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An Analysis of Article 6(5) DMA as the Core of Self-Preferencing in Digital Markets

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Abstract

One of the areas in which the most obvious effects of our increasingly digitalised world are encountered is undoubtedly competition law. This digitalization perspective has started to be observed through international digital market regulations and in an increasing number of regulations issued by national competition authorities. The greatest effects of these developments -which are set to render traditional approaches obsolete- are mostly seen through business users and end users. This is mainly due to the efforts online platform providers' generating themselves more prominently in this digital world, in other words, their desire to provide less visibility to their competitors, has had more negative impacts than positive ones on the said stakeholders, which has now become a situation protected within the European Union by Digital Markets Act -specifically under Article 6(5). When discussing the effects of the efforts of the companies- often referred to as Big Tech- to prioritise their own online platform services as one of the latest trends of this digital world, it is also significant to address a series of obligations imposed by the Act on the key players -commonly known as GAFAM- generating these impacts and the compliance measures they are gradually beginning to adopt. In this study, the analysis of how self-preferencing behaviours -which have been long observed in competition law for many years- have evolved into the main domain of digital markets, their reflections in the real world, and the regulations aimed at gatekeepers playing the lead role in this context will be conducted.

Abstrakt

Einer der Bereiche, in denen die Auswirkungen unserer zunehmend digitalisierten Welt am deutlichsten zu spüren sind, ist zweifellos das Wettbewerbsrecht. Diese Entwicklung der Digitalisierung ist inzwischen in den internationalen Vorschriften für digitale Märkte und in einer zunehmenden Zahl von Vorschriften der nationalen Wettbewerbsbehörden zu beobachten. Die größten Auswirkungen dieser Entwicklungen -die traditionelle Ansätze überflüssig machen werden- sind vor allem bei gewerblichen Nutzern und Endverbrauchern zu beobachten. Dies ist vor allem auf die Bemühungen der Anbieter von Online-Plattformen zurückzuführen, sich in dieser digitalen Welt stärker zu profilieren, mit anderen Worten, ihr Bestreben, ihre Konkurrenten weniger sichtbar zu machen, hatte mehr negative Auswirkungen als positives auf die genannten Interessengruppen, was nun in der Europäischen Union durch das Gesetz über digitale Märkte -insbesondere durch Artikel 6 (5)- geschützt wird. Bei der Erörterung der Auswirkungen der Bemühungen der Unternehmen -oft als Big Tech bezeichnet eigenen Online-Plattformdienste als einen der jüngsten Trends dieser digitalen Welt in den Vordergrund zu stellen, ist es von Bedeutung, sich auch mit einigen Verpflichtungen zu befassen, die das Gesetz den Hauptakteuren -allgemein als GAFAM bekannt- auferlegt, die diese Auswirkungen hervorrufen, sowie mit den Compliance-Maßnahmen, die sie allmählich zu ergreifen beginnen. In dieser Studie wird analysiert, wie sich selbstreferenzielle Verhaltensweisen -die im Wettbewerbsrecht seit vielen Jahren beobachtet werden- zum Hauptbereich digitaler Märkte entwickelt haben, wie sie sich in der realen Welt widerspiegeln und welche Regelungen auf die Hauptakteure abzielen, die in diesem Zusammenhang die führende Rolle übernehmen.

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List of Abbreviations

Art.	Article
AGCM/ICA	Autorità Garante della Concorrenza e del Mercato/ Italian Competition Authority
B2C	Business to Consumer
CSS	Comparison Shopping Service
CM	Compliance Mechanism
CPS	Core Platform Service
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
EC	European Commission
EU	European Union
FRAND	Fair, Reasonable and Non-Discriminatory
FTC	Federal Trade Commission
FBA	Fulfilment by Amazon
GWB/GCA	Gesetz gegen Wettbewerbsbeschränkungen/German Competition Act
GAFAM	Google, Apple, Facebook, Amazon, and Microsoft
GHA	Google Hotel Ads
i.e.	in other words
ibid.	ibidem/in the same source
OIS	Online Intermediation Service
OSE	Online Search Engine
OS	Operating System
R&D	Research and Development
SERP	Search Engine Results Page
SMEs	Small and Medium-Sized Enterprises
TFEU	Treaty on the Functioning of the European Union
U.S.	United States

Chapter I: Introduction

In our rapidly digitalising world, new terminologies are being introduced day by day to the competition law lexicon established on traditional approaches and the stakeholders namely businesses and final users at some point have to be a part of this sharp transition as they encounter the most undesirable outcomes, especially in digital platforms nowadays. When a final user is encountered with mostly Google's own comparison shopping services with Google's intention of detrimenting its competitors when searching for a white sneaker or the same qualified suppliers -one belonging to Google and the other one not- are ranked unfairly with the former one being ranked higher, then these stakeholders become automatically included to the digitalization cycle. Competition law violations impacting various actors related to self-preferencing behaviours "deriving from the leveraging phenomenon"[1] are substantially influenced by the rapid adaptation of tech giant companies to this digitalization process. As several international organizations are facing challenges in this rapid adaptation process – due to the struggle between the traditional remedies based on the Treaty on the Functioning of the European Union and the need to keep up with the digitalization speed- especially the European Union has resorted to passing a law -DMA- to regulate the behaviours of online platform providers in digital markets. "The system is heavily inspired by competition law, yet the EU legislator insists that it is not just another set of competition rules but rather a system of regulatory intervention that is complementary to competition law".[2] The basis of this complementarity feature lies in the fact that DMA is considered as an alternative solution since TFEU cannot keep up with the speed of the digitalizing world as expected as mentioned in the Proposal of DMA as such: "The proposal complements existing EU (and national) competition rules. It addresses unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules (…)".[3] I believe there are mainly two reasons why the TFEU will always be ineffective at some point one being procedural and one administerial.

[1] The European Commission attributed Google's behaviour in terms of Comparison Shopping Service to the leveraging theory.
Betül Ayhan, 'Rekabet Hukuku Perspektifinden Çevrim İçi Platformlarda Kendini Kayirma Sorunu Ve Çözüm Önerileri' Turkish Competition Authority, Thesis of Competition Experts, n.193, Ankara 2022
[2] Assimakis Komninos, "The Digital Markets Act: How Does It Compare with Competition Law?" [2022] SSRN Electronic Journal
[3] Proposal for a Regulation of The European Parliament and of The Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) 2020, Recital 15

In terms of the first one, as we all know, there are basically 3 steps of applying Art. 102 TFEU to any competition law infringement possibilities:

1.) Definition of the relevant market
2.) Determining the dominant undertaking
3.) Analysing whether the act of this dominant undertaking constitutes an abuse of dominance

Though the application structure of Art. 102 TFEU is so familiar to competition law enforcers as it has been applied for years, the difficulties in terms of concluding a decision regarding the existence of an infringement start from the very beginning as "the problem with market definition is that one should make up mind deterministically, either inside or outside of the market".[4] This step gets even more burdensome when it comes to multi-sided digital platforms as it is not simple to set the geographical boundaries in global markets.

In terms of the administerial problems, I believe the EU-based authorities as the European Commission become late to intervene in the processes which indeed derive from the long-lasting infringement investigations mentioned above, however, institutional shortcomings become more of an issue in digital market related infringements just like in procedural reasons as "dominant positions may be reinforced or even expand".[5] The most concrete example of market expansions caused by the delayed intervention of competition authorities can be observed in Google Shopping Case as Google tried to extend its dominant position from the market of general search results to the CSS market. Although this situation is based on the reality of leveraging in its legal foundation as mentioned in the Case "leveraging is a generic term in relation to the impact which a practice identified on one market may have on another market"[6] when viewed from a broader perspective under procedural considerations, had the analysis of the three steps mentioned above in the application of Article 102 TFEU not taken so long, Google would not have been able to transfer its dominant position in its primary market to the secondary one. One can assert that the investigation process under Art. 102 TFEU is the

[4] Swedish Competition Authority, "The Pros and Cons of Market Definition" https://www.konkurrensverket.se/en/knowledge-and-research/the-pros-and-cons/the-pros-and-cons-of-market-definition-2017/ Accessed September 23, 2024

[5] Heike Schweitzer and 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 Journal of European Competition Law & Practice

[6] T-612/17 Google and Alphabet v Commission (Google Shopping) (GENERAL COURT Ninth Chamber) para. 163

direct reflection lying behind the *ex-post* idea of TFEU as “it is applied to market conduct once it has occurred”.[7] There is a huge difference between Google's abuse of dominance in the search market and the subsequent transfer of that dominance to the CSS market. The first situation is a classic example of abuse of dominance, while the second situation arises due to the Commission's failure to act in a timely manner by its institutional duties, despite following the ex-post approach that requires an investigation after the abuse has occurred.

Since all these procedural and administerial shortcomings have not been effectively solved by the TFEU methods, especially in the case of digital markets, and will never be solved in the expected time, the complementarity aspect of the DMA stands out, whereas its innovativity is highlighted due to the prominence of online platform operations in the competition law sector, just as in many other sectors, and hence there is a need for regulation in this regard.

The provision of the DMA that will be addressed in this study, which has become a prominent regulation in the digital world for the aforementioned reasons, is Article 6(5). This article regulates the reflections of self-preferencing, commonly seen in cases of abuse of dominance, particularly in digital markets in forms like ranking, indexing, and crawling. It is worth mentioning the practical reasons behind focusing on self-preferencing behaviours under the abuse of dominance. First of all, the fact that this type of violation has both positive[8] and negative[9] aspects from the consumers' point of view creates an interesting experimental environment due to the confrontation of contrasting data. From the businesses' perspective, they are negatively impacted by the unfair ranking consequences of self-preferencing practices by gatekeepers, which occupy a key position in the service chain between online platform providers and consumers as the leading actors in the DMA. Another reason this topic is worth studying is the sheer number of investigations and cases involving large tech companies regarding self-preferencing. Moreover, the fact that the boundaries of technology in terms of

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[7] Viktoria H.S.E. Robertson, “The Complementary Nature of the Digital Markets Act and the EU-Antitrust Rules” (2024) 12 Journal of Antitrust Enforcement

[8] “Amazon displays its own products above those of third-party sellers in its marketplace, doing so results in greater consumer welfare because consumers prefer those products.”
“What Constitutes Self-Preferencing and Its Proliferation in Digital Markets” (Global Competition Review, December 8, 2023)
https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets Accessed September 23, 2024

[9] “Typical examples of self-preferencing include the manipulation of the order of search results and rankings in favor of platforms’ own products/services. There is growing concern that these self-preferencing behaviours may have undesirable effects on the users of the platform, including consumers and sellers.”
Yuta Kittaka, Susumu Sato and Yusuke Zennyo, “Self-Preferencing by Platforms: A Literature Review” (2023) 66 Japan and the World Economy

inclusion in our lives are becoming more and more blurred every day, this type of infringement can occur within seconds on digital platforms, such as on any social media platform, demonstrating how prevalent this issue is in everyday life. Thus, it is valuable to examine both the results that the obligations imposed by the DMA bring for companies already designated as gatekeepers or are candidates for this title, as well as the future effects of these obligations on the aforementioned end users and business users. In this study, the economic motives behind the self-preferencing behaviours, which are already emerging in various forms in our rapidly digitalizing world, by analyzing the digital reflections of these behaviours and their effects on both the infringers and the various actors they impact will be examined.

Chapter II: Economics of Self-Preferencing

1. A Concept Analysis

The term 'self-preferencing' was until a few years ago largely unfamiliar to us, yet it has recently caught significant attention. Even the case initiated by the European Commission against Google under this concept in 2017 (Google Shopping Case)[10] did not evoke as much interest as the concept does today, so what factors have contributed to the increasing relevance of this term in our lives where digital platforms are now dominating? Given the striking reality of the domination of online platforms in our lives, it would be unrealistic to define this concept without highlighting the significance of digitalization. That being the case, Motta describes it as such: "The term "self-preferencing", which refers to situations where an integrated platform discriminates in favour of its first-party services or products to the detriment of those of a third party, e.g., by making the latter less prominent, ranking them lower, degrading or delaying their access to the platform, or worsening their terms and conditions of access".[11] Though he considers that "although the term is typically associated with practices by digital platforms, it may equally apply to any industry",[12] I think considering the author's definition of self-preferencing as merely a choice made through digital platforms would be a rather shallow interpretation. This is because, as reflected in Marco's article or in a publication by the Centre for Competition Policy,[13] perhaps the most concrete manifestation of our evolution from traditional environments to digital platforms is the necessity to include the term 'digital' in our definitions when describing competition law concepts.

Another noteworthy aspect of Marco's definition is the way in which the self-preferencing behaviours of these platforms are expressed as creating discrimination in their favour. Just as in the previously mentioned issue, defining it through discrimination cannot simply be explained by the author's choice. In fact, depending on whether this expression is used or not, it would not be incorrect to say that the definition of self-preferencing is being done accurately enough. Because, as Graef points out, "(…) it is useful to distinguish the more neutral term

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[10] (n 6).
[11] Massimo Motta M "Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases" (2023) 90 International Journal of Industrial Organization
[12] ibid.
[13] "Self-preferencing is usually defined as when a large digital platform treats its own (vertically integrated) products more favourably than those of its competitors."
Peter Ormosi, "The Legal Definition of Self-Preferencing: Too Narrow, Too Broad, or Both?" (Centre for Competition Policy, November 8, 2023) https://competitionpolicy.ac.uk/blog/the-legal-definition-of-self-preferencing-too-narrow-too-broad-or-both/ Accessed October 2, 2024

‘differentiation’ from the notion of ‘discrimination’, which has a negative connotation; in fact, it is common for undertakings to differentiate the offers they make to customers”.[14] For instance, while it is a classical marketing strategy for two companies in the sportswear sector, such as Nike and Adidas, to offer very similar white sneakers at different prices in traditional markets, marketing Nike's white sneaker on Google's digital platform, known as Google Shopping Units, in a way that disadvantages Adidas is an application aimed at discrimination. As in the case of Art. 102 TFEU, abuses are ordinary commercial behaviours namely not to supply a competitor (which are in breach of Art. 102 provided that they are carried out by a dominant undertaking), so is the price differentiation of the products by the competitors unless it is intended to arbitrarily favour anyone's goods.

The reason behind the used expressions -namely digital platforms or discrimination- when creating the “ideal” definition of self-preferencing is to make the most accurate version of it rather than just being about a simple word choice. Just as there is a difference regarding existing law in terms of “the law as it ‘is’ and the law as it ‘ought’ to be”,[15] as the latter being associated with the law in an ideal world, I believe it can be interpreted that including the mentioned keywords in the definition of self-preferencing is also more like a policy aimed to make the most ideal expression of this concept.

2. From the Economics Perspective

“The case against self-preferencing may look clear from an economic theory point of view to the extent that it amounts to unequal treatment of equal offers. As such, several economists have taken the view that self-preferencing should, in general, be prohibited”.[16] I believe it should not be that easy and direct to come to this conclusion as self-preferencing is not a concept that can be described solely by negative outcomes. Moreover, “over the last couple of years, economists have started studying the competitive effects of so-called self-preferencing behaviours”.[17] The economic evaluation of this kind of behaviours is indeed like solving an equation including multiple unknowns and it is not possible to reach a concrete solution when

[14] Inge Graef, “Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence” (2019) 38 Yearbook of European Law

[15] Ki-Gab Park, “Lex Ferenda in International Law” (23 October, 2018) https://legal.un.org/avl/pdf/ls/park-kigab_presentation.pdf

[16] Martin Peitz, “How to Apply the Self-Preferencing Prohibition in the DMA” (2023) 14 Journal of European Competition Law & Practice

[17] Juliette Caminade, Juan Carvajal, and Christopher R. Knittel, “An Economic Analysis of the Self-Preferencing Debate” (Concurrences, November 2022) <https://awards.concurrences.com/en/awards/2023/business-articles/an-economic-analysis-of-the-self-preferencing-debate> Accessed October 4, 2024

every unknowns are simultaneously focused. By taking into consideration this crucial relation, the fragmented economic analyses will be provided by focusing on the relevant unknowns in each and every part when addressing the reasons lying behind the need to dedicate a section to economics.

2.1. Complex nature of economic analysis unlike the legal one

"Regulators in many regions (…) have launched investigations into so-called self-preferencing practices by digital platforms, over concerns that they exploited their power in order to become even more dominant".[18] This ambition can be directly seen especially through the eyes of the most famous Big Tech companies -known also as GAFAM[19] as a more mediatic name- as they carry their businesses in a highly intensive way to be at the forefront within their all competitors. This situation -which is indeed the ultimate goal of becoming the tech giant of the age rather than being the leader of their sectors- can be illustrated by a classic tension between the tech rivals as follows: "One of the major strategic moves in Google's corporate history was to invest in the Android operating system and to keep it as open source software".[20] "Had it not done so, Apple might well have come to dominate the smartphone market, making Google reliant on its competitor's device for delivery of mobile search".[21] The expansion of successful technology companies into markets in which they seek to achieve a dominance over other successful companies even in different industries[22], may not be all that surprising, considering their multifunctional and compact business models. In my opinion, it could be at some point asserted that these high-tech companies might feel -so to say- forced in terms of engaging in multiple self-preferencing behaviours to keep pace with the high competition existing both in their own and outside sector. Because as Salinger says, "the expectation that other firms will engage in self-preferencing can induce firms to engage in the practice themselves".[23] On the contrary, this expectation can be solely evaluated as their excuses as well

[18] ibid.

