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# The Legality of Self-Preferencing under Article 102 TFEU

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# Summary

This thesis explores the evolving legal treatment of self-preferencing by dominant digital platforms under Article 102 TFEU. It aims to clarify the current legal position and contribute to a more coherent understanding by combining legal doctrinal analysis with law-and-economics reasoning. Three sub-questions guide the analysis: the economic rationale behind self-preferencing, applicable theories of harm under Article 102, and the implications of recent legal and regulatory developments.

The thesis begins by defining self-preferencing as a dominant firm's preferential treatment of its own services and outlines mechanisms through which it occurs. Economically, self-preferencing may generate efficiencies but can also harm competition by excluding rivals or raising their costs, effects that are amplified in digital markets.

Legally, the thesis assesses whether existing abuse categories – refusal to deal, discrimination, and tying – can address self-preferencing. While each has limitations, they remain adaptable to many scenarios. A major development was the ECJ's *Google Shopping* judgment in 2024, which confirmed that self-preferencing can constitute abuse even absent a refusal to deal. The Court introduced discriminatory leveraging as a distinct form of abuse: the use of dominance in one market to unfairly advantage a firm's own adjacent service. While the ruling expanded the reach of Article 102 by recognizing a new form of abuse, it left the legal contours of the new category of abuse unclear, resulting in continued legal uncertainty for self-preferencing conduct.

Furthermore, the thesis examines the interaction between Article 102 and the DMA, which provides faster, rule-based enforcement against gatekeepers. It considers whether increased reliance on the DMA in self-preferencing cases could reduce the development of case law under Article 102. Additionally, it explores whether the DMA's strong emphasis on fairness may gradually influence the interpretation of Article 102, pushing it toward a more fairness-oriented approach in digital markets. The Commission's 2024 Draft Guidelines add to the uncertainty by presenting an inconsistent framing of self-preferencing.

The thesis concludes that while self-preferencing by digital platforms is now more clearly recognized as a potential abuse, its legal contours remain unsettled. Ongoing tensions between effects-based antitrust and ex ante regulation require a nuanced approach to ensure consistent and effective enforcement in the digital economy.

# Sammanfattning

Denna uppsats undersöker hur självgynnande (“self-preferencing”) beteenden hos digitala plattformar i dominerande ställning behandlas rättsligt enligt artikel 102 FEUF. Syftet är att klargöra den nuvarande rättsliga situationen och skapa en mer sammanhängande förståelse genom att kombinera rättsdogmatisk metod och analys med rättsekonomiska resonemang. Analysen vägleds av tre delfrågor: den ekonomiska grunden för självgynnande, tillämpliga skadeteorier enligt artikel 102, samt de rättsliga och regulatoriska konsekvenserna av senare utvecklingar.

Uppsatsen inleds genom att definiera self-preferencing som en dominerande aktörs gynnande av sina egna tjänster och därefter identifiera mekanismerna genom vilka detta sker. Ur ett ekonomiskt perspektiv kan självpreferens medföra effektivitetsvinster, men även skada konkurrensen genom att utestänga konkurrenter från marknaden, effekter som förstärks i digitala kontexter.

På det rättsliga planet analyseras om befintliga missbruksformer – vägran att tillhandahålla (refusal to deal), diskriminering och kopplingsförbehåll – kan omfatta self-preferencing. Även om dessa har begränsningar i förhållande till vissa typer av self-preferencing bedöms de vara tillämpliga i ett flertal situationer. En viktig utveckling i detta avseende var EU-domstolens dom i *Google Shopping*-målet 2024, där domstolen fastslog att self-preferencing kan utgöra missbruk även om det inte utgör en vägran att tillhandahålla. I domen introducerades en ny kategori av missbruk: “discriminatory leveraging,” vilket innebär att dominans i ett marknadsled används för att otillbörligt gynna egna tjänster på en angränsande marknad genom diskriminerande metoder. Även om domen breddade tillämpningen av artikel 102, är denna nya missbruksforms legala gränser fortfarande otydliga, vilket fortsatt skapar osäkerhet kring var gränsen går mellan tillåten och otillåten self-preferencing.

Vidare behandlar uppsatsen samspelet mellan artikel 102 och DMA, som möjliggör snabbare och regelbaserad tillsyn mot grindvakter. Det diskuteras huruvida ett ökat fokus på DMA i ärenden som rör self-preferencing kan hämma rättsutvecklingen under artikel 102. Uppsatsen undersöker också om DMA kan komma att påverka tolkningen av artikel 102, och driva den i en mer rättvisebaserad riktning i digitala sammanhang. Kommissionens utkast till nya riktlinjer för missbruk av dominerande ställning från 2024 bidrar samtidigt till rättsosäkerhet genom att presentera en inkonsekvent tolkning av självpreferens.

Slutsatsen är att self-preferencing av digitala plattformar numera i högre grad erkänns som en möjlig form av missbruk, men att dess rättsliga konturer fortfarande är oklara. Den pågående spänningen mellan effektbaserad

konkurrensrätt och ex ante-reglering kräver ett nyanserat angreppssätt för att säkerställa en enhetlig och effektiv tillämpning i den digitala ekonomin.

# Förord

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*Filippa Dyrefors,*

Lund, maj 2025

# Abbreviations

|                     |                                                                                                                                                               |
|---------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|
| AEC                 | As-Efficient Competitor                                                                                                                                       |
| AG                  | Advocate General                                                                                                                                              |
| API                 | Application Programming Interface                                                                                                                             |
| Article 102         | Article 102 TFEU                                                                                                                                              |
| CJEU                | Court of Justice of the European Union                                                                                                                        |
| Commission          | European Commission                                                                                                                                           |
| CSS                 | Comparison Shopping Service                                                                                                                                   |
| DMA                 | Digital Markets Act                                                                                                                                           |
| Draft Guidelines    | Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings                                              |
| ECJ                 | European Court of Justice                                                                                                                                     |
| EU                  | European Union                                                                                                                                                |
| GC                  | General Court                                                                                                                                                 |
| ICA                 | Italian Competition Authority                                                                                                                                 |
| NCA                 | National Competition Authority                                                                                                                                |
| NFC                 | Near Field Communication                                                                                                                                      |
| TEU                 | Treaty on European Union                                                                                                                                      |
| TFEU                | Treaty on the Functioning of the European Union                                                                                                               |
| 2009 Guidance Paper | Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings 102 TFEU |

# 1 Introduction

## 1.1 Background

In recent years, major digital platforms have been at the center of intense scrutiny from commentators, policymakers, academics, and the media. Their widespread influence, ongoing expansion beyond their original markets, and entrenched market power have raised concerns across various sectors. In response, many countries have considered and, in some cases, already implemented new legislative measures.<sup>1</sup> At the same time, competition authorities, initially criticized for their perceived inaction, have stepped up their enforcement efforts.

In the European Union (“EU”), the European Commission (“Commission”) has responded by initiating abuse of dominance proceedings under Article 102 of the Treaty on the Functioning of the European Union (“TFEU”). Recognizing that traditional enforcement tools under the TFEU may no longer be sufficient to address the complexities of digital markets, the EU introduced a new regulatory framework in 2024: the Digital Markets Act (“DMA”).<sup>2</sup> Later that same year, the Commission also published its Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (“Draft Guidelines”). These aim to assist undertakings in assessing whether their conduct constitutes an exclusionary abuse under Article 102 and to provide guidance to national courts and competition authorities, thereby enhancing legal certainty and consistency in enforcement.<sup>3</sup>

This thesis focuses specifically on the competition concerns surrounding digital markets, particularly a category of practices often referred to as “self-preferencing.” The concept generally describes a form of conduct where an integrated firm favors its affiliates at the expense of competitors. These types of practices have recently gained a lot of attention from both national competition authorities (“NCAs”), the Commission and the EU courts, especially in cases involving large digital platforms with dual roles as both marketplace operators and competitors on the same platform.<sup>4</sup> The competitive concern is essentially that when a vertically integrated platform

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<sup>1</sup> See, e.g., ‘Digital Competition Regulations Around the World,’ (16 May 2024) *International Center for Law & Economics* (web page), available at <https://laweconcenter.org/spotlights/digital-competition-regulations-around-the-world/> (accessed 20 Feb. 2025).

<sup>2</sup> Digital Markets Act, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (2022) OJ L265/1 (“DMA”), Recital 5.

<sup>3</sup> European Commission, *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings* (2024), para. 8.

<sup>4</sup> Pablo Ibáñez Colomo, ‘Self-Preferencing: Yet Another Epithet in Need of Limiting Principles’, (2020) 43 *World Competition*, p. 418-419.

with market power at the upstream level also operates at the downstream level, there is a weakened ability to constrain the platform's incentive to favor its own downstream products or to mitigate the negative effects of such behavior.<sup>5</sup> The risk of anticompetitive harm is further heightened by the structural features of digital markets, such as high concentration, significant entry barriers, and strong network effects.<sup>6</sup>

The above raises important considerations with regards to how to legally approach the concept in a way that effectively curbs harmful practices that distort competition, while still permitting platforms to adopt business strategies that do not have a negative effect on competition, and that could potentially even enhance social welfare.<sup>7</sup>

## 1.2 Aim and Research Questions

The aim of this thesis is to assess the effectiveness of the current enforcement framework in addressing competition concerns related to self-preferencing in digital markets. Specifically, it examines whether the general abuse provision in Article 102 TFEU ("Article 102") is sufficiently flexible to accommodate the diverse forms and characteristics of self-preferencing, while still ensuring legal certainty and predictability in its application. The thesis also seeks to explore the legal criteria used to evaluate self-preferencing conduct, including the definition of competition on the merits and the applicability of established categories of abuse. Finally, it aims to examine whether the current EU legal framework provides NCAs with clear and adequate guidance for determining when self-preferencing constitutes an abuse of dominance. The following research question will be answered to achieve the purposes of this thesis:

- What is the current legal position regarding how self-preferencing in the digital markets should be evaluated under Article 102?

To address the main research question, the following sub-questions will be examined:

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<sup>5</sup> Guillaume Duquesne, et al., 'What constitutes self-preferencing and its proliferation in digital markets,' (2 Oct. 2024) *Global Competition Review* (web page), available at <https://globalcompetitionreview.com/guide/digital-markets-guide/fourth-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets> (accessed 26 Feb. 2025).

<sup>6</sup> Nora Lampecco, 'Self-favouring by a vertically integrated undertaking: from discrimination to self-preferencing,' (2021, working paper) available at [https://dial.uclouvain.be/pr/boreal/object/boreal%3A267457/datastream/PDF\\_01/view](https://dial.uclouvain.be/pr/boreal/object/boreal%3A267457/datastream/PDF_01/view) (accessed 26 Feb. 2025), p. 6.

<sup>7</sup> See, e.g., Peter Ormosi, 'The Legal Definition of Self-preferencing: too Narrow too Broad or Both', (8 Nov. 2023) *Competition Policy Blog* (web page), available at [https://competitionpolicy.wordpress.com/2023/11/08/the-legal-definition-of-self-preferencing-too-narrow-too-broad-or-both/#\\_ftn1](https://competitionpolicy.wordpress.com/2023/11/08/the-legal-definition-of-self-preferencing-too-narrow-too-broad-or-both/#_ftn1) (accessed 7 Feb. 2025).

- From a law and economics perspective, what are the potential concerns and justifications associated with self-preferencing?
- Which theories of harm can be applied to address self-preferencing under Article 102? Is there a distinct theory of harm that covers self-preferencing practices?
- How might the current legal approach to self-preferencing affect the future enforcement of Article 102, especially considering developments such as the DMA and the Draft Guidelines?

### 1.3 Delimitations

Firstly, this thesis primarily considers Article 102 and related EU sources. Nevertheless, since Article 102 serves as the foundation of the competition law of EU member states, national legal sources are also examined to a limited extent. In response to the challenges posed by rapid digitalization, the EU has introduced the DMA, and although heavily influenced by competition law, it constitutes a distinct *ex ante* regulatory instrument designed to complement the existing legal framework. Due to the limited scope of this thesis, the DMA is examined only insofar as it contributes to a deeper understanding of the evolving approach to self-preferencing under Article 102.

Secondly, Article 102 sets out several conditions for its application. This thesis focuses solely on the concept of abuse and does not address the other requirements for the Article to apply.

Thirdly, this thesis examines self-preferencing exclusively in the context of digital markets. While different forms of preferential conduct may arise in more traditional sectors, such as retail, telecommunications, or media, the focus here is on digital platforms. This limitation is made for two main reasons. First, preferential treatment in non-digital markets is already extensively addressed through established competition law doctrines, such as the refusal to deal framework. Second, digital platforms exhibit unique economic characteristics that give rise to new forms of competitive harm and enforcement challenges. This thesis does not seek to develop a general theory of self-preferencing applicable across all sectors but rather aims to contribute to the understanding of how this type of conduct should be assessed within the evolving legal framework governing digital markets in the EU.

Fourthly, Article 102 identifies three main categories of abuse: (1) exploitative abuses, (2) exclusionary abuses, and (3) reprisal abuses. Exploitative abuses involve pricing strategies and other practices that *directly* harm consumer welfare. Economically, these abuses typically occur when a dominant firm leverages its market power to extract excessive profits from

consumers – gains that a non-dominant firm could not achieve – or otherwise takes unfair advantage of consumers.<sup>8</sup> Exclusionary abuses is the most prevalent and significant category of abuse, and refers to strategic practices aimed at undermining competitors, thereby restricting their ability to compete. While these actions do not always directly harm consumers, they can lead to reduced competition, ultimately resulting in higher prices, lower quality, or diminished innovation, which negatively impacts consumer welfare.<sup>9</sup> The third category, reprisal abuses, refers to cases where a dominant firm punishes a competitor to discourage aggressive competition or pressures customers not to do business with a rival.<sup>10</sup> Self-preferencing by dominant firms, such as favoring their own products in rankings or impairing the performance of rival services, is generally treated as an exclusionary abuse. This classification is consistent with prevailing enforcement approaches in both the EU and the United States.<sup>11</sup> However, recent commentary suggests that, in digital markets, self-preferencing could also amount to an exploitative abuse, where the conduct is less about excluding rivals and more about extracting excessive value from users, suppliers, or complementors.<sup>12</sup> While this perspective adds an important dimension to the debate, this thesis focuses exclusively on self-preferencing as an exclusionary abuse. This reflects both the current legal position within the EU and the scope constraints of this thesis.

Fifthly, this thesis examines those forms of self-preferencing most commonly identified as involving non-price conduct by vertically integrated digital platforms. This refers to situations where, for example, a dominant platform limits third-party access to certain features, data, or tools, or manipulates rankings to favor its own services. The thesis does not address practices that may also be labelled as self-preferencing but that involves price-conduct, and that would appropriately be analyzed as a form of margin squeeze. These practices, while potentially anticompetitive, have long been addressed within existing legal frameworks. Moreover, the thesis does not aim to evaluate all possible forms of non-price self-preferencing but focuses instead on a select few that have attracted a lot of attention in recent years in the EU. This narrowed focus allows for a more meaningful examination of the key issues most relevant to the current legal landscape.

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<sup>8</sup> Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 3rd edn, (Hart Publishing: Oxford: 2020), p. 262.

<sup>9</sup> *ibid.*, p. 263.

<sup>10</sup> *ibid.*, p. 264.

<sup>11</sup> Michael Tagliavini, 'Self-preferencing conducts of digital platforms,' (2024, doctoral thesis), available at <https://iris.luiss.it/retrieve/6ed6b4aa-b521-4a98-873a-b71d0e48a3c4/20241008-TAGLIAVINI.pdf> (accessed 21 Apr. 2025), pp. 80-82.

<sup>12</sup> See, eg., Patrice Bougette, Oliver Budzinski & Frédéric Marty, 'Self-Preferencing Theories Need To Account for Exploitative Abuse,' (27 March 2023) *ProMarket* (web page), available at <https://www.promarket.org/2023/03/27/self-preferencing-theories-need-to-account-for-exploitative-abuse/> (accessed 23 Apr. 2025).

Sixthly, there are several cases from the Court of Justice of the European Union (“CJEU”, used as an umbrella term for the EU’s judicial system) regarding self-preferencing (although referred to in other terms). This thesis focuses primarily on the *Google Shopping* case,<sup>13</sup> as it is considered one of the most significant in shaping the current legal framework for self-preferencing in digital markets. The case has been widely discussed in academic debates and is deemed most relevant to answering the research question of this thesis. Other CJEU cases will be referenced but not analyzed in detail.

Finally, this thesis does not address issues relating to evidentiary standards, burden of proof or other procedural aspects, as these fall outside the aim and scope limitations of this study.

