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Self-Preferencing: Navigating a Balance between Intellectual Property Rights and Fair Competition in the Digital Market

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Abstract

Als neu entwickelte wettbewerbliche Schadenstheorie stellt „Self-Preferencing“ eine in der EU vielfach diskutierte Thematik dar. Den Begriff zu definieren, erweist sich als komplex in Anbetracht der Vielfalt an Verhaltensweisen, die sich sowohl als Self-Preferencing als auch unter traditionelle Schadenstheorien einordnen lassen. Diese Schwierigkeit kann zu Unsicherheiten führen, besonders in Angesicht des fundamentalen Rechts einer jeden Plattform, ihr geistiges Eigentum ausschließlich zu nutzen und Konkurrenten nicht gleichberechtigt an den daraus erwirtschafteten Gewinnen und Vorteilen teilhaben zu lassen. Zudem lassen die Ähnlichkeiten zwischen Self-Preferencing und der Essential-Facilities-Doktrin die Frage aufkommen, weshalb mit Self-Preferencing-Fällen, in denen Unternehmen gezwungen werden, Mitbewerbern auf ihrer eigenen Plattform, oft geschützt als geistiges Eigentum, gleiche Behandlung zukommen zu lassen, nicht unter ähnlich strengen Kriterien verfahren wird, wie sie auch im Fall *Bronner* entwickelt wurden.

Über Vergleichsforschung und mit einem besonderen Fokus auf Fallanalysen und das Gesetz über digitale Märkte als geschaffener Rechtsrahmen, führt diese Masterarbeit eine kritische Bewertung der fehlenden Klarheiten durch und untersucht den Schutz von Grundrechten als mögliche Legitimation für das Verhalten einer dominanten Plattform, ihre eigenen Produkte im nachgelagerten Markt zu bevorzugen. Self-Preferencing wird nicht als an sich missbräuchlich eingestuft, sondern es wird erforscht, wo die Schwelle zum Missbrauch gem Art 102 TFEU erreicht wird, was besonders dann der Fall ist, wenn das diskriminierende Verhalten zu Marktabschottung führt. Letztlich soll der Stellenwert eines Gleichgewichts zwischen der Wahrung fairen Wettbewerbs und dem Schutze geistigen Eigentums hervorgehoben werden. Die Analyse suggeriert, dass die Beurteilung von Self-Preferencing die Erreichung dieser Balance anstreben und potenziell wettbewerbsschädliche Auswirkungen auf der einen Seite und den Eingriff in Grundrechte der Plattform auf der anderen Seite durch die Anwendung einer strengen juristischen Prüfung und Verhältnismäßigkeitsüberlegungen abwägen sollte, um Innovation und Fortschritt fördern und einen florierenden Binnenmarkt zu garantieren.

Abstract - English

As a newly developed theory of harm, self-preferencing is widely discussed in the EU. Defining the term has proven quite complex, considering the variety of behaviors that may be considered self-preferencing but also fit traditional theories of harm. This difficulty may lead to uncertainty, particularly regarding a digital platform's fundamental right to use its intellectual property exclusively and exclude rivals from profiting equally from its facilities. Moreover, the similarities between self-preferencing and the Essential Facilities Doctrine raise the question of why self-preferencing cases are not assessed under similarly stringent criteria as those established in the *Bronner* case.

Through comparative research, with a particular focus on European and national case law and the DMA as the existing legal framework, this master's thesis critically assesses this lack of clarity and explores the protection of a company's fundamental rights as a potential justification for dominant platforms favoring their own downstream products. Moreover, it considers self-preferencing as not inherently abusive and examines the threshold at which it becomes an abuse under art 102 TFEU, which is particularly the case when discriminatory behavior leads to the foreclosure of competitors. Ultimately, the importance of striking a balance between safeguarding fair competition and protecting a company's intellectual property rights is emphasized. The research proposes that self-preferencing assessments should strive to achieve this balance by weighing the potential anti-competitive effects of self-preferencing on the one hand against the interference with a platform's fundamental rights on the other. This should be done through the application of a strict legal test and proportionality considerations, as such an approach is likely to promote innovation and contribute to a thriving Internal Market.

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Table of abbreviations

ACM	Autoriteit Consument & Markt (Dutch Competition Authority)
AG	Advocate General
AGCM	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
ATTF	App Tracking Transparency Framework
BSE	Barcelona School of Economics
CJEU	Court of Justice of the European Union
CEPR	Center for Economic and Policy Research
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CPI	Competition Policy International
DMA	Digital Markets Act
ECJ	European Court of Justice
FBA	Fulfillment by Amazon
GC	General Court
GCR	Global Competition Review
GREDEG	Groupe de Recherche en Droit, Économie, Gestion (research group on law, economics, and management)
GRUR	Deutscher Verband für Gewerblichen Rechtsschutz und Urheberrecht (German Association for the Protection of Intellectual Property)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Competition Act)
ICA	Italian Competition Authority
iOS	iPhone Operating System
IP	intellectual property
IPR	intellectual property right
ITIF	Information Technology and Innovation Foundation
MDR	Mitteldeutscher Rundfunk (Central German Broadcasting)
NCA	National Competition Authority

OEM	original equipment manufacturer
OS	operating system
SFP	Seller Fulfilled Prime
SME	small and medium-sized enterprise
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSE	Toulouse School of Economics
WMP	Windows Media Player

1. Introduction

Since the progression of the technological age, the trading of goods and services has undergone revolutionary changes, profoundly moving the market from a physical structure to its universally connected, digital expansion.[1] A phenomenon resulting from this global development is the rise of large tech companies, particularly based in the United States. The "Big Five", namely Google, Apple, Amazon, Meta, and Microsoft,[2] may differ in their business models but show one striking similarity: They all comprise an intermediary function, providing a playing field that facilitates interactions between other companies and consumers.[3] Google, for instance, intermediates through its search engine and the Google Play Store, similar to Apple and its App Store. In comparison, Amazon serves as a marketplace, connecting sellers and buyers, whereas Meta is a middleman between consumers and advertisers. Lastly, Microsoft, mostly known for its operating system, facilitates interactions between third-party software and users.[4] The consequence is a relationship between Big Tech platforms and other businesses that is deeply rooted in dependency. This is heightened and maintained through market power, the companies' ownership over essential technology, and the need for smaller enterprises, particularly SMEs, to use this technology for visibility.[5]

This reality – while not inherently harmful – serves as the baseline for judicial and regulatory conflicts within the Internal Market: On the one hand, the protection of fair competition is paramount for the proper functioning of the market and the preservation of consumer welfare.[6] On the other hand, creative innovation depends on safeguarding

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[1] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38/1 Yearbook of European Law 448, 448; Bruno Jullien and Wilfried Sand-Zantman, 'The Economics of Platforms: A Theory Guide for Competition Policy' (2019) TSE Digital Center Policy Papers series 1 <https://ssrn.com/abstract=3502964> accessed 22 October 2025, 1.
[2] Jullien and Sand-Zantman (n 1) 1; Giulia Ferrari, 'Big Tech strategies across markets: the role of self-preferencing in Digital Antitrust' (PhD thesis, Universita Commerciale "Luigi Bocconi" PhD School 2021), 7.
[3] Graef (n 1) 448; Jullien and Sand-Zantman (n 1) 2.
[4] Cf *Microsoft* (Case C-3/37.792) Commission Decision C(2004) 900 final [2004] OJ L32/23; *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final [2017] OJ C9/11; *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 final [2018] OJ C402/19; *Amazon Marketplace* and *Amazon Buy Box* (Cases AT.40462 and AT.40703) Commission Decision C(2022) 9442 final [2022]; *Apple – App Store Practices (music streaming)* (Case AT.40437) Commission Decision C(2024) 1307 final [2024].
[5] Graef (n 1) 448-449.
[6] KD Raju, 'Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India' (2014) 2/3 Intellectual Property Rights: Open Access <https://www.researchgate.net/publication/307824931_Interface_between_Competition_law_and_Intellectual_Property_Rights_A_Comparative_Study_of_the_US_EU_and_India> accessed 22 October

intellectual property rights. These rights place their owner in a position of exclusivity, allowing them to utilize their property as well as prohibiting third-party use.[7] To illustrate, if companies could not patent inventions, protect technical instructions with copyrights or trade secrets, or guard their brands with trademarks, their incentive to further improve products might be compromised due to other companies profiting from their efforts, leading to a decrease in market strength.[8]

While some scholars argue that IP grants its owner a temporary monopoly within the boundaries of which they can exclusively use and protect their right, competition law thus does the exact opposite, condemning monopolies and their abuse. Still, both aim for proper market function and the maximization of social welfare.[9] To achieve this, it is therefore crucial to strike a balance between the two.

This balance can prove difficult, especially when dominant intermediary platforms expand into adjacent markets, particularly through downstream integration, thereby putting them in competition with the same companies they serve.[10] Problems may then arise if those same platforms choose to favor their own products and services, effectively discriminating against their dependent competitors.[11] Legally evaluating this dual-role scheme, called self-preferencing, is complex, considering that promoting one's own products is inherently competitive and that the behavior may even have pro-competitive effects.[12]

The assessment of these cases has been the focal point of recent investigations by the EU Commission. The landmark decision *Google Shopping*, later confirmed by the General Court and the ECJ,[13] exemplifies this. Similarly, National Competition

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2025, 1; Silky Mukherjee, 'Interface between competition law and intellectual property law: a study of United States, European Union and Indian law' (PhD thesis, Gujarat National Law University 2016), 4.

[7] Tom Arnold et al, 'The Interface between Intellectual Property Law and Competition Law in the North American Context' (1987) 12/16 Canada-United States Law Journal 121, 122; Mariateresa Maggiolino and Laura Zoboli, 'The Intersection between Intellectual Property and Antitrust Law' in Irene Calboli and Maria Montagnani (eds), *Handbook of intellectual property research: lenses, methods, and perspectives* (Oxford University Press 2021), 121.

[8] Raju (n 6) 2; Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

[9] Raju (n 6) 1-2; Mukherjee (n 6) 8-9; Maggiolino and Zoboli (n 7) 121-122.

[10] Fiona Morton et al, 'Designing regulation for digital platforms: Why economists need to work on business models' (*CEPR*, 4 June 2020) <https://cepr.org/voxeu/columns/designing-regulation-digital-platforms-why-economists-need-work-business-models> accessed 22 October 2025, para 3; Juliette Caminade et al, 'An Economic Analysis of the Self-Preferencing Debate' (2022) 32/2 California Lawyers Association's Competition Newsletter 30, 37.

[11] Morton et al (n 10) paras 15ff; Caminade et al (n 10) 30.

[12] Graef (n 1) 450; Patrice Bougette et al, 'Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses' (2022) 2022/01 GREDEG Working Paper Series, 15; Jonathan Jacobson and Ada Wang, 'Competition or Competitors? The Case of Self-Preferencing' (2023) 38/1 Antitrust 13, 13.

[13] Case T-612/17 *Google LLC and Alphabet, Inc v European Commission* (General Court, 10 November 2021); Case C-48/22P *Google LLC and Alphabet, Inc v European Commission* (ECJ, 10 September

Authorities, such as the Italian Competition Authority, have also investigated self-preferencing, as seen in the case of *Amazon Logistics*.[14] Beyond these inquisitive actions taken by the EU Commission, courts, and National Competition Authorities, there is an ongoing debate on the need for ex ante regulation. Some even argue for the need for a self-preferencing ban, as recently implemented by the Digital Markets Act.[15]

Through comparative research and an evaluation of case law and the legal framework, I intend to assess self-preferencing and its effects from both legal and economic angles. By doing so, I will determine if and under what circumstances this behavior constitutes abuse of dominance. I will also analyze whether IPR exclusivity may justify such actions. The latter will focus on how competition and intellectual property law intersect and how to balance their protection.

2. The relationship between competition law and intellectual property law in the digital market

To establish the interface between competition law and IP law, one must first understand the subject matter of both, their objectives, and how the regulator intends to achieve those objectives through the available legal tools.