[19] "GAFAM Empire is a project in which we look at all the known acquisitions conducted by five big tech companies: Google, Amazon, Facebook, Apple, and Microsoft."
"The GAFAM Empire" (GAFAM Empire) <https://gafam.theglassroom.org/en/about/> Accessed October 4, 2024

[20] John Callaham, "Android History: The Evolution of the Biggest Mobile OS in the World" (Android Authority, May 9, 2024) <https://www.androidauthority.com/history-android-os-name-789433/> Accessed October 7, 2024 cited in Michael A. Salinger, "Self-Preferencing" [2020] The Global Antitrust Institute Report on the Digital Economy 10

[21] Michael A. Salinger, "Self-Preferencing" [2020] The Global Antitrust Institute Report on the Digital Economy 10

[22] "Some platforms also serve a dual role in other industries. For instance, Salesforce, a major player in CRM (customer relationship management), began operations in 1999 as a CRM app vendor. Additionally, in 2007, the company opened its app development platform Force.com to third-party developers."
Kittaka and the others (n 9).

[23] Salinger (n 21).

which is helping them to provide the basis for their exercisable self-preferencing behaviours. When legally evaluating these companies' behaviours -sometimes exceeding their own markets to establish dominance over competitors- a conclusion regarding the existence of an infringement is reached based on whether these behaviours constitute an abuse of dominance, however, this being relied upon a fundamental premise[24] cannot be stated for the economic evaluation as there is no one main principle for that. Hence, "in the EU competition law system, self-preferencing behaviour has so far been examined, by and large, under Article 102 TFEU".[25] However, since there is no one main principle that can be taken into consideration when handling the self-preferencing from the economics perspective, an evaluation in this respects depends on multiple unknowns included in equity as mentioned above. Moreover, it can be clearly said that these behaviours are frequently encountered in daily life "as self-preferencing is a common business practice throughout the economy".[26] "Supermarkets and other retailers, for example, regularly sell -and preference- their own products alongside those of third-party businesses".[27] As a result, it is complex to analyse the economic intentions of companies engaging in these behaviours especially when the concept has also gained ground within the last players of the circle.

2.2. The several economic reasons for the increased attention to self-preferencing behaviours on digital platforms compared to physical environments

"Why concerns regarding self-preferencing have been heightened in the digital economy when such practices are not new and are widespread?"[28] Or what could be the reasons behind self-preferencing behaviours -which have been made a part of our daily lives and carried out in physical environments- turning into much talked about issues that reach million-dollar lawsuits? As an illustration highlighting this difference, people would probably take it as normal as possible when a supermarket chain that also sells its own branded products places these products on shelves in a way that makes them more appealing to its customers compared to

[24] "A straightforward legal basis for a theory of abusive self-preferencing is Article 102 (c) TFEU. This provision says that it is abusive for a dominant firm to apply "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"."
Nicolas Petit, "Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf" [2015] Competition Law & Policy Debate 1 CLPD (2015)
[25] Pablo Ibáñez Colomo, "Self-Preferencing: Yet Another Epithet in Need of Limiting Principles" (2020) 43 World Competition
[26] International Center for Law &Economics, "Issue Spotlight: Self-Preferencing" (International Center for Law & Economics, November 10, 2022) <https://laweconcenter.org/spotlights/self-preferencing/> Accessed October 6, 2024
[27] ibid.
[28] Caminade and the others (n 17).

other brands, whereas "Amazon is facing a $1bn lawsuit over claims that the company favoured its own products on its website".[29] It could be mentioned that the resonance of the same behaviours traditionally in physical environments and currently in online platforms -as if their origins were entirely different concepts- is due to various economic reasons.

2.2.1. Reasons deriving from the business model of the platforms

(A) What is dual mode?

"Economists have referred to a platform that runs a digital marketplace and sells physical or digital products on it as operating in dual mode".[30] "The literature has called them ‘‘dual-role platform’’ (Chen and Tsai, 2019; Kittaka and Sato, 2022), ‘‘hybrid platform’’ (Anderson and Bedre-Defolie, 2021; Etro, 2023), ‘‘vertically-integrated platform’’ (Padilla et al., 2022) and the like".[31] "Examples can be seen in many industries, including search engines (Google and Bing), online shopping malls (Amazon, Walmart, and JD.com), video game consoles (Nintendo, Sony Interactive Entertainment, and Microsoft), mobile app stores (Google and Apple), and online travel agencies (Expedia and Booking.com)".[32] These examples are mostly got used to be encountered with regard to e-commerce platforms operating as B2C commerce models as the commercial transactions directly take place between a business user and a final user. For instance, one of the most known e-commerce platforms in Turkey "Trendyol" was mainly established as a platform provider serving from fashion&beauty to homeware&electronics in 2010, which then commenced acting as a hybrid platform by building its own brand; "Trendyolmilla" and "Trendyolman" in terms of women and man fashion sector respectively, "Trendyol Express" as a delivery service of the products sold within its platform.[33] The dual-role feature of Trendyol can be understood not only from its own brands -serving in the competition with the other retailers operating within the digital platform- but also its vision, as follows:

[29] Adam Smith, "Amazon Used 'Secretive, Self-Favouring Algorithm' to Promote Its Own Products, $1bn Lawsuit Claims" The Independent (October 21, 2022) <https://www.independent.co.uk/tech/amazon-lawsuit-algorithm-buy-box-b2207600.html> Accessed October 7, 2024

[30] Andrei Hagiu, Tat-How Teh, Julian Wright, "Should Platforms Be Allowed to Sell on Their Own Marketplaces?" [2020] RAND Journal of Economics cited in Juliette Caminade, Juan Carvajal, and Christopher R. Knittel, "An Economic Analysis of the Self-Preferencing Debate" (Concurrences, November 2022)

[31] Kittaka and the others (n 9).

[32] Kittaka and the others (n 9).

[33] "Trendyol: One Stop Fashion Shop" (Trendyol) <https://www.trendyol.com/> Accessed October 7, 2024

"*Our vision:*
To be the most preferred platform by customers
To be the most preferred platform by sellers
To be the most preferred company by employees"[34]

In fact, providers offering platform usage services also become players in the relevant market on the platform in which they provide these services and it could be stated that this expansion policy favours the service providers themselves, as becoming a competitor to business users on a platform they have established and knowing the operating system perfectly down to the finest details is like starting a game one step ahead. I believe one of the most compelling motives behind the platforms' dual mode policies is the customer gain they acquire by offering a wide range of service choices. As mentioned in a study, "some types of products may be more efficiently provided by the platform, and others may be more efficiently provided by third-party sellers, and offering all of them in the same place provides onestop shopping benefits to consumers"[35]. By considering this said benefit to consumers, platform providers are highly inclined to engage in secondary service sectors as clicks in their secondary sectors will make them even more sought-after brands regarding their core business sectors. Moreover, it would be wrong to say that the other players in the digital platform ecosystem, namely complementors on the supply side and users on the demand side, benefit from the dual nature of the platforms as much as the platform providers do. Subsequently, it could be stated that "from the platform perspective, having a dual role can be an effective business strategy, however, from the competition policy perspective concerns have been raised regarding dominant platforms' use of dual roles".[36] These concerns -deriving from the execution of self-preferencing behaviours in digital platforms- will be analysed in the following chapter.

(B) Why is the dual mode troubling?

One of the latest trends among the platform providers -serving as hybrid platforms- has been on the competition authorities' worldwide radar, hence it could be asserted that maybe the tech giants such as Amazon or Google are not that pleased anymore with their improved business models due to the existing scrutiny and the very likely possibility of upcoming investigations awaiting them by the competition authorities. "For instance, U.S. lawmakers, as

[34] ibid.
[35] Andrei Hagiu, Tat-How Teh, Julian Wright, "Should Platforms Be Allowed to Sell on Their Own Marketplaces?" (2020) 53 RAND Journal of Economics
[36] Kittaka and the others (n 9).

part of the 2020 "Investigation of Competition in Digital Markets" accused large digital platforms of engaging in various forms of self-preferencing that resulted in the platforms either favoring their own products or services, or "giving preferential treatment to one business partner over others," ultimately "picking winners and losers in the marketplace.".[37]" It is normal for self-preferencing to be one of the first concepts that come to mind when the topic is problems concerning dual platforms, as our familiarity with this concept dates back to times when companies acted in a traditional manner, rather than dual platforms, thus, it is not surprising to see these behaviours, which initially started on physical platforms[38], also manifesting in hybrid platforms that have become trendy service providers today. The point being made is that it is no surprise to encounter self-preferencing behaviours through the platforms operating in a hybrid mode, since this issue was problematic from the very beginning of the digital platforms, as it is not necessarily exclusive to dual ones. Accordingly, the troubling part of dual mode will not be handled with regard to self-preferencing, as the problems still arise even in perfect competitive markets in the absence of these behaviours.

"The "platform operator" and "platform participant" have coincided-often without outcries of harm-in many contexts, extending well beyond the tech companies that are tightly associated with the term these days".[39] It could be for certain asserted that there is considerable overlap between the two concepts, which nevertheless cannot be concluded with nonexistence of harm, especially if there is a possibility of conflict of interests. As mentioned in academic studies, "the platform's dual role, as a marketplace operator that connects merchants to consumers and simultaneously as a seller that competes directly with other merchants, can cause a conflict of interest"[40] or in a more strict position such as "this dual role played by platforms in various digital markets, acting simultaneously as intermediaries and providers, contains a conflict of interest that has raised fears that it may be exploited by platforms to further entrench their dominance, frustrate competition and stifle innovation"[41] in another study. How can one become a competitor in a game whose rules are set up by itself? We shall consider a scenario

[37] Caminade and the others (n 17).
[38] "This dynamic is not new and is prevalent offline."
Avigail Kifer and Jeffrey T. Prince, "Conflicts of Interest and Platforms" [2023] CORNERSTONE RESEARCH Economic and Financial Consulting and Expert Testimony
[39] ibid.
[40] Ruitong Wang and Ye Qiu, "Dual Role and Product Featuring Strategy of Digital Platform" [2024] Marketing Science
[41] Lina M. Khan, "The Separation of Platforms and Commerce" [2019] Columbia Law Review cited in Carmen Herrero Suárez, "The Amazon Market Place Case: The Risks of Being a Judge and Party" (2023) 32 Revista Electrónica de Direito

where a coach knows all the strengths and weaknesses of the eleven players on his team and has figured out under what conditions each one can show their best performance. In an amateur league match, this coach encounters an urgent problem that requires substituting one of the players in the second half. In this scenario, the team scores five goals in the first half whereas the other five goals in the second half were scored only by the coach himself. All the fans then congratulated the coach as if all the success belonged solely to him.

First of all, there is *no level playing field* between the coach and his players in this match.

Case: The coach got a head start in comparison to his ten players as he is the one himself setting up all the rules concerning the team's playing order. As an illustration, when a coach, who knows from whom he can best take a pass, takes the pass and scores a goal, there is no level playing field with the player who scored one of the goals in the first half as the player lacks the same level of knowledge that comes from being the person who sets all the rules in a structured environment, unlike the coach.

Google: Though Google was established as a search engine at first and became the dominant brand in this sector[42], it then decided to engage in other services by providing; "Froogle" in terms of "allowing users to search for products, compare prices, and find online retailers offering the items they were interested in"[43] which was followed by the first rebranding as "Google Product Search" "in terms of aiming to provide a more comprehensive and user-friendly shopping experience" and the second rebranding as "Google Shopping" in terms of "paid advertising, allowing retailers to promote their products within the platform [and] enabling retailers to create and manage campaigns directly within Google Ads".[44] Google's these mentioned market expansions especially their market entry concerning the sale of several brands under the name of Google advertisements can be compared to the example above as Google and the business users within its platform represent the coach and his players respectively. In the years when Google was acting only as a platform provider by enabling

[42] "Google dominates with around 95% market share in the EU27 and the rest of the competitors (Bing, Yahoo!, Seznam, DuckDuckGo) following with shares of 3% and less."
European Commission: Directorate-General for Communications Networks, Content and Technology, Joe Sunderland and the others, Digital Markets Act – Impact assessment support study – Annexes, Publications Office, 2020, https://data.europa.eu/doi/10.2759/230813
[43] Diginimbus, "The Evolution and Impact of Google Shopping: Revolutionizing the Online Retail Landscape." Medium (September 22, 2023) <https://medium.com/@diginimbus39/the-evolution-and-impact-of-google-shopping-revolutionizing-the-online-retail-landscape-7aa017f46307> Accessed October 12, 2024
[44] ibid.

hundreds of business users' products to bring together to the consumer's demands or in other words before Google became one of the competitors in this hybrid ecosystem established by itself, since "many of the platforms base their business model precisely on the collection and commercial use of personal data or information"[45] it had a very significant access to data. However, this data did not only consist of personal information regarding the customers, rather than that, as also in the case of the allegations levied against Amazon as "Amazon appears to use competitively sensitive information about marketplace sellers, their products and transactions on the marketplace"[46] as stated by the European Commission, Google -as the platform provider- had for certain access to competitively sensitive information which indeed is not necessarily a problem unless used. Hence, Google had an opportunity[47] to analyse the transactions between the merchants and consumers and was capable of estimating the merchants' sale policies by observing their sales frequency which ultimately brings us to the fact that there was at no time level playing field between Google as a service provider and the merchants as business users. As in the example of the coach who knows which player can pass him the ball in the best manner and scores by having the ball from that player, Google was in a position to score its own goal by evaluating the transactions of its competitors with their customers, enabling it to offer products that better meet people's demands.

Secondly, the coach is inclined to *favour* himself by benefiting his players' strengths and weaknesses.

Case: Though all the goals were scored by the coach in the second half, he might have tactically played to favour himself by relying on his players' sufficient or insufficient abilities by deliberately not allowing anyone else other than himself to score.

Google: "Self-preferencing may be an attractive strategy for a platform in some instances because it may reduce competition between a platform's own product and competing

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[45] Carmen Herrero Suárez, "The Amazon Market Place Case: The Risks of Being a Judge and Party" (2023) 32 Revista Electrónica de Direito 147

[46] Rod Carlton and Rikki Haria, "Self-Preferencing – Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)" [2020] CPI Antitrust Chronicle cited in Juliette Caminade, Juan Carvajal, and Christopher R. Knittel, "An Economic Analysis of the Self-Preferencing Debate" (Concurrences, November 2022)

[47] See also for the Amazon Marketplace Case: "Access to this information (market trends, consumer ratings, product characteristics, sales levels, existence of demand, investments made, etc.) allows the platform to decide whether or not to start producing a certain good, under better conditions than its rivals and with a better positioning on the platform. This information is not available to the rest of the sellers operating in the market, which puts them at a competitive disadvantage. "
Herrero Suárez (n 44).

products”.[48] Indeed, it is not challenging for digital platform providers to favour their own products in terms of ranking, indexing and crawling as underlined under Art. 6(5) DMA,[49] since when the platform provider has great probability to inform itself with its competitors' transactions, it should not be that burdensome to make the necessary arrangements about algorithms concluding with the preferential treatment regarding the products advertised by the platform itself or in other saying discriminatory display of the other merchants' products. It is concluded in the Google Shopping Case that, “users usually only click on the ‘ten highest-ranking generic search results on the first Google general search results page’, so preferential positioning of Google services is likely to increase traffic to Google services to the detriment of competitors”.[50] When an end user purchases a product by clicking on one of the Google's displayed ad and conclude the shopping process with the purchase of the product, then it is unfortunately not Google's outstanding algorithm structure serving to the exact needs of the customers as in a quantitively identical manner, but its supremacy over the other competitors that it established via the preferential treatment in the ranking concluding ultimately leading to more product purchases under its name. Subsequently, this situation cannot be described as a fair success for Google in an environment where it competes on equal terms with its rivals, similarly, the five goals scored by the coach alone can be explained only by his taking advantage of the unfair conditions in comparison to the other players.

(C) How to cope with this concern?

Regulators have felt the need to seek solutions with concern regarding the hybrid structures of large companies with dual roles, which, so to speak, lay the groundwork for their self-preferencing behaviours on digital platforms. “In February 2019, India introduced new laws to force the separation of the two types of businesses, leading Amazon and the Walmart-backed Flipkart to change their business practices there, so they stopped selling under their own name”.[51] “This type of regulatory remedy, in which digital platforms would be prevented from selling on the marketplace they operate, was also proposed in the U.S. by Senator Elizabeth

[48] Andrei Hagiu and Bruno Jullien, “Why Do Intermediaries Divert Search?” (2011) 42 The RAND Journal of Economics cited in Avigail Kifer and Jeffrey T. Prince, “Conflicts of Interest and Platforms” [2023] CORNERSTONE RESEARCH Economic and Financial Consulting and Expert Testimony

[49] “The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.”
REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 2022

[50] Sofia Pais and Marta Prata Domingos, “The Principle of Equal Treatment in the Google Shopping Case” (2023) 28 Bialystok Legal Studies

[51] Hagiu and the others (n 35).

