German ARC to introduce a provision by which a competition authority may prohibit specified conduct for the future (similar to a regulatory scheme) seems a good idea when it comes to conduct that is not ex ante obviously abusive but may have demonstrable exclusionary effects. Whether the provision on self-preferencing in § 19a of the Draft Bill really achieves this effect is a matter for separate discussion.[35]

32 Interpretative notes to the Draft Bill, p. 76.

33 § 81(1) no. 2(a) in the Draft Bill's version.

34 Commission Decision of April 29, 2014, Case AT 39.985, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

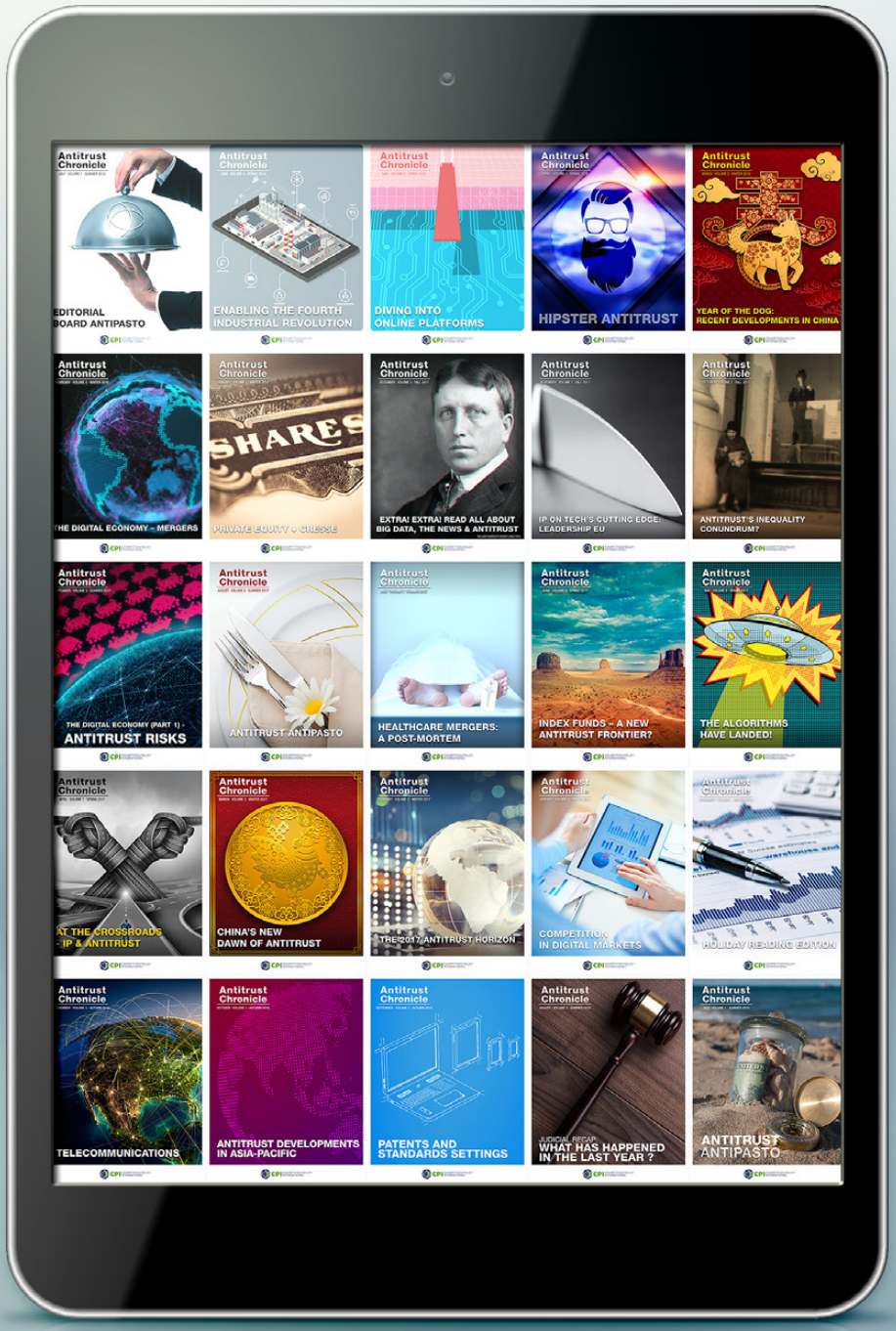
35 Thomas Höppner considers the definition of the abuse to be commendable, but takes issue with the concept of an ex nunc prohibition decision. Höppner, *Plattform-Regulierung light*, WuW 2020, 71, 76 *et seq.* Christoph Degenhart criticizes the provisions from a (German) constitutional perspective. Degenhart, *Verfassungsfragen einer 10. GWB-Novelle auf der Grundlage des Referentenentwurfs vom 24.01.2020*, WuW 2020, 309 *et seq.*

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.




CPI
COMPETITION POLICY
INTERNATIONAL