Competition law, to begin with, serves as the legal basis for regulatory measures that safeguard competition.[16] As such, its objective is largely the prevention of monopolistic practices, which negatively affect competition in a particular market.[17] A market in which competitors have a fair chance to compete is also a market in which innovation thrives. That is, because the existence of rivals may invoke a company's ambition to improve its goods and provide services of a higher standard than its competitors.[18] Fundamentally, protecting competition thus benefits the community as a whole: it ensures a certain level of fairness for competitors and positively affects the quality of

2024); Florian Heimann, 'The End of the Google Shopping Saga' (*Kluwer Competition Law Blog*, 28 October 2024) <https://legalblogs.wolterskluwer.com/competition-blog/the-end-of-the-google-shopping-saga/> accessed 22 October 2025, para 2.

[14] Provvedimento AGCM, *Amazon* (Caso A528 – *Logistica di Amazon*), Delibera dell'Autorità Garante della Concorrenza e del Mercato, 30 novembre 2021, n 29925; Graef (n 1) 450.

[15] 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) (DMA) [2022] OJ L 265, art 6(5).

[16] Raju (n 6) 1; Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

[17] Raju (n 6) 6; Maggiolino and Zoboli (n 7) 122.

[18] Maggiolino and Zoboli (n 7) 122.

goods and services, ultimately being of advantage to consumers.[19] To do so, competition law outlaws the abuse of a dominant position. The EU does so in art 102 TFEU, which states that '[a]ny abuse by one or more undertakings of a dominant position within the internal market […] shall be prohibited […] in so far as it may affect trade between Member States'.[20] The violation, therefore, does not lie in the position of market dominance itself, but rather in the abuse of such, which can occur through various behaviors as shown by the non-exhaustive list in art 102 TFEU.[21]

While, in simplified terms, competition law thus seeks to prevent monopolies, it has been historically argued that intellectual property law does somewhat the opposite:[22] By granting intellectual property rights, such as patents for inventions, copyrights for authored works, or trademarks for brands, legislators award exclusive rights to creators to protect their intangible property and incentivize innovation.[23] This exclusivity not only allows the respective owner to reap the benefits of their creation but also grants a "negative right" to exclude others from using or profiting from it.[24] Based on this exclusivity, the idea that intellectual property creates a temporary monopoly is not new. In 1829, the U.S. Supreme Court first linked patents and monopolies.[25] This was later confirmed in *International Salt*, where the Court argued that patent exclusivity constituted a monopoly and that ultimately all intellectual property rights automatically conferred a dominant position onto their holder.[26] Later, the Supreme Court extended this idea to copyrights,[27] while lower courts also applied it to trademarks[28].

Today, the concept that intellectual property automatically grants monopolistic status to its owner is outdated. Rather than assuming a monopoly or market dominance solely based on IP ownership, cases must be evaluated individually.[29] Still, examining the relationship between competition law and intellectual property law historically seems helpful to fully understand the fundamental difference between the two: While

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[19] Maggiolino and Zoboli (n 7) 122.

[20] Consolidated version of the Treaty on the functioning of the European Union (TFEU) [2012] OJ 326/47, art 102.

[21] TFEU, art 102.

[22] Arnold et al (n 7) 121; Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 122, 123; Herbert Hovenkamp, 'How IP Rights Create Competition in E-Commerce' (*Network Law Review*, 18 October 2024) <https://www.networklawreview.org/ip-rights-competition/> accessed 22 October 2025, para 2.

[23] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

[24] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

[25] Hovenkamp (n 22) para 2.

[26] Hovenkamp (n 22) para 6.

[27] Hovenkamp (n 22) para 6.

[28] Hovenkamp (n 22) para 6.

[29] Maggiolino and Zoboli (n 7) 124; Hovenkamp (n 22) para 7.

competition law restricts certain behavior to protect the existence of competitors and maintain a level playing field, intellectual property allows its owner to act exclusively in a manner that benefits themselves. Additionally, they may exclude competitors from taking advantage of their creation, potentially limiting their competitors' abilities.[30] While the laws thus differ vastly in their approaches, they are not contradictory. Instead, they coexist with the shared goal of benefiting the community by promoting innovation and technological advances. One could even see competition law and IP law as two sides of a scale, meant to be weighed up against each other to create a balance, allowing competitors to rely on the effectiveness of each one of them without being harmed by the other. This means that IP exclusivity cannot be unlimited in light of competition law. Although it may be an outdated approach to speak of automatic monopolies granted by intellectual property,[31] the risk of IP abuse remains. Art 8(2) of the TRIPS Agreement indirectly addresses this risk. It calls for measures against such abuse if it negatively affects trade or global technology transfer.[32] A dominant undertaking could therefore both act on exclusive IP rights and be abusive under competition law at the same time.[33]

Nevertheless, intellectual property rights not only have the capacity to hinder competition but can also foster it.[34] This is particularly the case in digital markets. That is because two-sided platforms, meaning platforms on which two groups of users come together to interact,[35] are traditionally seen as "winner takes all" businesses or natural monopolies. This is primarily due to their strong network effects: The more users are present on one side, the more valuable it becomes for users on the other. To illustrate, the value of a marketplace, a platform for sellers and buyers, will increase for sellers when the number of buyers grows. Ultimately, large platforms with a large user base gain immense advantages over smaller ones.[36]

Despite this natural phenomenon, competition in the digital market is often strong.[37] There are multiple reasons for this, and the existence of intellectual property rights plays a role in them:

[30] Maggiolino and Zoboli (n 7) 121-122.
[31] Hovenkamp (n 22) para 7.
[32] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (opened for signature 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299, art 8(2).
[33] Cf Maggiolino and Zoboli (n 7) 122.
[34] Maggiolino and Zoboli (n 7) 124; Hovenkamp (n 22) para 11.
[35] Jullien and Sand-Zantman (n 1) 2.
[36] Hovenkamp (n 22) para 8.
[37] Hovenkamp (n 22) para 9.

A first key factor for thriving competition in a given market is a high degree of product differentiation. If different varieties of a product or service in demand are offered, competition between those businesses will be promoted rather than hindered.[38] Rather than one large company profiting from network effects, product differentiation will ensure that consumer demand is directed towards multiple platforms, allowing individual consumer needs to be fulfilled. However, companies have a greater incentive to create innovative products with distinctive features rather than mere copies of goods that have already been developed by competitors, if a legal framework exists to protect the ideas behind those goods. Intellectual property law thus creates the boundaries that competitors may not cross, forcing them to put in the effort to create something novel.[39]

Another factor that can lead to pro-competitive effects for two-sided platforms in the digital market is multi-homing, where users participate in more than one platform or utilize more than one service provider, instead of focusing on only one.[40] Again, this would take dominance away from one particular platform and rather promote competition between multiple providers. While the existence of intellectual property rights may not have a direct effect on the platforms users choose, one could assume that the protective framework of IPRs still incentivizes owners of such rights to promote their products and services on several sites. After all, they can rely on the existing safety net providing legal protection rather than losing control over their IPR.

Last but not least, interoperability can facilitate competition in the digital market.[41] Interoperability is understood to be a network's capability to be somewhat compatible with other competing networks, allowing them to connect or exchange relevant data and other information.[42] Naturally, interoperability ensures that a single large platform cannot completely shut out competitors and put them at a competitive disadvantage.[43] Truthfully, one might assume that the exclusivity of intellectual property law conveys the complete opposite of the open systems that interoperable platforms would entail. However, it could be argued that through the safety guaranteed by the protection of their intellectual property rights, companies would be more eager to disclose relevant interoperability information. They could, for example, potentially resort to controlled

[38] Jullien and Sand-Zantman (n 1) 5-6; Hovenkamp (n 22) para 9.
[39] Jullien and Sand-Zantman (n 1) 6; Hovenkamp (n 22) para 9.
[40] Jullien and Sand-Zantman (n 1) 6; Hovenkamp (n 22) para 10.
[41] Jullien and Sand-Zantman (n 1) 6.
[42] Jullien and Sand-Zantman (n 1) 6.
[43] Jullien and Sand-Zantman (n 1) 6.

disclosure through the issuance of licenses, ensuring legal remedies in case of violations.

While, therefore, the anti-competitive effects of large networks in the digital market can be mitigated in markets characterized by product differentiation, multi-homing, and interoperability, recent years have shown that this is not always the case. Over the past few decades, “Big Tech” companies, such as Google, Amazon, and Apple, have evolved and have undoubtedly established dominant positions in their respective markets.[44] For some of their platforms, product differentiation, multi-homing, and interoperability are simply not the reality. Sometimes, this is because of the nature of a particular platform. For example, Google’s search engine does not provide much room for product differentiation.[45] In other cases, large companies outright refuse to provide necessary information to competitors that is needed for interoperability. This happened in the case of *Microsoft*, in which Microsoft refused to provide specifications for its operating system and based its argument on the exclusivity of its intellectual property rights.[46] As seen, IPR can not only facilitate competition by promoting and incentivizing businesses to participate in pro-competitive behaviors. It may also be used by already dominant platforms to abuse their position by protecting their creations and brand, as well as refusing to license their innovative work.[47] By doing so and expanding their position, in which they benefit from multi-sided network effects strengthened by brand loyalty from consumers, competitors have a much more difficult time staying afloat in the market. To compete, they would have to overcome these effects through costly means, such as additional research and extensive advertising.[48] These harmful consequences can be further exacerbated if dominant platforms, which primarily serve as intermediaries, choose to vertically integrate by not only offering a space for third-party platforms but also providing their own services, while continuing to capitalize on their dominant position and protecting their exclusive rights.[49] Frankly, vertical integration by itself is not necessarily harmful for competition and is a rather common occurrence, considering it can lead to immense price reduction through the avoidance of double marginalization, as well as improve internal coordination and

[44] Jullien and Sand-Zantman (n 1) 2.
[45] Hovenkamp (n 22) para 12.
[46] *Microsoft* (n 4).
[47] Cf Maggiolino and Zoboli (n 7) 124.
[48] Cf Maggiolino and Zoboli (n 7) 124.
[49] Morton et al (n 10) para 3; Caminade et al (n 10) 37.

knowledge-sharing, but also ensure the constant supply of high-quality products or incentivize competitors to improve their own goods and services.[50] Nevertheless, companies may further abuse their dominance by leveraging their advantageous position and technological advantages, as well as their competitors' dependence on their platform, to award preferential treatment to their own products while downgrading competitive goods, possibly resulting in vertical foreclosure.[51]

While this act of complementary innovation through the expansion of a platform's activity to an adjacent, often downstream market can thus have pro-competitive effects, it can also lead to the opposite by giving large platforms an opportunity to further strengthen and even abuse their dominant position and steering consumers away from competitors and towards their own products.[52]

All in all, innovation is an objective both competition law and IP law seek to achieve, as a high level of innovation is generally associated with a thriving market and consumer welfare.[53] While intellectual property law realizes this aim by granting a position of exclusivity to the IP's holder, allowing them to shut out competitors from profiting from it,[54] competition law does so by restricting undertakings in their behavior and preventing them from abusing their dominance to maintain a high level of competition[55]. Despite their different approaches, competition law and IP law are, in many ways, complementary, as evidenced by the pro-competitive effects that IP protection has in the digital market. However, IP rights can also contribute to an undertaking's dominant position on the market and can be abused in a way that would warrant interference under competition law. Since it is not always simple to tell how far the exclusivity granted by those rights reaches and to what degree leveraging tactics by dominant platforms can be justified through this exclusivity, or at what point the regulator has to intervene, it is necessary to take a closer look at the behavior of platforms on the digital market and assess those cases accordingly. In any case, the aim should be to navigate a balance between competition law and intellectual property law, as only a balanced approach can achieve the ultimate goal of a functioning market without either harming competition or intervening too strongly in the fundamental rights of competitors.

[50] Jullien and Sand-Zantman (n 1) 27-28.
[51] Jullien and Sand-Zantman (n 1) 29; Morton et al (n 10) paras 15ff; Caminade et al (n 10) 30.
[52] Jullien and Sand-Zantman (n 1) 29; Morton et al (n 10) paras 15ff; Caminade et al (n 10) 30.
[53] Raju (n 6) 1-2; Mukherjee (n 6) 4, 8; Maggiolino and Zoboli (n 7) 121.
[54] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[55] Raju (n 6) 1; Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

3. Self-preferencing

3.1. Overview

After establishing the effects of vertical integration on competition, this next section focuses on dual-mode platforms that give preferential treatment to their own goods and services – a practice also known as self-preferencing. This form of anti-competitive conduct has been among the most widely discussed issues in modern competition law.[56] By definition, self-preferencing refers to a firm favoring its own products over those of third-party vendors on its platform.[57] It essentially requires three elements: a platform connecting businesses with consumers, vertical integration of the platform, and acts of giving preferential treatment to the platform's own products, whether they are of the platform's individual brand or sold by the platform as a first-party retailer.[58]

The term "preferential treatment" lacks a precise definition, as the behaviors platforms use to favor their products are diverse. They may range from increasing visibility for their own products to actions that exclude competitors entirely.[59] Examples include displaying a platform's own goods more prominently, pre-installing a product on a device, using the data acquired from third-party interactions to boost sales, or charging additional fees to third-party sellers.[60] Despite their variety, these behaviors share a common thread: they give the platform's own offerings an advantage over those of competitors.