Warren in 2020, who tweeted that "You can be the umpire, or you can be a player, but you can't be both at the same time. We need to #BreakUpBigTech so we can level the playing field." ".[52] In my view, regulating the aforementioned troubling aspects of dual-role platforms in this manner -preventing the Big Techs from selling under their own name- is indeed an effective way to cope with the problems that may eventually -if not necessarily but very likely- conclude with the self-preferencing behaviours by the platform providers. Since the differential treatment motives -concerning the display of platform providers' own products on the top pages- derive very likely from the sense of "belonging" to their own brand and in the case of not selling under their own names due to the proposed regulations, the service providers after all would not be inclined to treat the products differently as this mentioned sense of belonging will not be on the table. Additionally, it is obvious that preventing the platform providers -in other words tech giants serving as both umpires and players at the same time as Warren indicates- from selling on the market they run is an appropriate method. As it is known, the primary duties of the platform providers' are to serve a platform environment both to the business users and end users about the ability; to display the products and purchase them respectively, whereas their secondary duty is to sell products under their own name. Hence, it would be unrealistic to come up with a solution if the companies acting in a hybrid role were asked for a proposal in a way that they are required to restructure related to their primary duties. Furthermore, the concept of self-preferencing in digital platforms came into our lives simultaneously with the rise of dual role platforms, because platform operators began to feel the desire to favour their own products as soon as they became able to sell their own goods. On account of this, in addition to their primary and secondary duties, evaluating the issue from this main perspective better illustrates the proposed solutions for why platform owners should be prevented from selling their own goods within the BreakUpBigTech policy.

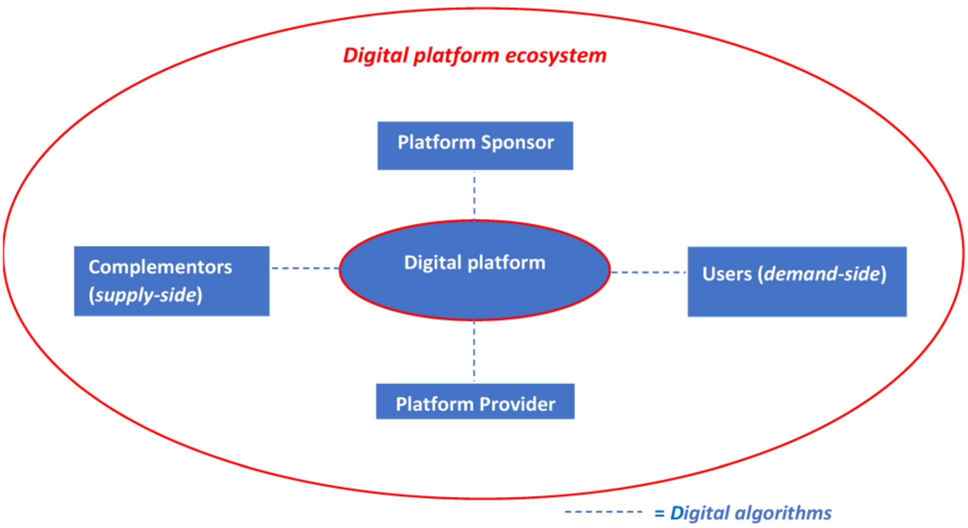
(D) What is the economic base of dual-role platforms?

Not only dual-role platforms or hybrid platforms, but also, as stated by Padilla[53], "vertically-integrated platforms" are one of the ways to define the aforementioned dual structure of the companies. "This is because digital platforms can be viewed as vertically integrated firms when they decide to operate in dual mode".[54] As mentioned in one of the economy journal, "at a high level, a platform that operates in dual mode can be viewed as a

[52] Caminade and the others (n 17).
[53] Jorge Padilla, Joe Perkins, Salvatore Piccolo, "Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms" [2020] THE JOURNAL OF INDUSTRIAL ECONOMICS
[54] Caminade and the others (n 17).

vertically integrated firm that uses the upstream input (the facilitation of transactions through its marketplace) to offer a downstream product (sell its own product through the marketplace) that competes with other downstream sellers".[55] The reason why dual-role platforms can be evaluated as vertically-integrated companies derives from the structural features of vertical integration and Adelman makes this definition by relying on the expansion of the sectors by saying "a firm is called vertically integrated when it transmits from one of its departments to another a good or service which could, without major adaptation, be sold in the market"[56] whereas Cole focuses more on supply chain by stating "that type of organization that comes into existence when two or more successive stages of production and/or distribution are combined under the same control".[57] To exemplify, Amazon's dual role feature arises from its vertically integrated business model, which was at the beginning of its operations only providing the platform access for the merchants in terms of displaying their products in the upstream market, followed by afterwards the offering of also its own products -such as Amazon Basics, Mama Bear or Happy Belly- to the end users in which the purchases occur in the downstream market. In this way, Amazon, which initially operated solely as a platform provider in the digital platform ecosystem, has expanded its role as a service provider by also taking the role of complementor on the supply side within the digital ecosystem it operates.

Figure 1: The Logic of Digital Platform Ecosystems

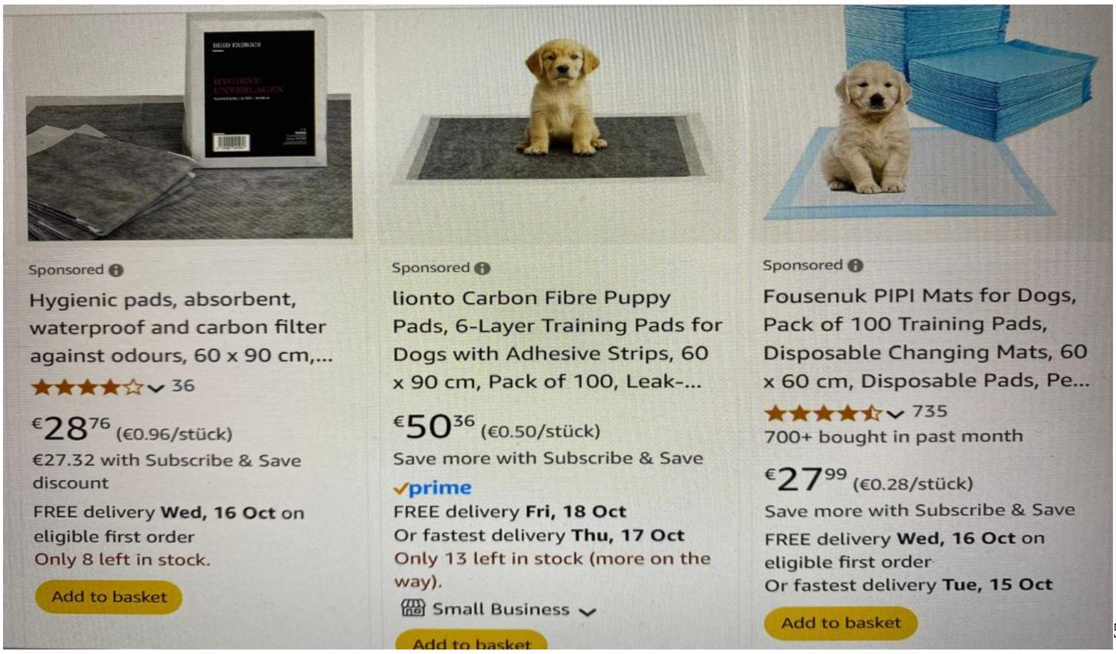


[58]

[55] Hagiu and the others (n 30).
[56] Friedrich Kessler and Richard H. Stern, "Competition, Contract, and Vertical Integration" (1959) 69 The Yale Law Journal
[57] ibid.
[58] Mario Calabrese and others, "Digital Platform Ecosystems for Sustainable Innovation: Toward a New Meta-Organizational Model?" <https://www.mdpi.com/2076-3387/11/4/119> Accessed October 13, 2024

Figure 2: Platform Operators' Product Visibility in the Absence of Vertical Integration

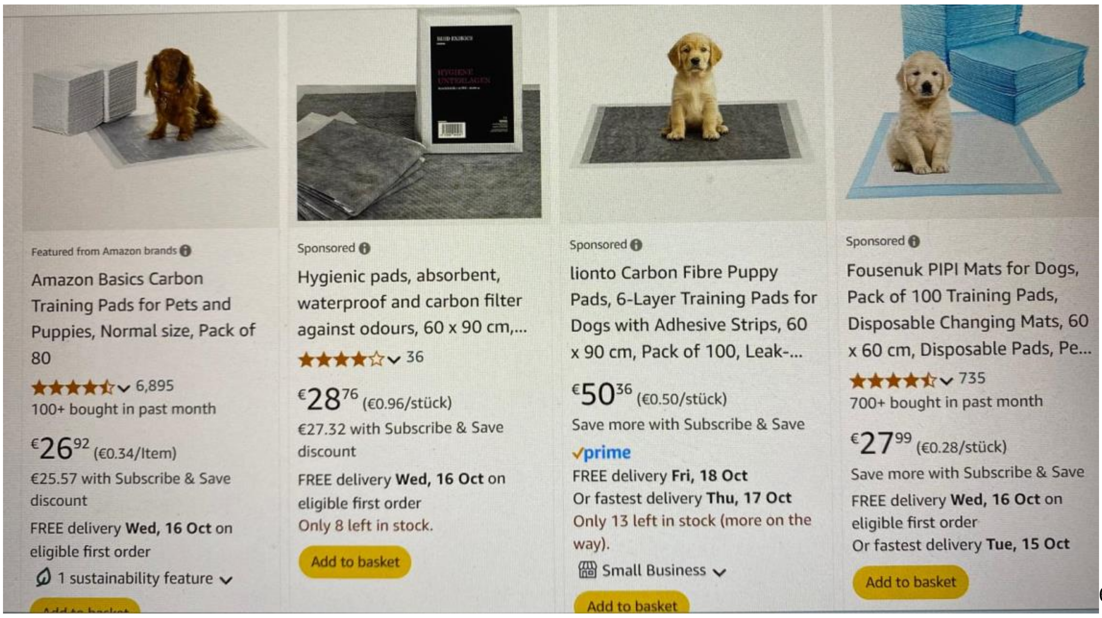
Amazon's platform service for the merchants before vertical integration



[59]

Figure 3: Platform Operators' Product Visibility in the Presence of Vertical Integration

Amazon's platform service for the merchants and itself after vertical integration



[60]

[59] "Amazon.de: Carbon Training Pads" (Amazon) <https://www.amazon.de/s?k=carbon+training+pads&crid=26PNRR4ST3074&sprefix=carbon+trainig+%2Caps%2C95&ref=nb_sb_ss_ts-doa-p_1_15> Accessed October 13, 2024

[60] ibid.

(E) What are the pro and anticompetitive effects of vertical integration?

As with the rise of dual role platforms in recent years, economists have started studying both the pro and anticompetitive effects of vertical integration, as both of them have significant reflections through the eyes of businesses and end users. It is indeed challenging to draw a conclusion in terms of which effect outweighs the other, thus evaluating the concept of vertical integration by focusing on a single unknown than assessing the equity in an empirical manner as the opposite effects might vary on a case by case basis, would be an inadequate assessment.

In terms of the anticompetitive effects with regard to business users, (…) "because digital platforms operate in the upstream market, as intermediaries, they can potentially influence the costs faced by third-party sellers to distribute, or even produce, goods and services in the downstream market".[61] The aim behind these practices, which have existed actually since the emergence of digital platforms, is to exclude competitors from the relevant market which is performed by platform providers wearing their business user hats, hence, " [s]ome of the oldest abuse of dominance cases concern instances in which vertically-integrated firms engaged in raising rivals' costs strategies against competitors on adjacent markets".[62] "This concept referred to as raising rivals' cost is the increasing the costs of rivals which are already operating in the market or those entering it by an undertaking whose costs either do not increase or increase relatively at a lower rate (Carlton and Perloff 1994, 407)".[63] This concept can be adapted to online services as such: "(…) a vertically integrated entity, in this case a digital platform, has the ability and an incentive to raise the costs of third-party sellers in order to benefit their own products and services downstream".[64] The steps in the process of raising rivals' costs by service providers can be stated as such:

1.) A platform operator seeks to raise the costs of its rivals in the upstream market -in which it provides service to the suppliers and interacts with them- by several commercial strategies. As an illustration, "causing the rivals which recently enter to the market to invest of a large amount of advertising costs by means of raising advertising costs, increasing the switching cost for providers, causing the rise of input prices, costs

[61] Caminade and the others (n 17).
[62] Ibáñez Colomo (n 25).
[63] Alper Karakurt, 'Ekonomik ve Hukuki Açıdan Piyasa Kapama Etkisi' Turkish Competition Authority, Thesis of Competition Experts, n. 67, Ankara 2005
[64] Caminade and the others (n 17).

deriving from legal procedures and decisions of regulatory bodies (Faull and Nikpay 1999, 182)".[65]

2.) The suppliers are forced to sell their products at higher prices in the downstream market, since production costs of products are raised by the platform operator at the production phase through the mentioned strategies, business users are increasing the cost price to achieve profit or avoid losses.

3.) The platform provider, by this means, reduces the competition in the downstream market, as it gets challenging day by day for the business users to stabilize their profits without making a loss.

4.) In the last step, sometimes it becomes inevitable for the suppliers to leave the market entirely, as they are unable at some point to cope with an imbalance between selling and cost price. In this manner, the platform operator has increased its market share in the relevant market by excluding its rivals.

Particularly in the cases of Big Tech, I believe that the raising rivals' costs practices are not merely a strategic move aimed at reducing competitors' ability to interact with customers in downstream markets, but rather an effort to significantly hinder or block their access to the market altogether, which is indeed "market foreclosure". Though market foreclosure is evaluated as one of the commercial strategies by the dominant firms and defined as "the dominant company's obstructing or preventing its actual or potential competitors from reaching customers or supply sources through its abusive conducts, to consumers' disadvantage"[66], I believe, this concept is much more than just a strategy when the dominant firms are the ones operating in a dual mode. Accordingly, I do not agree with Karakurt's expression as follows: "Market foreclosure is another commercial strategy raising rivals' costs"[67] as the dominant undertaking's position is a key factor taken into consideration by competition authorities when examining whether market foreclosure practices create an anticompetitive state. Because, "generally, the stronger the dominant position is, the higher the probability that the practice leads to anticompetitive market foreclosure".[68] When it is borne in mind how dominant the most famous tech brands in their sectors are; Google in search engines, Amazon in online shopping malls, Sony in video games consoles, again Google and Apple in mobile app stores

[65] Karakurt (n 62).
[66] Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings by Turkish Competition Authority 2014
[67] Karakurt (n 62).
[68] (n 65).

and lastly Booking in online travel agencies, it would not be a practical interpretation to evaluate their policies about raising rivals' cost as a daily strategy which is actually encountered almost on a daily basis between firms that are not as dominant as them or those that are not dominant at all.

In terms of the procompetitive effects with regard to end users, "economists and regulators[69] have long understood that, in certain conditions, vertical integration can have procompetitive effects by incentivizing firms to lower final prices consumers, through the elimination of double marginalization".[70] "This concept [of double marginalization] describes the situation where there are two separate monopolies in the both upstream and downstream markets, and both monopolies engage in monopolistic pricing, resulting in customers in the downstream market facing significantly higher prices".[71] Since each and every players at the different stages of digital supply chain platform, namely platform operator and supplier, seeks to maximize their profits at the highest possible level, hence, generally speaking, each firm in the supply chain adds a markup to the price set by the previous firm before the product reaches the customers, and pecifically for digital platforms, business users add a markup to the price set by the digital platform providers, which ultimately conclude as higher price from the eyes of end users. "However, when firms are vertically integrated, the firm has access to inputs at marginal cost, leading to lower prices, and the elimination of one of the two markups".[72] Platform providers acting in downstream markets as well as upstream markets, by means of vertical integration, either add markups to the production cost in the upstream market without adding any additional markups in the downstream market in which also they are one of the sellers or without adding any primary markups to the product at the production phase and only implementing this in the downstream market just before marketing the product to the end users. As an illustration between double marginalization practices and elimination of them, the

[69] "Among the first to voice this concern was Spengler (1950), who showed in a setting of successive monopoly (where an upstream monopolist sells its product to a single downstream firm, which then resells the product to final consumers) that when the downstream firm adds its own markup to the markup of the upstream firm, the resulting final price will be higher than what a monopolist selling directly to consumers would charge."
Tommy Staahl Gabrielsen, Greg Shaffer and Bjørn Olav Johansen, "When Is Double Marginalization a Problem?" (Working Papers in Economics, University of Bergen, Department of Economics 2018)
[70] Caminade and the others (n 17).
[71] Şerife Demet Kaya, 'Fiyat Sıkıştırması Ekonomik ve Hukuki Açıdan Bir Değerlendirme' Turkish Competition Authority, Thesis of Competition Experts, n. 87, Ankara 2008
[72] Jeffrey Church JR and Roger Ware, Industrial Organization: A Strategic Approach (Irwin/McGraw-Hill 1999) cited in Juliette Caminade, Juan Carvajal, and Christopher R. Knittel, "An Economic Analysis of the Self-Preferencing Debate" (Concurrences, November 2022)

following example can be given: supposing that ***B*** is the production cost and ***B1*** is the markup value by the firm operating in an upstream market, whereas ***S*** is added markup to the purchase price by the firm operating in a downstream market.