## 1.4 Method and Materials

### 1.4.1 EU Legal Method

This thesis applies the EU legal method, as it aims to determine how self-preferencing is currently evaluated under Article 102. The EU legal method entails a specific way of interpreting EU legal sources. As the EU constitutes an autonomous legal system, it has its own hierarchy of norms. The highest level of this hierarchy is primary law, which includes the various EU treaties, such as the TFEU, the Treaty on European Union (“TEU”), the Charter of Fundamental Rights, and the general principles of law as established by the CJEU. Secondary law includes binding instruments such as regulations, directives, and decisions.<sup>14</sup>

A crucial additional legal source is the case law of the CJEU which interprets and develops the application of EU law. The CJEU uses various interpretative methods, notably teleological interpretation, to ensure coherence with the objectives of the treaties.<sup>15</sup> Soft law instruments, such as the Commission’s Guidance Papers and Guidelines, although non-binding, play an important role in the enforcement and interpretation of competition law.<sup>16</sup> Academic literature and legal doctrine, while not formally cited by the CJEU, contribute to the scholarly understanding and critical evaluation of the law’s development.<sup>17</sup>

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<sup>13</sup> Case AT.39740 – *Google Search (Shopping)*, 27 June 2017; Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:T:2021:763; Case C-48/22 *Google LLC and Alphabet Inc v European Commission* ECLI:EU:C:2024:726.

<sup>14</sup> Jörgen Hettne & Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag I svensk rättstillämpning*, 2nd edn, (Nordstedts Juridik: Stockholm: 2011), pp. 41-44.

<sup>15</sup> *ibid.*, pp. 49, 168-170.

<sup>16</sup> *ibid.*, pp. 46-48.

<sup>17</sup> *ibid.*, pp. 120-122.

The analysis is centered on Article 102, with a focus on how self-preferencing practices are assessed under this provision. Several cases by the European Court of Justice (“ECJ”) and the General Court (“GC”) are analyzed, chosen based on their relevance and authority in shaping the legal interpretation of self-preferencing. The *Google Shopping* case is examined in detail, while other cases are analyzed insofar they illustrate how the CJEU interprets and applies Article 102 in digital markets. Decisions from the Commission are also used, since they provide insight into how competition rules are enforced in practice.

#### 1.4.2 Legal Dogmatic Method

In combination with the EU legal method, the main method used in this thesis is the legal dogmatic method, since the primary research question concerns the current legal position on how self-preferencing in digital markets should be evaluated under Article 102. This method is commonly used in legal literature to interpret and systematize valid legal norms within a specific legal order which in this thesis is the EU legal system.<sup>18</sup>

The aim is to clarify how Article 102 has been applied in practice to cases involving self-preferencing, and to assess whether a consistent legal approach can be identified. Soft law instruments such as the Commission’s Guidance Papers and Guidelines, as well as Commission decisions are also included to the extent they illustrate enforcement in practice or support the interpretation of binding legal norms.

#### 1.4.3 Legal Analytical and Law and Economics Methods

In addition to the legal dogmatic method, this thesis also applies a legal analytical method to complement the examination of the current legal position under Article 102. While the legal dogmatic method focuses on identifying and interpreting valid legal norms, the legal analytical method allows for a more critical analysis of the underlying principles, rationales, and implications of the law.<sup>19</sup> This approach is particularly relevant to the sub-questions of this thesis that go beyond merely describing the legal framework. The question of the impact the current legal framework has on future enforcement requires a deeper evaluation of the objectives and effectiveness of EU competition law in addressing self-preferencing.

Moreover, it should be noted that competition law is closely intertwined with economic reasoning, and Article 102 is inherently guided by economic objectives.<sup>20</sup> As such, economic considerations constitute an integral part of the legal analysis, particularly in relation to the sub-question concerning the potential concerns and justifications associated with self-preferencing

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<sup>18</sup> Jan Kleineman, ‘Rättsdogmatisk metod’ in Nääv, Maria & Zamboni, Mauro, *Juridisk metodlära*, 2nd edn, (Studentlitteratur: Lund: 2018), p. 21.

<sup>19</sup> Ibid., pp. 36-37.

<sup>20</sup> See, e.g., O’Donoghue and Padilla (n 8), pp. 6-9.

conduct. While no specific economic model or theory will be examined in detail, evaluating the legal framework through an economic lens, by considering the effects of self-preferencing and assessing whether these outcomes align with the underlying objectives of EU competition law, is highly relevant to the aim of this thesis. This part of the analysis relies primarily on academic literature in both law and economics, as well as relevant soft law, and enforcement practice, to place the legal rules in a broader theoretical and practical context.

## 1.5 State of Research

The concept of self-preferencing in digital markets has only quite recently emerged as a significant point of discussion within EU competition law. Academic research on self-preferencing under Article 102 is still developing and reflects ongoing debates regarding its proper legal qualification, theoretical foundations, and enforcement implications.

Much of the existing legal scholarship focuses on, firstly, whether it is appropriate to subject all types of self-preferencing conduct to regulatory intervention and, secondly, what the legal avenues are to address problematic self-preferencing behavior. Early contributions, such as those by Bo Vesterdorf in 2015, questioned whether self-preferencing could be abusive at all under EU competition law, if the dominant firm in question has no duty to deal with rivals under the essential facilities doctrine.<sup>21</sup> However, other scholars like Petit, have maintained that already existing legal categories under Article 102 offer a solid basis for addressing abusive self-preferencing.<sup>22</sup>

In the last decade, and particularly since the Commission fined Google for abusing its dominant position in 2017, the legal debate regarding self-preferencing has intensified. The *Google Shopping* case marked a turning point in both legal scholarship and enforcement practice and has sparked renewed academic interest in delineating the boundaries of abusive conduct for vertically integrated digital platforms. The introduction of the DMA and the Draft Guidelines has further fueled this interest.

Nevertheless, academic commentary on the legal position of self-preferencing after the ECJ's judgment in *Google Shopping* in 2024 remains limited and fragmented, with key questions surrounding legal qualification, theoretical foundations, and the interaction with regulatory instruments like the DMA still open for debate. By integrating legal doctrinal interpretation with law-and-economics reasoning, the thesis aspires to contribute to a more

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<sup>21</sup> Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal - Two Sides of the Same Coin?' (2015), 1(1) *Competition Law & Policy Debate*.

<sup>22</sup> Nicolas Petit, 'Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015), *Competition Law & Policy Debate* 1 (rev edn, Feb. 2020).

coherent understanding of this increasingly prominent yet still legally unsettled area of EU competition law.

## 1.6 Outline

*Chapter 2* marks the beginning of this thesis by defining the concept of self-preferencing and exploring its economic foundations, particularly in relation to integrated platform models. A typology of preferential treatment mechanisms is developed, including discriminatory ranking, data use, and access restrictions, with attention to the roles of leveraging and discrimination.

*Chapter 3* provides an in-depth analysis of the legal framework under Article 102. It first explores how abuse of dominance is assessed, including the requirement of exclusionary effects and conduct falling outside competition on the merits. The chapter then considers whether existing categories – refusal to deal, discrimination, and tying – can accommodate different forms of self-preferencing.

*Chapter 4* critically assesses the *Google Shopping* judgment, which marked a turning point by recognizing self-preferencing as a standalone abuse. It considers legal uncertainties left unresolved by the ECJ, including the role of discriminatory leveraging as a new theory of harm. The chapter concludes by assessing how enforcement may evolve in light of the DMA and the Draft Guidelines.

*Chapter 5* presents the conclusion of the thesis.

## 2 Defining Self-Preferencing

### 2.1 Introduction

Defining self-preferencing is difficult. Although the term is widely used by scholars and practitioners, it does not correspond to a precisely defined conduct under competition law.<sup>23</sup> However, self-preferencing is generally understood as the practice whereby a company favors its own products or services, or those within its ecosystem, over competing offerings from other entities.<sup>24</sup> With this definition in mind, there appears to be two cumulative conditions that need to be fulfilled for a practice to be understood as “self-preferencing.”

First, it must involve an integrated firm operating in two directly connected markets. This connection can be either vertical or horizontal. If the connection is vertical, the firm operates on both an upstream market, which involves earlier stages of the supply chain, and a downstream market, where it either interacts directly with consumers or brings products to market.<sup>25</sup> If the connection is horizontal, the firm operates on two complementary markets, on the same level. Second, the firm in question must leverage its market power by implementing some kind of mechanism that gives preference to its own activities over those of competitors.<sup>26</sup>

Although these two conditions give some structure to the concept, it still encompasses a broad variety of practices, ranging from the complete exclusion of competing alternatives to more subtle advantages, such as preferential placement or promotion of the firm's own products or services.<sup>27</sup> The definition does not capture the varying impacts that different preferencing behaviors might have in practice. Instead, it serves as a broad, catch-all phrase, begging the question of whether there are any other important considerations to be made to further delineate self-preferencing as a competition concern.

### 2.2 Integrated Digital Platforms and the Underlying Economics

Like the concept of self-preferencing, the term “digital platform” lacks precision. Nevertheless, one of the main characteristics of a multisided

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<sup>23</sup> Duquesne et al. (n 5).

<sup>24</sup> See, e.g., European Commission, *Competition Policy for the Digital Era*, ((Report by Jaques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, 2019), p. 66; Herbert Hovenkamp, ‘Antitrust and Self-Preferencing’ (2023), 38(1) *U of Penn, Inst for Law & Econ Research Paper*, p. 5; O’Donoghue and Padilla (n 8), p. 1091.

<sup>25</sup> Richard Whish & David Bailey, *Competition Law*, 11th edn, (Oxford University Press: Oxford: 2024), p. 695.

<sup>26</sup> Colomo (n 4), p. 420.

<sup>27</sup> Hovenkamp (n 24), p. 5.

platform is that it acts as an intermediary to enable the exchange of products, services or information between two or more distinct, non-competing groups of platform users. Numerous types of digital platforms exist, such as credit card systems, search engines, app stores and streaming platforms.<sup>28</sup> Efficient transactions on digital platforms rely on effectively matching different platform participants, such as buyers and sellers. Given the vast number of available offers, platforms create value by helping users navigate options, for example by recommending relevant products, and thus reducing search costs.<sup>29</sup> These recommendations play a pivotal role in shaping competition and grant platform providers substantial influence over market dynamics.<sup>30</sup>

### 2.2.1 The dual role of vertically integrated firms

Beyond merely facilitating exchanges between third-party actors, many platform providers also participate on their own platforms through their affiliates, thereby establishing a *vertical integration*. For example, Amazon not only operates the Amazon Marketplace, but also sells its own products on the platform. Moreover, a firm can operate on two markets through a *horizontal integration*. This would be the case, for instance, if a company offers multiple services or products that compete with each other or with those of third parties on the same level of the supply chain, such as a technology company running both a music streaming service and a podcast platform.<sup>31</sup> Of course, a firm can also, through a digital ecosystem, be integrated both vertically and horizontally simultaneously, which is the case for big tech firms that operate across multiple levels of the supply chain, while also competing directly with third-party businesses in several markets.<sup>32</sup>

The multi-sided role that these platforms have creates a potential conflict of interest, as the incentives of a platform provider and those of a market participant do not always align. When operating in dual mode, the platforms have an incentive to give its affiliates a competitive edge and treat them differently from how they treat third-party actors on the platform.<sup>33</sup> As a result, third-party actors who might rely on the platform to reach customers, will find themselves at a structural disadvantage, as their ability to compete is influenced by the very entity they depend on for market access.

The main competitive concern with integrated firms in general is the risk of foreclosure, which refers to actions that block competitors' access to markets,

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<sup>28</sup> Whish & Bailey (n 25), pp. 1046-1048.

<sup>29</sup> Raluca M. Ursu, 'The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions,' (2018), 39 (4) *Marketing Science*, p. 530.

<sup>30</sup> See, e.g., Luis Aguiar, Joel Waldfogel & Sarah Waldfogel, 'Playlisting favorites: Measuring platform bias in the music industry,' (2021, working paper) available at <https://ssrn.com/abstract=3884712> (accessed 5 March 2025), p. 21.

<sup>31</sup> Whish & Bailey (n 25), pp. 223-224.

<sup>32</sup> O'Donoghue and Padilla (n 8), pp. 1046-1049.

<sup>33</sup> Colomo (n 4), pp. 420-421.

effectively excluding them from competition.<sup>34</sup> Vertical foreclosure can take the form of input or customer foreclosure. Input foreclosure occurs when a firm controlling a key input denies access to, limits compatibility with, or raises costs for rivals, typically competing with its downstream subsidiary. Customer foreclosure arises when a dominant firm prevents an upstream competitor from reaching customers by restricting access to its downstream operations. Foreclosure in complementary markets refers to cases where a firm controlling a primary product or service, such as a platform, denies access to a complementary product or service, like an app. The mechanisms mirror those of vertical foreclosure, which has been the main focus of economic literature and is the primary concern of this thesis.<sup>35</sup>

From an economic perspective, one concern with vertical integration can be analyzed through the “raising rivals’ costs” model. This model suggests that when a firm is vertically integrated and acts as an intermediary in the upstream market, such as by controlling a digital platform, it has both the opportunity and, potentially, the incentive to increase the costs faced by third-party sellers in the downstream market. The firm may make it more difficult or costly for third-party sellers to distribute or produce competing goods or services.<sup>36</sup> Unlike the integrated firm, these rivals often rely entirely on a single market for their revenues and may be unable to sustain a pricing strategy where revenues fall short of long-run incremental costs. In other words, the integrated firm tilts competition in favor of its own affiliates, potentially excluding non-integrated competitors.<sup>37</sup> Self-preferencing constitutes a specific mechanism through which an integrated firm can raise rivals’ costs, for example, by granting preferential placement to its own products or restricting access to essential data or functionalities. Such conduct reduces competitors’ effectiveness not through superior efficiency or innovation, but by exploiting control over the upstream market, an outcome that may lead to anticompetitive effects.

However, it is not always the case that a dominant firm has the economic incentives (nor the ability) to exclude competition in a related market through self-preferencing conduct or other envelopment strategies. In the context of digital platforms, it has been argued that the incentive to raise rivals’ costs may be weaker, as these marketplaces generate value by facilitating interactions between buyers and sellers, with their success largely dependent

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<sup>34</sup> Lee Hwang, ‘Foreclosure,’ *Global Dictionary of Competition Law*, Concurrences (web page), Art. No 117887.

<sup>35</sup> Massimo Motta, ‘Self-preferencing and foreclosure in digital markets: Theories of harm for abuse cases’ (2023), 90 *International Journal of Industrial Organization*, p. 3.

<sup>36</sup> Kevin C Adam, Juliette Caminade and Christopher R Knittel, ‘The Intersection of Self-Preferencing and Pricing Practices in the Digital World,’ (2022) *The Price Point: Newsletter of the ABA Section of Antitrust Law’s Pricing Conduct Committee*, <https://www.analysisgroup.com/link/d76a46125f904706b688c75c8084998d.aspx> (accessed 1 May 2025), pp. 3-4.

<sup>37</sup> O’Donoghue and Padilla (n 8), p. 1064.

on maximizing user engagement and transaction volume. As such, excluding rivals could be counterproductive, potentially reducing the platform's overall attractiveness and value.<sup>38</sup>

Moreover, economists and regulators have long acknowledged that, under certain circumstances, vertical integration can generate pro-competitive effects by encouraging firms to lower final consumer prices. A commonly recognized efficiency benefit of vertical integration is that it removes double marginalization – the problem that arises when two separate firms with market power (i.e. there is no perfect competition) that operate at different levels of the supply chain each price goods above marginal cost, leading to double price markups and effectively deadweight losses borne by consumers. When these firms merge into one integrated entity, they can coordinate pricing across the chain, which not only increases the firm's total profits but can also improve overall market welfare by lowering prices for consumers.<sup>39</sup>

### 2.2.2 Effects of self-preferencing in digital markets

In the digital economy, the distinction between pro-competitive and anticompetitive self-preferencing remains unclear and widely debated. While self-preferencing can generate anticompetitive effects, it has also been recognized as a legitimate business strategy that allows firms to enhance efficiencies, achieve economies of scale, and recover upstream investments, which are indeed pro-competitive effects. The efficiency justifications for self-preferencing closely resemble those traditionally associated with vertical integration.<sup>40</sup>

However, concerns about the potential anticompetitive effects of self-preferencing must be viewed within the broader structural context of multi-sided platforms. A frequently cited issue is that these markets tend to be highly concentrated, largely due to strong network effects (where the value of a product increases as more users adopt it), significant economies of scale and scope (which lower the cost of production and expansion as the firm grows), very low marginal costs, and a high control of data. These features make the market likely to tip towards a single dominant firm, as new entrants often find it difficult to compete due to the advantages that come from size and control over data.<sup>41</sup> This dynamic raises concerns under both economic theory and competition law in relation to self-preferencing practices, as it may

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<sup>38</sup> Adam, Caminade and Knittel (n 36), p. 4.