Considering the broadness of the term "self-preferencing", some scholars suggest its most extreme forms overlap with behaviors classed by EU case-law as other types of abuse.[61] According to this theory, an utter refusal to deal, margin squeezing, and contractually tying a product to another could be classified as self-preferencing.[62] While

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[56] Bougette (n 12) 1.

[57] Michael Salinger, 'Self-Preferencing' (2020) The Global Antitrust Institute Report on the Digital Economy 10 <https://ssrn.com/abstract=3733688> accessed 22 October 2025, 329; Bruce Hoffman and Garrett Shinn, 'Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem' (2021) CPI Antitrust Chronicle June 2021 <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/06/2-Self-Preferencing-and-Antitrust-Harmful-Solutions-for-an-Improbable-Problem-By-D.-Bruce-Hoffman-Garrett-D.-Shinn> accessed 22 October 2025, 3; Herbert Hovenkamp, 'Antitrust and Self-Preferencing' (2023) 38/1 Antitrust 5, 5.

[58] Hoffman and Shinn (n 57) 3.

[59] Aurelien Portuese, '"Please, Help Yourself": Toward a Taxonomy of Self-Preferencing' (*ITIF*, 25 October 2021) <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing> accessed 22 October 2025, 1; Hovenkamp, ‚Antitrust and Self-Preferencing' (n 57) 5.

[60] Portuese (n 59) 1-2.

[61] Thomas Bowman and Kadambari Prasad, 'What constitutes self-preferencing and its proliferation in the digital markets?' (*GCR*, 22 September 2025) <https:// globalcompetitionreview.com/guide/digital-markets-guide/fifth-edition/article/what-constitutes-self-preferencing-and-its-proliferation-in-digital-markets> accessed 22 October 2025, para 3.

[62] ibid.

it seems that those methods are indeed capable of putting the products of an already dominant platform in a better position, the EU has been adamant in considering self-preferencing an independent form of abuse.[63]

Moreover, the prevailing view is that self-preferencing is a “milder” form of discrimination compared to, for instance, refusal to deal. It stands to reason that this is the case, because rather than completely shutting out competitors, platforms choose not to treat them as favorably as themselves – an approach that aligns with normal, competitive behavior.[64] After all, companies naturally seek to elevate their own success and attract consumers to their products.

In any case, the economic reality shows that self-preferencing is not always sinister.[65] Companies may simply seek technological advantages by integrating their own products on their platform, or leverage their proprietary knowledge to facilitate vertical integration and help boost the downstream market.[66] Moreover, they might prefer to implement their own goods and services rather than relying on many third-party providers, aiming to protect the security of their intellectual property or to avoid the liability of managing multiple third-party standards.[67] Ultimately, it is in any businesses interest to attract consumers, which they achieve by offering an adequate selection of high-quality goods and services.[68] By entering into the downstream market and offering their own products, platforms can maintain these standards and keep consumers from leaving.

That being said, while self-preferencing in itself may not be an unusual business practice, issues arise when there is a significant power imbalance between the platform and its competitors. Dominant platforms, which profit from the strong network effects discussed in chapter 2, already have significant advantages over their competitors.[69] Naturally, a situation in which an undertaking is not only dominant but also provides a platform necessary for smaller businesses to be seen and then chooses to offer its

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[63] Cf DMA, art 6(5); *Google Shopping* (Commission) (n 4).

[64] Erik Hovenkamp, ‘Proposed antitrust reforms in Big Tech: What do they imply for competition and innovation?’ (2022) CPI Antitrust Chronicle July 2022 <https://www.competitionpolicyinternational.com/wp-content/uploads/2022/07/2-PROPOSED-ANTITRUST-REFORMS-IN-BIG-TECH-WHAT-DO-THEY-IMPLY-FOR-COMPETITION-AND-INNOVATION-Erik-Hovenkamp.pdf> accessed 22 October 2025, 5; Hovenkamp, ‚Antitrust and Self-Preferencing’ (n 57) 7.

[65] Cf Salinger (n 57) 333; Hoffman and Shinn (n 57) 7; Portuese (n 59) 2; Jacobson and Wang (n 12) 13.

[66] Salinger (n 57) 333; Hoffman and Shinn (n 57) 6-7.

[67] Salinger (n 57) 333.

[68] Salinger (n 57) 333; Hoffman and Shinn (n 57) 6-7.

[69] Jullien and Sand-Zantman (n 1) 2; Hovenkamp (n 22) para 8.

own products on this platform, essentially competing with these businesses, is at a higher risk of being abused.[70] Specifically, the undertaking may deliberately exacerbate the existing power imbalance by leveraging its advantages to steer consumers towards its own products and away from competitors, ultimately extending its dominance to the downstream market and potentially triggering vertical foreclosure.[71]

Nevertheless, even in cases where platforms already enjoy dominance in a market and then extend their activities to an adjacent market, malicious intent cannot be automatically assumed. After all, EU law does not outlaw dominance in itself,[72] and reaping the rewards of economic strength is not, per se, nefarious.[73] Presuming malice often overlooks the fact that even dominant platforms typically seek long-term consumer satisfaction, which may not be achieved by offering a firm's own products with the sole purpose of strengthening their market position and harming competitors. While this may lead to short-term profit increases, it might harm economic success in the long run if consumer needs are not met.[74]

It should also be noted that evaluating a platform's intent solely by its outward behavior is nearly impossible. Platforms may be similar in their function as intermediaries and engage in self-preferencing. However, their unique business models must be considered when analyzing their intentions.[75] To illustrate, firms like Apple rely largely on consumer-side monetization by, for example, selling devices or offering paid subscription services, while platforms like Google focus on free services that are monetized through advertising.[76] The business model differences suggest that companies like Apple depend more on high-quality products that consumers are willing to pay a higher price for. In contrast, platforms like Google do not share this primary objective, affecting Google's ways of interacting with third-party businesses differently from Apple's.[77] One might thus assume that Apple, due to its reliance on high quality, might have less systematic bias towards its own products. This could mean that Google may have a greater incentive to self-preference for reasons other than quality increase.[78]

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70 Cf Salinger (n 57) 352.
71 Cf Jullien and Sand-Zantman (n 1) 29; Morton et al (n 10) paras 15ff; Caminade et al (n 10) 30.
72 Cf TFEU, art 102.
73 Hoffman and Shinn (n 57) 9.
74 Hoffman and Shinn (n 57) 7.
75 Morton et al (n 10) para 19.
76 Morton et al (n 10) para 7.
77 Morton et al (n 10) para 13.
78 Morton et al (n 10) paras 16-18.

While this might be true, it cannot be denied that in the past decade, several platforms with different business models have faced scrutiny by the EU Commission for self-preferencing behavior. This includes both Google and Apple.[79] That is because self-preferencing can, due to its discriminatory nature, harm competition, albeit this might not be a company's sole intent. When assessing a self-preferencing case under competition law, it is therefore necessary to evaluate the behavior from different angles and weigh its competitive effects. The next chapter will focus on these effects and analyze self-preferencing in the light of art 102 TFEU.

3.2. Impact of self-preferencing on fair competition

Art 102 TFEU does not outlaw mere dominance in a particular market. Rather, only the abuse of such dominance constitutes an infringement.[80] To assess, whether self-preferencing can be interpreted as abuse of a dominant position, it is necessary to examine its specific elements: the existence of a dominant platform that vertically integrates and grants favorable treatment to its own products in the downstream market.[81] Cast aside the question of dominance - which is not the focus of this thesis and will only be briefly mentioned in chapters 4 and 5 - the potential abusiveness of self-preferencing is essentially rooted in the fact that a platform, as an intermediary, on which businesses depend to reach consumers,[82] also competes with those same businesses. It does so by offering its own products and services and giving those goods and services favorable treatment, putting its competitors at a disadvantage.[83] In other words, companies that rely on a particular dominant platform to be visible to consumers are suddenly forced to compete with the platform in the downstream market. Their competitive success may suffer because the platform leverages its upstream dominance and internal knowledge to promote its own products and services, thereby putting them at an unfair advantage.

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[79] Cf *Google Shopping* (Commission) (n 4); *Apple – App Store Practices (music streaming)* (n 4).
[80] Cf TFEU, art 102.
[81] Hoffman and Shinn (n 57) 3.
[82] Hoffman and Shinn (n 57) 3.
[83] Rod Carlton and Rikki Haria, 'Self-Preferencing – legal and regulatory uncertainty for the digital economy (and beyond?)' CPI Antitrust Chronicle June 2020 <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/06/Self-Preferencing-—-Legal-and-Regulatory-Uncertainty-for-the-Digital-Economy-and-Beyond-Carlton-Haria.pdf> accessed 22 October 2025, 2; Salinger (n 57) 329; Hoffman and Shinn (n 57) 3; Giuseppe Colangelo, 'Antitrust Unchained: The EU's Case Against Self-Preferencing' (*GRUR International*, 22 September 2022) <https://laweconcenter.org/resources/antitrust-unchained-the-eus-case-against-self-preferencing/> accessed 22 October 2025, para 2; Hovenkamp, 'Antitrust and Self-Preferencing' (n 57) 5.

There are two factors to consider: Firstly, the competitors at risk depend on the dominant platform. To be noticed by consumers, they often have no choice but to offer their products through this platform.[84] While other possibilities might exist, such as using different platforms or offering goods and services through a company's own website, those options may not be economically viable.[85] This is especially true for many SME's that have not established a notable brand reputation or other means of consumer loyalty.[86] Additionally, because the platform dominates the upstream market, smaller companies benefit considerably from the large network effects associated with this dominance. As a result, using other platforms becomes less appealing or even economically unfeasible.[87]

Given this dependent relationship, self-preferencing as abusive behavior partly draws on the Essential Facilities Doctrine.[88] This principle holds that a dominant company with an essential, indispensable facility must grant competitors access to it, despite general contractual freedom.[89] While self-preferencing, as described in chapter 3.1, is usually not a case involving the denial of access, the dependence of competitors makes the platform "essential" to them in a similar way.[90]

The second factor that needs to be considered is the discriminatory behavior. While under the Essential Facilities Doctrine, the discrimination lies in an outright refusal to let competitors access the facility,[91] typical self-preferencing cases are scenarios in which competitors do indeed have access to the platform but are treated in a less favorable way than the dominant platform treats its own products.[92] This is achieved by the dominant platform vertically integrating, not only competing with third-party

[84] Graef (n 1) 448-449; Colangelo (n 83) para 2.

[85] Cf the General Court's elaborations on the lack of alternatives for Google's search pages; *Google Shopping* (General Court) (n 13) para 227; see also *Google Shopping* (Commission) (n 4) para 222.

[86] Cf *Google Shopping* (Commission) (n 4) para 222.

[87] Colangelo (n 83) para 2.

[88] Bo Vesterdorf, 'Theories of self-preferencing and duty to deal – two sides of the same coin?' (2015) 1/1 Competition Law & Policy Debate 4, 7.

[89] Cf Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7817.

[90] *Google Shopping* (Commission) (n 4) para 222; *Google Shopping* (General Court) (n 13) para 227; Graef (n 1) 448-449; Colangelo (n 83) para 29ff.

[91] *Bronner* (n 89).