Double Marginalization in Non-Vertical Integrated Platforms

Upstream Market	Downstream Market
$\boldsymbol{B + B1 = Q_X}$	$\boldsymbol{Q_X + S = Q_Y}$

Elimination of Double Marginalization in Vertical Integrated Platforms Respectively at the Upstream and Downstream Markets

Upstream Market	Downstream Market
$\boldsymbol{B + B1 = Q_X}$	$\boldsymbol{Q_X = Q_X}$

Upstream Market	Downstream Market
$\boldsymbol{B=B}$	$\boldsymbol{B+S=Q_Z}$

Subsequently, as the values of $\boldsymbol{Q_X}$ and $\boldsymbol{Q_Z}$ in any case smaller than $\boldsymbol{Q_Y}$ or in other words regardless of at which supply chain step the markups are added since there is a situation where a markup is added to the product produced by the firm operating in the upstream market, and this marked-up product has an additional markup added by a firm operating in the downstream market as well, the elimination of double marginalization benefits always the end users.

2.2.2. Reasons deriving from the common business sector in the dual mode business model

(A) What are private labels?

"Private labels are products that are developed, branded and marketed under a retailer's name, rather than by a manufacturer under its brand name".[73] "The strategy of developing an own version of a product to compete with an outside seller's offering has been long used by retailers".[74] It is significant to emphasize that these retailers have increasingly been observed among especially supermarket chains in recent times as mentioned in *World Competition*

[73] Roger Van den Bergh and Hila Nevo, "Private Labels: Challenges for Competition Law and Economics" (2017) 40 World Competition

[74] Shopova Radostina, 'Private Labels in Marketplaces' [2021] Vienna Graduate School of Economics

Journal in a following manner: “Private labels are a growing business to European retailers, as the last couple of decades have witnessed an expansion in their role and scope across various product categories, most prominently in the food supply chain”.[75] Though some autors attribute the rise of private labels in food supply chain to economic crisis occuring in specific countries[76], whereas some link it to the globally rising inflation[77], I consider that assessing the rise in private labels sector solely based on economic dynamics in countries or worldwide is not accurate. Since these private label products of large supermarket chains were in general a cheaper alternative[78] to their rival’s products which were sought to be launched in the relevant market to address a greater part of consumers, unlike branded products, generally targeting specific customers in different segments. As an example, the price of the same-sized pesto sauce under Billa's private label, Clever, can be compared to the product from Barilla, the world's largest pasta producer. Even in a scenario where two products are sold together in an attempt to lower the individual sale price (*see bundling practices*)[79], Clever still remains cheaper than Barilla.

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[75] Van den Bergh and Nevo (n 72).
See also: Strategic product placement of private labels or products by “category captains” are commonplace in the grocery sector and has been recognised to be a source of important efficiencies.
Elias Deutscher, “Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU” (2022) 6 European Papers - A Journal on Law and Integration

[76] “As the purchasing power of many households has been negatively affected by the economic crisis, thus making prices a main concern, private labels successfully challenge the prices of branded goods and satisfy altered consumption choices.”
Van den Bergh and Nevo (n 72).

[77] “More recently, as inflation has been soaring worldwide, private labels sales have increased as “cost-conscious consumers” are switching to private labels.”
Annie Gasparro, “More Shoppers Buy Store Brands, Eating Into Big Food Companies’ Sales” (July 23, 2022) <https://www.wsj.com/articles/more-shoppers-buy-store-brands-eating-into-big-food-companies-sales-11658581202> Accessed October 15, 2024 cited in Juliette Caminade, Juan Carvajal, and Christopher R. Knittel, “An Economic Analysis of the Self-Preferencing Debate” (Concurrences, November 2022)

[78] “Private labels typically offer trusted and cheaper alternatives to their competitors, providing value and options, in particular for more price-sensitive customers.”
Caminade and the others (n 17).
“2020 surveys found that nearly 20% of grocery shoppers increased their purchases of private labels due to their lower prices.”
Steven Begley and Angus McOuat, “Turning Private Labels into Powerhouse Brands” McKinsey & Company (October 30, 2020) <https://www.mckinsey.com/industries/retail/our-insights/turning-private-labels-into-powerhouse-brands> Accessed October 16, 2024 cited in Juliette Caminade, Juan Carvajal, and Christopher R. Knittel, “An Economic Analysis of the Self-Preferencing Debate” (Concurrences, November 2022)

[79] These practices where a package of two or more products or services offered at a discount are called bundling. “In general the total price of the package is typically set lower than the sum of the individual product prices to encourage customers to purchase the bundle.”
“Paket Satış” (Rekabet Kurumu) <https://www.rekabet.gov.tr/tr/Sayfa/Yayinlar/rekabet-terimleri-sozlugu/terimler-listesi?icerik=6e62c201-543e-4b16-ab3c-16b4948b5e48> Accessed October 16, 2024

Figure 4: Price Comparison of Supermarket Private Labels and Branded Products

[80]

[81]

Moreover, these strategic implications are still maintained by the retailers which will be undoubtedly implied in the future as well, as there will be always some consumers purchasing better priced private labels even in the absence of inflation or economic crisis. I believe large supermarket chains' greatest motive in this aforementioned applications or the real reason behind the recent increase in the private labels sector is retailers' goal for a quick profit. As these products are relatively more affordable compared to branded products, resulting in lower production costs as well and to achieve quick profits, retailers opt to purchase low-cost products wholesale from manufacturers instead of buying them at retail prices, and they present these products to consumers by adding their own margins on each item purchased. On the other hand, in case of high inflations or economic crisis, the customers clearly turn to these affordable products, however, I do not agree that this is mainly due to customers' reaction to inflation or crisis, rather than that it derives from the sellers' reaction to them which ultimately impacts consumers' behaviours as well. During these challenging times -not only for consumers but perhaps even more for sellers- retailers will likely introduce more products under private labels to quickly achieve profitability to survive, resulting in a greater presence of private labels in the

[80] "BILLA" (BILLA Online Shop) <https://shop.billa.at/kategorie/sugo-und-pesto-14024> Accessed October 16, 2024
[81] ibid.

market compared to branded products, eventually resulting in more purchase of private labels than branded ones.

(B) Why have self-preferencing behaviours under private labels become more of an issue in digital platforms than in non-digital ones?

"Several non-digital companies and intermediaries have long operated in dual mode, selling their own products alongside those of third parties, deciding on their pricing and placement, and often favoring their own products over those of competitors".[82] With the rise of digital ecosystems, these products sales under private labels of retailers have been maintained in the digital platforms including self-preferencing behaviours in this environment as well, which indeed aroused curiosity as if the mentioned practices were not firstly encountered in non-digital platforms but in digital ones. Though "such behaviours are neither new nor specific to digital platforms, and had not raised anticompetitive concerns of such magnitude before"[83], why have competition authorities started taking on a tougher role when it comes to self-preferencing under private labels in digital platforms?

First of all, the self-preferencing under private labels in non-digital platforms and digital platforms are distinctly perceived practices among consumers. In terms of non-digital platforms, while private label products of retailers are economically more attractive to consumers, " [o]verall, private labels are usually successful with consumers: in 2020, they accounted for around 18% of product sales in U.S. supermarkets".[84] As the end users have such tendency towards private labels, self-preferencing policies under them, namely retailers' display of their own products more prominently on shelves compared to other products or creating visually appealing advertisements for their brands to better attract customers' attention, can be merely perceived as attractive opportunities let alone as practices that are considered as unfair from the eyes of end users. It could be moreover asserted that, since Billa places its own Clever brand pesto sauce on the shelves in more prominent positions, or Spar prioritizes its own S-Budget brand products in the same way -the brand is already aimed at marketing to customers more even via its name- consumers often do not even notice this. In other words, since these practices seem economically attractive to them, they normalize the situation and therefore do not question why other brands are displayed in the back rows on the shelves while retailers promote their private label products. On the other hand, "[l]ike classic retailers, marketplaces

[82] Caminade and the others (n 17).
[83] ibid.
[84] ibid.

develop their own versions of products and position them in direct competition with hosted sellers".[85] "Amazon offers more than 20,000 private label products over 100 in-house brands, ranging from food and beverage, automotive, clothing, and electronics (DataWeave 2020, Lamb 2020). Similarly, Apple develops many Apps, such as Pages, Apple Music, and iMovie, that iOS users frequently purchase in the App Store".[86] However, as the tendency of retailers to prioritize their own products over branded products is significantly high in online platforms than traditional ones, it cannot be stated that these practices result in customers being unaware of them, as is the case of traditional platforms. Moreover, as Zou and Zhou express, even if there would not be sufficient correlation between the searched product by consumers and the presented product of retailers, the retailers do still prioritize their private labels to raise their own brands' display in general.[87] Subsequently, as the online retailers are -so to say- more active in digital platforms than non-digital ones with regard to self-preferencing practices under their own brands, the end users are in position in which they are both more realizing and also questioning the mentioned practices of online retailers.

Secondly, there has been a remarkable rise in the cases and scrutinies about the prioritized own products of online retailers brought to national competition authorities in recent years. In terms of one of the most noteworthy decisions[88] held by the Turkish Competition Authority concerning Turkey's largest e-commerce platform -Trendyol- the following findings were stated:

1.) Trendyol infringed Article 6 of Act No. 4054 on the Protection of Competition by abusing abusing its dominant position[89]

2.) Trendyol intervened in the algorithm and used third-party sellers' data to unfairly favour its own retail operations, while simultaneously hindering its competitors[90]

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[85] Shopova (n 73).
[86] Wang R and Qiu (n 40).
[87] "These practices raise antitrust concerns because platforms sometimes selfpreferentially
prioritize their first-party products, even if they are less relevant, over third-party counterparts in consumers' personalized search rankings (Mattioli 2019). "
Tianxin Zou and Bobby Zhou, "Self-Preferencing and Search Neutrality in Online Retail Platforms" [2024] Management Science
[88] The Turkish Competition Board's decision numbered 23-33/633-213, dated 26.07.2023, regarding DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. (Trendyol)
[89] "DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ Hakkında Yürütülen Soruşturma" (Rekabet Kurumu) <https://www.rekabet.gov.tr/tr/Guncel/dsm-grup-danismanlik-iletisim-ve-satis-t-9278cd7d562cee118ec500505685da39> Accessed October 16, 2024
[90] ibid.

Trendyol was sentenced to 61.342.847,73 TL (≈ 1.650.000.00 €) by the Board and since Trendyol operates in a dual mode by marketing products under its own name as Trendyolmilla and Trendyolman, in the obligations imposed on Trendyol other than the infringement decision itself, Trendyol has been imposed to refrain from all interventions made through algorithms and coding that would provide advantages for its private label products in comparison to its competitors.[91]

I believe the primary reason behind the growing concerns and the subsequent rise in cases at both the national and international levels is the different amounts of collected data by traditional businesses and platform operators, because, for instance, Amazon, as an online retailer, has a much greater and easier access to data compared to any other setting, particularly when compared to a traditional retailer like Billa, due to the significantly higher flow of information in the digital environment regarding the sales of third-party sellers to customers. "In that context, some antitrust practitioners have argued that their heightened concerns in the digital world come from the greater extent and scale of data that can be gathered by digital platforms compared to traditional intermediaries".[92] "For instance, current FTC Chair Lina Khan argued in Amazon's Antitrust Paradox that "the type of behaviour that online firms can track is far more detailed and nuanced" compared to what brick-and-mortar stores have access to, discussing how Amazon had "amassed significant troves of data on users".[93] As a result, as the online platforms belong to have more data about third partys' transactions with the end users, this issue is not solely a matter of competition law, but also simultaneously raises potential concerns related to data protection, regarding how much of the collected data is used and for what purposes which has ultimately become an issue that competition authorities are increasingly focusing on.

Subsequently, varied assessments regarding retailers' self-preference practices in online and traditional platforms arise from both consumers' different attitudes to these behaviours depending on the execution place and competition authorities' increased attention to them as the scrutinies about this topic are for certain more borne in mind in comparison to traditional platforms.

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[91] Turkish Competition Authority, "DSM Grup Danışmanlık İletişim ve Satış Ticaret AŞ Hakkında Yürütülen Soruşturmaya İlişkin Nihai Kararın 4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 49. Maddesi Uyarınca Açıklanması" <https://www.rekabet.gov.tr/Dosya/dsm-nihai-karar-duyuru.pdf> Accessed October 16, 2024

[92] Caminade and the others (n 17).

[93] ibid.

3. Concluding Remarks

Self-preferencing is a concept which should be firstly evaluated from an economical perspective before legal, since without analysing the economic motives behind a practice, the legal assessment in terms of concluding a result regarding the outweighed competitive or anticompetitive aspects cannot be properly made. I consider the economic analysis in this respect is particularly significant as self-preferencing has several angles even when it comes to its just beneficial or harmful effects let alone the differences regarding them. The legal assessment of self-preferencing is often described as practices performed by dominant undertakings with significant market share, or those on the path to becoming one, to increase their dominance in the relevant market, however, as the environment is more gray[94] with regard to economics, sharp conclusion as such cannot be made. Moreover, since there are many different variables at play, the economic evaluation is more complicated, and when the inevitable risk[95] factors brought by economic practices are added to the circle, it no longer appears as if one subject is being analyzed from two different disciplines, but rather as if two separate subjects are being evaluated legally and economically. For this reason, it is deemed necessary to conduct a comprehensive economic analysis before proceeding to the legal part of the matter.

[94] Caminade states that, "[w]hile the effect of self-preferencing on competition, prices, and consumer welfare can be ambiguous, as there is evidence these actions can benefit consumers, antitrust practitioners and regulators argue that these actions are simply unfair to competitors."
Caminade and the others (n 17).

[95] This risk factor can be especially seen in raising rivals' costs as such: (…) "[R]aising rivals' costs would be profitable only if the increase in profits in the downstream market were larger than the losses suffered by making the platform less attractive, and digital platforms create most of their value by facilitating interactions between buyers and sellers in the platform.
Caminade and the others (n 17).

Chapter III: Understanding the Art. 6(5) DMA

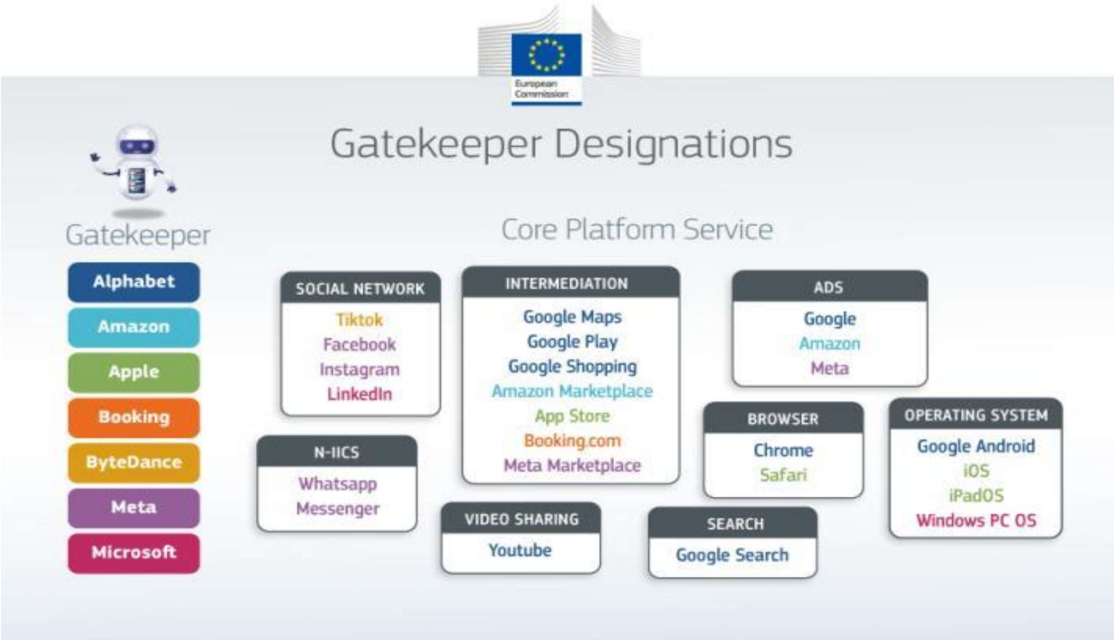
The Digital Markets Act initally was proposed on 15.12.2020 by the European Commission and became applicable on 02.05.2023 to regulate the largest digital companies' market dominating powers known as gatekeeper power.[96] "A few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers".[97] As expressed in the complex nature of the economic analysis section, while the ultimate aim of the Big Tech companies in today's world is to become the emperor in any sector -not restricted to their core service sector but also any other secondary sectors in which they find themselves after a while in a competitive environment with their rivals due to increased vertical integration expansions of large digital platforms- they first drawed the EU's attention which was then followed by several national competition authorities regarding digital platforms regulations. The inevitable end concerning new legislation -regulating the Big Techs' behaviours inclined to be classified under anticompetitive roof- concluding with the assessment of whether there is a need to designate them as a gatekeeper by taking into consideration main quantitative criteria[98] and whether they are crucial intermediaries between business and users when providing their core platform services. As of today, Booking -being the last designated gatekeeper- the European Commission has designated seven companies in total due to the following core platform activities:

[96] (n 3).
[97] ibid.
[98] "A company are presumed to be a gatekeeper under the DMA provided that the followings are met:

(i) when the company achieves a certain annual turnover in the European Economic Area and it provides a core platform service in at least three EU Member States;
(ii) when the company provides a core platform service to more than 45 million monthly active end users established or located in the EU and to more than 10,000 yearly active business users established in the EU; and
(iii) when the company met the second criterion during the last three years."