<sup>39</sup> Philippe Choné, Laurent Linnemer and Thibaud Vergé, 'Double Marginalization, Market Foreclosure, and Vertical Integration,' (2024) 22(4) *Journal of the European Economic Association* 1884, pp. 1915-1918.

<sup>40</sup> See, e.g., European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2008) OJ C265/6, paras 13-14.

<sup>41</sup> *Stigler Committee on Digital Platforms, Final Report* (Report by Luigi Zingales, Guy Rolnik & Filippo Maria Lancieri, 2019), pp. 7-8.

allow a dominant platform to leverage its structural advantages to entrench its market position and expand its power into adjacent markets.<sup>42</sup>

Notwithstanding the above, the prevailing view is that the impact of favoring of the downstream entity varies depending on the specific circumstances of each case.<sup>43</sup> In recent years, economists have increasingly begun to explore the competitive effects of self-preferencing practices. Their research has analyzed how such conduct impacts consumer surplus and overall welfare across different market settings, while also examining the potential outcomes of various regulatory interventions and proposed remedies. In general, although still relatively few, existing studies present mixed results regarding the effects of self-preferencing.<sup>44</sup>

It is also worth noting that most of these studies focus on the competitive effects of search result manipulation of platforms operating in dual mode. For instance, Zenny examined a platform's employment of fair versus biased search engines and found that biases in favor of first-party products (the platform's own offerings) can have pro-competitive effects as they increase the platform's profitability from first-party sales and incentivize it to attract more consumers by lowering commission fees. In turn, product prices are reduced, ultimately benefitting consumers. Additionally, the rise in consumer participation encourages greater third-party seller involvement.<sup>45</sup> However, another study conducted by Hagiu et al. concluded that banning self-preferencing could, depending on the market context, increase price competition between a platform's own products and those of third-party sellers, thereby lowering prices and enhancing consumer welfare.<sup>46</sup>

Another benefit of self-preferencing is that it can help platforms improve product quality, fill gaps in their product range, and offer a more attractive ecosystem, which can increase inter-platform competition.<sup>47</sup> It can also enhance overall consumer experience, when ensuring higher quality and greater trust in their services, as well as generating high-quality matches in the context of different ranking mechanisms.<sup>48</sup> For example, Lee and Musolff found that although Amazon prioritized its own products over those of third-

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<sup>42</sup> See, e.g., Commission (n 24), p. 7.

<sup>43</sup> Duquesne et al. (n 5).

<sup>44</sup> Yuka Kittaka, Susumo Sato & Yusuke Zenny, 'Self-preferencing by platforms: A literature review,' (2023) 66(101191) *Japan and the World Economy*, pp. 9–10.

<sup>45</sup> Yusuke Zenny, 'Platform Encroachment and Own-Content Bias' (2022) 70(3) *Journal of Industrial Economics*, pp. 705–706.

<sup>46</sup> Andrei Hagiu, Teh Teh-Hui & John Wright, 'Should Platforms Be Allowed to Sell on Their Own Marketplaces?' (2022) 53(2) *RAND Journal of Economics* 297–327.

<sup>47</sup> Patrice Bougette and Frédéric Marty, 'Self-Preferencing: An Economic Literature-Based Assessment Advocating a Case-by-Case Approach and Compliance Requirements,' (2025) *CPI Antitrust Chronicle*, p. 7.

<sup>48</sup> Oxera, *How Platforms Create Value for Their Users: Implications for the Digital Markets Act*, Prepared for the Computer and Communications Industry Association (2021), pp. 24–27.

party sellers in its marketplace, this practice ultimately enhanced consumer welfare, as consumers tended to prefer Amazon's offerings. By ranking its own products higher, Amazon reduced consumers' search costs and intensified price competition. However, the authors also emphasized that, over the long term, this heightened price competition may discourage new firms from entering the market.<sup>49</sup>

Another potential pro-competitive benefit of self-preferencing is the effect it can have on the dominant firm's investment incentives. A core element of dynamic competition is the investment and innovation by firms aiming to secure a competitive edge over their rivals. Naturally, if a firm is required to share the outcomes of its investments with competitors, its incentive to invest may be significantly reduced.<sup>50</sup>

While the number of theoretical economic studies exploring self-preferencing and its effects on competition has grown, empirical research remains scarce, likely due to the challenges of accessing and analyzing relevant data.<sup>51</sup>

## 2.3 Mechanisms of preferential treatment

Recent cases that have been labelled as self-preferencing (that is, by scholars and not necessarily by the CJEU) encompasses a diverse range of behaviors that are claimed to distort competition in downstream markets. While some of these practices align clearly with established theories of harm,<sup>52</sup> others are less straightforward to categorize within traditional antitrust frameworks (see Section 3.3).<sup>53</sup> In Section 2.3.1, four categories of preferencing behaviors that have been documented among integrated digital platforms, all of which have raised competition concerns within the EU, are outlined.

Furthermore, when defining self-preferencing, it is crucial to consider the role of discrimination in assessing whether such conduct should be deemed "unfair" and, importantly, whether discrimination alone is sufficient to justify intervention under EU law. Another important consideration is the role of leveraging through vertical integration when assessing the legality of self-preferencing: understanding how a dominant firm may use its position in one

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<sup>49</sup> Kwok Hao Lee & Leon Musolff, 'Entry Into Two-Sided Markets Shaped By Platform-Guided Search,' (2023, working paper) available at [https://lmusolff.com/papers/Entry\\_and\\_Platform\\_Guided\\_Search.pdf](https://lmusolff.com/papers/Entry_and_Platform_Guided_Search.pdf) (accessed 8 May 2025), p. 40.

<sup>50</sup> See, e.g., Howard A Shelanski, 'Unilateral Refusals to Deal in Intellectual and Other Property,' (2009) 76 *Antitrust Law Journal*, p. 371.; Opinion of Advocate General Jacobs in Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others ECLI:EU:C:1998:569, para. 57.

<sup>51</sup> Kittaka, Sato & Zenryo (n 44), pp. 9-10.

<sup>52</sup> In general, a theory of harm in a competition law case outlines why a specific type of conduct violates competition law, explaining how the conduct harms competition and why it should be prohibited.

<sup>53</sup> Duquesne et al. (n 5).

market to strengthen its position in an adjacent market is crucial to understanding when self-preferencing becomes abusive. These questions are examined further in Section 2.3.2.

### 2.3.1 Typology of preferential treatment mechanisms

The *first category* encompasses practices where digital platforms leverage their privileged access to non-public data about competitors to enhance their own market positioning. A prominent example of this involves platforms using data gathered from interactions between buyers and third-party sellers to inform their decisions about introducing new products under their own private labels.<sup>54</sup> Such practices have been alleged against Amazon in the EU, where the Commission accused the company of using competitively sensitive information, such as sales trends, pricing, and consumer preferences, to shape its own product offerings and marketing strategies.<sup>55</sup> The competitive concern here is that by using information of this kind to set prices or design products in ways that are not available to third-parties, the platforms may harm innovation and competition by discouraging competitors from introducing new or improved products.<sup>56</sup>

The *second category* includes practices where digital platforms rank or display their own products more prominently than those of third-party sellers. This can occur, for example, through ranking algorithms that systematically favor the platform's own offerings in search results. The ECJ judgment in *Google Shopping* illustrates such practice, as Google was found to have given preferential treatment to its own comparison shopping service ("CSS") by prominently displaying it in search results while simultaneously demoting rival services (see Section 4.2).<sup>57</sup> The competitive concern is that such rankings and displays may misleadingly signal to consumers that the platform's own products outperform those of competitors in terms of quality or price. This can undermine the sales of rivals' offerings, discourage competitors from investing in innovation, and contribute to market monopolization.<sup>58</sup>

The *third category* encompasses practices where a platform sets commercial conditions that favor customers who use an adjacent first-party product. For example, in its decision, the Commission found that *Amazon* allegedly set criteria for winning the Buy Box – a prominent box on an Amazon product

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<sup>54</sup> Juliette Caminade, Juan Carvajal & Christopher R. Knittel, 'An Economic Analysis of the Self-Preferencing Debate,' (2022) 32(2) *Competition*, p. 31.

<sup>55</sup> European Commission, 'Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices,' (10 Nov. 2020, press release) available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077) (accessed 13 Feb. 2025).

<sup>56</sup> Caminade, Carvajal and Knittel (n 54), p. 31.

<sup>57</sup> C-48/22 (n 13).

<sup>58</sup> Caminade, Carvajal and Knittel (n 54), p. 31.

page where shoppers can directly click “Add to Cart” or “Buy Now” – that favored sellers who used Amazon’s own logistics service. The competitive concern with this conduct is that it may distort competition in the market for marketplace services and logistics services by artificially steering demand towards sellers who use Amazon’s own services, rather than based on merit. This can disadvantage competing logistics providers and independent sellers, ultimately leading to reduced choice, innovation, and higher costs for consumers and sellers.<sup>59</sup> However, it is important to note that in this case, the preferential treatment is not explicitly directed towards the platform’s own products or services, as the strategy instead favors specific third-party participants. Nevertheless, the indirect effect is that this preferential treatment serves to promote the use of the platform’s own services, thereby enhancing its competitive advantage over rival logistics firms.

The *fourth category*, which is closely related to the third category, includes practices where a platform grants preferential access to certain features while restricting or withholding access for others. This may involve limiting third parties’ access to critical functionalities, such as an application programming interface (“API”) that allows different software applications to communicate with each other. A prominent example of this type of practice is prevalent in the Commission’s case against Apple regarding its control over access to the Near Field Communication (“NFC”) technology in iOS devices. Apple was accused of restricting third-party developers’ access to the NFC chip, which is a critical feature needed for contactless payments and essential for apps to compete in the mobile payments market. Apple only allowed its own payment service, Apple Pay, to use the NFC functionality, while denying similar access to third-party apps. The competitive concern with such conduct is that it may prevent competitors from offering similar or comparable functionality or user experiences, which can strengthen the platform’s market dominance. This may hinder innovation, limit consumer choice, and lead to higher prices over time.<sup>60</sup>

### 2.3.2 Elements of discrimination and leveraging

In the context of digital platforms, the mechanisms through which integrated firms favor their own subsidiaries can take many forms.<sup>61</sup> However, two elements that appear central to the very notion of self-preferencing are *discrimination* and *leveraging*.

It can be argued that self-preferencing, like many of the abuses that fall under Article 102, always involves an element of discrimination, since the conduct entails the dominant firm to treat its own products or services more favorably than those of rivals. However, this does not necessarily have to be true. For instance, if the platform’s product exhibits better quality or price compared

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<sup>59</sup> Case AT.40703 – *Amazon Buy Box*, 20 Dec. 2022, paras 199-220.

<sup>60</sup> Case AT.40452 – *Apple – Mobile Payments*, 11 July 2024, paras 85-91.

<sup>61</sup> Colomo (n 4), p. 419.

to competing alternatives, then a self-preferencing pattern could arise simply as a result of the platform's offerings being objectively superior. Arguably, the issue here is then not about equivalent transactions being treated differently, but about dissimilar situations being treated differently.<sup>62</sup>

However, if a dominant firm grants more favorable treatment to its own products or services than to those of third parties, and no objective justifications like those discussed above can be identified, the conduct may constitute a form of discriminatory treatment. The next question is then whether such discrimination, in itself, warrants regulatory intervention from a "fairness" perspective, on the grounds that these practices are unfair to competitors. Critics of self-preferencing argue that such conduct is inherently "unfair," maintaining that a "level playing field" is essential for all competitors. In other words, the argument goes that there is something inherently problematic about vertically integrated firms favoring their own products, services or subsidiaries: by tipping the competition in their own favor, such firms act in a way that goes beyond fair, merit-based competition. From this perspective, the affiliated product or service succeeds not because of its own qualities, but because it gains an advantage from being linked to the dominant firm.<sup>63</sup>

Nevertheless, the use of "fairness" as a guiding principle in competition law has faced considerable criticism, not only due to its conceptual vagueness, but also because it risks prohibiting efficient conduct in cases where behavior deemed "unfair" may in fact promote competition. Such prohibitions could ultimately harm consumers, contrary to the core objectives of competition policy.<sup>64</sup> This could occur, for example, when firms are required to share their competitive advantages with rivals, which may reduce incentives to invest and innovate. Recognizing that attempts to neutralize a firm's advantages can, over time, undermine the competitive process itself, EU law does not impose a general duty on vertically integrated firms to create a level playing field.<sup>65</sup>

Advocate General ("AG") Jacobs expressed this view in his Opinion in *Bronner*, where he warned that firms might be deterred from gaining a competitive edge if courts or authorities later compel them to share those advantages, for the sake of "fairness." Conversely, rivals may be less motivated to innovate themselves if they can rely on regulatory intervention to benefit from others' efforts.<sup>66</sup> In this spirit, it could even be argued that self-preferencing practices actually serve as a legitimate mechanism to ensure that a firm is compensated for its investments and innovation, making them

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<sup>62</sup> O'Donoghue and Padilla (n 8), p. 955.

<sup>63</sup> Colomo (n 4), p. 421.

<sup>64</sup> Carlo F. Petrucci, 'Self-preferencing in the EU: a legal and policy analysis of the Google Shopping case and the Digital Markets Act,' (2023) 22(1) *Competition Law Journal*, p. 26.

<sup>65</sup> Colomo (n 4), pp. 422-423.

<sup>66</sup> AG Jacobs, *Oscar Bronner* (n 50), para. 57.

an integral part of a pro-competitive business model.<sup>67</sup> Notwithstanding the points made above, discrimination remains a prominent and closely scrutinized concept in EU competition law, and perspectives on self-preferencing have seen a clear shift, with many now perceive it as particularly harmful with regards to the unique dynamics of the digital sector.<sup>68</sup>

In the context of self-preferencing, the relevant type of discrimination is best characterized as *secondary-line exclusionary discrimination*. This refers to discrimination that causes harm on an upstream, downstream or a neighboring market, where the dominant company also operates.<sup>69</sup> The term “secondary-line” indicates the level at which the injury occurs. In contrast to *primary-line harm*, which targets competitors at the same level as the dominant firm, secondary-line harm affects trading partners (like customers or suppliers) or competitors in related markets. Furthermore, secondary-line discrimination can manifest in two ways: exclusionary, by hindering rivals’ ability to compete, or exploitative, by placing trading partners at an unfair disadvantage without necessarily eliminating competition.<sup>70</sup> In self-preferencing cases, the focus typically lies on exclusionary effects, as the dominant firm leverages its market power to reinforce the position of its own services or products in a related market at the expense of competitors operating on the same market. This raises important questions about the appropriate legal framework for assessing such conduct. Section 3.3.2 further examines the specific role of the discriminatory element when addressing self-preferencing practices under Article 102.

The second element often discussed in connection to self-preferencing practices, which was mentioned briefly above, is leveraging. The term refers to the practice where a dominant undertaking uses its position in one market to gain an advantage in an adjacent market. The concept covers a broad range of practices, which may have pro-competitive effects, anticompetitive effects, or elements of both. In other words, the term does not indicate whether the behavior is lawful or unlawful; it simply describes the market context in which the behavior takes place.<sup>71</sup> However, Pre-Chicago School,<sup>72</sup> it was assumed that a firm holding a monopoly in one market would always have an incentive to expand its monopoly power into a related market for a complementary product, thereby securing two monopoly profits instead of

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<sup>67</sup> Colomo (n 4), p. 431.

<sup>68</sup> Colomo (n 4), p. 418.

<sup>69</sup> Lena Hornkohl, ‘Article 102 TFEU, Equal Treatment and Discrimination after Google Shopping’ (2022), special issue *Journal of European Competition Law & Practice*, pp. 11-12.

<sup>70</sup> *ibid.*, p. 5.

<sup>71</sup> O’Donoghue and Padilla (n 8), pp. 307-308.