[92] Carlton and Haria (n 83) 2; Salinger (n 57) 329; Hoffman and Shinn (n 57) 3; Hovenkamp, 'Antitrust and Self-Preferencing' (n 57) 5.

businesses but also potentially putting them at a competitive disadvantage through behaviors that may steer consumers towards their own products.[93]

Nevertheless, the vertical integration of platforms is not always harmful to competition and may even have pro-competitive effects.[94] For starters, platforms offering their own products may improve efficiency and reduce transaction costs. That is, because the price calculation of the respective products and services offered by the dominant firm on its own platform does not need to account for both the profit margin of the upstream platform provider and the downstream seller, considering that the seller and platform provider are the same entity. This phenomenon, known as double marginalization, can be avoided through vertical integration.[95] Moreover, some scholars believe that vertical integration can create a higher incentive for third-party businesses to innovate and improve their products, enabling them to compete effectively. This might happen to an even higher degree if the dominant platform enhances its own products, consequently motivating competitors to do the same.[96] Promoting innovation is, after all, one of the primary objectives of competition law, as it can significantly contribute to consumer welfare.[97]

On the other hand, the anti-competitive effects of vertical integration are also discussed in the literature. In fact, some scholars disagree with the theory of vertical integration advancing innovation, as they assume the exact opposite. Specifically, some argue that a platform switching to a dual-mode business model poses a threat to downstream competitors rather than incentivizing them to improve. As a result, competitors would feel discouraged from putting in the effort, particularly if they fear their efforts might be in vain, which may be the case if the platform gives its own products an unfair advantage through self-preferencing behavior.[98]

While it is therefore not always clear whether vertical integration affects competition positively or negatively, it seems logical to assume that its impact may depend on the specific behaviors displayed by the vertically integrated platform. While it is natural for a firm to promote its own products in the market,[99] certain methods of self-preferencing

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[93] Carlton and Haria (n 83) 2; Salinger (n 57) 329; Hoffman and Shinn (n 57) 3; Colangelo (n 83) paras 2-4; Hovenkamp, ‘Antitrust and Self-Preferencing’ (n 57) 5.

[94] Carlton and Haria (n 83) 2; Ferrari (n 2) 56, 61; Bougette (n 12) 15; Colangelo (n 83) para 15; Bowman and Prasad (n 61) para 15.

[95] Jullien and Sand-Zantman (n 1) 27-28.

[96] Bowman and Prasad (n 61) para 26.

[97] Arnold et al (n 7) 122; Raju (n 6) 1-2; Mukherjee (n 6) 4, 8; Maggiolino and Zoboli (n 7) 121.

[98] Bowman and Prasad (n 61) para 25.

[99] Jacobson and Wang (n 12) 13.

may cross the line into unfair competition. Determining whether platforms are prone to engage in such behavior can be a complex task, though some indicators for this tendency exist:

One measurement is the level of upstream competition.[100] Due to the strong network effects of large intermediary platforms – especially in markets with little product differentiation, low multi-homing, and minimal interoperability - platforms may find themselves in a monopoly-like position, facing weak upstream competition. As a result, such platforms may have more incentive to seek unfair downstream advantages through abusive conduct. After all, weak upstream competition leaves third-party sellers with few alternatives, heightening dependence on the dominant platform.[101] Conversely, strong upstream competition increases the likelihood that vertical integration, even with self-preferencing, results in pro-competitive outcomes.[102] Thus, there is a strong correlation between the dependency of third-party businesses on dominant platforms, intensified by weak upstream competition, and the platform's likelihood to engage in self-preferencing that exceeds fair competition and could be deemed abusive under art 102 TFEU.

A second indicator of a platform being likely to engage in anti-competitive self-preferencing, as some scholars argue, is the level of consumer demand.[103] This idea is based on the theory that low consumer demand makes platforms less likely to engage in vertical integration for the expansion of their business. Instead, they are more likely to vertically integrate and favor their own products only to exploit their consumer base by foreclosing the downstream market.[104] Such vertical foreclosure could then harm not only competitors but also consumers, as product quality would be overlooked in favor of manipulating the market for the platform's own gain.[105]

After establishing the positive and negative effects of vertical integration and explaining the higher likelihood of abusive self-preferencing where platforms face weak upstream competition and lower consumer demand, it is necessary to clarify when specifically self-preferencing behavior remains market-oriented and when it reaches abusiveness under art 102 TFEU. First, it should be pointed out that the impact of self-preferencing on competition is a widely discussed topic and that opinions diverge in the relevant

[100] Portuese (n59) 6; Bowman and Prasad (n 61) para 19.
[101] Bowman and Prasad (n 61) para 12.
[102] Bowman and Prasad (n 61) para 19.
[103] Bowman and Prasad (n 61) para 33.
[104] Bowman and Prasad (n 61) para 33.
[105] Bowman and Prasad (n 61) para 33.

literature. Some economists view self-preferencing not only as a natural part of competition but even as having a positive effect on the market. That is, because dual-mode platforms that steer consumers towards their own products can achieve higher profits from those goods. Consequently, they might afford to charge lower commissions to third-party businesses, selling through the platform. This could lower prices and attract more consumers.[106] However, some scholars disagree. They argue that self-preferencing harms price competition between the platform and third-party sellers. According to this view, consumers are steered towards the platform's more expensive products and away from more affordable goods sold by competitors, leading to higher overall prices.[107]

While opinions on the market effects of self-preferencing thus differ, there is a general consensus on when self-preferencing undoubtably becomes abusive. Particularly, that is, when it is indirectly predatory, exploitative, or a form of anti-competitive leveraging.[108] For example, indirectly predatory behavior can involve a dominant platform urging third-party businesses to also use its complementary services, such as logistics. This could result in those providers relying solely on the platform's services, thus single-homing, ultimately harming competing service providers by crowding them out.[109] Consequently, competitors may be forced to raise prices to remain viable, making them less attractive and potentially facing horizontal foreclosure.[110]

Aside from horizontal foreclosure in the upstream market, the previous elaborations on self-preferencing also show potential negative effects on competition in the downstream market. Exploitative practices with this effect can include algorithm manipulation through dark patterns that make third-party providers less visible and less accessible.[111] The dominant firm may then force third-party sellers to enter into costly contractual relationships with the platform to increase their visibility. This can result in a wealth transfer that benefits the dominant platform.[112]

Other behaviors that can fall under self-preferencing, although they are often investigated differently, such as under fraud, are acts leading to consumer deception. A platform may, for example, grant itself preferential treatment by using consumer data

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[106] Bowman and Prasad (n 61) para 29.
[107] Bowman and Prasad (n 61) para 29.
[108] Bougette (n 12) 2-3, 8.
[109] Bougette (n 12) 8.
[110] Bougette (n 12) 3-4, 8.
[111] Bougette (n 12) 4.
[112] Bougette (n 12) 4.

acquired not only from its own interactions with consumers but also from those of third-party sellers. Such data is not equally available to all third-party sellers, putting them at a disadvantage. For this reason, the use of such data may be considered self-preferencing. However, consumers might not realize that the platform uses their data from interactions with third-party businesses, potentially deceiving them.[113] As mentioned, this behavior is clearly abusive in its own way. Nevertheless, its classification as fraud and deceit often outweighs its harmful effects on competition.[114] While some of the examples mentioned are obviously abusive and harmful to competition, it is not always simple to conclude that a dominant position is abused. Scenarios where a platform merely practices leveraging are not outlawed by art 102 TFEU. However, if this behavior is discriminatory enough to harm upstream or downstream competition, or even lead to horizontal or vertical foreclosure, it is typically considered abusive.[115] All in all, self-preferencing needs assessment on a case-by-case basis, carefully weighing possible positive and negative effects on competition. When evaluating these cases, it is also essential to consider potential justifications for behavior that may appear abusive. In that regard, the next chapter will explore the idea of intellectual property potentially justifying differentiated treatment in favor of a platform's own products and services.

3.3. Self-preferencing from an IP law perspective

The central idea behind intellectual property, as discussed in chapter 2, is to grant its owner an exclusive right to use their creations and exclude others.[116] Consequently, even in the context of promoting competition, a platform is not generally required to help competitors by granting them equal access to its business and the innovations behind it.[117] Instead, the owner may leverage their platform and associated patents, trademarks, copyrights, or trade secrets to promote their own products, without having to allow all competitors to benefit equally or gain similar profits from their innovative

[113] Jacobson and Wang (n 12) 18.
[114] Jacobson and Wang (n 12) 18.
[115] Bougette (n 12) 2-3, 8; Jacobson and Wang (n 12) 13, 18-19.
[116] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[117] Cf Charter of Fundamental Rights of the European Union (CFREU) [2012] OJ 326/391, arts 16, 17; Portuese (n 59) 1-2.

efforts. This principle is reinforced by the fact that companies are generally free to decide whom they engage with in business.[118]

All this suggests that self-preferencing is generally unproblematic from the perspective of a company merely reaping the rewards of its innovations. Nevertheless, history shows that restricting self-preferencing behaviors, even regarding an undertaking using its intellectual property, is not a modern phenomenon. While this paper focuses on self-preferencing in the EU, it seems necessary to first take a brief look at the history of American antitrust law, as early connections between IP law and self-preferencing can be found there. For instance, in 1850, the United States Supreme Court in *Wilson v Simpson* held that a person purchasing a patented wood planning machine could not be contractually forced by the patent license to only use the patentee's own replacement blades.[119] This case, which is an example of a seller unlawfully forcing a buyer to use their complementary goods rather than being able to buy from competitors, served as the basis for the doctrine of patent exhaustion, allowing users of patented goods to choose their own aftermarket.[120] Although the case differed from modern self-preferencing cases since it did not involve a digital intermediary platform, it could still be considered somewhat similar: it presents a scenario of a patent licensee attempting to grant preferential treatment to their own replacement blades. Furthermore, the doctrine of patent exhaustion was later reinforced by Section 3 of the Clayton Act, which explicitly stated that it was unlawful to sell patented or unpatented goods on the condition that the buyer does not purchase goods from a competitor, if such behavior had a negative effect on competition.[121] Some argue that this regulatory provision constituted one of the first rules on self-preferencing.[122]

Aside from this historical approach, which demonstrates that judicial and regulatory restrictions on self-preferencing have existed despite the exclusivity granted by IP rights, one should take into consideration that the modern concept of self-preferencing stems – at least in part – from the underlying principles of the Essential Facilities Doctrine.[123] Under this principle, an undertaking could be forced to allow a competitor access to its essential facilities.[124] As pointed out in case law, forcing an undertaking

[118] Cf *United States v Colgate & Co*, 250 US 300, 307 (1919); Hovenkamp, ‚Antitrust and Self-Preferencing' (n 57) 5.
[119] *Wilson v Simpson*, 50 US 109 (1850).
[120] Hovenkamp, ‚Antitrust and Self-Preferencing' (n 57) 5.
[121] Clayton Act 15 USC § 14; Hovenkamp, ‚Antitrust and Self-Preferencing' (n 57) 6.
[122] Hovenkamp, ‚Antitrust and Self-Preferencing' (n 57) 6.
[123] Jacobson and Wang (n 12) 16.
[124] Cf *Bronner* (n 89).

to directly deal with competitors conflicts with the fundamental rights granted by IP law.[125] For this reason, European courts apply strict criteria to cases of refusal-to-deal or refusal-to-license, which must be fulfilled to justify such a conclusion.[126] After all, intellectual property protection aims to safeguard innovation in the market.[127] This purpose must be considered in conjunction with rules on fair competition.

While the EU Commission and European Courts view self-preferencing as distinct from refusal-to-deal scenarios, its roots in the Essential Facilities Doctrine and its similarities - discussed in chapter 3.1 - cannot be denied. Yet, cases of self-preferencing have consistently not been subject to the same or similarly strict criteria as cases involving the Essential Facilities Doctrine.[128] Big Tech platforms like Google have been arguing that self-preferencing should face similar scrutiny.[129] Generally, a creator should have the right to use and promote their own creations, without being required to offer the same advantages to others. This is the exclusivity that IP law guarantees.[130] That being said, one should ask if it is really the responsibility of a dominant firm to create a level playing field and how strict the criteria should be when evaluating self-preferencing, a behavior that is, to some degree, natural in competition, as a potential violation of competition law that requires intervention by authorities. When doing so, it also seems necessary to discuss how similar these criteria should be to those applied in refusal-to-deal cases, given the striking similarities to self-preferencing, which many view as simply a less severe form of the same discriminatory behavior. Ultimately, it seems logical to at least consider the exclusivity guaranteed by IP as a potential justification and therefore weigh it against the conduct's effects on competition. After all, the exclusive right for a firm to control the use of its innovations naturally allows the firm to promote its own products and maximize the value of its property.