"Digital Markets Act: Commission Designates Six Gatekeepers" (European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> Accessed October 21, 2024

Figure 5: Core Platform Services of Gatekeepers



[99]

Among several unfair practices, self-preferencing under Art. 6(5) DMA is a common anticompetitive behaviour among tech giants[100] which results in at the end of the day one of the reasons to be classified under gatekeeper, hence this provision -with the aim of providing the ideal environment of digital platform services- requires a separate analysis.

1. A Provision Analysis

1.1. About some keywords

(A) "Fair"

Have you ever considered why exploitative abuses namely unfair contractual conditions or unfair prices exposed on consumers are rarely investigated by the EU Commission?[101] Since when did we start to describe legal terms by using subjective criteria as fair; what is fair, to

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[99] European Commission, "Gatekeepers" <https://digital-markets-act.ec.europa.eu/gatekeepers_en> Accessed October 21, 2024

[100] See Google, Amazon and Apple's nature of concerns under the unfair practices of self-preferencing in rankings and listings on pages 9-10.
(n 42).

[101] "There have been over 30 judgments [about exclusionary abuses] by the EU Courts since the 2008 Guidance [and] [d]espite the Commission's renewed interest in exploitative abuse cases, these are not covered by the Guidelines, which are limited to exclusionary abuses. This is likely because there is limited case law from the EU Courts on exploitative abuses, for decades the "unloved child" of EU competition law."
Lucas Vanassche and the others, "European Commission's Draft Guidelines on Exclusionary Abuses of Dominance: An Attempt to Settle the Question of Who Needs to Show What" (Freshfields Risk&Compliance, August 6, 2024) <https://riskandcompliance.freshfields.com/post/102jfjm/european-commissions-draft-guidelines-on-exclusionary-abuses-of-dominance-an-at> Accessed October 23, 2024

whom behaviour is fair or not and as of when exactly unfair behaviours are deemed to be trouble under competition law? It is not even possible to reach a consensus in everyday life regarding the meaning of "fair", let alone make a definition from a competition law perspective for such a subjective term beyond its legal meaning. "Therefore, it seems impossible to require a platform to act in one particular way that can be considered fair".[102] Though a very subjective expression as such has been used by the EU lawmakers, it is clear that the intended meaning is that the gatekeeper will not rank its own products in its platform, where both its own products and those of business users are displayed, with anticompetitive intent, and thus will not engage in practices that lead to ill-gotten gain. Additionally, the "fair ranking" phrase conveys certain warnings related to anticompetitive self-preferencing, however, I believe the problem is not that this phrase fails to form any idea in minds, but rather that it addresses the ranking scenario - being one of the most prevalent situations of the self-preferencing concept that inherently has both positive and negative aspects, using such an ambiguous term. The lawmakers apparently felt the need to reduce this said ambiguity as they further explained the meaning of fair by explaining under which circumstances the practices of gatekeepers shall be deemed unfair as follows:

"***Article 12***

Updating obligations for gatekeepers

…

5.

…

(a) that practice is engaged in by gatekeepers and is capable of impeding innovation and limiting choice for business users and end users

…

(b) there is an imbalance between the rights and obligations of business users and the gatekeeper obtains an advantage from business users that is disproportionate to the service provided by that gatekeeper to those business users".[103]

Though with the following explanations the lawmakers have intended to clarify the meaning of fair ranking by indicating what the unfair would be, Sanlı and Doğan (by relying on the same problem under the Draft Regulation Amending the Law on the Protection of

[102] Graef (n 14).
[103] (n 49).

Competition under Turkish Competition Law[104]) analyses that, while there are discussions regarding whether this concept should be in the realm of competition law intervention or not, expressions as objective or non-discriminatory -as being more included in the realm of competition law intervention- would reinforce the provision.[105] Subsequently, as there is no expression of fair under the German Competition Act (GWB), the wording of the related provision is better regulated in comparison to DMA and mentioned Turkish Draft Act as well.

(B) "Similar services or products of a third party"

The prohibition is drafted by making a comparison between the gatekeeper's own services and products and similar ones offered by third parties. "For as long as no third-party provides a similar service, the gatekeeper has flexibility in offering its distinct service (…) However, once a similar Third-Party Service exists, the prohibition of self-preferencing comes into play".[106] It is significant to state that the threshold in the related comparison is low, as it is not required to offer necessarily the same services or products by the third parties for the gatekeepers to be evaluated under self-preferential treatment and it is sufficient enough to be part of any scrutiny for the gatekeepers provided that the offered products or services fall under the same roof. There is a question which must be nevertheless asked to determine the scope of what is meant by similar and Höppner indicates it as follows: "This will typically be the case if the service offers comparable functionalities as the gatekeeper's service, regardless of the technology or user interface deployed".[107] The aim lying behind the EU lawmakers when drafting the provision in a mentioned way is to extend the boundaries of favourable treatment prohibition imposed against the gatekeepers, preventing the possible excuses which might be asserted from the Big Techs such as the argument that self-preferential treatment would be inadmissible only if the products or services are identically same to those offered by third parties. One could argue that, while it enough to have comparable functionalities as Höppner's clarification about the provision, it provides even lower threshold than to offer similar products and services, since there might be situations in which the offered product of a gatekeeper and the one by a third party are not similar ones but can be still comparable to each other. The writer

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[104] Rekabet Kurumu, "Rekabetin Korunması Hakkında Kanunda Değişiklik Yapılmasına Dair Düzenleme Taslağı "<https://files.lbr.cloud/public/202210/Turkey%20Digital%20Markets%20Draft%20Law.pdf?VersionId=bVVgEVvmee2nFnAKvXT7FeGf.gAxMPOK> Accessed October 23, 2024

[105] Doc Dr Kerem Cem Sanlı and Av Dr Cihan Doğan, "Rekabetin Korunması Hakkında Kanun'da Değişiklik Yapılmasına Dair Düzenleme Taslağı: Genel Bakış, Karşılaştırma ve Değerlendirmeler" [2023] Rekabet Hukuku ve Politikası Uygulama ve Araştırma Merkezi

[106] Höppner T, Self-Preferencing in Online Search: Under Article 6(5) DMA (1st edn, Nomos Verlagsgesellschaft 2024)

[107] ibid.

explains this probability by saying "[d]istinct services may pursue comparable purposes"[108] and by exemplifying "(…) online marketplaces such as Amazon and specialised CSSs constitute distinct OISs, falling into different markets, their purpose may still be comparable for either end users, business users, or both".[109] Subsequently, it should be always taken into consideration that, what important is when evaluating the products and services of the gatekeeper's and third party's to conclude whether they can be comparable to each other, more than merely assessing the similarities, let alone considering their identical features.

1.2. About the subject

"Having been identified as one of three most commonly experienced problematic trading practices, banning gatekeepers from self-preferencing or self-favouring is one of the DMA's most central objectives as such practice raises barriers to entry and expansion for those competing with the gatekeeper".[110] The related provision is regulated under Art. 6(5) as such:

"***Article 6***

Obligations for gatekeepers susceptible of being further specified under Article 8

…

5.

The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking".[111]

This provision directly correlates with the rivalry relation between the platform operator and the business users existing under the platform as a result of the platforms' vertical integration which diminishes the platform's motivation to act fairly.[112] Moreover, Sanlı and Doğan highlight that gatekeeper platforms generally operate under a vertically integrated business model[113], however, I believe it goes without saying this comment, because the digital platforms operating in hybrid mode can be already viewed as vertically integrated firms as mentioned in the previous chapter, hence the gatekeepers as being subtitle of digital platforms

[108] ibid.
[109] ibid.
[110] ibid.
[111] (n 49).
[112] Sanlı and Doğan (n 105).
[113] ibid.

a fortiori belong to this business model. Additionally, I consider it is significant to highlight that the authors' concerns regarding gatekeepers' inclinations to favour their own services[114] are not something peculiar to companies designated as gatekeepers, since these probable self favouring attitudes are a common reflection of vertically integrated firms' anticompetitive effects. Subsequently, while being a gatekeeper means at its core being a vertically integrated firm, it should be borne in mind that the prohibitions imposed on gatekeepers always lead to concerns regarding the anticompetitive effects of this fundamental concept.

1.3. About the content

"There have been (…) main changes to the self-preferencing provisions in the final DMA text compared with the draft, all of which extend the scope of the obligations for gatekeepers".[115] One of the most remarkable ones among these changes is the addition of crawling and indexing, as in the Proposal only ranking was mentioned as the core of self-preferential treatments in search results.

"***Article 6***

Obligations for gatekeepers susceptible of being further specified

…

(d) refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and nondiscriminatory conditions to such ranking"[116]

If we need to draw an inference from the general to the specific in the first place, these three concepts are the three interdependent steps when delivering online search results, as it is not possible to complete the search cycle in the absence of any of them. As Tan and Gambarin states, the aim of this addition can be expressed as such: "The EC appears to be pushing for greater transparency across all components of the ranking process, which seems to be consistent with its drive for more transparency overall in ranking algorithms/conditions (…)".[117]

[114] "The gatekeeper platforms might provide a better position for their own services. In this respect, they might have the ability to significantly harm the products and services of the other business users."
Sanlı and Doğan n (105).
[115] Malcolm Tan and Monica Gambarin, "Open up Your Algorithm or Else" (Frontier Economics) <https://www.frontier-economics.com/uk/en/news-and-insights/articles/article-i9387-open-up-your-algorithm-or-else/> Accessed October 26, 2024
[116] (n 3).
[117] Tan and Gambarin (n 115).

Therefore, we are talking about parts that make up a whole, which also means that the self-preferential behaviours of gatekeepers are not limited to ranking; they can also be observed in crawling and indexing. This is why, although ranking is the final stage of delivering online search results and self-preferencing behaviours are more tangible here, the first two stages must also pursue fair, transparent, and non-discriminatory objectives, thus it has been more appropriate for the relevant regulation to be structured in this way.

When delivering search engine results, search engines operate in a certain way before bringing end users within seconds together with the results within seconds, as follows:

Crawling: It is the first step in the process which implies the newly discovered websites or information found by a search engine by browsing through the web regarding a specific product or service.

Indexing: It is the next step which includes the storage of already found information in the first step and their adding to the search engine's database.

Ranking: It is the last step in which all related information regarding a product or service is displayed according to a specific algorithm, often based on search frequency and popularity.

While crawling and indexing are not steps which can be perceived externally from the end user's perspective, only ranking is, as people can at some point realize that a certain business users' products are given precedence over others, this does not necessarily mean that the first two steps always function ideally as they ought to be. Moreover, "(…) it may be considerably more difficult to detect self-preferencing in crawling and indexing for several reasons".[118] Tan and Gambarin point out that "(…) dissecting the entire search algorithm to examine crawling and indexing is a complex task that would require significant efforts by the EC and would impose an even greater data-sharing burden on gatekeepers".[119] I also believe that this situation would be burdensome for the Commission because there will be not only technical difficulties requiring a comprehensive analysis but also there will be for certain opposition by the gatekeepers to the legitimacy of the intended task. As dissecting their whole algorithm might be a real problem that might reveal all of their strategic decision-making mechanisms, hence the Commission's intention at this point might be met with objections

[118] ibid.
[119] ibid.

regarding the sharing of data at a very core level by the gatekeepers. On the other hand, I have a different perspective about the second difficulty asserted by the writers, which concerns that, any self-preferencing treatments at the crawling stage would likely be detected in ranking, thus they interpret the said difficulty concerning the inefficiency of extending the scope to the first stage in addition to ranking.[120] However, I believe it might be sometimes too late to take any action when necessarily the anticompetitive behaviours met at the crawling stage are waited until the ranking, as irreparable damages may have occurred until ranking. Additionally, in cases where anticompetitive self-preferencing behaviours are identified at the early stages, there should be an immediate response to prevent potential infringement cases when the issue at stake is considered through the procedural economy.

2. Concluding Remarks

Self-preferencing is indeed a concept that the competition authorities have had for years familiar with, however, when these preferential conducts are carried out very by big companies in online environments, this sense of familiarity has to some extent lost its meaning in the eyes of authorities in terms of tackling with this problem. One of the reasons for this struggle was the expansion of these giant companies into additional sectors beyond their core businesses, hence they have, over time, become the target of blame before the authorities which ultimately resulted in their designation as gatekeepers due to self-preferencing practices under Art. 6(5) DMA. Though these practices are mostly encountered as ranking in online searches, not only this type of conduct has been regulated under this said Article, as crawling and indexing are also part of these behaviours when considering search engine services from a broader perspective. Ultimately, it does not imply that the favouring examples of the gatekeepers cannot be encountered at the crawling and indexing stages merely because it is harder to detect them at the earlier stages in the delivery of online search results, therefore the amendments included in the DMA after the Proposal provide a more accurate framework.

[120] ibid.

Chapter IV: Impacts on Businesses and End Users

1. Rationale for Dedicating this Chapter

"[T]he benefits emerging from gatekeepers' compliance with the substantive obligations of [DMA] (…) are only an advantageous corollary of the real raison d'eˆtre of the Act. They are only a matter of lucky contingency" says Professor Andriychuk and adds that "[t]he obligations for gatekeepers introduced by the DMA do not automatically create or reflect the corresponding rights of business (let alone end) users".[121] I believe this type of an introductory sentence serves quite enough to the aim of attracting the reader's attention as it truly brings into question whether there cannot be any natural correlation arising from the gatekeepers' obligations from the perspective of businesses and end users. To be able to speak of a newly established or existing right, of course, the existence, scope, and legitimacy of that right must first be established. However, the rights mentioned within the scope of the DMA are not rights inherent to an individual in the conventional sense, but rather advantages obtained by business users and end users as a result of obligations imposed on gatekeepers and I believe that rights assessments, when conducted, are approached with this understanding as well. On the other hand, I am partially aligned with the Professor's perspective when stating "[c]onceptually, what is endorsed and supported by the new regime should not be viewed as a subjective right of business and end users but an objective public interest in promoting more dynamic digital markets".[122] Since the core purpose of the DMA is directed to digital markets with the aim of creating a more effective competition environment, it does not nevertheless mean that there cannot be any indirect effects raising before businesses and end users those who are not primarily affected as gatekeepers by DMA but are still subjects of this effect. Moreover, since the desired competition within digital markets can be acquired by addressing the acts' major concerns - gatekeeper practices that cannot be addressed by existing regulations- that is why the aim of the DMA is compatible at some point with the gatekeepers itself, thus I believe it is both not appropriate and against the spirit of the DMA to consider its purposes completely in the absence of gatekeepers obligations. Additionally, I think it is not a realistic view to say that "[c]orrelating or even equating the wide scope of gatekeepers' obligations with the central mission of the DMA (…) risks leading the DMA to a dead end (…)"[123], because it should not

[121] Oles Andriychuk, "Do DMA Obligations for Gatekeepers Create Entitlements for Business Users?" (2022) 11 Journal of Antitrust Enforcement
[122] ibid.
[123] ibid.

be forgotten that the DMA’s ultimate aim concerning the effective, dynamic and innovative competition by regulating the gatekeeper’s behaviours can merely be achieved by considering the Big Techs’ as one part of the problem as well.

Considering this disputable relation between the gatekeeper’s obligations and their reflections before businesses and end users, the necessity of dedicating a chapter to the impacts of self-preferencing on digital platform’s merchants and consumers has emerged, because the main reason making us discuss the mentioned controversial reflections of obligations imposed on gatekeepers about their preferential treatments on online platforms is Article 6(5) DMA. Additionally, the beginning point is not these obligations which are indeed the proposed solutions to the “self-preferencing” problem, but the practices themselves, and since it is a crystal-clear fact that these practices have both anti and procompetitive effects on businesses and end users, the Article proposed for the solution of this problem -specifically regarding the obligations reflected in “do’s” and “don’ts” for gatekeepers-certainly has an impact on the parties mentioned. In other words when a problem impacts certain parties, then the proposed solutions addressing it would undoubtedly affect those parties involved. Subsequently, to better understand the relationship between these obligations and the parties mentioned, the impact of the source of these obligations on the parties needs to be addressed.

2. Impacts on Businesses

“Self-preferencing is a long-standing and common business practice consisting of leveraging capabilities to promote one’s own complementary products and services. (…) Moreover, self-preferencing covers a wide range of commonly accepted business practices”.[124] Given that it is so prevalent, why was Google sentenced € 2,42 billion fine[125] due to it’s self favouring practices to the detriment of its competitors in terms of unfair ranking or why the Italian Competition Authority (AGCM) fined[126] Amazon in November 2021 due to Amazon’s “granting preferential treatment to third-party sellers who use the company’s own logistics and delivery services”?[127] It appears that the prevalence of self-preferencing behaviours in online platforms is not something that renders it innocent, since it is a serious concern when the major

[124] Aurelien Portuese, “‘Please, Help Yourself’: Toward a Taxonomy of Self-Preferencing” Information Technology and Innovation Foundation | ITIF (October 25, 2021) <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing/> Accessed October 29, 2024

[125] (n 6).