<sup>72</sup> The Chicago School is an economic theory of antitrust law that has had a significant influence on U.S. antitrust law, and has also shaped EU competition policy, particularly in the growing emphasis on economic analysis. See, e.g., Vladimir Bastidas Venegas, ‘Rättsekonomi’ in Maria Nääv & Mauro Zamboni, *Juridisk metodlära*, 2nd edn, (Studentlitteratur: Lund: 2018), pp. 185-188.

just one. Based on this reasoning, various types of unilateral practices involving leveraging were historically considered per se illegal. One significant concern was that a monopolist might condition the sale of its monopoly product on the purchase of its products sold in other markets – so-called tying – and thereby extend its dominance into markets that were previously competitive.<sup>73</sup>

Nevertheless, the Chicago School’s application of price theory led to a more skeptical view of antitrust intervention, especially in cases involving vertical integration strategies. One significant contribution that remains highly relevant is the *single monopoly profit theorem*.<sup>74</sup> This principle explains that when a firm already holds a monopoly in one market, it cannot boost its overall profits by trying to dominate a related market. The reason is that the monopolist is already able to capture the full monopoly profit from its main market, and expanding into adjacent markets does not allow it to extract additional monopoly gains.<sup>75</sup> The theorem challenges the traditional view by suggesting that monopolists have limited incentive to foreclose competitors in adjacent markets. This reasoning undermines the assumption that vertical integration or self-preferencing automatically lead to competitive harm and has been influential in the assessment of practices such as tying and vertical integration cases, often leading to greater caution before condemning leveraging as abusive.<sup>76</sup> That is not to say, however, that the single monopoly profit theorem is without limitations. In fact, Iacobucci and Ducci highlight that the theorem might fail in the context of two-sided platforms.<sup>77</sup>

Notwithstanding the above, as with discrimination, leveraging remains a prominent and ongoing concern in EU competition law. The potential for dominant firms to exploit their market power to extend their influence into adjacent markets remains an area of great concern from both NCAs and the EU courts. The role of leveraging in the context of Article 102 is further explored in Chapter 4.

## 2.4 Summary

Self-preferencing lacks a clear legal definition under EU competition law but generally refers to a dominant firm’s preferential treatment of its own products or services. The legal and economic assessment remains complex, as self-preferencing can generate both pro-competitive and anticompetitive effects. Economic theories show that while vertical integration can lead to

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<sup>73</sup> O’Donoghue and Padilla (n 8), p. 269.

<sup>74</sup> Edward Iacobucci and Francesco Ducci, ‘The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-Sided Markets,’ (2018) 47 *European Journal of Law and Economics*, pp. 31-32.

<sup>75</sup> O’Donoghue and Padilla (n 8), p. 270.

<sup>76</sup> *ibid.*, 271.

<sup>77</sup> Iacobucci & Ducci (n 74), pp. 34-40.

efficiencies and an enhanced consumer welfare, it can also distort competition by harming market dynamics which, in turn, can harm consumers.

Furthermore, this section outlined key mechanisms of self-preferencing, focusing on four categories: (1) using competitors' non-public data to enhance a platform's own offerings; (2) ranking or displaying a platform's own products more favorably; (3) setting commercial conditions that incentivize use of the platform's own services; and (4) granting selective access to critical features while limiting rivals' access. Central to the assessment of the competitive effects of self-preferencing are the concepts of discrimination and leveraging, which are further examined in the following sections.

## 3 The Legal Framework to Analyze Self-Preferencing under Article 102

### 3.1 Introduction

In general, EU competition law seeks to prevent restrictions on and distortions of competition, and Article 102 serves as the cornerstone for assessing the legality of unilateral conduct by dominant undertakings that may constitute an abuse of market power. The provision specifically focuses on ensuring that dominant firms do not engage in exclusionary or exploitative practices that would distort competition and harm consumers within the internal market.<sup>78</sup>

This does not entail the view that the fact that some firms gain an advantage over others is inherently problematic; on the contrary, competition law encourages the development of superior products and services. Market share gains that result from a firm's efforts to outperform competitors do not, in themselves, constitute a violation of Article 102. Similarly, less efficient competitors that offer consumers less favorable options in terms of price, variety, quality, or innovation can naturally result in the exit or marginalization of these firms.<sup>79</sup> While competition law does not penalize dominance itself, it does impose a *special responsibility* on dominant firms to ensure their conduct does not undermine fair competition. This principle was first established in the ECJ's ruling in *Michelin v Commission*,<sup>80</sup> and has since been reaffirmed in other judgments of the EU courts.<sup>81</sup> However, its precise meaning and normative significance remain contested.<sup>82</sup>

The concept of abuse remains highly debated. For decades, competition authorities, courts, and scholars have sought to define abuse of dominance in a manner that balances predictability, flexibility, administrability, and economic coherence.<sup>83</sup> Section 3.2 aims to clarify the concept of abuse by identifying the common elements required for unilateral conduct to constitute an abuse under Article 102. Moreover, self-preferencing has been recognized as a broad concept, potentially encompassing a wide range of legal

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<sup>78</sup> European 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 C45/7, paras 4-7.

<sup>79</sup> See, e.g., Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172, paras 21-22.

<sup>80</sup> In Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* ECLI:EU:C:1983:313, the ECJ stated that a firm in a dominant position has a 'special responsibility not to allow its conduct to impair genuine undistorted competition' on the internal market, para 57.

<sup>81</sup> See, e.g., Case C-377/20 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2022:379, para. 74.

<sup>82</sup> See, e.g., O'Donoghue and Padilla (n 8), p. 267.

<sup>83</sup> Whish & Bailey (n 25), p. 198.

classifications. Section 3.3 examines how self-preferencing can be assessed within already established legal categories of Article 102.

### 3.2 The concept of abuse: which criteria must be met?

There is no judgement of the CJEU that establishes a comprehensive definition of abuse under EU competition law. Instead, the EU courts have opted for a case-by-case approach, avoiding broad theoretical statements, and assessing each situation based on its specific facts and circumstances.<sup>84</sup> However, one of the most influential and frequently cited definitions of exclusionary abuse was set out in the *Hoffmann-La Roche* judgment. According to this definition, the hallmark of abusive conduct is that it has “the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition,” and does so through a “recourse to methods different from those which condition normal competition.”<sup>85</sup> Assessing whether a conduct amounts to abuse therefore requires an evaluation of its effects on competition. However, it also requires a second criterion, which is that the conduct deviates from “normal competition” or “competition on the merits,” as it is commonly referred to.

In August 2024, the Commission published its Draft Guidelines in an attempt to further clarify the notion of “abuse” within the meaning of Article 102. The Draft Guidelines introduce a two-step approach to identifying abusive behavior: (i) that the conduct departs from competition on the merits, and (ii) that it is capable of producing exclusionary effects.<sup>86</sup>

Nevertheless, defining the scope of these fundamental principles has led to some of the most debated issues under Article 102, particularly regarding the extent to which it is required to show anticompetitive effects, what the standard for such effects is or should be, and what types of anticompetitive effects are deemed relevant under the Article.<sup>87</sup> Section 3.2.1 provides a more thorough and technical review of what role the “effects-criterion” plays in evaluating the legality of self-preferencing practices. Section 3.2.2 focuses on what constitutes a departure from competition on the merits. Exploring these two criteria is crucial for understanding the current direction of EU competition law and the limits of lawful competitive conduct by dominant firms.

#### 3.2.1 The ‘effects-criterion’

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<sup>84</sup> Whish & Bailey (n 25), p. 204.

<sup>85</sup> Case C-85/76 *Hoffman-La Roche & Co AG v Commission* ECLI:EU:C:1979:36, para. 91. An affirmation of the principle was made in C-209/10 (n 79), para. 24.

<sup>86</sup> Commission (n 3), para. 45.

<sup>87</sup> O’Donoghue and Padilla (n 8), p. 315.

As regards the effects-criterion, the Draft Guidelines do not offer a precise definition of what constitutes an exclusionary effect, but they list indicators such as a rising market share for the dominant firm, failed market entry by competitors, or marginalization of rivals.<sup>88</sup> This suggests a broad interpretation of “exclusion,” seemingly equating it with any form of foreclosure.

Theories of harm in self-preferencing cases primarily focus on two key aspects: *vertical foreclosure* through the leveraging of market power, and *consumer harm*. Vertical foreclosure occurs when a firm that controls a crucial input restricts access to it for rivals that rely on it – for instance by outright refusal, reducing compatibility, imposing different types of usage barriers, or significantly increasing the price it charges competitors.<sup>89</sup> This practice typically disadvantages competitors of the firm’s downstream affiliate, limiting their ability to compete effectively.<sup>90</sup> Nevertheless, foreclosure is not inherently harmful but depends on whether it is likely to produce anticompetitive effects in the relevant market. The examples provided in the Draft Guidelines could be consistent with both legitimate competition and anticompetitive behavior, such as a dominant firm gaining market share or pushing competitors out due to innovation or efficiency gains.<sup>91</sup> This idea was encapsulated in paragraph 19 of the Commission’s Enforcement Guidance on Article 102 TFEU (“2009 Guidance Paper”) in the following way:

“The aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term ‘anti-competitive foreclosure’ is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.”<sup>92</sup>

In essence, foreclosure becomes “anticompetitive” when it results in consumer harm. This harm can take various forms, including higher prices,

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<sup>88</sup> Commission (n 3), para. 70(g).

<sup>89</sup> Commission (n 40), paras. 33-36.

<sup>90</sup> Motta (n 35), p. 2.

<sup>91</sup> Jorge Padilla, ‘What Is an Exclusionary Abuse?’, (2024, essay) available at <https://ssrn.com/abstract=5006000> (accessed 10 March 2025), pp. 12-13.

<sup>92</sup> Commission (n 78), para. 19.

reduced output, restricted choice, lower quality, and hindered innovation.<sup>93</sup> Moreover, even if the Draft Guidelines seem to take a clear step away from the 2009 Guidance Paper, it must be noted that these guidelines do not carry legal binding force for courts or legislators, and case law has repeatedly affirmed that not every exclusionary effect is necessarily harmful to competition; it must have an impact on effective competition and, by extension consumer welfare. A mere loss of competitive pressure is not sufficient to establish abuse; for example, if a dominant company offers a better product that shifts weaker rivals to budget segments, this may benefit consumers across different price levels.<sup>94</sup>

However, the precise importance of consumer harm under Article 102, and the extent to which such harm must be demonstrated, remains a subject of ongoing debate. The provision is not limited to addressing conduct that directly harms consumers but also aims to prevent behavior that undermines the competitive structure of the market.<sup>95</sup> The acceptability of exclusionary conduct leading to foreclosure depends on the underlying objective of Article 102, which is somewhat ambiguous. If the primary goal is to promote consumer welfare, foreclosure should only be considered problematic when it prevents customers or competitors from competing on the merits in a way that ultimately harms consumers. However, if the provision is instead aimed at safeguarding the commercial freedom of market participants, foreclosure may be deemed unlawful even in the absence of proof of consumer harm, if it restricts rivals' ability to operate freely at both horizontal and vertical levels.<sup>96</sup>

For a long time, EU law on the abuse of dominance placed significant emphasis on structural presumptions about business practices' impact on market competition, rather than on their actual measurable effects, such as consumer welfare.<sup>97</sup> However, this formalistic approach has faced extensive criticism over the years, primarily for its failure to accurately assess the actual impact of certain behaviors, potentially leading to the protection of inefficient competitors. The approach is claimed to have created *false positives* and *false negatives*.<sup>98</sup> A false positive arises when a competition authority mistakenly classifies pro-competitive conduct as abusive, harming not only the firm deemed guilty but also consumers, as beneficial competition is restricted. Conversely, a false negative occurs when anticompetitive behavior is wrongly

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<sup>93</sup> Commission (n 24), p. 41.

<sup>94</sup> Padilla (n 91), p. 13.

<sup>95</sup> O'Donoghue and Padilla (n 8), p. 335.

<sup>96</sup> Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press: Cambridge: 2010), p. 115.

<sup>97</sup> O'Donoghue and Padilla (n 8), p. 335.

<sup>98</sup> Whish & Bailey (n 25), p. 210.

deemed lawful, allowing harmful practices to continue and ultimately disadvantaging consumers.<sup>99</sup>

The focus has since then reoriented, and the 2009 Guidance Paper marked a first attempt to introduce a more consistent, evidenced-based effects analysis in exclusionary abuse of dominance cases.<sup>100</sup> The effects on efficiency and consumer welfare gained greater importance and economic analysis in general came to play a bigger role in Article 102 cases handled by the Commission. Moreover, the EU courts started to pay more attention to the Commission's decisions, and especially to the economic reasoning behind them.<sup>101</sup>

Nevertheless, in 2023, the trend appeared to shift again, as the Commission updated its 2009 Guidance Paper, published a Policy Brief titled 'A Dynamic and Workable Effects-based Approach to Abuse of Dominance', and announced plans to adopt new guidelines on exclusionary abuses of dominance by 2025 (hence the published Draft Guidelines). Two reasons among others can explain this shift in approach. First, the inherent complexity of the effects-based approach has caused longer proceedings, as shown by the *Google Shopping* case, which took seven years. Second, since its adoption in 2009, the Commission and NCAs has increasingly focused on digital market cases, where the concepts set out in the 2009 Guidance Paper have been less applicable.<sup>102</sup> This raises the crucial question of how these developments shape the current and future enforcement of EU competition law, which is discussed further in Chapter 4.

### 3.2.2 Conduct outside of 'competition on the merits'

Abuse under Article 102 is not established merely by showing effects on the competitive structure. Any potential or actual exclusionary effects must also result from conduct that goes beyond "competition on the merits." Abuse does not necessarily involve practices that are inherently illegitimate; instead, nearly any business strategy can become anticompetitive if used to exclude rivals. "Competition on the merits" is a principle that requires, first, that dominant firms compete based on their capabilities, offering consumers better value rather than restricting market access for competitors. Second, due to their special responsibility, dominant firms must ensure that their conduct does not distort genuine competition.<sup>103</sup>

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<sup>99</sup> *ibid.*, p. 199.

<sup>100</sup> Commission (n 78), paras 19-20.

<sup>101</sup> Damien Geradin & Stijn Huijts, 'Abuse of dominance: has the effects-based analysis gone too far?', (2024) 40 *Oxford Review of Economic Policy*, p. 777.

<sup>102</sup> *ibid.*, p. 778.

<sup>103</sup> Heike Schweitzer & Simon de Ridder, 'How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses,' (2024), 15(4) *Journal of European Competition Law & Practice*, p. 232.

However, the term “competition on the merits” is inherently vague. While it has been defined as competition based on a product’s “price, quality, and functionality,” this definition remains unclear and lacks precise limiting principles. This highlights the need to define which types of conduct exceed the boundaries of competition on the merits and to clarify the normative significance of the concept itself.<sup>104</sup>

In certain cases, determining whether a conduct departs from competition on the merits has been relatively straightforward. For example, in *Servizio Elettrico Nazionale*, the ECJ stated that actions that broadens consumer choice, such as introducing new products or improving existing ones, fall within competition on the merits.<sup>105</sup> By contrast, conduct that lacks a legitimate efficiency rationale and serves only to exclude competitors constitutes abuse. In this context, the Draft Guidelines refer to the so-called *no economic sense* test that helps identify such *naked exclusion*, where a conduct has no justification beyond harming rivals. In these cases, competition authorities may infer anticompetitive effects directly.<sup>106</sup> Nevertheless, in many cases, exclusionary strategies have some efficiency potential and hence hold economic interest for the dominant undertaking. In this context, it becomes more difficult to decide whether the conduct should be considered a manifestation of competition on the merits or not.

As explained in Chapter 2, self-preferencing conduct can generate both pro-competitive and anticompetitive effects and the Draft Guidelines recognize this by stating self-preferencing “can be widespread in certain sectors of the economy and the question whether a given self-preferencing conduct contravenes Article 102 depends on an analysis of all relevant circumstances.”<sup>107</sup> This inevitably raises the question of what these circumstances can be. The Draft Guidelines outline three non-cumulative conditions to be considered when assessing whether a conduct departs from competition on the merits (see Section 4.4.3), but generally, the Commission provides very limited guidance on this issue overall.<sup>108</sup>

The *As-Efficient Competitor* (“AEC”) test has been proposed as a tool to distinguish conduct that constitutes legitimate competition on the merits from abusive conduct. The AEC-test was developed as an attempt to operationalize the *AEC principle*, stating that if a conduct would likely drive out equally efficient competitors, then it is unlawful. The test supports an effects-based approach where the efficiencies generated by the dominant undertaking are weighed against the negative effects of the conduct.<sup>109</sup> The test was

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<sup>104</sup> O’Donoghue and Padilla (n 8), p. 266.

<sup>105</sup> C-377/20 (n 81), para. 85.

<sup>106</sup> Schweitzer & de Ridder (n 103), p. 232.

<sup>107</sup> Commission (n 3), para. 157.

<sup>108</sup> *ibid.*, para. 161.

<sup>109</sup> Schweitzer & de Ridder (n 103), p. 233.

originally developed for price-related practices, particularly margin squeezes, but Barbera et al., among others, argue that it can, under certain circumstances, be extended to non-price conduct such as self-preferencing conduct.<sup>110</sup> In these cases, the AEC-test would essentially determine whether the conduct would likely reduce demand for an equally efficient competitor to the point that it could no longer operate profitably.