The next chapter will examine these questions from the perspectives of the EU Commission, European courts, and National Competition Authorities by discussing two landmark cases that evaluate the behavior of two major platforms: Google and Amazon.

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[125] Cf Joined Cases C-241/91 P and 242/91 P *RTE and ITP v Commission of the European Communities* [1995] ECR I-808, para 49.

[126] Cf *Magill* (n 125); *Bronner* (n 89).

[127] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

[128] Cf *Google Shopping* (Commission) (n 4) para 651.

[129] *Google Shopping* (Commission) (n 4) para 645.

[130] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.

4. The cases *Google Shopping* and *Amazon Logistics*

The EU's assessment of self-preferencing is best illustrated by examining the behaviors of two major platforms and the associated legal assessments by the EU Commission. The first case, *Google Shopping*, stands out as a legal precedent for defining self-preferencing as a standalone abuse.[131] It is also a notably lengthy case, resulting in a significant fine. The Commission's investigations alone took years, starting in 2010[132] and concluding seven years later with a 2.4 billion Euro fine.[133] Google then appealed twice – first before the General Court[134] and then before the European Court of Justice[135] both of which essentially upheld the fine. The behavior found to be abusive under art 102 TFEU consisted of Google giving its own shopping comparison services greater prominence and demoting competitors.[136]

A second focus of this thesis are Amazon's self-preferencing tactics. These actions have led to the initiation of multiple proceedings. What is interesting about this case is that investigations of Amazon's behavior have not only been conducted by the EU Commission in *Amazon Marketplace* and *Amazon Buy Box*,[137] but also by the Italian Competition Authority, hereinafter also referred to as ICA, in *Amazon Logistics*[138]. The Commission has thus far not fined the platform but only issued a commitment decision after initiating investigations in 2019. Nevertheless, it is still interesting to evaluate Amazon's behavior, particularly in light of *Google Shopping*, where the proceedings have concluded with the ECJ's final decision in September 2024.[139]

The next section will summarize both *Google Shopping* and the Amazon cases. It will focus especially on the arguments presented by the parties and on the procedure used to determine the existence of an abuse of a dominant position.

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[131] Carlton and Haria (n 83) 3; Portuese (n 59) 13; Massimo Motta, 'Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases' (2022) BSE Working Paper 1374 <https://bse.eu/sites/default/files/working_paper_pdfs/1374_0.pdf> accessed 22 October 2025, 8; Heimann (n 13) para 1.

[132] *Google Shopping* (Commission) (n 4) para 43.

[133] Carlton and Haria (n 83) 3.

[134] *Google Shopping* (General Court) (n 13).

[135] *Google Shopping* (ECJ) (n 13).

[136] Carlton and Haria (n 83) 3.

[137] *Amazon Marketplace* and *Amazon Buy Box* (n 4).

[138] Provvedimento AGCM, *Amazon*, n 29925 (n 14).

[139] *Google Shopping* (ECJ) (n 13).

4.1. Case summaries

4.1.1. *Google Shopping*

Google, the subsidiary of Alphabet, which was founded in 2015 and is now Google's umbrella company, started to be investigated by the EU Commission after multiple companies had lodged complaints about its behavior.[140] The baseline of the accusation of anti-competitive behavior was the fact that Google enjoys a dominant position in essentially all national markets for general search engines. This dominance is based on their high market shares, their brand influence, the lack of multi-homing present in this particular market, and the existence of strong entry barriers for potential competitors.[141] The other relevant market in the case was the market for comparison shopping services. That is because Google not only offered its search engine to third-party comparison shopping services but also started its own comparison shopping service. They then displayed this service on their platform, essentially competing with those third-party businesses.[142]

Google's particular behavior can be broken down into three key actions, each reflecting preferential treatment toward its own comparison shopping service. Firstly, while rivals' comparison shopping services appeared only on Google's general search results pages, Google's own service was also featured on special search result pages, which offered more than a basic description. Particularly, they included additional pictures and information, thereby increasing consumer appeal.[143] Secondly, Google used a different ranking algorithm for its own comparison shopping service.[144] Thirdly, this algorithmic difference resulted in Google's service being displayed above all or at least among the top search results.[145]

The Commission argued that this behavior was anti-competitive self-preferencing and thus an abuse of Google's dominant position. The concern was that it would lead to a decrease in traffic for competitors and an increase in traffic for Google's own services.[146] This could ultimately result in the foreclosure of competing comparison shopping services, which might be forced to stop providing their services. That would allow Google to increase fees for merchants, which could then be passed on to the

[140] *Google Shopping* (Commission) (n 4) paras 5, 43.
[141] *Google Shopping* (Commission) (n 4) paras 271-272.
[142] *Google Shopping* (Commission) (n 4) para 379.
[143] *Google Shopping* (Commission) (n 4) paras 371-372.
[144] *Google Shopping* (Commission) (n 4) para 379.
[145] *Google Shopping* (Commission) (n 4) para 379.
[146] *Google Shopping* (Commission) (n 4) paras 591ff.

consumer through higher prices.[147] The Commission also argued that the behavior risked harming competition by reducing innovation: Competitors would feel less incentive to innovate due to the threat of being foreclosed and Google would no longer have to compete on the merits, also disincentivizing innovation on Google's part.[148] Overall, the Commission concluded that Google's behavior would have anti-competitive effects both in the market for general search services and the market for comparison shopping services.[149]

In Google's counterarguments, it essentially relied on the belief that the scenario at hand was a case of refusal to supply. This, they argued, would warrant the application of the criteria established for the Essential Facilities Doctrine in the *Bronner* case.[150] They reasoned this by claiming that the EU Commission was effectively forcing Google to grant its competitors access to a significant proportion of its general search results pages. However, these pages were not indispensable, as required by the Bronner criteria.[151] Furthermore, there was no precedent of Google's behavior to constitute a different type of abuse. This further strengthened Google's argument to apply the Essential Facilities Doctrine.[152] In any case, Google argued that they only displayed their services in this particular way to improve product design, and harming competition was never their intention.[153]

These arguments were rejected by the EU Commission, which ruled that the behavior in question was not a case of refusal to supply. Instead, it was found to be an independent type of abuse that did not require the application of the Bronner criteria.[154] That is, because Google's behavior was not a passive refusal, but an active act of discrimination against competitors by favoring its own services.[155] For this reason, the Commission did not force Google to enter into a contractual relationship with competitors, as is typically required under the Essential Facilities Doctrine. Rather, it urged Google to stop this discriminatory behavior.[156] Further, even if Google intended

[147] *Google Shopping* (Commission) (n 4) para 594.
[148] *Google Shopping* (Commission) (n 4) para 595.
[149] *Google Shopping* (Commission) (n 4) paras 608, 641.
[150] *Google Shopping* (Commission) (n 4) para 645.
[151] *Google Shopping* (Commission) (n 4) para 645.
[152] *Google Shopping* (Commission) (n 4) para 646.
[153] *Google Shopping* (Commission) (n 4) para 647.
[154] *Google Shopping* (Commission) (n 4) para 651.
[155] *Google Shopping* (Commission) (n 4) para 650.
[156] *Google Shopping* (Commission) (n 4) para 651.

to improve its design, the case could still be assessed under competition law and found to be abusive.[157]

Since any behavior that is abusive under art 102 TFEU may still be justified, Google provided several potential justifications for its actions. First, they argued that their actions were simply adjustments needed to ensure the quality of their search result pages. They essentially claimed this positioning improved the quality for users.[158] Google further argued that it would actually harm competition to place other comparison shopping services equally to Google's, as consumers expected Google to promote its own service over those of competitors.[159] Moreover, Google contended that the EU Commission's actions infringed on its intellectual property rights and its freedom to conduct its business, both of which were protected by Google's fundamental rights.[160] Lastly, Google claimed it lacked the technological capability to rank other comparison shopping services like its own.[161]

The Commission found these justifications insufficient. It never forbade Google from adjusting its mechanisms to benefit consumers – Google could merely not apply different mechanisms to its own services compared to others,[162] nor display its own services more favorably[163]. Moreover, Google had not provided evidence that consumers only expected to see its own comparison shopping service. In fact, Google had not been transparent about using different algorithms for its own services and those of its competitors.[164] While there was an interference with Google's fundamental rights, including intellectual property rights, this was permitted under art 102 TFEU and thus not a violation of those rights. That is, because the interference aimed at a general interest, respected the essence of the fundamental rights, and safeguarded the rights and freedoms of others. Protecting the Internal Market was essential for both competitors and consumers.[165] Regarding the technological limitations, Google had simply not provided sufficient evidence.[166]

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157 *Google Shopping* (Commission) (n 4) para 652.
158 *Google Shopping* (Commission) (n 4) para 655.
159 *Google Shopping* (Commission) (n 4) para 657.
160 *Google Shopping* (Commission) (n 4) para 658.
161 *Google Shopping* (Commission) (n 4) para 659.
162 *Google Shopping* (Commission) (n 4) para 661.
163 *Google Shopping* (Commission) (n 4) para 662.
164 *Google Shopping* (Commission) (n 4) para 663.
165 *Google Shopping* (Commission) (n 4) paras 665-670.
166 *Google Shopping* (Commission) (n 4) para 671.

Considering there was also a potential effect on trade as Google offered its services in several Member States and Google's behavior was capable of eliminating competitors in the EU,[167] the EU Commission found that Google should cease its infringement of art 102 TFEU.[168] Furthermore, Google was ordered to pay a fine of 2.4 billion Euros.[169] After the Commission's decision, Google appealed the case before the General Court. In its defense, it claimed that its behavior constituted competition on the merits rather than being anti-competitive and that the Commission had failed to sufficiently consider its pro-competitive effects.[170] According to Google, its method of favorably displaying its own shopping comparison services was merely an act of leveraging, which is not always considered abusive.[171]

In its response, the General Court started off by pointing out that the list of abuses found in art 102 TFEU was not exhaustive[172] and acknowledged that extending one's dominant position to an adjacent market, which was – in the case of Google – an extension from the market for general search services to the market for comparison shopping services, was not by itself abusive.[173]

However, the Commission was right to argue that through Google's actions, it diverted consumer traffic away from other providers of comparison shopping services. An equal display on Google's general search pages was necessary for those competitors and could not be replaced by other services.[174]

Interestingly, the General Court expanded the Commission's reasoning by pointing out that Google's general search result pages were an "open" platform. In fact, it thrived from this open business model and from displaying the services of different businesses to the consumers. This model distinguishes Google from "closed" types of infrastructures, which are not by nature accessible to other companies.[175] By emphasizing this argument, the GC essentially also differentiated the case at hand from cases, in which companies may argue with the exclusivity of their intellectual property to exclude competitors, as can be found in refusal-to-deal scenarios. By calling Google's infrastructure open, one could argue that in such a scenario, this open

[167] *Google Shopping* (Commission) (n 4) para 685.
[168] *Google Shopping* (Commission) (n 4) para 697.
[169] *Google Shopping* (Commission) (n 4) para 754.
[170] *Google Shopping* (General Court) (n 13) paras 136, 142.
[171] *Google Shopping* (General Court) (n 13) para 143.
[172] *Google Shopping* (General Court) (n 13) para 154.
[173] *Google Shopping* (General Court) (n 13) para 162.
[174] *Google Shopping* (General Court) (n 13) paras 159-197, 219.
[175] *Google Shopping* (General Court) (n 13) para 177.

nature outweighs a platform's incentive to protect its facility from competitors. This was one of Google's arguments, which relied on IP in its justifications.[176] All in all, the GC used this observation to argue that it was not beneficial, but rather harmful to competition, for this open type of infrastructure to restrictively manipulate the results displayed on the search result pages. After all, due to the network effects associated with such a platform, having a large number of users was beneficial. That is why Google had to justify this difference in treatment.[177]

To make matters worse, Google had not always displayed different treatment of competitors. Rather, it had only changed its behavior when it entered the market for comparison shopping services itself. By doing so and granting preferential treatment to its own service, it had acquired a super-dominant position and abused its gateway role by making the services of competitors less visible. Such behavior could not constitute competition on the merits.[178]