[126] See the Case: Case A528 Italian Competition Authority vs Amazon dated 30 November 2021

[127] Giuseppe Colangelo, “Antitrust Unchained: The EU’s Case Against Self-Preferencing” (2023) 72 GRUR International

and the most successful Big Tech companies were sentenced to million dollar fines. For instance, Google's said fine is one of the highest fines imposed by the Commission up until today and "at the time of the decision, it had been a record-breaking fine".[128] When considering Alphabet's global revenue in the year the fine was imposed, it was \$110.9 billion[129] (~ €97.6 billion) and represents approximately 2.5% of its total revenue in 2017. Though this ratio is not that insignificant, it was still not a penalty that would considerably impact them financially due to Alphabet's extremely high profit margin. Although this fine may not be a significant amount that could negatively impact them financially, what is being discussed today, and will continue to be discussed in the future, is not the amount of the fine itself, but the fact that it is the first case that comes to mind when thinking about self-preferencing in online platforms. Ultimately, these are practices that we have become accustomed to seeing in a digitalizing world, yet they create situations that are equally memorable due to their consequences and the first of these consequences will be addressed in terms of business users.

2.1. From the Anticompetitive Perspective

The main players affected by the scale and conduct of gatekeeper platforms are e-commerce merchants, service providers and application developers which depend on those platforms for a significant portion of their sales or marketing. This dependency between the platform operators and the business users could be associated with an atypical type of employee and employer relationship. Just as an employer presents working conditions to an employee, such as an office working environment or the logistical support provided by the employer during business trips for a salesperson, a similar relationship can be observed between a platform provider and a merchant using that platform. In this regard, the platform provider offers essential services to the merchant, enabling them to display their products or services on the online platform and subsequently reach customers. The only issue deviating from a classic employer and employee example is related to who pays the wage (the dependency factor that does not exist between the parties in terms of labor law is disregarded as it is not relevant to the matter at hand). Since the sine qua non element in online platforms is the service of providing the platform to business users, the essential service between the parties is provided by the platform operator, hence merchants pay for this core service. As Zou and Zhou indicate, "[a]n

[128] Giulia Ferrari, "Big Tech Strategies across Markets: The Role of Self-Preferencing in Digital Antitrust" (PhD Thesis, UNIVERSITA' COMMERCIALE "LUIGI BOCCONI" PhD SCHOOL 2021)
[129] "Alphabet Announces Fourth Quarter and Fiscal Year 2017 Results" (U.S. Securities and Exchange Commission)
<https://www.sec.gov/Archives/edgar/data/1652044/000165204418000004/googexhibit991q42017.htm>
Accessed October 29, 2024

online platform (the first-party seller) offers a first-party product to compete with a third-party seller, who pays the platform a percentage commission".[130] Moreover, in a situation where this relationship between the parties has existed for a long time, and the platform serves as the primary source of income for a business user, but at the same time this vertically integrated platform starts to favour its own products, it can be stated that the negative effects on the business user will arise as a series of cascading effects, like dominoes. Subsequently, it would not be impossible to say that "(…) dependent business users could face excessive or discriminatory charges and unfair terms and conditions, which limit their ability to compete outside the platform ecosystem"[131], hence it requires a strong understanding of the process.

(A) Less Choices

"Suppliers rely on online discoverability"[132], especially the ones who only exist as merchants in a platform rather than operating as an owner of their website as well, which forms indeed a strong dependency on the platform in terms of business users. "Accordingly, supplier's dependency on platforms to ensure discoverability of their offerings depends on the strength of their own online presence".[133] However, if the platforms engaging in self-preferencing behaviours are the ones as Google or Amazon, no matter how strong the online presence the business users have, it loses its significance as it is not a hard question to reckon how long the business users having a successful online presence - let alone small and medium-sized enterprises (SMEs)- can remain resilient to these practices of gatekeepers. When a digital platform operator acting in a dual mode favours its own products in ranking, it leads to two opposing outcomes as forming the two sides of a coin, which are the more display of its own products and correspondingly the less display of its competitor's products. In the same way that the products of merchants are showcased fairly on a platform according to a certain level of relevance by an existing algorithm, platform operators also use a special algorithm to prioritize their own products, resulting in unfair ranking. This specific algorithm can be supported by a following reference focusing on Google's on Google Shopping Case: "Special ranking mechanisms -i.e. specific algorithms (one of these called "Panda")- specifically designed to reduce the ranking of rivals on the general result page".[134] One of the results of this intentionally reduced rankings of other businesses' is the lesser choice options they are left, due to lesser

[130] Zou and Zhou (n 87).
[131] Sunderland and the others (n 42).
[132] Höppner (n 106).
[133] ibid.
[134] Ferrari (n 128).

displays, the business users start to struggle to reach their end users by continuing to exist on that platform because, when gatekeepers display their own products more to the detriment of their competitors, the business users, automatically see their channels to reach their existing customers diminishing day by day.[135] "To compensate for this, merchants will be increasingly forced to either invest in their own consumer-facing frontend or to co-operate with merchant platforms, social networks or other distribution channels, even though their terms and conditions may not comply with the merchant's business strategy".[136] As mentioned above, suppliers exist by the discovery of their products via end users, however when their products are displayed less than the usual, it automatically impacts their visibility to consumers as they have to search the business suppliers - whom they frequently transact with- by themselves now in a scenario without self-preferencing, to access their products at the level they are displayed. It can be underlined that " "[t]he less end users find a supplier directly, the more such supplier depends on other distribution channels to be discoverable".[137] Consequently, when a business user's products are displayed less due to the platform's self-preferencing behaviour, one of their pathways to reach customers is removed, meaning that with fewer products displayed, the business user automatically faces the risk of losing one of their distribution channels due to reaching fewer customers.

(B) Increasing Dependency

Merchants are not only facing the risk of less choice in terms of their distribution channels but also the increasing dependency on the platforms that favour their products over those of merchants. If, after reading this sentence, you are questioning how business users can face the risk of leaving the primary platform they operate on while still experiencing an increased dependence on that platform, you are in the right place. When they are left alone with the lesser choices, it could be asserted that being able to find other distribution channels for business users as the bridge between themselves and end users, would be a scenario that might sound more appealing, however, this is not a high probability as the market conditions do not always allow for this.

[135] This can be exemplified also by considering Google's CSS: "The more CSSs that leave the market following Google's CM, the less options merchants have to reach out to consumers."
Höppner, Thomas, Google's (Non-) Compliance with the EU Shopping Decision (September 28, 2020). Study
[136] ibid.
[137] Höppner (n 106).

I believe the merchants can find themselves dependent on the core platform due to two reasons:

The first one relates to the ideal consequence of business users being left with fewer choices, which is searching for other distribution channels when addressing the last players in the supply chain. As Höppner indicates in the paragraph above[138], there might not be always coherence between merchants' business strategy and the terms and conditions introduced to them when looking for alternative platforms. Because the most significant point from the perspective of business users when targeting end users is the display of their products and services on the related platform at the most optimal level possible. What is most profitable for merchants is the most effectively run online platform service in terms of establishing the best matches with the displayed products and end user's queries, as it is the first and foremost key to raise their profit margin. This point could be expressed with regard to online search engines in the following manner: "The attractiveness of an OSE directly depends on its ability to process the end user's query and to then match such identified information demand with the most relevant sources supplying corresponding information".[139] In terms of achieving this success, there needs to be a compatible structure between the platform operator and the merchant, and this is ensured as long as they can reconcile each other's terms and conditions in a way that maximizes the interests of all parties involved. When the merchants cannot find other distribution channels as effective as the previous one, then they consider accepting the terms and conditions which they have been familiar with for a long time offered by the first platform providers.

It could be asserted that there is a risk evaluation made at this point. On the one hand, merchants may be expected to accept terms and conditions that are completely contrary to their business strategies by the alternatively discovered distribution channels, while on the other hand, they are forced to accept an algorithmic arrangement that favours the platform's own products over those of other business users. In both scenarios, there is a situation of consenting to undesired conditions by business users, hence the problem should be evaluated from a broader perspective. What still drives merchants to choose the platform that conducts self-preferencing practices against them is the risks of the secondary treatment that merchants perceive from the platform outweigh the risks of the terms and conditions of other distribution

[138] See the reference 135.
[139] Höppner (n 106).

channels with which they have not yet engaged in any business relationship not being sufficiently aligned with their own. To explain this situation with numerical data, "[t]he French court, identified that almost 25% of Amazon's merchants in France where not present on any other platform nor had or could afford a direct to customer online business".[140] As in this example, sometimes business users do not even reach the point of evaluating the terms and conditions of other alternative distribution channels, let alone consenting to them. That is why conducting this dual analysis requires a broad perspective, as stated in a study as follows, "[t]he increasing importance of digital channels and the dependence, especially of small businesses, on such channels, means that the implications of discriminatory or unfair conduct by gatekeeper platforms could be far-reaching".[141] Subsequently, platform dependency is a result of the fact that business users still exist on the platform where they are exposed to self-preferencing behaviours due to the insufficient sustainability of alternative distribution channels.

The second one relates to the unavailability of the first reason explained above, as sometimes the business users are not even in a position to evaluate whether the risk of engaging themselves with other distribution channels outweighs the risks of not abandoning the core platform treating their products and services by applying second-class treatment. When the core platform adopting self-preferencing behaviours is a monopol in the related market, the possibility of finding other distribution channels loses its significance, let alone assessing whether their alternative terms and conditions are appropriate to choose, since the products and services are offered by a single seller in monopolies which exclude the probability of possible competitors. Moreover, it is so common to see these scenarios especially when vertically integrated platforms are run by Big Techs. For instance, in terms of the search engine market; "[t]he monopolisation of the CSSs market towards Google's on-SERP-CSS automatically means that merchants have even less of a choice but to accept any terms and conditions that Google imposes on them for placing ads, including ever increasing auction prices".[142] Since there is no possibility for business users to discuss the issues mentioned above when the platform has become a monopoly in the relevant market, they will be forced to accept the conditions imposed by the monopoly to maintain their existence in the market, leading to a dependency on the existing platform. Furthermore, one of the criteria considered in the gatekeeper designation, which is a step further, is "the ability to act as a gatekeeper (thereby

[140] Sunderland and the others (n 42).
[141] ibid.
[142] Höppner (n 135).

creating dependency and the conditions for unfair trading)"[143], hence creating dependency on business users is a strong indicator when designating undertakings as gatekeepers. Additionally, though it is not impossible to enter the market for other sellers in monopolies as the market has high entry barriers at the end of the day, that would not change anything, because if alternative distribution channels can somehow overcome market entry barriers and enter the market, then the dynamics will be dictated by the actions or inactions of the platform that holds a dominant position. Ultimately, the monopol features of the online platforms which are remarkably common to see in today's dual mode platform environment are another reason for creating dependency among merchants on platforms.

(C) Case Analysis: Turkish Competition Board vs. Google

The investigation initiated on April 2021 by the Turkish Competition Board (Board) against Google Reklamcılık ve Pazarlama Ltd. Şti., Google International LLC, Google LLC, Google Ireland Limited, and Alphabet Inc. (Google) pertains to allegations that "Google abused its dominant position in the general search services market by promoting its own local search and accommodation price comparison services in a way that would exclude competitors".[144]

The findings in the decision[145] issued as a result of the investigation were as follows:

1.) Google enjoys a dominant position in the general search services market
2.) Google infringes Art.6 (titled as Abuse of Dominant Position of the Act No. 4054 on the Protection of Competition

- by abusing its dominant position in the general search services market by favouring its own services in the local search market (Local Unit) and accommodation price comparison market (GOOGLE Hotel Ads-GHA) to the detriment of its competitor; and
- by preventing competitors operating in local search sites from entering the Local Unit market or creating high entry barriers.

[143] Sunderland and the others (n 42).
[144] Announcement Regarding the Final Decision on the Investigation Conducted on Google Reklamcılık ve Pazarlama Ltd. Şti., Google International LLC, Google LLC, Google Ireland Limited, and Alphabet Inc. in accordance with Article 49 of Act No. 4054 on the Protection of Competition
https://www.rekabet.gov.tr/Dosya/geneldosya/google-yerel-arama-nihai-karar-pdf
[145] The Competition Board's decision dated 08.04.2021 and numbered 21-20/248-105
https://www.rekabet.gov.tr/Karar?kararId=fe766197-3187-4e42-95a9-32d6ababde58

As a result, Google was sentenced to an administrative fine of 296,084,899.49 TL (~ €30 billion), with the following obligations to restore fair and transparent competition in the local search and accommodation price comparison markets:

- the implementation of corrective measures within six months following the issuance of the reasoned decision to eliminate the disadvantageous service conditions imposed on its competitors operating in the local search and accommodation price comparison markets
- an annual reporting requirement to the regulatory authority for Google for five years, starting from the implementation of the new compliance conditions.

"However, it is found that Google failed to implement the new designs that were supposed to be applied in "local search services" with respect to hotel inquiries (…) and therefore a daily administrative fine has been imposed on Google under Article 17 of the Act No. 4054 at %0,05 of its annual gross revenues in 2023, until the obligations concerned are fulfilled".[146] The Board later announced that this daily administrative fine was terminated as Google began to implement its obligations. "As a result, the Board imposed a total fine amounting to TRY 482 million on Google for failure its obligation, which is much higher than the original fine imposed for the infringement".[147]

In terms of the assessment of the Case, it could be stated that "Google preferenced its own local search services and accommodation price comparison service on Google Search result pages, by displaying results above rivals, in larger spaces and with a richer visual design".[148] Google leveraged its dominant position from general search services market to the aforementioned two markets, hence as in the case of Google Shopping Case, by creating an arrangement that displays competitors' services lower in the rankings and on less prominent pages, it made it more difficult for business users to exist on the platform it offered. "Google

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[146] "Rekabet Kurumu" (Daily Fines Imposed on Google for Failing to Comply with Obligations, May 16, 2024) <https://www.rekabet.gov.tr/en/Guncel/daily-fines-imposed-on-google-for-failin 3ef2c4fd8813ef1193c90050568585c9> Accessed November 5, 2024

[147] Ali Tunçsav and Esen Çakır, "Quarterly Competition Law Bulletin-2024 Second Quarter (Kolcuoğlu Demirkan Koçaklı Attorneys at Law)" (July 2024) <https://www.kolcuoglu.av.tr/Uploads/Publication/quarterly-competition-law-bulletin---2024-second-quarter-Gw4q5CPm.pdf> Accessed November 5, 2024

[148] Büşra Özcan, "Competition Law, Policy and Regulation in the Digital Era" <https://unctad.org/system/files/non-official-document/ccpb_IGECOMP2021_Turkey_Bozcan_en.pdf> Accessed November 5, 2024

operates in Turkey's search services market through a «unit» that it displays on its internet search results pages above its rivals. This «unit» may also be known as OneBox technology, Local Unit and Hotel Unit. What was found anticompetitive [that] Google does not allow rivals to access this unit, which gave Google a significant advantage".[149] While this situation allowed Google to display its own services the most, it automatically reduced the visibility of other business users' services as well, thus their profit margins for selling services to customers also diminished, placing them at risk of having less choice in this distribution channel operated by Google. Subsequently, since the aim of the undertakings is to favour their own products and services "to the detriment of their competitors", it is not unusual for business users to face such negative effects in this case and many other self-preferencing cases.

3. Impacts on End Users

"It is normal for companies to promote their own products over those of their competitors, and, in many cases, this can lead to efficiencies. However, a dominant company giving preferential treatment to its own products or services in downstream or related markets (self-preferencing) can raise concerns".[150] One of the parties targeted by this concern is also the end user, which can be seen as the final link in the supply chain of online platform services. As the final players in the supply chain, consumers are inherently affected by the preferential treatment of platform providers, while what happens in the upstream market, for instance, between a platform operator and business users, is observed by consumers in the downstream market which can be seen in different forms, namely increased prices, lower qualities or the more accessibility of products. The possible effects of self-preferencing practices on consumers, on the other hand, are not easy to distinguish regarding the pro or anticompetitiveness as in the case of business users, hence there could be sometimes contracting assessments from competition scholars about this matter. For instance, Manne and Bowman assert, "we cannot assume that something is bad for competition just because it is bad for certain competitors"[151] whereas Zhou indicates, "regulatory agencies in the U.S. are worried that the fate of millions of consumers is being determined by a few big firms".[152] While I believe such a dual analysis is necessary, I do not agree with Hoffman and Shinn's following statement: "In

[149] ibid.

[150] Pedro Caro de Sousa, "What Shall We Do About Self-Preferencing? " [2020] CPI Antitrust Chronicle

[151] Geoffrey A. Manne and Sam Bowman, "Platform Self-Preferencing Can Be Good for Consumers and Even Competitors" (Truth on the Market, March 4, 2021) <https://truthonthemarket.com/2021/03/04/platform-self-preferencing-can-be-good-for-consumers-and-even-competitors/> Accessed November 6, 2024

[152] Maryland Smith Research, "Will Banning Self-Preferencing in Digital Markets Help or Hurt?" (Smith School, September 9, 2024) <https://www.rhsmith.umd.edu/research/will-banning-self-preferencing-digital-markets-help-or-hurt> Accessed November 6, 2024

reality, self-preferencing is likely to be beneficial to consumers and competition, or at worst harmless, except in certain particular circumstances. And existing antitrust law is quite capable of appropriately handling those circumstances".[153] I believe self-preferencing is neither exceptionally to the detriment of the consumers as it generally exists in an anticompetitive manner from the consumer's perspective nor does the existing legislation serve enough to the needs of competition actors. As it will be handled in the upcoming paragraph there are several anticompetitive impacts of self-preferencing with regard to consumers and regarding the authors' second statement, I completely think that, if the existing legislation as TFEU had sufficiently addressed the problematic issues under competition law, Google would not have faced a fine of 2.42 billion euros imposed by the EU, nor would numerous national competition authorities[154] have taken legal action against Google at the national level. Additionally, when undertakings engage themselves with self-preferencing practices, these actions raise serious concerns not only regarding business users but also end users, hence their consequences need to be addressed from a dual perspective.