However, unlike cases that involve pricing conduct, where it is possible to directly compare prices and costs, a non-price conduct like self-preferencing does not offer such a straightforward comparison. While it is theoretically possible to develop economic models that could apply to non-price conduct, it raises some issues, particularly in platform markets characterized by significant network effects and economies of scale. For example, self-preferencing by a dominant platform may hinder rivals to achieve the minimum efficient scale necessary to compete effectively, even if they are as efficient as the dominant undertaking.<sup>111</sup> Schweitzer and Ridder also highlight that one of the advantages of the AEC-test in price-based cases – that the dominant undertaking can perform the test itself – is lost when the test is applied to non-price-based conduct. Instead, additional information will be required, much of which falls outside the dominant firm’s control.<sup>112</sup>

### 3.3 Possible legal categorizations of self-preferencing

Article 102 sets out a non-exhaustive list of practices that may constitute abuse of dominance, including: (a) imposing unfair pricing or trading conditions; (b) limiting production to the detriment of consumers; (c) engaging in discriminatory practices that put certain trading partners at a competitive disadvantage; and (d) requiring other parties to accept additional obligations unrelated to the contract, either by nature or commercial practice, as a condition for concluding the contract. While these four clauses can broadly be classified as exploitative, exclusionary or reprisal, some abuses such as discrimination and tying, can be exploitative or exclusionary, or both at the same time.<sup>113</sup>

Under EU competition law, leveraging and favoring abuses may, in principle, fall under any of the four clauses of Article 102.<sup>114</sup> Concerns related to leveraging and anticompetitive foreclosure arising from self-preferencing outside digital markets have traditionally been addressed under established categories of abuse. These include, for example, refusal to deal, tying, or

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<sup>110</sup> Adriano Barbera, Nicolás Fajardo Acosta & Timo Klein, ‘The Role of the AEC Principle and Tests in a Dynamic and Workable Effects-Based Approach to Abuse of Dominance,’ (2023) 14(8) *Journal of European Competition Law & Practice*, pp. 582–594.

<sup>111</sup> Barbera, Fajardo Acosta & Klein (n 110), pp. 589–590.

<sup>112</sup> Schweitzer & de Ridder (n 103), p. 233.

<sup>113</sup> O’Donoghue and Padilla (n 8), p. 294.

<sup>114</sup> *ibid.*, p. 307.

discrimination, each governed by its own set of legal criteria.<sup>115</sup> As such, self-preferencing has not previously been treated as a standalone form of abuse, but rather assessed within the framework of established legal categories – an approach the following sections explore in the context of digital markets

### 3.3.1 Self-preferencing as a refusal to deal?

Many commentators have explored whether self-preferencing could be addressed through the framework of *refusal to deal*. Under Article 102, a dominant firm's refusal to grant access to an essential input may, in very specific and narrowly defined circumstances, be considered abusive.

First, it must be noted that vertically integrated firms prioritizing their own products or services over those of competitors has long been recognized as a natural consequence of the integration of complementary activities, rather than an anomaly or an inherently anticompetitive practice. From an economic perspective, it is a predictable outcome driven by the strategic behavior of rational market participants seeking to maximize efficiency and profitability.<sup>116</sup> In non-digital markets, vertically integrated firms have engaged in different favoring practices that have often been considered legitimate.<sup>117</sup> A common example is supermarkets favoring their own private-label products over competing brands. Supermarkets may not only give their own products better shelf placement but may also choose not to stock rival products at all.<sup>118</sup> Another common example is retailers using information from third-party sellers to develop and promote their own competing products.<sup>119</sup>

In EU competition law, the distinction between lawful and unlawful conduct in this context has been shaped by the *duty to deal* doctrine, which is generally considered an exception to the fundamental principle of contractual freedom.<sup>120</sup> The duty to deal doctrine is based on the premise that a dominant firm is typically free to enter into or continue contractual relations with whomever they wish, and an obligation to provide third-party access arises only in exceptional circumstances.<sup>121</sup> Intervention where Article 102 would require a dominant firm to supply a product or service, needs to be considered

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<sup>115</sup> Duquesne et al. (n 5).

<sup>116</sup> Colomo (n 4), p. 425.

<sup>117</sup> Hovenkamp (n 24), p. 5.

<sup>118</sup> Caminade, Carvajal & Knittel (n 54), p. 33.

<sup>119</sup> Andrea Melchionda, 'Self-preferencing as an independent abuse: still clouds on the horizon,' (2022), 4 *Eurojus*, p. 23.

<sup>120</sup> O'Donoghue and Padilla (n 8), p. 603.

<sup>121</sup> *ibid.*, p. 1093.

carefully, since it could weaken both the dominant firm's and its competitors' incentives to invest and innovate, which would not benefit consumers.<sup>122</sup>

In other words, the threshold for imposing a duty to deal has been set very high. For the duty to deal under Article 102 to be invoked, the refusal in question must entail some exceptional harm to competition in the relevant downstream market for the final product, in which the input is an essential component.<sup>123</sup> In case law, this rationale has been captured under the *essential facility doctrine*. The EU Courts have established four criteria (although one of these applies specifically to access to intellectual property and will therefore not be discussed here) for applying the essential facilities doctrine under Article 102, as set out in cases like *Bronner*.<sup>124</sup> According to this judgment, for a refusal to deal to be considered abusive, the complainant must demonstrate: (i) the indispensability of the input, (ii) the exclusion of effective competition on a downstream market; and (iii) the absence of an objective justification.

While the precise meaning of these conditions varies depending on the specific circumstances of each case, the core principle remains the same: when access to a resource is deemed indispensable for effective competition in a related market, a dominant firm's freedom to operate may be restricted, since controlling such a crucial facility can make any refusal to grant access disproportionately harmful to competition.<sup>125</sup> The concept of indispensability is interpreted strictly. It is not enough to show that it would be economically impractical for a specific company to replicate the input; rather, it must be proven that creating an alternative input would be economically unfeasible for *any* potential competitor. In the *IMS Health* case, the GC clarified that a product cannot be considered indispensable solely because it is superior to available alternatives. It must be demonstrated that the absence of access to the input would render competition in the adjacent market either "impossible" or "unreasonably difficult."<sup>126</sup>

The reason why this legal framework is often considered when discussing self-preferencing practices is because of the vertical dimension of such practices, which allows a firm to restrict access in different ways. However, the type of refusal typically seen in self-preferencing practices employed by digital platforms, is not an outright denial of access to competitors. Rather, it

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<sup>122</sup> Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law,' (2017) (2) *University of Illinois Journal of Law, Technology and Policy*, p. 308.

<sup>123</sup> O'Donoghue and Padilla (n 8), p. 604.

<sup>124</sup> Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others* ECLI:EU:C:1998:569.

<sup>125</sup> Niamh Dunne, 'Dispensing with indispensability', (2020) 16(1) *Journal of Competition Law & Economics*, p. 74.

<sup>126</sup> Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* ECLI:EU:C:2004:257, para. 28.

often involves an implicit or a so-called *constructive refusal*, where access is formally granted but subject to unfair or impractical conditions. For example, in the case of Apple (fourth category of Section 2.3.1), the refusal concerns making only third-party complementary products compatible with the platform. In this case, Apple allows general access to its own iOS software but restricts interoperability with certain essential features. This raises the question of whether it is possible, or perhaps even appropriate, to treat digital platforms' constructive refusals to deal under the essential facilities doctrine, meaning that digital platforms must control an "indispensable" input for a conduct to even be considered abusive in the first place.

According to the 2009 Guidance Paper, an actual refusal by the dominant undertaking is not required for the essential facility doctrine to apply; a constructive refusal is sufficient.<sup>127</sup> Nevertheless, the EU courts have since then clarified that the indispensability criterion does not apply in cases where the dominant firm has either voluntarily agreed to provide access or is subject to regulatory obligations to do so. This includes situations such as *margin squeeze*, where a dominant firm, despite granting access to a crucial input, sets the wholesale and retail prices at such level that competitors who rely on the input cannot compete effectively on the downstream market.<sup>128</sup> The same goes for the degradation of supply or the imposition of unfair terms, or other forms of unfair access restrictions.<sup>129</sup> According to the ECJ, the indispensability requirement from *Bronner* is limited to cases involving an outright refusal to deal and does not extend to abusive practices concerning access once it has already been granted.

The reasoning behind the EU courts' distinction between outright and constructive refusals is further explored in relation to *Google Shopping* in Chapter 4, but generally, commentators who support this approach argue that an indispensability requirement for constructive refusals to deal would be overly restrictive, potentially rendering the framework too rigid to capture the full scope of anticompetitive effects from self-preferencing. The reasoning is that such practices can harm competition even when access to the platform is not indispensable, especially in rapidly evolving digital markets.<sup>130</sup>

Notwithstanding the above, even if the essential facilities doctrine were considered a viable legal pathway in cases of constructive refusals to deal, significant challenges would remain in applying it to self-preferencing scenarios. One difficulty lies in identifying what constitutes the relevant input, which is often far from straightforward. In the context of *Google*

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<sup>127</sup> Commission (n 78), paras 78-79.

<sup>128</sup> See, e.g., Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83, paras 55-56.

<sup>129</sup> See, e.g., Case C-165/19 P *Slovak Telekom, a.s. v European Commission* ECLI:EU:C:2021:239, paras 50-51; Case C-42/21 P *Lietuvos geležinkeliai v Commission* ECLI:EU:C:2023:12, paras 79-85.

<sup>130</sup> Dunne (n 125), pp. 21-23.

*Shopping* and its favoring of its own services on general search pages, one might argue that the input is a specific positioning or ranking on those pages. However, this differs significantly from how the notion of an input has traditionally been understood in case law, where it typically refers to physical infrastructure, such as ports or telecommunications networks, or to intangible assets protected by intellectual property rights.<sup>131</sup>

Furthermore, another challenge would be to understand when the input becomes indispensable. For instance, it is unlikely that Amazon's collection of non-public data of retailers' sales would meet the indispensability requirement (as well as the other refusal to deal criteria). Collection of data is non-rivalrous, meaning that competitors are not prevented from obtaining similar data elsewhere.<sup>132</sup> As established in *Bronner*, the indispensability criterion requires that access be essential to competition, not merely desirable, and that no viable substitute exists. Thus, Amazon's datasets are unlikely to be considered truly indispensable.

Given the CJEU's current legal position as explained above, this thesis will not continue to examine the potential difficulties of applying the essential facilities doctrine to self-preferencing conduct.

### 3.3.2 Self-preferencing as discrimination?

Article 102(c) constitutes a specific stand-alone anti-discrimination clause, which considers it abusive for a dominant firm to apply "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." This is a form of secondary-line injury, and as explained in Section 3.3.2, these occur when a dominant firm's actions distort competition among its own customers or suppliers rather than directly harming competitors.<sup>133</sup>

Secondary-line exclusionary practices, meaning that the dominant firm hinders rivals' ability to compete in related markets, are typically addressed under the other clauses of Article 102. This reflects an important distinction between discrimination directed at competitors and discrimination between customers or suppliers. As discussed in more detail in Section 2.2, a vertically integrated dominant firm supplying its rivals may have strong incentives to exclude them from the market. By contrast, when it comes to discrimination between customers who the dominant firm does not compete with, there is no clear strategic advantage in treating customers unequally; in fact, such conduct may even harm the dominant firm by reducing its own sales. Article 102(c) is designed specifically to address discrimination between trading partners, where the harm lies in distorting competition among them, whereas

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<sup>131</sup> O'Donoghue and Padilla (n 8), p. 603.

<sup>132</sup> Thomas A. Lambert, *How to Regulate – A Guide for Policymakers* (Cambridge University Press: Cambridge: 2017), p. 61.

<sup>133</sup> Petit (n 22), p. 3.

exclusionary discrimination against rivals is better captured by other provisions within Article 102.<sup>134</sup>

That said, although applied in relatively few cases, Article 102(c) has addressed situations where a vertically integrated dominant firm has unfairly favored its own downstream operations to the detriment of competitors. These cases clearly illustrate a theory of abusive self-preferencing, where the firm leverages its market position to benefit its own firm over independent competitors. It is noteworthy, however, that the focus of Article 102(c) lies not on the leveraging of market power into an adjacent market, but rather on the act of discrimination itself.<sup>135</sup>

Petit highlights three specific cases that address self-preferencing in the context of Article 102(c).<sup>136</sup> In *Deutsche Bahn*, the Commission found, which was later confirmed by the GC, that Transfracht – a maritime transport subsidiary of the German railway operator – unlawfully benefitted from lower access fees to rail infrastructure compared to its rival, Intercontainer.<sup>137</sup> Similarly, in *GT-Link*, a public entity that owned and operated a commercial port exempted its own downstream ferry services from port duties while imposing them on a competing ferry company. The ECJ held that this could constitute unlawful discrimination under Article 102(c).<sup>138</sup> Moreover, the Commission closed its investigation into a Belgian telecom operator after it agreed that its subsidiary, Belgacom Directory Services, would also start paying for subscriber data – something that previously only independent phone directory publishers had to pay for.<sup>139</sup> Although it is not certain whether the Commission relied on Article 102(c) in this case, given the absence of a published decision, the facts of the case clearly illustrate a textbook example of secondary-line price discrimination by a vertically integrated firm.

Although most cases applying Article 102(c) have involved price discrimination, the provision is not limited to pricing practices. Its broad wording encompasses any application of dissimilar conditions to equivalent transactions that places trading partners at a competitive disadvantage. Hence, all four categories of self-preferencing outlined in Section 2.3.1 could potentially fall under Article 102(c) despite being non-price practices. However, for the provision to be applicable, all the constituent elements of Article 102(c) must be fulfilled, namely: (i) the existence of transactions with

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<sup>134</sup> O'Donoghue and Padilla (n 8), pp. 957-958.

<sup>135</sup> O'Donoghue and Padilla (n 8), p. 958.

<sup>136</sup> Petit (n 22), pp. 3-4.

<sup>137</sup> Case T-229/94 *Deutsche Bahn AG v Commission* ECR [1997] II-1689, paras 85-93.

<sup>138</sup> Case C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)* ECLI:EU:C:1997:376, para. 41.

<sup>139</sup> European Commission, *Settlement reached with Belgacom on the publication of telephone directories – ITT withdraws complaint*, (11 Apr. 1997, Press release) available at [https://ec.europa.eu/commission/presscorner/detail/de/ip\\_97\\_292](https://ec.europa.eu/commission/presscorner/detail/de/ip_97_292) (accessed 7 May 2025).

other trading parties; (ii) the placing of certain trading parties at a competitive disadvantage; and (iii) the application of dissimilar conditions to equivalent transactions. In addition, there must exist no objective justification and the conduct must result in an exclusionary effect. Below, several considerations are discussed regarding whether these conditions are likely to be met in cases of self-preferencing.

Regarding the *first requirement* – that there must be transactions between the dominant firm and third parties – Akman highlights two different aspects that potentially raises concern in relation to self-preferencing practices. First, it is not entirely clear whether the term “other trading partners” could include a situation where the discrimination occurs between the dominant firm itself (through its subsidiaries) and one of its own trading partners.<sup>140</sup> Nazzini contends that Article 102(c) expressly targets discrimination between two or more of the dominant undertaking’s customers or suppliers, not discrimination between an integrated division of the dominant undertaking and its competitors.<sup>141</sup> However, the case law presented above seems to suggest otherwise, as it was in fact subsidiaries of the dominant firms that were being favored in different ways.

Second, an important consideration in relation to self-preferencing is whether there must be actual “transactions” with “trading parties” for a discriminatory conduct to fall within the scope of the provision. This is particularly relevant for practices where digital platforms rank or display their own products more prominently than those of third-party sellers, since in such cases, it is not always obvious that a transactional relationship exists between the platform and the affected third parties.<sup>142</sup> For instance, in the context of *Google Shopping*, websites appearing in the general search results page are not engaged in a commercial exchange with Google. These websites do not pay Google to be listed; rather, Google displays these publicly available websites for free, without any specific agreement or reciprocal obligation.<sup>143</sup> As a result, there is no transaction that would typically create a trading relationship. The Commission has in earlier cases, such as *BdKEP*, adopted a broad understanding of “trading parties,” suggesting that even business contacts without formal contracts could be sufficient.<sup>144</sup> However, even under this broader interpretation, some form of commercial interaction or exchange of obligations is required. In the case of search engine results, one could argue that there is no such exchange, since websites are selected and displayed

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<sup>140</sup> Akman (n 122), p. 329.

<sup>141</sup> Renato Nazzini, ‘Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google,’ (2016) *GCLC Annual Conference Series*, p. 14.