As far as the application of the Bronner criteria is concerned, the GC's elaborations are quite intriguing. On the one hand, it pointed out the similarities between the case at hand and the Essential Facilities Doctrine, considering that Google's search pages had similar characteristics and there were no economically viable substitutes available to replace them.[179] It also essentially argued that the criteria could be considered as fulfilled, since, due to the lack of alternatives, the search pages were indispensable, and competition was likely to be eliminated as other comparison shopping services might cease to provide their services due to Google's behavior.[180] Nevertheless, despite these elaborations indicating that the GC agreed with Google on applying the criteria, the GC explicitly did not do so. Rather, it stated that the scenario in question was, despite the similarities, to be distinguished from refusal-to-deal cases.[181] Not every case that partially concerned some sort of access was automatically to be evaluated under the Essential Facilities Doctrine. Rather, for this to be the case, a competitor needed to request access to a facility that was then denied by the dominant undertaking. Moreover, the abuse would need to lie in the refusal to let the competitor access such a facility itself, rather than in other leveraging behaviors, as is the case

[176] *Google Shopping* (General Court) (n 13) para 557.
[177] *Google Shopping* (General Court) (n 13) para 178.
[178] *Google Shopping* (General Court) (n 13) paras 182-183.
[179] *Google Shopping* (General Court) (n 13) para 224; Heimann (n13) para 12.
[180] *Google Shopping* (General Court) (n 13) para 227.
[181] *Google Shopping* (General Court) (n 13) para 229; Heimann (n13) para 13.

with *Google Shopping*.[182] Therefore, the case at hand was to be considered an independent type of infringement that did not require the application of the Bronner criteria.[183]

Ultimately, the only argument offered by Google, with which the GC agreed, was that the Commission had not sufficiently established potential harm to competition in the market for general search pages. Rather, this was only the case for the market for comparison shopping services.[184] In that regard, however, it was sufficient for the Commission to establish the potential for anti-competitive effects rather than their actual existence.[185] This potential harm to competition could not be outweighed by any pro-competitive effects of Google's behavior and could not be justified.[186] That is why – for the most part – the General Court upheld the Commission's decision.[187]

The ECJ later agreed with the judgment of the General Court.[188] It was noted that the strict criteria established in *Bronner* were only required in refusal-to-deal scenarios due to the severe impact on a company's fundamental rights that comes from forcing the company to let competitors access its facilities.[189] Google's argument that this was the case here due to the visually appealing search boxes, through which Google displayed its own comparison shopping service, constituting a separate, essential facility to which it refused to grant others access, could not be followed, since competitors never requested access to these boxes but rather demanded Google to stop the discriminatory treatment and, moreover, the boxes could not be considered separate facilities. In the case at hand, access was therefore granted to the search pages themselves, but under unfair conditions, which, since these pages were also indispensable to competitors, was more likely to be considered abusive.[190]

Regarding the specific type of abuse applied to this case, the ECJ pointed out that art 102 TFEU neither outlaws companies from acquiring a dominant position in the market through their own performance, nor does it require dominant undertakings to ensure that less efficient competitors remain in the market. Less efficient competitors being forced out of the market through competition on the merits is, therefore, not inherently

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182 *Google Shopping* (General Court) (n 13) para 232.
183 Heimann (n 13) para 13.
184 *Google Shopping* (General Court) (n 13) para 457.
185 *Google Shopping* (General Court) (n 13) paras 441-442.
186 *Google Shopping* (General Court) (n 13) paras 579, 595.
187 *Google Shopping* (General Court) (n 13) para 596.
188 *Google Shopping* (ECJ) (n 13) para 271.
189 *Google Shopping* (ECJ) (n 13) para 91.
190 *Google Shopping* (ECJ) (n 13) paras 97, 105, 111.

problematic. Neither is leveraging by a dominant company automatically anti-competitive. However, these cases required a case-by-case analysis to determine whether the behavior in question was still considered competition on the merits.[191]
Contrary to Google's opinions, the General Court had sufficiently conducted such a case-by-case analysis and, in accordance with the opinion of the Commission, had established that the behavior's classification as abuse consisted of two parts, namely the favoring of Google's own comparison shopping services and the downgrading of the comparison shopping services of competitors.[192] Considering the open nature of the upstream market and all other relevant factors, this behavior was discriminatory and not competition on the merits. Google had exploited its upstream dominance in the market for general search services to gain a competitive advantage downstream, in the market for comparison shopping services, ultimately harming downstream competition.[193] Google's behavior was thus to be considered an abuse of a dominant position.[194]

4.1.2. Amazon – multiple investigations

While the *Google Shopping* case has significance in the self-preferencing case law,[195] it has not been the only instance of a major platform favoring its own products. Another example that should be noted is the various behaviors displayed by Amazon, which have led not only to investigations by the EU but also by National Competition Authorities, such as the ICA.[196] With the proceedings conducted by the EU Commission in *Amazon Marketplace* and *Amazon Buy Box* only resulting in the issuance of binding commitments thus far, the case *Amazon Logistics*, the initiation of which by the ICA preceded investigations by the EU and in which the ICA has already fined Amazon in the amount of over one billion Euros, will be assessed first.

4.1.2.1. *Amazon Logistics*

After investigating Amazon's behavior since April 2019, the ICA made a final decision in 2021, issuing a fine of more than 1.1 billion Euros on the grounds that Amazon had

[191] *Google Shopping* (ECJ) (n 13) paras 163-164, 172.
[192] *Google Shopping* (ECJ) (n 13) para 172.
[193] Heimann (n 13) para 31.
[194] Heimann (n 13) para 3.
[195] Carlton and Haria (n 83) 3; Portuese (n 59) 13; Motta (n 131) 8; Heimann (n 13) para 1.
[196] *Amazon Marketplace* and *Amazon Buy Box* (n 4); Provvedimento AGCM, *Amazon*, n 29925 (n 14).

abusively leveraged its dominance in the market for intermediary services.[197] Similar to other self-preferencing cases, this was concluded from Amazon extending its dominance from the market for intermediary services to an adjacent market, namely the logistics market, which includes services such as order fulfillment and delivery.[198] Amazon's specific behavior consisted of granting third-party sellers on its platform certain advantages only if they used Amazon's logistics service, FBA.[199] These advantages, which were not given to third-party sellers using the logistics services of rivals, included Prime label eligibility, not getting penalized for negative performance, exclusive access to certain events for specific occasions, such as Black Friday, and a higher chance of winning the Buy Box – a crucial tool for businesses to increase sales, as this meant that a merchant was chosen as the default purchase option when no specific seller was selected by the consumer.[200] This essentially meant that third-party sellers were technically still able to choose different logistics services, but at a disadvantage, leading them away from other logistics service providers. This ultimately caused harm to those competing providers, who would then have fewer users and struggle to stay in the market. Subsequently, the ICA concluded that there was a significant risk of consumers being affected as their alternative options for services other than Amazon would decrease, considering that Amazon ensured sellers used its logistics service.[201] Amazon's act of pushing third-party sellers towards their own logistics system was thus an abusive act of self-preferencing, consisting of the two elements identified in *Google Shopping*: the act of granting its own services preferential treatment by promising visibility-improving benefits to users of its own services, while also demoting competitors.[202]

In its arguments, Amazon essentially – and similarly to Google's claim regarding their behavior being aimed at improving their design - claimed that their own logistics service was simply of a better quality, which they intended to protect.[203] Promising sellers advantages for using Amazon's own logistics service was the most effective way for Amazon to do so. This argument did not convince the ICA, as they maintained that if Amazon was concerned about the quality of the logistics services used by sellers, they

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[197] Provvedimento AGCM, *Amazon*, n 29925 (n 14); Ferrari (n 2) 135; Motta (n 131) 28.
[198] Motta (n 131) 28.
[199] Motta (n 131) 28.
[200] Motta (n 131) 29.
[201] Motta (n 131) 29.
[202] Carlton and Haria (n 83) 3.
[203] Motta (n 131) 29.

might as well require logistics services to fulfill a list of objective, quality-ensuring criteria.[204] Moreover, the abusiveness of Amazon's behavior did not lie in the sole act of granting advantages to third-party sellers using its own logistics service but instead also in the second element of abusive self-preferencing, namely the act of harming competing providers of logistics services, by putting third-party sellers using rival logistics services at a severe disadvantage, making them significantly less visible to consumers. This is heightened by the fact that, as the ICA concluded, the Buy Box had similar significance to consumer engagement as being near the top of the search result pages had in *Google Shopping*.[205] As a result, competing providers of logistics services were made less attractive to third-party sellers, putting them at a competitive disadvantage.[206]

The ICA then also pointed out that Amazon's behavior would likely result in foreclosure in the market for logistics services. Similar to *Google Shopping*, where the foreclosing effects of Google's actions were rooted in the decrease of consumer traffic for competitors, Amazon's behavior was at risk of foreclosing competing providers of logistics services. This was because users of those competing services were made less visible by not being eligible for the Buy Box or Prime. This was independent of whether the logistics services offered by competitors may have been of even higher quality than Amazon's FBA, ultimately making competing logistics services less attractive and third-party sellers less likely to choose those other service providers. Eventually, this could result in the foreclosure of Amazon's competitors.[207] Specifically, third-party sellers – due to the negative consequences associated with choosing different logistics service providers – would have fewer choices when selecting one. Subsequently, due to Amazon's dominance in the logistics services market and sellers' reliance on its services, Amazon could increase prices on its services. This might then cause sellers to charge higher prices to consumers. Additionally, due to its dominant position, Amazon would feel less incentive to improve its own logistics service, which could be detrimental to both sellers and consumers.[208]

Lastly, this foreclosure might even extend to the market for intermediary services. That is, because sellers might be more incentivized to single-home, using only Amazon and

[204] Motta (n 131) 29.
[205] Motta (n 131) 29.
[206] Motta (n 131) 29.
[207] Ferrari (n 2) 139-140.
[208] Ferrari (n 2) 140.

its logistics service FBA, as the additional use of other platforms would require them to add other logistics services, leading to increased costs for the sellers. Thus, competing intermediary platforms might attract fewer sellers and, subsequently, due to network effects, fewer consumers, potentially foreclosing them from the market.[209]
Based on these considerations, the ICA thus concluded that Amazon's self-preferencing behavior constituted an abuse under competition law.[210]

4.1.2.2. *Amazon Marketplace* and *Amazon Buy Box*

In addition to the Italian Competition Authority, the EU Commission also began investigating Amazon's behavior. As the two relevant cases, namely *Amazon Marketplace* and *Amazon Buy Box*, are similar in their subject matter and the Commission has issued a combined commitment decision in both,[211] they will be evaluated together. Nevertheless, it should be pointed out that as of this point, the Commission has made no formal decision on Amazon's behavior constituting an infringement of art 102 TFEU. However, in its preliminary assessments, it has classified Amazon's behavior as anti-competitive.[212] If Amazon fails to fulfill the binding commitments it has offered and the Commission has accepted, a formal infringement decision is likely to follow.
The investigations concerned several behaviors the EU Commission found to be problematic, considering Amazon's dual role in e-commerce. Notably, Amazon, which was found to have a dominant position in the marketplace services market,[213] operates both as a platform for third-party merchants and as a retailer, selling its own products through the same platform.[214] Based on this, the two cases can be separated into two categories of behaviors: While the conduct observed in *Amazon Marketplace* was Amazon's use of a high volume and variety of non-public data obtained from data made available by third-party sellers and transactions between third-party sellers and consumers, subsequently granting itself a competitive advantage in Amazon's retail business,[215] the platform's behavior in *Amazon Buy Box* consisted of Amazon using criteria for both the selection of the offers displayed in the Buy Box and the selection

[209] Ferrari (n 2) 140.
[210] Motta (n 131) 28.
[211] *Amazon Marketplace* and *Amazon Buy Box* (n 4).
[212] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 221.
[213] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 95.
[214] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 3.
[215] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 4.