3.1. Anticompetitive Impacts

(A) Less Choices

The fewer business users' products are displayed on online platforms due to pereferential treatment of the platform provider's own products, the lesser options consumers have. Indeed, the outcome of reduced choice, previously discussed for business users, is not unique to them; rather, it similarly impacts consumers as well, as both parties stand on the same side of the scale in this regard. The initial outcome of the process, which begins with the platform provider prioritizing its own products or services on the platform, is the reduced visibility of business users due to unfair ranking, leading to their diminishing chances of maintaining a presence on that platform. The final consequence of this process is that end users are exposed to fewer product types because of this decreased visibility of business users. The view that self-preferencing practices have ultimately impacts on consumers, specifically by leading to reduced choice, is also addressed in a study published by the European Commission as follows: "Impacts on dependent users and alternative platforms are likely to ultimately be felt by consumers through [r]educed choice in areas where leverage by conglomerate platforms

[153] D. Bruce Hoffman and Garrett D. Shinn, "Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem" [2021] CPI Antitrust Chronicle
[154] See the followings Google cases:
United States Department of Justice (DOJ) v. Google (2023) (Google Search)
The Competition and Markets Authority's (CMA) investigation against Google (2022) (Ad Tech)

is practised at the expense of rivals".[155] Google, standing as one of the foremost examples of this, as Höppner underlines, "[d]ue to Google's CM, consumers will find increasingly fewer alternative CSSs".[156] Though it can be undoubtedly asserted that when undertakings engage in self-preferencing behaviours, their first and foremost intention is not to leave consumers with fewer options or perhaps they would not intend this outcome at all, it is the indirect consequence of their core intention that is to exclude their competitors from the market.

(B) Increased Prices

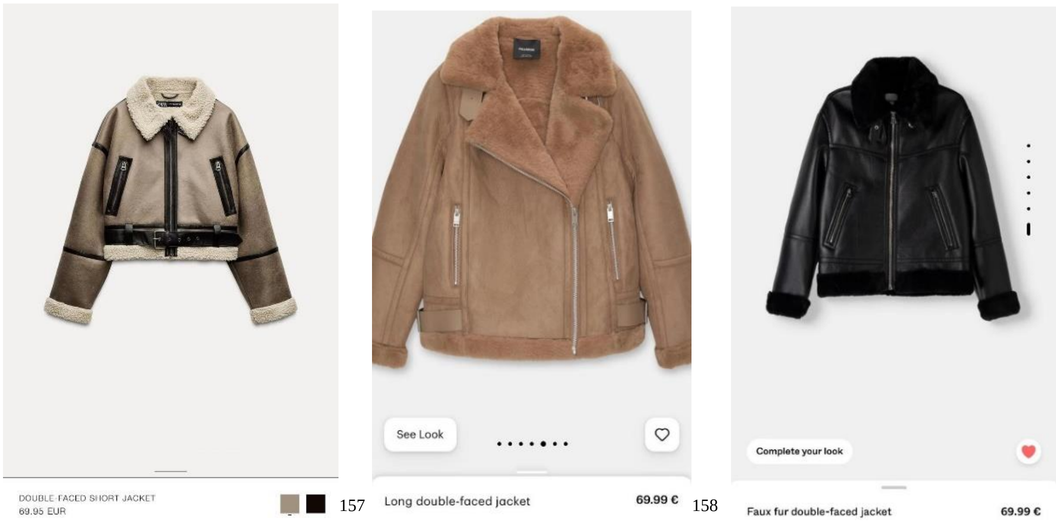
The main reason for an increase in prices derives from the reduced competition in a platform once a dual role platform provider starts favouring its services to a significant extent. Since the more business users cannot find distribution channels other than the platform itself, the quicker the distortion of competition begins in that market, as the players actively competing with each other on the platform face the risk of disappearing one by one. Though it could be asserted that, while the business users are sometimes forced to choose the secondary treatment offered on that platform rather than taking the risk of choosing terms and conditions of alternative distribution channels that they do not fully agree with, it does not mean that the competition is not distorted in the relevant market just because the business users maintain to exist in that platform. Because merchants are essentially compelled to continue operating on a platform where unfair ranking is applied to their own products and services, as they believe they cannot survive on other distribution channels, they are forced to remain on the existing platform. In this case, while the products and services with the highest visibility in the eyes of customers are either owned by the platform itself or the products of other business users are displayed on later pages and in fewer numbers, it becomes impossible to speak of any unreduced competition. In such a diminished competitive environment, the market dynamic takes shape by what self-preferencing practices applying platforms do and do not, contrary to the outcomes caused by the strategic decisions of different actors in a properly functioning market. However, in an ideal competitive market, brands with similar quality tend to price their products within similar ranges by following each other's market strategies.

To exemplify, brands namely Zara, Pull&Bear and Bershka -as some companies within the Inditex group, are brands of similar quality, and their product pricing strategies are generally very similar to each other. The following photos (as in the order of the brands in the previous

[155] Sunderland and the others (n 42).
[156] Höppner (n 135).

sentence) show products under the name “double-faced jacket” which, despite having different appearances, serve the same purpose and are priced identically.

Figure 6: Price Strategy Similarities Among Brands Under the Same Parent Company



[157] [158] [159]

While there is always an effective competition between these brands as the targeted consumer scales are the same as each other, if any of them raises the price of the double-faced jacket to €100, the brand would certainly sell the jacket in a good amount. However, it would undoubtedly make much less profit margin from the sale if it were priced at €60, as consumers prefer to buy one of the two cheaper brands, hence none of the brands would make such a strategic mistake. In a scenario when one of the three above mentioned brands would have significantly greater market share than others and be in a dominant position in the clothing retail market, it might have benefits to raise the price of the double-faced jacket to €100, if it engages in self-preferencing practices to replace the photos above, primarily and more with a situation displaying its own products. Additionally, when the consumers cannot easily achieve the jackets priced at €60, they will hayve no choice but to buy the €100 one.

At this point, while the platform functioning in a hybrid role realizes good enough that it is the most ideal seller from the eyes of consumers, it tends to increase the prices of the

[157] Zara.com, “Kurze Doubleface-Jacke” (Zara) <https://www.zara.com/at/de/kurze-doubleface-jacke-p08073254.html?v1=415355040> Accessed November 7, 2024

[158] “Long Double-Faced Jacket” (Pull&Bear) <https://www.pullandbear.com/at/en/long-doublefaced-jacket-l07710338?cS=730> Accessed November 7, 2024

[159] “Doubleface-Jacke aus Kunstpelz” (Bershka) <https://www.bershka.com/at/doubleface-jacke-aus-kunstpelz-c0p164324911.html?colorId=800> Accessed November 7, 2024

products or services it provides because of the instability of other business users in the eyes of customers gives the platform operator confidence that, unless there is a drastic price increase, customers will eventually choose them. In the case of the price gouging scenario, platform operators know well enough that its ultimate goal to be the most preferred one would be impossible to be achieved, hence they are aware of the point at which they should stop in this regard. "According to one study, on average products suggested in Shopping Units are 13.7% more expensive than would be found on competing CSSs".[160] As in the case of this example, though there are for certain higher prices of Google's itself services, it means that it is still not an expense causes consumers not to use Google's services at the end the day. Subsequently, when there is a lesser choice in terms of the competing business users, this enables dual role platforms to increase the prices of products and services they offer.

(C) Less Innovation

One of the anticompetitive effects of self-preferencing on consumers is less innovation regarding newly launched products in the market and this issue can be observed as a reduced incentive to invest in new strategies both from the perspective of merchants and platform providers.[161] In terms of merchants, it could be said that, while they are already; struggling to maintain their existence on the core platform they operate or in an effort to find alternative distribution channels, their these concern outweigh the need to be innovative on the market. Moreover, it would not be realistic to expect merchants striving to survive to invest in R&D projects, consumer-oriented improvements or marketing improvement techniques. Even in such a scenario that there is a risky investment in terms of fostering the innovation of its products done by a business user, these endeavours will not meet its expectations, since the products with increased innovations will be unfairly ranked as well and their visibility will never be presented enough to customers in a way that justifies the R&D investment. This issue can be exemplified with regard to Google in such manner: "In particular, the self-favouring reduces rival CSS's incentives to invest in their services to improve their quality as they will realise that such investments will not increase their visibility on Google's gatekeeper platform because such quality does not matter for appearing in Google's Shopping Units".[162] With respect to the

[160] Grant Thornton, "Google shopping EU benchmark – Data analysis study", 12 April 2019, p. 4, https://politi.co/3csexPT cited in Thomas Höppner, Google's (Non-) Compliance with the EU Shopping Decision (September 28, 2020). Study

[161] Höppner handles this point with regard to Google's CSS services as follows: "The CM reduces the incentives for both Google and competing CSSs to invest in new search functionalities to compare products and prices." Höppner (n 135).

[162] ibid.

platform provider, since it already addresses large number of consumers by making it more difficult for competitors existing on the platform, its greatest concern will not be increasing the innovation of the products it launches to the market as the strongest supplier in the market. Additionally, the struggle of the platform operators will be to maintain their dominance over their competitors which they build by relying on self-preferencing practices. Subsequently, neither the existing business users nor the platform operator will prioritize the innovation of the products, consumers will be deprived of any enhancement in this regard.

(D) Case Analysis: Case A528 Italian Competition Authority vs Amazon

The investigation initiated in April 2019 by the AGCM against some of the subsidiaries of the Amazon Group including the following five companies Amazon Italia Logistica S.r.l., Amazon Italia Services S.r.l., Amazon Services Europe S.à r.l., Amazon EU S.à r.l., and Amazon Europe Core S.à r.l.. The allegations pertained to claims that "Amazon would grant improved visibility of the seller's offerings, higher search rankings and better access to consumers on Amazon.com only to third-party sellers that subscribe to "Amazon Logistics" or "Fulfillment by Amazon" (FBA), putting other third-party merchants at a disadvantage".[163]

The findings in the decision[164] issued as a result of the investigation were as follows:

1.) Amazon enjoys a dominant position in logistics services in the Italian market.
2.) Amazon abuses its dominant power by offering business users to use its own logistics service brand, Amazon Logistics, as a condition for joining Amazon Prime, hence Amazon grants them more prominent visibility on its platform through unfair ranking.
3.) Amazon harms its competitors who are not using its logistic service as it displays its products by subjecting them to second-class treatment.

As a result, Amazon was sentenced to an administrative fine of € 1,128 billion with the following obligations to restore fair and transparent competition in logistics services in the Italian market:

[163] "AGCM - Autorita' Garante Della Concorrenza e Del Mercato" (Autorita' Garante della Concorrenza e del Mercato) <https://en.agcm.it/en/media/press-releases/2019/4/A528> Accessed November 8, 2024
[164] (n 126).

- Amazon grants the same conditions in terms of the ranking and visibility within the platform to merchants who are not using Amazon logistics but still complying with FRAND standards (fair, reasonable and non-discriminatory) with its Prime consumers.
- Amazon "refrains from negotiating - on behalf of sellers - rates and other contractual terms concerning the logistics of sellers' orders on Amazon.it with carriers and/or competing logistics operators, outside FBA".[165]

Amazon appealed AGCM's ruling to the Italian Supreme Court of Cassation and since these aforementioned facts were commenced to be investigated by the EU Commission in 2020 as well, Amazon brought this investigation to the CJEU on the grounds that these investigations are duplicative and the Italian Supreme Court of Cassation regards the ruling of the CJEU as a preliminary issue, while the Court has not yet issued its ruling on the specific case.[166]

In terms of the assessment of the Case with regard to end users, it could be stated that "by implementing such abusive strategy, in the ICA opinion, Amazon harmed not only competing e-commerce logistics operators (which have been prevented from presenting themselves to online sellers as providers of services of comparable quality to Amazon's FBA)"[167] but also consumers of the other logistics operators whose visibility it has hindered. "In particular, Amazon prevented third-party sellers from associating the Prime label with offers that were not managed with FBA, [hence] [t]he abusive conduct consisted in tying third-party sellers' access to a set of exclusive benefits to their adoption of Amazon own logistics service".[168] In this case business users who opted to use other logistic services than the FBA, could not transition to Amazon Prime, hence they were deprived of being found there by their consumers which indeed was a significant concern, as labelled with Prime has a great impact[169]

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[165] "AGCM - Autorita' Garante Della Concorrenza e Del Mercato" (Autorita' Garante della Concorrenza e del Mercato) <https://en.agcm.it/en/media/press-releases/2021/12/A528> Accessed November 8, 2024

[166] Turkish Competition Authority, "Dijital Dönüşümün Rekabet Hukukuna Yansımaları" (2023) <https://www.rekabet.gov.tr/Dosya/dijital-piyasalar-calisma-metni.pdf> Accessed November 8, 2024

[167] Federico Marini Balestra and Lucia Antonazzi, "Amazon Fined for over 1 Billion Euro for Abuse of Dominant Position in Italy" (Bird & Bird, 19, 2022) <https://www.twobirds.com/en/insights/2022/italy/amazon-fined-for-over-1-billion-euro-for-abuse-of-dominant-position-in-italy> Accessed November 8, 2024

[168] ibid.

[169] "According to the ICA findings, the Prime label is crucial to gain visibility and increase sales on Amazon.it. for the following reasons:

- It makes it easier to sell to the above 7 million consumers members of Amazon's loyalty program;
- It allows sellers to participate in the well-known special events promoted by Amazon (e.g.: Black Friday, Cyber Monday, Prime Day); and

in terms of increasing sales. The reflection of this outcome from the eyes of consumers was the fewer choices they were left with due to the inadequate visibility of their commonly used sellers. Subsequently, these anticompetitive practices as such result in detrimental consequences primarily on sellers; however, as these practices create a domino effect that ultimately impacts consumers, they are also negatively impacted.

3.2. Procompetitive Impacts

"[M]odern political and popular discourse treats self-preferencing as nearly a per se evil. But, is there any reason to think that is right?"[170] asks Hoffman and Shin and further elaborate that, since anticompetitive effects of self-preferencing are exceptionally detrimental to consumers, existing regulations are sufficient to overcome these rare cases, hence there is no need to further assessment of what should be done in this manner. I also believe that self-preferencing is not completely detrimental for consumers, while "from a theoretical perspective, self-preferencing algorithms can have procompetitive benefits".[171] With that being said, it does not mean that the aforementioned anticompetitive impacts, fewer choices, increased prices and less innovation can be disregarded to some extent, as in my view the negative impacts are more significant for end users compared to the positive ones.

One of the most significant factors consumers pay attention to when purchasing a product or service is quality. It does not matter whether the purchase is made in person or via online platforms; however, this becomes more of an issue when it comes to online transactions, as there are always questions in people's minds when there is no possibility to visually test a product. When customers assess the quality of products on online shopping platforms, they often do that by purchasing products from the brands they know best or are most familiar with, hence instead of specifically searching for a product, they begin their search by looking for the brands they recognize. This process is not always carried out by the consumers themselves, but also through advertisements they are presented with by digital platforms. At this point, preferential treatment of the platform operator (in the assumption that the best-known brand for a consumer is the platform's own brand) acting in a hybrid manner begins to assume greater

- It increases the likelihood of a seller's offer to be selected as the "Featured Offer" displayed in the "Buy Box"."

ibid.

[170] Hoffman and Shin (n 153).

[171] Emilie Feyler and Veronica Postal, "Can Self-Preferencing Algorithms Be Procompetitive?" (Concurrences.com, June 2023) <https://awards.concurrences.com/en/awards/2024/business-articles/can-self-preferencing-algorithms-be-pro-competitive> Accessed November 10, 2024

importance, since introducing customers to the products of the brand they are already going to buy from the very beginning is completely aligned with their ultimate aim. It could be, therefore, stated that self-preferencing algorithms[172] are a mechanism that targets customers precisely to get them the products they want. Moreover, there are hundreds of existing sellers on a platform whose quality does not match their numbers; hence self-preferencing algorithms make it convenient for end users by preventing them from encountering products which are below a certain threshold. Though objections can be raised against this by arguing every seller should have the right to be visible for every type of consumer, it would not be realistic, as classic algorithms at first match consumers with their desired products by excluding other sellers. When, for instance, platform operators are well-known among majority of the people for their highly qualified services, consumers at that point do not want to encounter even other successful companies operating in the same sector, let alone sellers falling below a certain threshold. According to Bowman, "Amazon argues that FBA offers a more reliable service to consumers than other delivery options, and notes that there is no suggestion in the Italian ruling that consumers were harmed by Amazon's behaviour".[173] Subsequently, introducing end users to the products they will purchase from the very beginning enables a target-oriented shopping experience for them, hence self-preferencing algorithms have a procompetitive effect on consumers in this manner.