<sup>142</sup> Akman (n 122), p. 330.

<sup>143</sup> C-48/22 (n 13), para. 4.

<sup>144</sup> European Commission, Draft Decision AT.38745 *BdKEP/Deutsche Post AG and Federal Republic of Germany*, 20 Oct. 2004, available at [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38745/38745\\_32\\_1.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/38745/38745_32_1.pdf) (accessed 7 May 2025), para. 92.

without any compensation or guarantees from *Google*. If simply being listed in search results cannot, on its own, be considered a trading relationship, it is questionable whether Article 102(c) is applicable.

What concerns the *second requirement*, it is not entirely clear how the notion of “competitive disadvantage” would be applied to self-preferencing behavior. For instance, as highlighted by Iacobucci and Ducci, in the context of search manipulation, search algorithms are designed to discriminate and rank results based on certain criteria, and assessing discrimination in this setting is inherently challenging.<sup>145</sup> Nonetheless, in the *MEO case*, the ECJ clarified that discriminatory conduct must have the potential to distort competition and that merely showing that there is an immediate disadvantage is insufficient to establish such distortion. The ECJ stressed the importance of assessing all relevant circumstances, including whether there is evidence of a strategy designed to exclude downstream competitors that are at least as efficient as the dominant firm’s other trading partners.<sup>146</sup> In the context of self-preferencing, this raises the question of what significance the discrimination element actually has, if a conduct is abusive only to the extent that it has exclusionary effects, and moreover, if it is suitable at all to apply Article 102(c) to situations where vertically integrated firms favor their own downstream operations, while disadvantaging rivals. This is further explored in Chapter 4.

The *third requirement*, which involves applying dissimilar conditions to equivalent transactions, also raises some challenges when assessing self-preferencing practices. In the context of vertically integrated firms, Akman argues that it is problematic to treat internal and external transactions as truly “equivalent,” such as when a platform ranks their own products or services differently than those of third parties. This is because internal dealings typically involve different cost structures and operational efficiencies that are not directly comparable to those of third-party competitors. A vertically integrated firm may benefit from economies of scale or scope that allows it to operate more efficiently, and it cannot be expected to extend these advantages to their rivals. The reasoning is, in other words, that since a vertically integrated company cannot be forced to pass on its efficiency gains to third parties, differential treatment in such cases may not come from discriminatory intent but rather from structural and economic realities that undermine the notion of transaction equivalence.<sup>147</sup> As such, a case can be made that these cannot be considered equivalent transactions, thereby complicating the application of Article 102(c) to certain forms of self-preferencing. This does not necessarily mean that the practice at issue cannot

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<sup>145</sup> Iacobucci & Ducci (n 74), pp. 20-21.

<sup>146</sup> Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* ECLI:EU:C:2018:270, paras 26, 28.

<sup>147</sup> Akman (n 122), p. 329.

have exclusionary effects and constitute an abuse, but more that Article 102(c) may not be suitable to address these anticompetitive concerns.

Finally, regarding the availability of an objective justification defense against findings of discrimination in self-preferencing cases, such practices can often be conceptualized as delivering efficiencies that benefit consumers. For instance, when platforms leverage non-public data from third-party sellers to enhance their own product offerings, this can lead to the introduction of products better aligned with consumer demand, improving product quality and variety. However, when similar arguments were made in the *Google Shopping* case, the GC rejected them, concluding that the efficiencies claimed by Google were neither substantiated nor sufficient to outweigh the anticompetitive effects.<sup>148</sup> This shows that although objective justifications remain a theoretically available defense, identifying what constitutes an acceptable justification in practice, particularly in self-preferencing cases, remains uncertain.

While cases involving abusive self-preferencing under Article 102(c) remain uncommon in the EU competition enforcement, this absence does not necessarily reflect a legal gap. One possible explanation is that competition authorities lack confidence in the provision's applicability to such conduct.<sup>149</sup> However, in light of the concerns presented above, it appears likely that Article 102(c) might not be the most appropriate legal basis for addressing self-preferencing practices.

### 3.3.3 Self-preferencing as tying?

Self-preferencing can also be examined through the legal framework applicable to tying practices. According to Article 102(d), a dominant undertaking is prohibited from making “the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” In a typical tying scenario, a company holding a dominant position in one market uses this position to promote the sale of a distinct, complementary product in an adjacent market, thereby leveraging its dominance from one market into another through a form of conditional selling.<sup>150</sup>

In Section 2.3.1, several of the presented categories encompassed practices that could be understood as tying according to the definition above. Specifically, the third and fourth categories – favoring sellers who use the platform's own logistics services and granting selective access to important functionalities – resemble tying arrangements. In these scenarios, access to certain core features of the platform is conditioned, either explicitly or

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<sup>148</sup> T-612/17 (n 13), paras 567-576.

<sup>149</sup> Petit (n 22), p. 4.

<sup>150</sup> O'Donoghue and Padilla (n 8), p. 697.

implicitly, on the use of an adjacent product or service offered by the platform itself. This reflects the logic behind traditional tying, where a dominant firm leverages its position in one market to gain a competitive advantage in another by making the use of a second product effectively mandatory. Such conduct may limit the ability of competitors to compete on equal terms and undermine consumer choice by reducing the availability of alternative services or functionalities.<sup>151</sup>

Additionally, some authors have argued that practices that generally have been considered under other categories of abuse could be construed as different forms of tying. For example, Google's preferential treatment of its own CSS in its general search results pages may drive the selection of its tied product – its CSS – simply by giving it visual prominence. If this behavior has an effect comparable to coercion, then it could, according to the authors, be treated as a form of tying.<sup>152</sup>

Nevertheless, read literally, Article 102(d) only covers situations where there is a *contractual relationship* between the dominant firm and those who are obliged to buy the second product or service. In other words, instances of self-preferencing where there is merely an implicit obligation without any sort of contract would then fall outside the scope of tying as articulated in the clause.<sup>153</sup> As previously discussed in relation to Article 102(c), many instances of self-preferencing do not involve a contractual relationship between the dominant firm and the disadvantaged parties. However, this is not necessarily true for all types of self-preferencing. In these scenarios, the conditions for applying the tying provision may still be met.

According to well-established case law, four conditions must be met for tying to constitute an abuse. *First*, the products in question must be distinct from one another.<sup>154</sup> This condition is likely to be met in many self-preferencing cases. For instance, in the third category (as described in Section 2.3.1), exemplified by the *Amazon Buy Box* case, the tying product – access to favorable positioning in the Buy Box – and the tied product – Amazon's logistics service – are clearly separate services. A similar argument can be made for many practices falling under the fourth category, particularly where access to a technical functionality is made conditional on the use of a related platform-controlled service. This type of conduct may qualify as *technical tying*, which arises when a product is designed to function properly only when used together with the supplier's own complementary product, thereby excluding competing alternatives. Although not explicitly mentioned in

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<sup>151</sup> O'Donoghue and Padilla (n 8), pp. 717-718.

<sup>152</sup> Iacobucci & Ducci (n 74), p. 15.

<sup>153</sup> Akman (n 122), p. 345.

<sup>154</sup> O'Donoghue and Padilla (n 8), p. 719.

Article 102, the Commission has acknowledged that such practices can amount to an abuse under the provision.<sup>155</sup>

However, the first condition is not as evidently applicable to the first and second categories of self-preferencing. In the first category, where the platform uses internal data to develop competing products, there is typically no imposition of a tied product alongside a distinct tying product. Instead, the abuse lies in the misuse of non-public data, not in forcing users to accept two tied services. In the second category, involving biased ranking of the platform's own services in search results, opinions are divided as to whether the conduct involves two distinct products. Iacobucci and Ducci, for example, argue that the *Google Shopping* case does involve two separate products, namely, general search and specialized search.<sup>156</sup>

*Second*, the company must hold a dominant position in the market for the tying product, a point which falls outside the scope of this thesis and will therefore not be further examined.

*Third*, customers must not be offered a genuine choice to obtain the tying product without also acquiring the tied product. At first glance, this condition may appear not to be fulfilled in cases of self-preferencing, as such practices often resemble a form of internal prioritization rather than explicitly forcing users to adopt an additional product. However, in general, EU law adopts a broad interpretation of coercion. Neither Article 102 nor the relevant case law requires that consumers must be explicitly prevented from choosing a competing product.<sup>157</sup> In its *Facebook Marketplace* decision, the Commission stated that “compulsion or coercion can still exist where the party accepting the tied product is not required to use it or is entitled to use the same product supplied by a competitor of the dominant undertaking.”<sup>158</sup> In light of the above, this condition is likely to be fulfilled in many different instances of self-preferencing.

*Fourth*, the tying practice must be capable of producing exclusionary effects, which has already been discussed in earlier sections of this thesis.

### 3.4 Summary

EU competition law aims to prevent dominant firms from abusing market power to distort competition or harm consumers. EU courts define abuse case-by-case, focusing on conduct that harms competition and by extension, consumers. The Draft Guidelines clarify abuse as conduct that departs from

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<sup>155</sup> Commission (n 78), para. 48.

<sup>156</sup> Iacobucci & Ducci (n 74), p. 27. For an opposing view, see Akman (n 122), pp. 346-349.

<sup>157</sup> *ibid.*, p. 28.

<sup>158</sup> Case AT.40684 – *Facebook Marketplace*, 14 Nov. 2024, para. 750.

competition on the merits and is capable of producing exclusionary effects, though defining these principles remains debated.

Self-preferencing has been examined under the refusal to deal framework, which only prohibits refusals involving indispensable inputs, exceptional harm to competition, and no objective justification. However, self-preferencing is a constructive refusal, and EU courts generally reserve indispensability tests for outright denials of access.

Moreover, while some self-preferencing cases have been assessed under Article 102(c) as a form of discrimination, challenges arise around defining “trading parties,” “equivalent transactions,” and “competitive disadvantage.” These ambiguities limit its effectiveness in addressing self-preferencing, especially where vertically integrated firms favor internal operations over rivals without clear transactional relationships.

Lastly, many self-preferencing practices may qualify as abusive tying under Article 102(d), particularly when access to key platform features is conditioned on using the platform’s own services. However, challenges arise in applying this framework where no contractual relationship exists or where distinct products cannot be identified, limiting its broader applicability.

## 4 Self-Preferencing as an Independent Form of Abuse of Dominance?

### 4.1 Introduction

In recent years, the question of whether self-preferencing by dominant digital platforms constitutes a distinct form of abuse under Article 102 has attracted increasing scholarly and regulatory attention. The debate centers on whether this type of conduct differs so fundamentally from more traditional abuses, such as tying, refusal to deal, or discrimination, that it warrants recognition as a separate legal category. This issue has become particularly salient in the context of digital markets, where platforms often act as both regulators and participants, thereby creating unique risks of exclusionary conduct.

The judgment in *Google Shopping* stands out as the most significant development in this area to date, as it explicitly addresses the legality of self-preferencing by a digital platform within the framework of Article 102. Section 4.2 will analyze this judgment in detail, highlighting how the Commission and the CJEU interpreted and applied Article 102 to a novel form of platform behavior. Based on that analysis, Section 4.3 discusses the legal implications and boundaries of self-preferencing as identified in *Google Shopping*. Finally, Section 4.4 explores how the future regulation of self-preferencing may evolve, taking into account the enforcement strategies of the Commission and NCAs, the role of the DMA, and the Draft Guidelines published by the Commission.

### 4.2 The *Google Shopping* case

In a decision from June 2017, the Commission fined Google for abusing its dominant position, marking one of the most debated antitrust decisions in recent years. The case revolved around the way Google had designed the results page of its general internet search engine, Google Search, to favor its own CSS, Google Shopping, thereby placing competing CSS sites at a competitive disadvantage. In the following sections, the reasoning and arguments put forward by the Commission, the GC, and the ECJ is examined in order to clarify how the self-preferencing conduct was assessed at each level.

#### 4.2.1 The Commission's decision

The Commission identified two key differences in how Google treated its own CSS compared to its rivals. First, the results of Google's CSS were prominently positioned on the first search results page, often above or among the top generic results.<sup>159</sup> In addition to enjoying this significantly higher visibility, the results were also presented in a visually enhanced format,

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<sup>159</sup> AT.39740 (n 13), paras 379-385.

featuring images, product details, and prices, which made it more attractive than competing services.<sup>160</sup> By contrast, rival CSSs were only included among the generic search results and accessible via plain text links.<sup>161</sup> Second, Google's CSS was not subject to the same ranking algorithms as its rivals, whose results were often demoted – sometimes to the second page or beyond. This further reinforced the visibility advantage of Google's own service over its competitors.<sup>162</sup>

In the decision, the Commission concluded that Google had abused its dominant position in the market for general search services. It found that Google had favored its own CSS over competing services by granting it preferential positioning and display. This conduct constituted an abuse of dominance because: (1) it diverted traffic away from rival comparison shopping services, as users are more likely to click on prominently displayed results;<sup>163</sup> (2) the loss of traffic represented a significant share of the total visits to competing services and could not be effectively replaced through other available sources;<sup>164</sup> and (3) Google's actions had potential anticompetitive effects in both the CSS market and the broader general search market.<sup>165</sup>

From a legal perspective, the widespread debate surrounding the decision stemmed from the uncertainty about when self-preferencing amounts to anticompetitive conduct, particularly due to the Commission's ambiguous theory of harm. The Commission's reasoning hints two complementary theories of harm. First, it framed Google's conduct as a form of discriminatory treatment, emphasizing that rival CSSs were placed at an unfair disadvantage compared to Google Shopping. Second, it characterized the self-preferencing as a leveraging abuse, whereby Google exploited its dominance in the general search market to gain a competitive edge in the adjacent market for CSSs.

However, the Commission rejected classifying Google's conduct under existing categories of abuse, such as refusal to deal.<sup>166</sup> Instead, it asserted that leveraging a dominant position to gain an advantage in an adjacent market constituted "a well-established, independent form of abuse falling outside the scope of competition on the merits."<sup>167</sup> As noted by O'Donoghue and Padilla, while leveraging may – but does not necessarily – constitute an abuse, the term functions as an umbrella for various forms of conduct through which a dominant firm may seek to extend its market power into adjacent markets,

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<sup>160</sup> *ibid.*, para. 397.

<sup>161</sup> *ibid.*, paras 371-379.

<sup>162</sup> *ibid.* paras 345-370.

<sup>163</sup> *ibid.*, paras 452 et seq.

<sup>164</sup> *ibid.*, paras 539 et seq.

<sup>165</sup> AT.39740 (n 13), paras 589 et seq.

<sup>166</sup> *ibid.*, para. 650.

<sup>167</sup> *ibid.*, para. 649.

many of which are already subject to established legal tests. Therefore, merely characterizing conduct as leveraging does not in itself justify bypassing the legal criteria established for different categories of abuse.<sup>168</sup> Whether the Commission intended to establish a new category of abuse by classifying Google's self-preferencing as a standalone infringement is not entirely clear. Regardless, it did not set out any legal test or limiting principles to clarify when self-preferencing by a dominant firm may constitute a breach of Article 102.

#### 4.2.2 The GC judgment

Following years of intense debate, the GC delivered its highly anticipated judgment in November 2021, largely upholding the Commission's decision that Google had abused its dominant position by favoring its own CSS at the expense of rivals. The GC held that this conduct constituted an independent form of abuse, characterized by active discriminatory measures that advantaged Google's own service in search results while disadvantaging competing services.<sup>169</sup>

The GC found that Google's self-preferencing conduct distorted competition and constituted a departure from competition on the merits.<sup>170</sup> It highlighted the "abnormal" nature of Google's behavior: unlike traditional infrastructures, Google's general search engine operates as an open platform designed to collect and present information from across the web, and by favoring its own services within this framework, Google acted in a manner that undermined the business rationale of its platform.<sup>171</sup>

Like the Commission, the GC found that Google's conduct did not fall neatly within any of the established categories of abusive leveraging. In particular, the GC firmly rejected a narrow interpretation that would limit unlawful self-preferencing to cases qualifying as a refusal to deal under the *Bronner* criteria. It contended that these criteria are only applicable in situations involving an outright refusal to deal, where the exclusionary effect arises from the refusal itself.<sup>172</sup> In contrast, Google engaged in proactive conduct, as a form of implicit refusal to deal that influenced visibility and traffic.<sup>173</sup> However, the GC somewhat weakened its attempt to confine *Bronner* to explicit refusals to deal by stating that the Commission's decision indicated Google's general search results page possessed "characteristics akin to those of an essential facility."<sup>174</sup> The Commission had, according to the GC, concluded that the

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<sup>168</sup> O'Donoghue & Padilla (n 8), p. 1089.

<sup>169</sup> T-612/17 (n 13), para. 240.