of sellers eligible for the Prime Label in favor of its own retail services as well as – like the ICA had found in *Amazon Logistics* – third party sellers using Amazon's own logistics service, FBA. Consequently, third-party sellers using different logistics services were at a disadvantage.[216] That is the case because, through the Buy Box, an offer is predominantly displayed next to the "Buy Now" button, directing consumers to this particular seller, while offers made by other sellers are placed less visibly, making consumers less likely to choose those sellers.[217] As far as the Prime label is concerned, a Prime-labelled offer features significant advantages for consumers, namely free and faster delivery, making consumers with a Prime membership more likely to choose those offers.[218] Similar to the Buy Box, to receive the Prime label, an offer must meet a specific set of criteria established by Amazon.[219] While Amazon's own offers and offers by third-party sellers using the FBA were automatically eligible to be featured in the Buy Box and receive the Prime label, other third-party sellers had to fulfill this criteria, which – in the case of Prime – was the seller's qualification for Amazon's SFP program, requiring the seller to enter into an agreement with a specific carrier designated by Amazon for the delivery.[220] This meant that, unlike Prime offers by Amazon and third-party sellers using the FBA, which had a choice of several carriers, third-party sellers not using the FBA that wanted to receive the Prime label were bound to one specific carrier.[221] Moreover, having a Prime label significantly increased the likelihood of an offer being displayed in the Buy Box.[222] Last but not least, offers by third-party sellers not using the FBA showed much later delivery promises, and Amazon did not allow these sellers to display same-day or next-day delivery either, making them less attractive to consumers.[223] Considering all these aspects, the Commission found this behavior to be unduly discriminatory towards third-party sellers unless they chose to use Amazon's own logistics service FBA.[224]

The EU Commission found both Amazon's use of non-publicly disclosed data obtained through third-party sellers and the discriminatory treatment of third-party sellers not

[216] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 5.
[217] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 47.
[218] *Amazon Marketplace* and *Amazon Buy Box* (n 4) paras 212-215.
[219] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 217.
[220] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 150.
[221] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 150.
[222] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 142.
[223] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 155.
[224] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 153.

using FBA to be an abuse of a dominant position.[225] Regarding the former, it was found that Amazon shielded itself from the inherent risks and costs of competition in the retail market by relying on data obtained from third-party transactions to optimize its own retail activities. As a result, it distorted competition by granting itself a competitive advantage and leveraging its dominant position in the marketplace services market into the online retail services market.[226] Due to the advantages it granted itself, Amazon significantly increased the cost for third-party sellers to compete with Amazon on the sale of products with the highest demand. This had the potential to foreclose those third-party sellers from the market as they might stop selling their products.[227] As far as the Buy Box and Prime label were concerned, Amazon noted that most sales were made through the Buy Box, and sellers with the Prime label also had a significant advantage, as they had access to the most loyal customer base.[228] Moreover, Amazon clearly favored its own retail products, as most offers featured in the Buy Box were from Amazon, even when equally qualified offers by other sellers were available.[229] Also, applying different criteria for Buy Box and Prime eligibility to third-party sellers who chose not to use the FBA compared to third-party sellers using the FBA artificially generated traffic towards the latter while putting the former at a competitive disadvantage, by making it significantly harder for those third-party sellers to gain the advantages associated with the Buy Box and Prime.[230] Overall, this behavior could harm the consumer, as they are drawn towards offers that are not necessarily selected based on their quality, which does not reflect the outcome of competition on the merits.[231]

Although Amazon did not agree with the Commission's preliminary assessment in the two cases, it still agreed to several commitments. Firstly, it would stop using non-publicly available seller data as a means of improving its own services.[232] Moreover, it agreed to use objective, non-discriminatory methods to determine which sellers may participate in the Buy Box as well as which offer is displayed in the Buy Box, as a Featured Offer. In addition, Amazon would commit to displaying a second offer next to

[225] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 221.
[226] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 169.
[227] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 183.
[228] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 173.
[229] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 204.
[230] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 210.
[231] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 208.
[232] *Amazon Marketplace* and *Amazon Buy Box* (n 4) paras 232-233.

the Featured Offer if one was available from a different, qualified seller.[233] Regarding Prime eligibility, objective criteria were to be applied. Lastly, third-party sellers seeking the Prime label could choose their carrier and negotiate their terms and conditions freely.[234]

4.2. Case analysis

After summarizing both *Google Shopping* and the self-preferencing cases relating to Amazon, it becomes even more evident how vastly different self-preferencing behaviors can be from one another. While both Google and Amazon are essentially dual-mode platforms that have integrated into adjacent markets, competing with the users of the platform they provide, their approaches to granting their own services favorable treatment were quite distinct. While Google's abusive behavior consisted of prominently displaying its own comparison shopping service and using manipulated ranking algorithms to do so, essentially putting third-party comparison shopping services in the downstream market at a competitive disadvantage,[235] Amazon not only discriminated against the third-party businesses operating and competing in the retail market via its platform but also against providers of logistics services[236]. It could even be argued that Amazon's behavior was not mere self-preferencing but could also be classified as a whole other type of abuse, particularly tying.[237]

Overall, there are thus some questions that should be considered when it comes to self-preferencing. On the one hand, it appears that the EU Commission, the European Courts, and the ICA have agreed that a platform favoring its own services was not inherently abusive. Rather, it was the discriminatory nature of the conduct at hand.[238] On the other hand, some critics suggest that the decisions in *Google Shopping* and the cases regarding Amazon do not provide the clarity needed when it comes to the nature of self-preferencing. For example, considering the different types of behaviors that fall under this conduct, some might question whether self-preferencing truly constitutes a standalone abuse, as argued by the EU Commission, or whether it should

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[233] *Amazon Marketplace* and *Amazon Buy Box* (n 4) paras 234-235.
[234] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 236.
[235] *Google Shopping* (Commission) (n 4); Carlton and Haria (n 83) 3; Ferrari (n 2) 71; Colangelo (n 83) para 30; Motta (n 131) 8; Heimann (n 13) para 3.
[236] *Amazon Marketplace* and *Amazon Buy Box* (n 4); Carlton and Haria (n 83) 3.
[237] Ferrari (n 2) 141.
[238] *Google Shopping* (Commission) (n 4) para 595; *Amazon Marketplace* and *Amazon Buy Box* (n 4); Ferrari (n 2) 139-140.

be assessed under existing theories of harm, such as refusal-to-deal or tying.[239] Answering this question requires a careful evaluation.

4.2.1. Self-preferencing and the Essential Facilities Doctrine

In *Google Shopping*, Google's key argument was that its behavior should have been evaluated as a refusal-to-deal scenario, warranting the assessment of the strict conditions required under the Essential Facilities Doctrine.[240]

The conditions were established by the ECJ in *Bronner*[241] and, in the context of intellectual property, *Magill*[242]. In both cases, a dominant undertaking refused to deal with or license its intellectual property to a competitor, which was found to be abusive under art 102 TFEU. Particularly, *Bronner* addressed a dominant Austrian newspaper publisher forced to grant a smaller rival access to its home-delivery distribution system, deemed an essential facility.[243] On the other hand, *Magill* dealt with a TV broadcaster refusing to license its weekly program listings to an independent publisher.[244] The Court held that for a dominant enterprise to be required to grant access to its facility or license its intellectual property, access must be indispensable for the rival, meaning no economically viable alternative exists. Moreover, the refusal must likely result in the elimination of all competition in the market, and there must be no objective justification. In the case of intellectual property, as established in *Magill*, the refusal must also prevent a new product from emerging, for which there is consumer demand.[245]

In *Google Shopping*, Google claimed that its behavior was similar to the *Bronner* case, as Google refused to allow competitors to use their search result pages equally. Particularly, Google did not grant them access to the visually appealing search boxes through which it displayed its own comparison shopping services, since those search boxes constituted a separate, essential facility.[246]

Neither the Commission nor the Courts agreed with this argument. They pointed out that the search result pages were a single facility, encompassing the search boxes. In their view, Google's downstream competitors already had access but were simply

[239] Carlton and Haria (n 83) 3-4; Ferrari (n 2) 141; Colangelo (n 83) para 16.
[240] *Google Shopping* (Commission) (n 4) para 645.
[241] *Bronner* (n 89).
[242] *Magill* (n 125).
[243] *Bronner* (n 89).
[244] *Magill* (n 125).
[245] *Magill* (n 125); Colangelo (n 83) para 24.
[246] *Google Shopping* (ECJ) (n 13) para 93.

subjected to discriminatory treatment by Google.[247] While the GC and the ECJ did agree that the case had similarities to the Essential Facilities Doctrine and the GC even argued that the Bronner criteria were technically fulfilled, they remained adamant that the abuse at hand did not fall under the Essential Facilities Doctrine and that the Doctrine should not be interpreted too broadly.[248] In particular, for the Essential Facilities Doctrine to apply, there would have to be an explicit request to access a facility, which the dominant undertaking then denied. Their competitors had never issued such a request. Instead, they merely wanted equal treatment.[249]

One might ask whether the EU Commission and the Courts were correct in concluding that the scenarios in question were similar yet different and should therefore be treated differently in their assessment. In that regard it should be noted that Google also emphasized the protection of its intellectual property in its arguments for why its behavior was justified. It should be pointed out that Advocate General Kokott, in her statement regarding Google's behavior, highlighted the connection between the Essential Facilities Doctrine and the safeguarding of IPR. She emphasized that the stringent criteria applied to the Doctrine reflect an intention to balance a company's fundamental IP rights and contractual freedom on the one hand, and fair competition on the other.[250] The indispensability criterion and the threat-to-eliminate-competition-criterion illustrate this concept: An undertaking should not be forced to allow rivals to use its facilities and reap its associated rewards unless there is a significant risk for fair competition that outweighs the protection of the undertaking's freedom and fundamental rights.[251] In fact, protecting a businesses (intellectual) property and allowing interference in this exclusive right only under certain circumstances is vital to the market: If the criteria for such cases were less stringent, a company's incentive to innovate would suffer, since it would have no guarantee that its investments would pay off and elevate its competitive position.[252] Furthermore, the objective of competition law is not to protect individual competitors. On the contrary, interfering with an undertaking's property rights could never be justified solely because a competitor might disappear from the market if not granted access to the dominant undertaking's

[247] *Google Shopping* (ECJ) (n 13) para 105.
[248] *Google Shopping* (General Court) (n 13) para 232; Colangelo (n 83) para 66ff.
[249] *Google Shopping* (General Court) (n 13) para 232.
[250] Case C-48/22P *Google LLC and Alphabet, Inc v European Commission* (ECJ, 10 September 2024), Opinion of AG Kokott, para 84.
[251] *Google Shopping* (Opinion of AG Kokott) (n 250) paras 85-87.
[252] *Google Shopping* (Opinion of AG Kokott) (n 250) para 87.

property. Instead, only the risk of harming competition as a whole is a significant enough justification for forcing a company to deal with its rivals.[253]

That being said, as mentioned in chapter 3 and illustrated in the cases of both Google and Amazon, the concept of self-preferencing – whether it is harmful to competition or not – is similar to the idea behind the Essential Facilities Doctrine. Both ultimately describe a company utilizing its own facilities, which it has invested in, to leverage its market position. While there might be differences from an outright refusal-to-deal scenario, considering that rivals already have access, but do not have “equal” access to the facilities, Google’s arguments for applying the same stringent criteria as under the Essential Facilities Doctrine were not too far-fetched. After all, requiring Google to give rivals the same benefits on its facilities would interfere with its intellectual property rights. The GC even agreed that there were similarities with the Essential Facilities Doctrine and that there was an interference in Google’s fundamental rights, which was justified solely on the grounds of protecting fair competition.[254] Could it then not be argued that at least criteria similar to those in *Bronner* should be applied to self-preferencing cases? One might say so, especially since it is generally agreed that granting access under less favorable conditions can be seen as less severe discrimination than an outright refusal.[255] Why should the strict criteria applied to refusal-to-deal scenarios – which effectively favor the dominant firm – not also apply to cases that are similar to, but less severe than, refusal to deal?

It is thus not surprising that some scholars criticize the opinions of the EU Commission and the Courts regarding the application of the Essential Facilities Doctrine in *Google Shopping*.[256] On the other hand, others may view the case by focusing on the severity of the measures forced onto the dominant undertaking, rather than the severity of its abusive behavior. It could be argued that forcing a company to enter into a contractual relationship with a rival is a more significant interference with its freedoms than ordering it to stop discriminating against rivals who already have access.[257] Nevertheless, forcing a business to share its competitive advantage with competitors – thus neutralizing that advantage – may also harm innovation and, ultimately, the market. This is similar to compelling companies to deal with their rivals.[258]

[253] *Google Shopping* (Opinion of AG Kokott) (n 250) para 87; Heimann (n 13) para 35.
[254] *Google Shopping* (General Court) (n 13) paras 224-227.
[255] E. Hovenkamp (n 64) 5; Hovenkamp, ‚Antitrust and Self-Preferencing’ (n 57) 7.
[256] Cf Heimann (n 13).
[257] Cf *Google Shopping* (Opinion of AG Kokott) (n 250) para 91.
[258] Cf Carlton and Haria (n 83) 4-5.