4. Concluding Remarks

When self-preferencing in online platforms is discussed, a digital platform operator performing in dual mode is the subject that receives the most attention, however, it should not be the only one, since in addition to discussing those who engage in these behaviours, it is also significant to talk about the effects of these behaviours on business users and end users, who represent the second and third links in the supply chain. The reason for dedicating a well-based research on these two mentioned players is to be able to comprehend these practices from the perspective of merchants and consumers, as I believe that these behaviours, which we have become increasingly accustomed to seeing in daily life, have effects on the aforementioned that should not be underestimated. While business users are drastically subjected to anticompetitive impacts, especially less choice and increasing dependency on the platform, end users observe

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[172] Its definition can be expressed as follows: "[A]lgorithms that are allegedly "biased" by their creator to privilege their own content and products, the so called "self-preferencing" algorithms."
ibid.

[173] Matthew Gooding, "Amazon's €1.3bn Fine Is the Latest Blow against Big Tech 'Self-Preferencing'" (Tech Monitor, December 10, 2021) <https://www.techmonitor.ai/digital-economy/big-tech-self-preferencing-italy-eu-digital-markets-act?cf-view&cf-view&cf-closed&cf-view&cf-closed> Accessed November 10, 2024

procompetitive impacts through target-oriented advertisements while also being more exposed to anticompetitive effects, particularly less choices and increased prices. Ultimately, when these behaviours have in general remarkably anticompetitive impacts on other players in the supply chain, they need to be given a substantial amount of attention, as preferential treatments of undertakings can only be well understood by considering not only the action itself but also its impacts.

Chapter V: Gatekeepers' Implementation and Compliance Processes

"The Digital Markets Act aims at preventing gatekeepers from imposing unfair conditions on businesses and end users and at ensuring the openness of important digital services".[174] Platforms have caused significant competition law violations, leading to negative impacts, particularly on business users and, additionally, on end users; hence, following their designation, it is essential that they remain subject to thorough scrutiny. Practically, what matters most is not the gatekeeper designation of undertakings, but what has been done after that or what has not still been done by the gatekeepers. This designation can be compared to the initial analysis that reveals the problematic nature of a situation. The following step -taking the necessary cautions- is the core step that must be approached with the utmost significance, as it does not have any significance when only identification about a problem is made but no necessary steps are taken towards a solution. That is why this chapter will be dedicated to analyzing the process after the designation as a gatekeeper, in terms of supervision conducted by the EU Commission as well as the compliance measures implemented by the gatekeepers.

1. Supervision by the EU Commission

"On 5 September 2023, the Commission designated six gatekeepers -Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft- and 22 of their core platform services".[175] When an undertaking is designated by the Commission as a gatekeeper, it has limited time to comply with the specific Articles of the DMA in a following manner:

"***Article 3***

Designation of gatekeepers

…

10. The gatekeeper shall comply with the obligations laid down in Articles 5, 6 and 7 within 6 months after a core platform service has been listed in the designation decision pursuant to paragraph 9 of this Article".[176]

[174] EU Commission, "Questions and Answers: Digital Markets Act: Ensuring Fair and Open Digital Markets*" (European Union, September 6, 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349> Accessed November 13, 2024

[175] European Commission, "Designated Gatekeepers Must Now Comply with All Obligations under the Digital Markets Act" (European Union, March 7, 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1342> Accessed November 13, 2024

[176] (n 49).

Hence, the undertakings designated as gatekeepers for the first time on 5 September 2023 had to comply with their obligations laid down in Articles 5, 6 and 7 within 6 months. The obligation to comply with the obligations includes not only structural changes in the gatekeepers' core platform services but also a “Compliance Report” and its “Non-Confidential Summary” that must be submitted to the EU Commission. The legal basis of these written obligations originates from Art. 11 of the DMA.

“***Article 11***

Reporting

1. Within 6 months after its designation pursuant to Article 3, and in accordance with Article 3(10), the gatekeeper shall provide the Commission with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations laid down in Articles 5, 6 and 7.

2. Within the deadline referred to in paragraph 1, the gatekeeper shall publish and provide the Commission with a nonconfidential summary of that report”.[177]

…

In terms of providing precise information to the gatekeepers, the Commission has published a template[178] that the gatekeepers should take into consideration when drafting their Compliance Reports. It could be asserted that this template is the bare minimum information[179] the gatekeepers must provide, since “[f]ailure by a gatekeeper to provide such true, correct and complete information may influence the Commission’s prioritisation in opening proceedings with a view to the possible adoption of a noncompliance decision”.[180] These information are addressed in Section 2 in a broad scope; hence this specific section is particularly significant.

[177] ibid.

[178] “TEMPLATE FORM FOR REPORTING PURSUANT TO ARTICLE 11 OF REGULATION (EU) 2022/1925 (Digital Markets Act) (Compliance Report)” (EU Commission 2023)

[179] “The Template specifies the minimum of information that the Commission expects the gatekeepers to provide (…)”. Jens Peter Schmidt, Fabian Hübener and Sven Betzendörfer, “Ensuring Compliance with the Digital Markets Act” (NOERR, January 24, 2024) <https://www.noerr.com/en/insights/ensuring-compliance-with-the-digital-markets-act> Accessed November 14, 2024

[180] (n 178).

Section 2 of the Template includes detailed questions and information requests for gatekeepers focusing on the necessity to provide comprehensive information regarding; each core platform service that caused them to be designated as gatekeepers and each obligation imposed in the mentioned Articles of the DMA. Pursuant to this explanation obligation, the gatekeepers, for instance, must include under *Article 2.1.2./ ii*[181] the specific time of the measure's implementation, the scope of the measure regarding their service area and the geographic implication of the measure. These three fundamental aspects determine the outer framework of the Compliance Reports, since before explaining the measures in detail, they should be expressed by underlying the most primary points. I think this situation can be compared to statements regarding the fulfillment of procedural requirements before addressing the merits of the case in the petition submitted to the court. As in the case of a lawsuit, where no evaluation of the merits of the case is made before addressing the procedural requirements, similarly, the EU Commission wants to see the outer framework of the measures before assessing them in-depth. Following that, the gatekeepers must include "any technical/engineering changes that were made in connection with the implementation of the measure concerned as on data flows and internal data usage policies, tracking of new metrics, parameters of ranking algorithms and methodologies used to rank, classify or make results more prominent".[182] I believe this is the most crucial part for gatekeepers to comply with the obligations, as when Google favours its own services, behind this, there are well-structured algorithms, which are based on technologically advanced and professionally developed foundations. That is why it is so significant for Google, to subject its current algorithms to necessary structural changes, to create the impression that it is no longer using them in a way that reduces the visibility of other business users. On the other hand, the same point has great importance from the point of the Commission as well, while structural changes are the first and foremost points to control when assessing the compliance of the Reports. As another request, the gatekeepers are asked whether they had "any consultation with end users, business users and/or any interested parties that has been carried out in the context of (i) the elaboration of the measure and/or (ii) the implementation of the measure".[183] These consultations, particularly with interested parties, might have a genuine impact for the draft of the Compliance Report since a similar solution was held in the drafting process of the Guidelines on Exclusionary Abuses of Dominance. In the preparation process of the Guidelines which are expected to be

[181] ibid.
[182] ibid.
[183] ibid.

finalized[184] in the fourth quarter of 2025, the interested parties were asked to submit their opinions under the name of “Public Consultation”. It can be said that the preparation of the Guidelines involves an effective consultation process, as both highly experienced law firms working in the field of EU competition law and successful scholars in this area have provided their views. Similar to this, the gatekeepers were given a chance to consult the interested parties in terms of providing better-established Compliance Reports.

In Section 4, gatekeepers are obliged to provide a non-confidential summary of their Reports as “a faithful comprehensive and meaningful picture of the Compliance Report’s content”.[185] While the Summaries are the main documents accessible to the public, the measures taken for compliance allow for the evaluation of their effectiveness by interested parties, particularly by national competition authorities who have filed or are about to file lawsuits due to the gatekeepers' designation.

Additionally, it should be highlighted that “[t]wo obligations are effective from day 1 of the designation: the obligation on gatekeepers to put in place a compliance function as well as reporting on intended concentrations within the meaning of the EU Merger Regulation”.[186] It means that, although gatekeepers have 6 months to comply with the obligations, this period is indeed just for the submission of Compliance Report and its Non-Confidential Summary; however behavioural compliance with the obligations begins from the first of their designation. In terms of the fines which will be imposed on gatekeepers in non-compliance to the obligations such as failure to stop the violation or failure to initiate the compliance process, the Commission applies different approaches. “[T]he Commission can impose fines up to 10% of the company's total worldwide turnover, which can go up to 20% in case of repeated infringement”.[187] Subsequently, it could be stated that the process following the gatekeeper designation includes strict monitoring held by the Commission in terms of securing fair and undistorted competition.

[184] “The Commission plans to publish a draft of the guidelines for public consultation by mid-2024, with the aim of adopting them in 2025.”
“Application of Article 102 TFEU” (Competition Policy) <https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en> Accessed November 13, 2024
[185] (n 178).
[186] (n 174).
[187] ibid.

2. Compliance Measures Implemented by the Gatekeepers

On 7 March 2024, Google published its "annual compliance report for its products designated by the European Commission as providing Core Platform Services (CPSs): Google Android, Google Chrome, Google Play, Google Search, Google Shopping, Google Maps, YouTube, and Google Ads".[188] The main provision addressed in this thesis, DMA Art. 6(5), applies to only five CPSs of Google, since for Google Android, Google Chrome and Google Ads, this provision does not have a specific area of application. For instance, "Art. 6(5) does not apply to Google Android because it only applies to "ranking" services, which are defined in Art. 2(22) and do not include OSs".[189] In this chapter, the direct application of Art. 6(5) will be analysed in terms of the remaining CPSs.

(A) Google Maps

The EU Commission held in the Alphabet's Designation Decision[190] that its service in terms of Google Maps attributed to an online intermediation service (OIS) among ten core platform services (CPS) mentioned under Art. 2 (2)[191] of the DMA. "According to the Alphabet Designation Decision, Google Maps is an OIS because it facilitates the initiation of direct transactions between businesses and consumers based on a contractual relationship with the businesses".[192] To comply with gatekeeper's obligations after the designation, Google has developed various new systems by explaining compliance statements and their descriptions for each and every obligation leading to the designation. In terms of Art. 6(5), Google mentioned that all local businesses are ranked in a similar manner and it does not allow for first party local businesses in ranking.[193]

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[188] Alphabet, "EU Digital Markets Act (EU DMA) Compliance Report Non-Confidential Summary" <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-bb_2023-9-6_2024-3-6_en_v1.pdf> Accessed November 14, 2024

[189] ibid.

[190] PUBLIC VERSION COMMISSION DECISION of 592023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector

[191] See the ten CPSs under DMA: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)

[192] (n 188).

[193] Para. 52 of the Google Maps Chapter of Alphabet's Non-Confidential Summary

(B) Google Play

Alphabet notified[194] the Commission on 3 July 2023 that Google Play is an OIS form of CPSs and it is a software application store and consistent with this statement by Alphabet, the Commission held in the Designation Case that Google Play is an OIS under the DMA. As the description of compliance under Art. 6(5), Google expressed that there is no discrimination in ranking between app developers and the apps are ranked based on certain features common to all app stores, namely the ranking according to "user relevance" that displays the most related products and services for end users.[195]

(C) Google Shopping

One of the most attention-grabbing digital platforms to date, and the subject of the highest fine ever imposed by the European Commission in the context of competition law breach regarding an undertaking, is Google's most famous CPS Google Shopping, was decided to be an OIS in the Alphabet's Designation Case. In terms of compliance with the obligations, Google explained in its Non-Confidential Summary that Google does not display its products or services to the detriment of its competitors, hence ranking results are not affected from the fact what whether they are provided by Google or other business users.[196]

(D) Google Search

The EU Commission concluded Google's service regarding Google Search which is an Online Search Engine (OSE) CPS. As a compliance mechanism under Art. 6(5), Google has developed machine learning systems used by Google's ranking which consider people's evaluation of the services they receive and aim to present the results which are most liked by people.[197]

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[194] "Yesterday (3 July 2023 at midnight) was the deadline under the Digital Markets Act (DMA) for potential gatekeepers to notify the Commission if they meet the thresholds for gatekeepers established by Article 3 of the DMA. By the deadline, the Commission received notifications from the following companies: Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung."
EU Commission, "Potential Gatekeepers Notified the Commission and Provided Relevant Information" (European Union, July 4, 2023) <https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en> Accessed November 15, 2024

[195] Para. 113 of the Google Play Chapter of Alphabet's Non-Confidential Summary

[196] Para. 29 of the Google Shopping Chapter of Alphabet's Non-Confidential Summary

[197] Para. 52 of the Google Search Chapter of Alphabet's Non-Confidential Summary

(E)YouTube

YouTube is Alphabet's one of the core platform services which is a video-sharing platform under under Art. 2 (2) (d) of the DMA. With regard to its compliance mechanism, Google mentioned that it applies fair and equal rankings to all the content on the YouTube platform.[198]

3. Concluding Remarks

Just as the provisions in an act are addressed to solve certain problems, the provisions introduced in the DMA for gatekeepers have been brought to address issues that have been a real struggle to overcome in the last years. While the concept of gatekeeper designation is a recent issue, it would be incorrect to make a prediction about whether these provisions will truly be effective. At the same time, it could be stated that if the supervision by the EU Commission and afterwards the compliance mechanisms applied by the gatekeepers continue to be effectively applied, it will lead to significant progress in this matter. When evaluating the non-confidential summaries which are the public versions of the compliance reports, I believe that the gatekeepers truly understand why they are required to write this compliance report, since they are well aware of the fact that the next step whether it involves fines or lawsuits will follow in non-compliance with the obligations. Adhering to these well-drafted reports will not only be beneficial to them but also to business users and end users through the improvement of the competitive environment. Subsequently, the process after the designation of gatekeepers as the Commission's supervision and their compliance mechanisms are as significant as the problem itself.

[198] Para. 29 of the YouTube Chapter of Alphabet's Non-Confidential Summary

Chapter VI: Conclusion

The effort to exist in the digital world has become a very important issue today. From our daily habits to the platforms where undertakings operate, we now live in a way where many things are carried out using digitalization tools, which are the most prominent outcome of technology, rather than traditional methods. Because digitalization has become a necessity and a part of our lives that we can no longer imagine without it and what it brings. While the solution tools brought by digitalization have been more preferred over traditional solutions, this situation has also caught the attention of entities providing services to people, and they have started offering their services not only in traditional settings but also in digital environments. Though this awareness in terms of providing services to people in the way they most prefer to receive them has been a real milestone, it also brought along problems with it. Especially hybrid platforms operating as both platform providers and sellers in online platforms have started to come under national competition authorities' radar as well as the EU Commission. While platform operators -particularly Big Techs- were trying to address the digitalized needs of people, they grew significantly over time and in addition to their core service areas, began offering services in other fields finding themselves in a highly competitive environment. To maintain their company success and become a leader in the broad range of services they offer in such a competitive environment, they resorted to artificial interference in the natural competition in the market. A perfect example of this situation would be self-preferencing practices in online platforms which undertakings favour their own products and services to the detriment of their competitors. Sometimes these behaviours have been positively viewed by some competition law scholars whereas it was criticized negatively by others, but it has always been a controversial topic. When the need to intervene in the self-favouring practices of Big Techs arose due to serious competition law violations that occurred, these problems have been addressed through the abuse of dominance provision under Art. 102 TFEU. Although this provision has been applied for years in cases of abuse of dominance violations, its structure was not capable of addressing the violations held in online platforms, hence the problems occurring with the digitalization could not be addressed through Art. 102 TFEU. Both the inadequacy of the current legislation in addressing emerging problems and the pressing need for digitalization, Led the European Commission to enact the Digital Markets Act. The concept of self-preferencing is addressed in Article 6(5) of the DMA, where it is stated that gatekeepers, who have significant power in digital markets and are thus the main players of the Act, shall not treat their own products more favourably than third parties' in ranking and related indexing and crawling situations. Since the basis of self-preferencing practices in the online environment lies in the abuse of dominance, discussions on its competitive and anticompetitive aspects are also present here. With that being said, it can be certainly stated that their impacts on business users are more anticompetitive than end users, because business users, for example, are subjected to completely unfair ranking, while end users sometimes experience positive effects of self-preferencing behaviours, such as more target-oriented advertisements. Against these practices and in general competition law violations in digital markets, the solution process foreseen in the DMA, including the compliance mechanism for gatekeepers with the obligations set out in the Act and the Commission's supervision of this process, is actually good steps to begin with. The aim of this law is to protect the competitive environment in digital markets and to maintain this competition in a fair and contestable manner; however, with the currently available data, it is not possible to make an assessment of how effective this Act will be. Ultimately, self-preferencing on online platforms is an issue that has evolved with the impact of digitalization and has had significant implications for both businesses and end users, making it a topic that should be examined with great care.

I would like to emphasize the importance of the topic with this final closing sentence: On one hand, addressing the undeniable significance of digitalization, and on the other hand, tackling the serious problems it brings, is a clear indication of the fine line between serving the needs of society in terms of digitalization and striving to become the technological empire of the age.

With the hope that it will be of great value to all who have read it!

Beril

Vienna, November ’24

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This work has made use of ChatGPT[199] and Deepl[200] tools for translation purposes when needed.

[199] "ChatGPT" <https://chatgpt.com/>
[200] "Deepl Translate" <https://www.deepl.com/en/translator>