<sup>170</sup> T-612/17 (n 13), para. 184.

<sup>171</sup> *ibid.*, paras 176-179.

<sup>172</sup> *ibid.*, paras 230-233.

<sup>173</sup> *ibid.*, paras 239-240.

<sup>174</sup> *ibid.*, para. 224.

traffic generated by Google's search results was "indispensable" for competing CSSs.<sup>175</sup>

The GC classified the practice as a form of leveraging discrimination, recognizing it as a distinct type of abuse. However, it failed to articulate any alternative test or limiting principle for when such conduct should be deemed unlawful. Instead, the GC invoked for the first time the principle of equal treatment as a general principle that is also applicable to competition cases. It concluded that the principle underpins equal opportunities between competitors and constitutes a key condition for undistorted competition.<sup>176</sup>

#### 4.2.3 The ECJ judgment

In March 2022, Google appealed the GC's judgment to the ECJ.<sup>177</sup> The appeal was based on four grounds:

1. The GC erred in upholding the decision despite the Commission's failure to satisfy the legal criteria for imposing a duty to supply access to CSSs;
2. It failed to demonstrate that Google's conduct departed from competition on the merits;
3. It incorrectly assessed the causal link between the alleged abuse and its likely effects,<sup>178</sup> and
4. It wrongly concluded that the Commission was not required to examine whether the conduct could foreclose competitors that were equally efficient.<sup>179</sup>

The judgment was delivered in August 2024, in which the ECJ rejected all four grounds of appeal, ultimately upholding the €2.42 billion fine imposed by the Commission.<sup>180</sup>

With regards to the *first ground of appeal*, the ECJ rejected this ground, arguing that since the case concerned discriminatory conditions of access to Google's search results pages, and not an outright refusal to supply access, the *Brunner* criteria are not applicable.<sup>181</sup> ECJ thereby reaffirmed its approach from *TeliaSonera*, *Slovak Telekom*, and *Lithuanian Railways*, stating that the

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<sup>175</sup> *ibid.*, para. 227.

<sup>176</sup> Sofia Oliveira Pais & Marta Prata Domingos, 'The Principle of Equal Treatment in the Google Shopping Case,' (2023) 28(4) *Bialystok Legal Studies Białostockie Studia Prawnicze*, p. 145-146.

<sup>177</sup> C-48/22 (n 13), para. 45.

<sup>178</sup> This ground of appeal is not examined further due to the scope limitations of the thesis.

<sup>179</sup> C-48/22 (n 13), para. 59.

<sup>180</sup> *ibid.*, para. 271.

<sup>181</sup> *ibid.*, para. 118.

*Bronner* criteria apply only in the specific context of a refusal to grant access or supply, and cannot be extended to other forms of abusive conduct.<sup>182</sup> It emphasized that such cases entail compelling a firm to contract with a competitor, significantly impacting its freedom of contract and property rights. Here, however, ECJ found that the situation differed, as access to the general results page was granted but under discriminatory conditions, meaning the same level of interference with Google's contractual freedom did not arise.<sup>183</sup>

The ECJ also dismissed the *second ground of appeal*, concluding that Google's conduct did depart from competition on the merits. According to Google, the GC had wrongly based its legal assessment on circumstances that related only to the effects of the conduct, not its nature, and therefore it did not show a deviation from competition on the merits.<sup>184</sup> However, the ECJ rejected this argument, emphasizing that all relevant circumstances must be considered when assessing whether a practice departs from competition on the merits. These include the nature of the conduct, the functioning of competition and the characteristics of the relevant market(s), such as potential barriers to entry or expansion and the leveraging of market power across related or neighboring markets. The ECJ contended that the contextual factors presented by the Commission, including the significance of Google's traffic and the lack of viable alternatives, could indeed be used to determine whether Google's behavior deviated from competition on the merits.<sup>185</sup> The ECJ also confirmed that the conduct at issue must be shown to be capable of producing exclusionary effects, clarifying that these may also arise where the conduct, even at an early stage, hinders potential competitors from entering the market, thereby limiting competition, innovation, or consumer choice.<sup>186</sup>

The ECJ thereafter concluded that Google's more favorable positioning and display of its own CSS's results, combined with the simultaneous demotion of competing CSSs through ranking algorithms, placed the conduct in the context of the two related markets and the competition dynamics within them. It emphasized that the success of Google's service was not due to superior performance, but rather to the anticompetitive nature of these practices, when assessed in light of the relevant market context. As such, these practices were capable of producing potential exclusionary effects on the downstream market.<sup>187</sup> Furthermore, the ECJ clarified that not all instances where a dominant company treats its own services more favorably than those of its rivals automatically amount to an abuse or a departure from competition on the merits. Such assessment always depends on the specific facts of the case.

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<sup>182</sup> C-52/09 (n 128), paras 55-56; C-165/19 P (n 129), paras 50-51; C-42/21 P (n 129), paras 79-85.

<sup>183</sup> C-48/22 (n 13), paras 110-112.

<sup>184</sup> *Ibid.*, paras 123-137.

<sup>185</sup> C-48/22 (n 13), paras 165-168.

<sup>186</sup> *ibid.*, para. 167.

<sup>187</sup> *ibid.*, paras 171-174.

In Google's case, however, the GC did more than just acknowledge the preferential treatment of Google's own CSS as it carefully evaluated the nature of the upstream market and specific circumstances surrounding the conduct.<sup>188</sup>

The *fourth of ground of appeal* concerned Google's claim that the GC had erred in law by concluding that the Commission was not required to assess whether Google's conduct could foreclose as-efficient competitors. Google argued that the Commission failed to consider whether any difficulties faced by rival CSS were due to their lower efficiency or user preferences for alternatives, rather than Google's conduct.<sup>189</sup> The ECJ stated that the Commission may sometimes be required to assess whether as-efficient competitors could be foreclosed as a result of a dominant firm's conduct, making the AEC-test relevant to consider.<sup>190</sup> However, the ECJ continued to clarify that the AEC-test is not automatically required under the provision, and in this case, it agreed with the GC that due to the specific market conditions, it was not feasible to reliably assess the efficiency of Google's competitors, making the AEC-test irrelevant here.<sup>191</sup>

## 4.3 Insights from *Google Shopping*

### 4.3.1 Self-preferencing is not a refusal to deal

As previously noted, the ECJ affirmed the ruling of the GC's that the Commission was not required to meet the conditions set out in *Bronner*, thereby clarifying that proving unlawful access restrictions does not necessarily require the application of the strict "refusal to deal" test by the Commission, NCAs, or national courts.

The ECJ distinguished between two types of access restrictions: passive refusals, where a dominant undertaking denies access to infrastructure developed for its own use, and active restrictions, where access is granted but subject to unfair or discriminatory conditions. In the latter case, the abuse lies not primarily in the refusal itself, but in the use of access as a means of excluding rivals. The higher evidentiary standard that follows for passive refusals reflects the ECJ's view that compelling a company to deal with competitors interferes with its contractual freedom and property rights, which calls for greater caution and justification than when access has already been granted willingly by the dominant undertaking. This restrictive interpretation of the legal doctrine seems to reflect an intention on the part of the EU courts to grant the Commission greater discretion to assess allegedly abusive practices based on their specific factual context, rather than being constrained

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<sup>188</sup> *ibid.*, paras 186-193.

<sup>189</sup> *ibid.*, paras 252-259.

<sup>190</sup> *ibid.*, paras 263-266.

<sup>191</sup> C-48/22 (n 13), paras 267-269.

by rigid legal categories. As emphasized by Colomo, another reading could jeopardize the Commission's ability to engage in proactive decision-making and limit its space for policy intervention.<sup>192</sup>

Moreover, it appears reasonable that constructive refusals to deal, where access is formally granted but under unfair or discriminatory terms, should be subject to a distinct legal assessment from outright refusals. That said, while the openness of Article 102 enables it to encompass a wide range of abusive conduct by dominant undertakings, this flexibility must be balanced against the need to preserve legal certainty. This requires the application of limiting principles that clearly delineate the provision's prohibitive scope. Section 4.3.3 explores this tension more deeply by discussing the new theory of harm introduced in the *Google Shopping* judgment and what implications it has for defining the boundary between lawful and abusive self-preferencing.

#### 4.3.2 The unclear role of 'competition on the merits'

One of the most anticipated aspects of the judgment was how self-preferencing would be interpreted through the lens of competition on the merits. In this case, the notion was strategically employed by Google to argue that the preferential treatment of its own services was not inherently problematic, but rather a legitimate practice consistent with competition on the merits. This argument suggested that only conduct deemed "abnormal" would fall under the scope of Article 102. By framing the issue in this narrow way, Google sought to make it more difficult for the Commission to prove that its actions were anticompetitive. However, the ECJ rejected this interpretation and reaffirmed a broader understanding of abuse under EU law.

After first confirming that not all discriminatory conduct is harmful per se, the ECJ clarified that conduct not inherently incompatible with competition on the merits can still fall within the scope of Article 102, depending on the specific economic and legal context. The judgment thereby introduced an important nuance: self-preferencing is not automatically abusive but becomes so when combined with an additional element that distinguishes the behavior from ordinary business strategies. In other words, a dominant firm must go beyond merely favoring its own products or services and actively harm competition, for example by demoting rivals or otherwise impairing their access to the market. This is what ultimately separates harmful self-preferencing from lawful business practices. The "specific circumstances" are at the heart of the assessment of whether the conduct departs from competition on the merits.

The ECJ's effects-based, all-circumstances approach means that identifying an abuse depends on a comprehensive analysis of the market structure, the

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<sup>192</sup> Pablo Ibáñez Colomo, *The New EU Competition Law*, 1st edn, (Hart Publishing: Oxford: 2023), p. 274.

conduct in question, and its actual or potential anticompetitive effects. While this case-by-case analysis offers flexibility and market-specific considerations, it also highlights the vagueness of the notion of “competition on the merits.” The “specific circumstances” under which self-preferencing may amount to an abuse remain open to interpretation, highlighting the need for future case law to clarify the boundaries of this concept. However, as Fischer et al. point out, the case does offer some guidance by highlighting examples of potentially important factors, particularly in digital markets, such as user behavior and the platform’s role as a gateway.<sup>193</sup>

Despite the notion of competition on the merits being critical in determining whether a certain behavior is anticompetitive or not, it lacks a clear definition. Although case law reaffirms that competition on the merits may lead to the departure or marginalization of less-efficient competitors, this definition does not provide a positive understanding of what competition on the merits truly entails. Moreover, as previously noted, in the case of digital markets, that are characterized by network effects, scale and scope economies, and data advantages, a hypothetical replication by an equally efficient competitor may not be realistic (and neither mandatory, according to the ECJ in *Google Shopping*). While an AEC-test might be a helpful indicator, it doesn’t clear up the broader uncertainty of the concept.

Based on the above, understanding how the notion will be construed in relation to future self-preferencing cases remains unclear. The lack of a clear framework that ensures legal certainty and upholds the rule of law creates challenges, both for enforcement agencies as well as dominant firms trying to navigate the EU competition law landscape. Given the complexities involved, the lack of guidance may weaken the ability to effectively enforce the law and make it harder for vertically integrated firms to understand how to assess their business strategies. As a result, applying Article 102 to self-preferencing practices is likely to remain inconsistent and unpredictable.

#### 4.3.3 Discriminatory leveraging as a new form of abuse

The ECJ judgment confirms that a specific form of self-preferencing can amount to an independent abuse under Article 102. It is a form of discriminatory leveraging abuse that involves both favoring one’s own services and demoting competitors, resulting in potential foreclosure effects depending on the particular circumstances of the case. In the case of Google, the ECJ emphasized Google’s market power, the importance of Google’s traffic and the lack of viable options, and the broader market context as relevant circumstances. The basic elements of an independent discriminatory leveraging abuse were outlined in the judgment, namely: discrimination, anticompetitive effects, and a case-specific assessment of the circumstances.

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<sup>193</sup> Eva Fischer, Lena Hornkohl & Nils Imgarten, ‘Discriminatory Leveraging Plus – The Standard for Independent Self-Preferencing Abuses after Google Shopping (C-48/22 P)’ (2025), 10(1) *European Papers*, p. 32.

However, the *Google Shopping* judgment leaves many aspects open to interpretation.

It remains unclear what form or degree of discrimination is required for the conduct to qualify as an abuse. The conduct in *Google Shopping* involved both an element of preferential placement to its own service and competitor demotion, as rivals were pushed down in the general search results. Although it seems like both parts were required, that is the self-promotion and the simultaneous demotion, the judgment was based on very case-specific facts. These facts are unlikely to be repeated in the same way in other cases, which makes it difficult to develop a general legal test for self-preferencing solely based on this judgment. These ambiguities raise an important question about the broader implications of the ruling. To what extent does the *Google Shopping* judgment reflect a general position on the legality of self-preferencing under EU competition law, and to what extent is it merely a response to the specific circumstances of that case? Clarification would have been important here, especially when considering that self-preferencing has traditionally been seen as a normal consequence of vertical integration and even has been recognized as pro-competitive in certain market contexts.

Furthermore, according to the principle of legal certainty, the creation of a new category of abuse, such as self-preferencing, must be supported by a clear and well-reasoned theory of harm. Article 102 does not contain an exhaustive list of abusive practices, which allows room for new categories of abuse to be developed. However, when doing so, the legal boundaries must be clearly defined to avoid uncertainty. Without clear limiting principles to define unlawful self-preferencing, enforcement risks harming competition in the long term and, by extension, consumers. It is reasonable to assume that for other instances of self-preferencing to meet the threshold for abuse, they will likely need to exhibit a level of competitive harm comparable to that of Google. However, the precise tipping point at which self-preferencing becomes unlawful remains uncertain.

Another related question is how relevant this new form of abuse is for other types of self-preferencing that do not involve manipulation of general search page results and, moreover, how it will interact with already existing categories of abuse. As shown in this thesis, vertically integrated firms can favor their own product and services through many different means, many of which may already be captured by established categories of abuse under Article 102, each supported by well-developed theories of harm and legal tests. As highlighted by Melchionda, introducing self-preferencing as a distinct category of abuse is associated with a risk of creating legal uncertainty within the system. It may also give the Commission and NCAs discretion to select the legal framework that most conveniently fits their

enforcement strategy, potentially undermining consistency in the application of Article 102.<sup>194</sup>

At the same time, in light of the analysis presented in Chapter 3, it can be argued that a legal gap has existed with regard to certain forms of self-preferencing which, despite involving a discriminatory component and the potential for exclusionary effects, do not fit neatly within any of the established categories of abuse under Article 102. This ambiguity creates challenges for enforcement, as EU courts, national courts and NCAs may struggle to apply existing legal frameworks to new digital business strategies. The *Google Shopping* case arguably exemplifies this gap, highlighting the need for the development of clearer legal standards tailored to digital markets. If the judgment indeed marks the emergence of a new legal category, it will broaden the scope of EU competition law to include forms of conduct that previously fell outside the reach of established abuse categories. The next section discusses further how this development might be and, to some extent, already has been interpreted and applied by EU courts, national courts and NCAs moving forward.

#### 4.4 The Future Regulation of Self-Preferencing: Enforcement Strategies, the DMA, and the Draft Guidelines

##### 4.4.1 Enforcement under Article 102 after *Google Shopping*

The ECJ's ruling marks a significant development in EU competition law, particularly for powerful digital platforms that both control access to a digital market and compete with those active on that market. By affirming a broader interpretation of what may constitute abusive conduct, the judgment enhances the Commission's and the NCAs' capacity to address dominance-related concerns in new and more flexible ways, within the digital sphere and potentially also in other sectors.

This legal shift may encourage the Commission and NCAs to pursue self-preferencing cases under Article 102 with greater confidence and frequency. The judgment sends a clear message that dominant firms leveraging their gatekeeping role to steer markets in their own favor are facing stricter scrutiny from the regulatory landscape of the EU, with enforcement authorities now better equipped than ever to respond effectively. Indeed, since the Commission's decision in 2017, NCAs have become increasingly active in

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<sup>194</sup> Melchionda (n 119) pp. 24-25.

enforcing Article 102 in the context of self-preferencing conduct against various digital platforms.<sup>195</sup>

While many of these decisions have failed to provide a clear explanation of the theory of harm or the specific type of abuse involved, some authorities have made more ambitious efforts to align their reasoning with the approach taken in the Commission’s decision in *Google Shopping*. A notable example is the *Amazon FBA* case, in which the Italian Competition Authority (“ICA”) fined Amazon for tying essential features on its marketplace that were deemed necessary for commercial success on the platform, to its own logistics and delivery service.<sup>196</sup> The ICA explicitly referenced the theory of harm developed by the Commission and endorsed the view that “abusive leveraging” can amount to a standalone infringement of Article 102.<sup>197</sup>

However, this decision also illustrates the difficulties associated with introducing a new form of abuse that overlaps with already established legal categories, as discussed earlier. As Melchionda points out, the ICA initially approached the conduct as a case of tying, focusing on whether the services in question were separate products and whether coercion was present. Nevertheless, the authority then ultimately concluded that Amazon’s conduct also amounted to self-preferencing, based on the leveraging of its dominant position in the marketplace to promote its own logistics service at the expense of competing providers.<sup>198</sup> This shift in reasoning reflects the blurred lines between traditional abuse categories and newer concepts like self-preferencing.

Since the ECJ’s final ruling in *Google Shopping*, investigations into self-preferencing under Article 102 have been limited. In the few cases involving self-preferencing elements, the Commission has relied on different theories of harm than the one applied in *Google Shopping*. For example, in the *Facebook Marketplace* case, the Commission found that Meta had abused its dominant position by tying its online classified ads service, Facebook

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<sup>195</sup> See, e.g., the German Bundeskartellamt, *Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (15 Feb. 2019), available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=) (accessed 14 May 2025), note however, that this concerned an exploitative abuse; the French Competition Authority, *Decision 21-D-11 regarding practices implemented in the online advertising sector* (7 June 2021), available at [https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2021-07/21-d-11\\_ven.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2021-07/21-d-11_ven.pdf) (accessed 14 May 2025); Italian Competition Authority, *Decision in Case A528* (9 Dec. 2021).

<sup>196</sup> Italian Competition Authority (n 195). Thus, Amazon has been facing parallel competition proceedings on essentially the same conduct as before the EC, see the third category in Section 2.3.1.

<sup>197</sup> *ibid.*, para. 716.

<sup>198</sup> Melchionda (n 119) pp. 24-25.

Marketplace, to its personal social network, Facebook. All Facebook users were automatically given access to Marketplace and regularly exposed to it, thereby granting Marketplace a significant distribution advantage compared to competitors.<sup>199</sup> The Commission characterized this as abusive tying under Article 102(d), rather than as discriminatory leveraging, which raises the question of whether this was simply a case where the tying theory better fit the facts, or whether it reflects an intent to confine the leveraging theory used in *Google Shopping* to cases involving search manipulation. Nonetheless, the Commission has been notably active in addressing self-preferencing in a different context: as a potential infringement of the DMA.

#### 4.4.2 The interplay between Article 102 and the DMA

Following its decision in *Google Shopping*, the Commission proposed the DMA, an ex ante regulatory framework designed to complement EU competition law. It entered into force in 2022 and in March 2024, the Commission launched non-compliance investigations into Alphabet, Apple, and Meta concerning different self-preferencing practices.<sup>200</sup> On 22 April 2025, the Commission issued its final findings against gatekeepers Meta and Apple, concluding that they had violated the DMA.<sup>201</sup>

As noted above, the *Google Shopping* judgment relies on a case-by-case assessment focused on effects. In contrast, the DMA imposes clear bans on various forms of self-preferencing by so-called “gatekeepers”, including favoring their own services in rankings, leveraging data gathered from third-party sellers, or implementing unfair, discriminatory terms of access for a subset of core platform services.<sup>202</sup> In other words, the DMA imposes per se prohibitions without the need to demonstrate actual or potential exclusionary effects, reflecting a more targeted and categorical regulatory strategy, which the Commission can increasingly rely on in digital markets. This development raises some considerations regarding the relationship between Article 102 and this new regulatory instrument.

First, an initial aspect to consider when examining the DMA and Article 102 is how each framework’s approach might inform the understanding of self-preferencing in the other, with the influence potentially running both ways.

For example, in *Google Shopping*, the ECJ viewed anticompetitive self-preferencing as a combination of promoting the dominant firm’s own services

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<sup>199</sup> AT.40684 (n 158), paras 730-758.

<sup>200</sup> European Commission, *Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act*, (25 March 2024, Press release) available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_1689](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689) (accessed 16 May 2025).

<sup>201</sup> European Commission, *Commission finds Apple and Meta in breach of the Digital Markets Act*, (23 Apr. 2025, Press release) available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_1085](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085) (accessed 16 May 2025).

<sup>202</sup> Article 6(5) DMA; Article 6(10) DMA; Article 6(12) DMA.

and demoting those of competitors. The DMA, by contrast, does not explicitly define self-preferencing in the context of search engines. Instead, it prohibits more favorable treatment of a gatekeeper's own services in terms of ranking, indexing, and crawling, without mentioning the demotion of rivals, which was central in *Google Shopping*.<sup>203</sup> This raises the question of whether the prohibition targets self-promotion alone, or whether the demotion of rivals is also a necessary or sufficient element for a finding of self-preferencing under the DMA. Petrucci highlights that, since the DMA complements rather than replaces Article 102, a requirement for demotion under Article 102 does not necessarily imply that the same requirement applies under the DMA's prohibition.<sup>204</sup> In its preliminary findings sent to Alphabet in March 2025, the Commission identified certain features of Google Search that allegedly favor Alphabet's own services over those of rivals. The Commission emphasized that the infringement of the DMA stems from Alphabet giving its own services more "prominent treatment," specifically, by displaying them at the top of Google Search results or in dedicated spaces. No reference was made to the demotion of competing services, reinforcing the view that under Article 6(5) DMA, self-preferencing can amount to a breach even in the absence of explicit demotion.<sup>205</sup>

However, the question remains whether the demotion of rivals is, in itself, sufficient for a practice to be considered unlawful under the DMA. One interpretation is that the DMA's reference to "related indexing and crawling" suggests a broader understanding of self-preferencing that may include demotion effects, even if not explicitly mentioned.<sup>206</sup> Indexing and crawling refer to how platforms scan, identify, store, and organize content, and by selectively controlling these processes, a gatekeeper could both favor its own services and demote rivals, which mirrors the type of conduct examined in *Google Shopping*.<sup>207</sup> In other words, while the DMA does not expressly cover demotion, its language may still capture similar practices, and if Article 6(5) is interpreted in light of the findings in *Google Shopping*, this may very well be the case.

Another example, where the influence could potentially run the other way, is if the DMA's strong emphasis on "fairness" in the competition process, and particularly on ensuring that gatekeepers act neutrally toward their users and competitors, would affect the application of Article 102. While the concept of fairness has recently gained prominence in both rhetorical and policy debates, its actual impact on decisional practice in EU competition law remains limited. According to Stylianou and Iacovides, fairness as an

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<sup>203</sup> Article 6(5) DMA.

<sup>204</sup> Petrucci (n 64), p. 27.

<sup>205</sup> European Commission, *Commission sends preliminary findings to Alphabet under the Digital Markets Act*, (19 March 2025, Press release) available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_811](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_811) (accessed 19 May 2025).

<sup>206</sup> See, e.g., Fischer, Hornkohl & Imgarten (n 193), p. 42.

<sup>207</sup> Recitals (51), (52) DMA.

independent policy goal continues to be among the least frequently cited objectives in the legal decisions of various EU institutions.<sup>208</sup> However, as Mendelsohn explains, fairness is an overarching objective in the DMA, which becomes clear when looking at both the purpose and background of the regulation.<sup>209</sup> The DMA's asymmetric design, where obligations apply only to a limited group of large firms designated as gatekeepers, is specifically intended to curb their significant market power.<sup>210</sup> Many of the obligations and prohibitions in the DMA are directly inspired by previous enforcement actions taken by the Commission under Article 102, against firms like Google, Apple, and Amazon.<sup>211</sup>

The question is whether DMA's ambition to redefine the rules of the digital economy and promote "fairness" towards business users and other providers will also be reflected in the future application of Article 102 to self-preferencing practices. Šmejkal argues that the notion of fairness is already present in the application of Article 102, particularly through the concept of "competition on the merits," which inherently includes different fairness considerations.<sup>212</sup> Similarly, Petrucci notes that any definition of "competition on the merits" inevitably involves value judgments about how markets should function.<sup>213</sup> It is therefore possible that, although the ECJ has clarified that self-preferencing is not inherently incompatible with competition on the merits, fairness-based considerations will take on a more prominent role in future applications of Article 102, especially given the open-ended and evolving nature of the competition on the merits standard.

Second, a key aspect in assessing the interplay between Article 102 and the DMA is the future role of Article 102 in the enforcement of self-preferencing conduct. Given that the DMA provides the Commission with an alternative enforcement strategy, it may increasingly choose to address self-preferencing conduct through the ex ante obligations imposed on gatekeepers, rather than relying on the slower and more uncertain ex post framework of Article 102, that also requires the Commission to define a theory of harm and establish anticompetitive effects. For NCAs, however, the DMA is not directly enforceable, which means they must continue to rely on Article 102 (and

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<sup>208</sup> Konstantinos Stylianou & Marios Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' (2022), 42(4) *Legal Studies*, pp. 641-642.

<sup>209</sup> See, e.g., Recital (4) DMA, which states that the DMA aims to address "serious imbalances in bargaining power, and consequently, (...) unfair practices and conditions for business users, as well as for end users (...)."

<sup>210</sup> Juliane K. Mendelsohn, 'Fairness in the Digital Markets Act,' (2025, working paper) available at <https://ssrn.com/abstract=5104074> (accessed 20 May 2025), pp. 2-3.

<sup>211</sup> Viktoria H. S. E. Robertson, 'The complementary nature of the Digital Markets Act and the EU antitrust rules,' (2024) 12(2) *Journal of Antitrust Enforcement*, p. 326.

<sup>212</sup> Václav Šmejkal, 'Abuse of Dominance and the DMA – Differing Objectives or Prevailing Continuity?,' (2023) 69(2) *Acta Universitatis Carolinae Iuridica*, p. 48.

<sup>213</sup> Petrucci (n 64), p. 26.

national competition rules) when addressing self-preferencing practices at a national level.<sup>214</sup>

An important consideration in this context is that a shift by the Commission towards relying more heavily on the DMA, rather than Article 102, could reduce opportunities to clarify and develop legal standards for newer theories of harm, such as discriminatory leveraging, through case law. As a result, NCAs may be left with significant discretion when interpreting and applying Article 102 in these areas, potentially leading to fragmented enforcement across member states. Moreover, inconsistent enforcement, both at the national and EU level, risk creating legal uncertainty and complicating compliance for digital platforms. In this context, it should also be noted that many NCAs within the EU have either implemented or are considering the implementation of new ex ante regulatory frameworks to more effectively govern the business models and conduct of online platforms.<sup>215</sup> This underscores the growing recognition of the complex issues arising in digital markets, while simultaneously raising important questions about how to design these regulations in a way that genuinely fosters competition and improve outcomes for consumers. It will also be important to observe how the coexistence of these new regulatory regimes influences NCAs' enforcement strategies and their continued application of Article 102 in digital markets.

Lastly, it is important to recognize that the ex ante approach under the DMA applies only to the largest digital firms and, while far-reaching, its obligations do not capture all dominant firms or all forms of anticompetitive conduct. Consequently, competition law and particularly Article 102, will most likely continue to play a crucial role in addressing self-preferencing behavior in digital markets in the future.

#### 4.4.3 The Draft Guidelines: further complicating the matter of self-preferencing?

As mentioned in previous chapters, the Commission published Draft Guidelines in August 2024, seeking to enhance legal certainty by clarifying how the Commission interprets exclusionary conduct in light of existing case law from the EU courts. In the Draft Guidelines, the Commission recognizes that self-preferencing can be widespread in certain sectors, and whether such conduct infringes Article 102 depends on the specific circumstances. Drawing on the *Google Shopping* judgment, three non-cumulative factors that may indicate that a conduct deviates from competition on the merits are outlined.

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<sup>214</sup> Konstantina Bania & Damien Geradin, *The Digital Markets Act – A Guide to the Regulation of Big Tech in the EU* (Hart Publishing: Oxford: 2025), p. 268.

<sup>215</sup> See, e.g., the Swedish Government, *Statens offentliga utredningar* (SOU 2025:22) *Förbättrad konkurrens i offentlig och privat verksamhet*, pp. 103-105.

First, it is stated that preferential treatment must occur in a leveraging market that constitutes an “important source of business” for rivals in the downstream market, which they cannot effectively substitute.<sup>216</sup> This requirement appears to set a lower threshold than the one used by the ECJ in *Google Shopping*, where the focus was more specific: the Court considered whether the conduct in question diverted traffic away from rival CSSs. In other words, the ECJ was concerned not with the overall importance of the leveraging market, but with whether the actual conduct resulted in a significant loss of traffic to competitors. Moreover, while the ECJ emphasized that the conduct must be discriminatory to be abusive, the Draft Guidelines do not make any reference to discrimination.

Second, it is suggested that the self-preferencing must be likely to influence user behavior regardless of the intrinsic quality of the product.<sup>217</sup> Third, the guidelines mention that the conduct may be abusive if it lacks a plausible business rationale in the leveraging market.<sup>218</sup> This is based on a part of the GC’s reasoning in *Google Shopping* (see Section 4.2.2), which was nevertheless not adopted by the ECJ in its reasoning. Overall, the somewhat ambiguous formulation of these factors, combined with the fact that they partly differ from the ECJ’s reasoning in *Google Shopping*, raises doubts about the extent to which the Draft Guidelines genuinely contribute to greater legal certainty on the matter of self-preferencing.

Finally, a broader structural concern with the Draft Guidelines is their seemingly arbitrary and formalistic categorization of abusive conduct, through which similar or even overlapping practices are being subject to differing legal standards without a clear justification. A key example is self-preferencing, which in many respects shares functional characteristics with tying. However, despite these similarities, it is assessed under a different legal framework: while tying is presumed to have exclusionary effects, in self-preferencing cases the Commission must demonstrate that the conduct is capable of producing such effects. This inconsistent approach not only weakens legal certainty but also complicates the practical enforcement of Article 102.

## 4.5 Summary

In August 2024, the ECJ upheld the GC’s ruling and rejected all four of Google’s grounds of appeal, thereby clarifying important legal consideration relating to the legality of self-preferencing, such as the applicability of the Bronner criteria and the concept of competition on the merits.

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<sup>216</sup> Commission (n 3), para. 161(i).

<sup>217</sup> *ibid.*, para. 161(ii).

<sup>218</sup> *ibid.*, para. 161(iii).

The *Google Shopping* judgment clarifies that self-preferencing can constitute an abuse under Article 102 without amounting to a refusal to deal. The ECJ introduced discriminatory leveraging as a new form of abuse but left core aspects, such as the role of “competition on the merits” and legal boundaries, somewhat unclear, creating uncertainty for future enforcement.

The judgment expanded the scope of Article 102 and encouraged more active enforcement, but its legal implications remain uncertain. In contrast, the DMA offers quicker, rule-based action against gatekeepers and does not clearly require demotion for a self-preferencing breach and recent enforcement suggests self-promotion alone may suffice. The DMA’s focus on fairness may also influence how Article 102 is applied, potentially shifting it toward a more fairness-based approach. While the DMA enables faster enforcement against gatekeepers, it may reduce case law development under Article 102. The Draft Guidelines further complicate matters by framing self-preferencing in an inconsistent manner, raising concerns over legal certainty and coherent enforcement.

## 5 Conclusion

This thesis has explored the complex and evolving legal landscape surrounding self-preferencing under EU competition law.

From a law and economics perspective, it highlighted the dual concerns and justifications associated with self-preferencing, acknowledging both potential pro-competitive efficiencies and harmful exclusionary effects. The competitive risks associated with self-preferencing are generally similar to those found in other types of vertical integration. However, the unique features of digital markets can intensify some of these concerns, motivating a case-by-case assessment.

EU competition law, particularly Article 102, remains the primary tool to address abusive self-preferencing conduct, though its application faces significant challenges. The analysis of potential theories of harm shows that, although no single theory comprehensively covers all forms of self-preferencing, existing legal categories are in most cases sufficiently flexible to effectively address many of its various types.

The recent ECJ ruling in *Google Shopping* marked a pivotal moment by recognizing discriminatory leveraging as a distinct form of abuse and broadening enforcement scope. However, the judgment also left open important questions, notably regarding the precise boundaries of the new category of abuse and the interpretation of “competition on the merits,” which continue to generate uncertainty.

Moreover, the emergence of the DMA signals a shift towards clearer, rule-based prohibitions against self-preferencing by gatekeepers, promising faster enforcement, yet potentially limiting further case law development under Article 102. This evolving legal landscape, together with the Commission’s Draft Guidelines, presents challenges for coherent enforcement and legal certainty. Overall, the current approach shapes future enforcement by balancing effects-based, case-by-case competition law analysis with the growing influence of ex ante regulation, reflecting ongoing tensions in effectively addressing self-preferencing in the digital economy.

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