Despite these critical thoughts, the EU authorities remain in their position that an application of the Essential Facilities Doctrine was not appropriate in the case of self-preferencing. As Advocate General Kokott pointed out, applying the Doctrine to all cases, even if they were only similar to a refusal to deal, would excessively restrict the effectiveness of competition law, particularly art 102 TFEU.[259] This argument seems convincing, as applying the Doctrine to cases that cannot be exactly subsumed under all its elements might affect the level of legal certainty in the market. When the GC thus elaborated how the Google case seemed to fulfill the Bronner criteria either way, this should not be mistaken as the Court applying the Essential Facilities Doctrine, but rather as the GC arguing that the case at hand met these criteria, especially the indispensability of the Google search pages for competitors, making the abusive behavior even more severe.[260]

4.2.2. Self-preferencing as a standalone abuse

Even aside from the Essential Facilities Doctrine, some may argue that self-preferencing behavior, as seen in the cases with Google and Amazon, could sometimes be addressed under existing abuse categories.[261] For example, in the case of Amazon, the behavior could be interpreted as tying, since Amazon conditioned valuable visibility benefits on the use of its own logistics service, effectively penalizing sellers who choose alternatives.[262] Yet, the Italian Competition Authority classified the conduct as discriminatory self-preferencing instead. This suggests that, for the ICA, the act of favoring its own logistics service and harming rivals through this preference was more significant than the element of coercion.[263] Moreover, it is true that the list of abusive practices under art 102 TFEU is not exhaustive, meaning that authorities have the flexibility to apply its principles to forms of abuse that are not listed, such as self-preferencing.[264]

However, the broad approach by the Commission when it comes to self-preferencing, particularly its theory of self-preferencing being a standalone abuse in situations already covered by existing doctrines, creates uncertainty. That is, because most

[259] *Google Shopping* (Opinion of AG Kokott) (n 250) para 88.
[260] *Google Shopping* (Opinion of AG Kokott) (n 250) para 89; Heimann (n 13) para 12.
[261] Ferrari (n 2) 141; Carlton and Haria (n 83) 4-5; Jacobson and Wang (n 12) 13.
[262] Ferrari (n 2) 141.
[263] Ferrari (n 2) 142.
[264] TFEU, art 102.

traditional theories of harm, such as the Essential Facilities Doctrine or tying, require strict, step-by-step legal tests to determine the existence of an abuse. In contrast, the idea that self-preferencing constitutes a standalone abuse is quite novel and lacks clear evaluative criteria, making it hard to determine when behavior merely leverages a firm's power, which is not inherently abusive, versus when it crosses into unlawful competition.[265]

Ultimately, the EU Commission has identified self-preferencing as involving preferential treatment and consequent harm to competitors, and has found foreclosure effects in both the *Google Shopping* and the cases surrounding Amazon.[266] However, and further complicating matters, the differences in those cases suggest some inconsistencies and highlight ongoing uncertainty over what constitutes self-preferencing and how such conduct should be uniformly assessed.

5. Other EU judgments

It has been established that self-preferencing can encompass various types of behavior and that it can be challenging to distinguish between self-preferencing and other existing theories of harm, particularly the Essential Facilities Doctrine and tying.[267] This can lead to uncertainties, considering that for different types of abuses, the EU has adopted step-by-step assessments, including strict sets of criteria that must be fulfilled for behavior to be classified as abusive under art 102 TFEU.[268] The similarities to other theories of harm and the lack of a similarly stringent test for self-preferencing is problematic particularly when it comes to the level of protection for a platform's fundamental right to their intellectual property and contractual freedom:[269] Without the necessary clarity on the classification of certain behavior and the establishment of a sufficient legal test to determine the existence of an abuse, creating a balance between fair competition and a business's fundamental freedoms can be much more challenging.

To further illustrate this conflict, the decision in *Google Shopping* and the cases regarding Amazon will be put side-by-side with several other EU judgments concerning

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[265] Ferrari (n 2) 81.

[266] *Google Shopping* (Commission) (n 4) para 594; *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 183.

[267] *Google Shopping* (General Court) (n 13) para 232; Ferrari (n 2) 141; Colangelo (n 83) para 16.

[268] Ferrari (n 2) 94.

[269] Cf AG Kokott's elaborations on the Essential Facilities Doctrine; *Google Shopping* (Opinion of AG Kokott) (n 250) para 84.

similar behavior. The focus of this chapter will be to analyze this case law and compare it to the discussed judgments, with a particular emphasis on the classification of abusive behavior and the legal tests applied by the EU Commission and the Courts.

5.1. *Microsoft*

While the first case, in which the EU Commission found Microsoft's behavior to be an abuse of a dominant position, was not evaluated as self-preferencing, Microsoft's conduct shares similarities with the cases regarding Google and Amazon.[270] This makes it relevant to create a comprehensive picture of the classification of behavior, through which a platform can favor its own products.

The Commission decision dates to 2004,[271] predating self-preferencing as a standalone abuse. It involved two different types of abusive conduct: refusal to supply and tying.[272] In particular, Microsoft had refused to provide Sun Microsystems, a competing software developer, with the information needed for Solaris' interoperability with Windows. Additionally, Microsoft had tied its Windows operating system to its Windows Media Player, making rival media players less likely choices for consumers.[273] For clarity, the two types of conduct will be treated separately.

To start with, regarding the refusal to supply, the Commission noted Microsoft's dominant position in both the client PC and workgroup server operating system markets. Their high market shares, the creation of high barriers for competitors, and the link between the two markets supported this view.[274]

In its defense, Microsoft argued there was no proper request for information or a refusal to supply. It emphasized that Sun did not compete in the relevant market, its request was too broad, and Microsoft had even previously provided relevant interface information. The Commission dismissed these points.[275] While Sun's market share in the work group server operating systems market was low, it was still present. Moreover, Sun had in fact filed a valid request for information. The Commission did not expect it to specify every detail. Instead, the request was directed at obtaining any necessary information to make their operating system compatible with Windows PCs and servers.

[270] *Microsoft* (n 4); Bowman and Prasad (n 61) para 8.
[271] *Microsoft* (n 4).
[272] *Microsoft* (n 4); Ferrari (n 2) 58-59.
[273] *Microsoft* (n 4) paras 188-189, 546, 792.
[274] *Microsoft* (n 4) paras 471, 541.
[275] *Microsoft* (n 4) paras 561-584.

Regarding the requested information, the Commission also emphasized that Microsoft was only asked to provide any specifications needed to ensure interoperability, rather than detailed information on how to implement these specifications. Lastly, the mere fact that Microsoft had provided interface information in the past did not mean that this information was sufficient for full interoperability.[276]

As in any refusal-to-supply case, the EU Commission had to apply the Bronner criteria, requiring the indispensability of the essential facility, a risk of eliminating effective competition, the prevention of the emergence of a new product, and the absence of objective justifications.[277]

Microsoft advanced several arguments contesting the indispensability of the interoperability information. Firstly, it claimed that alternative products, such as Linux, demonstrated that the information was not objectively indispensable, as these competitors managed to remain viably present in the market for workgroup server OS without access to the contested information. Furthermore, consumer migration towards competing server operating systems indicated that competition persisted. Microsoft also argued that disclosure was not strictly indispensable since interoperability could theoretically be achieved through reliance on open industry standards or through lawful reverse engineering of the relevant specifications. Additionally, Microsoft suggested that it was possible to resort to client-side software on client PCs.[278] In its decision, the Commission rejected these arguments. It determined that, due to Microsoft's dominant position, the interoperability information constituted an indispensable facility for sustaining effective competition. Microsoft's proprietary protocols could not be adequately substituted by relying on open industry standards, as the necessary technical specifications amounted to non-public extensions of such standards.[279] Moreover, the Commission concluded that the volume and complexity of the specifications rendered reverse engineering an unreasonable burden on competitors.[280] Lastly, client-side interoperability solutions were found to impose disproportionate costs and implementation hurdles, such as compatibility issues arising from operating system upgrades. That is, because as soon as customers needed to upgrade their operating systems, they would need matching upgrades for

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[276] *Microsoft* (n 4) paras 561-584.
[277] *Bronner* (n 89).
[278] *Microsoft* (n 4) paras 666-667.
[279] *Microsoft* (n 4) para 669.
[280] *Microsoft* (n 4) paras 685-687.

their add-ons.[281] Finally, the Commission noted that while it was true that Microsoft had introduced a Communications Protocol Licensing program through which some information could be obtained, this program only covered server-to-client protocols, excluding the equally essential server-to-server protocols needed for full interoperability.[282]

In the opinion of the Commission, Microsoft's behavior also fulfilled the other conditions of the Essential Facilities Doctrine: Due to the lack of interoperability, rivals were hindered from creating new innovative features in their server operating systems, meaning that new products were prevented from emerging.[283] Moreover, Microsoft's refusal to supply interoperability information had potentially severe foreclosure effects on the market for workgroup server operating systems, reducing technological development and innovation to the detriment of consumers.[284]

An objective justification for protecting Microsoft's intellectual property laws, specifically its patents on software and the trade secrets behind its source code, could not be found either.[285] While the purpose of intellectual property law was to grant exclusivity to its owner and ensure they would reap the rewards of their innovations, incentivizing them to continue innovating, IP law also served another objective, benefiting not the individual rights holder but the general public: the stimulation of creativity for the public good. In some cases, the refusal to grant a license to competitors might be contrary to this second objective. This was particularly the case if the refusal to license constituted an abuse of a dominant position, which would have anti-competitive effects, ultimately hindering rather than stimulating innovation and thus going against the general public good.[286] In the case at hand, Microsoft's claims that their intellectual property was at risk were to be dismissed, since Microsoft only had to provide specifications rather than detailed implementations, making it unlikely for their product to be cloned, and their behavior was capable of harming competition, thus outweighing Microsoft's exclusive right to choose who to license to.[287]

When it comes to Microsoft's practice of tying the Windows operating system to the Windows Media Player, the Commission first pointed out that for a conduct to be

[281] *Microsoft* (n 4) para 674.
[282] *Microsoft* (n 4) para 689.
[283] *Microsoft* (n 4) para 700.
[284] *Microsoft* (n 4) paras 694, 712.
[285] *Microsoft* (n 4) para 712.
[286] *Microsoft* (n 4) para 711.
[287] *Microsoft* (n 4) paras 722, 725.

considered abusive tying under competition law, four requirements needed to be fulfilled: The two tied products needed to be separate from one another, the company under scrutiny had to have a dominant position in the market for the tying product, it did not give its customers a choice to purchase the tying product without the tied product, and the tying had a foreclosing effect on competition.[288]

The Commission found that Microsoft's behavior met all four conditions. Contrary to Microsoft's claims, the Windows OS and the Windows Media Player were not one integrated product but rather two separate goods, as evidenced by the fact that rival media players not tied to an operating system existed on the market.[289] Regarding the second element, namely the coercion or force factor, the Commission noted that OEMs could not license Windows from Microsoft without pre-installing the Windows Media Player. Should they choose a different, rival media player, they could only install it in addition to the WMP. Similarly, consumers buying Windows had no means of uninstalling the WMP. The fact that consumers might benefit from tying the two products, as they did not have to pay extra for the WMP, did not change the fact that there was an element of being forced to obtain both the tying and the tied product.[290]

Moreover, although consumers could install rival media players, Microsoft's behavior still had a foreclosing effect because the WMP's pre-installation gave it a significant competitive advantage. Few users installed other media players, demonstrating this impact.[291]

Despite Microsoft's argument that the conduct was based solely on superior product quality, the behavior was thus likely to harm competition and consumer welfare by limiting media player choice and deterring rival innovation.[292]

Therefore, the Commission found that both the refusal to license and the tying practice constituted abuses of dominance and ordered Microsoft to provide necessary interoperability information, unbundle the Windows OS and the WMP, and pay a fine of 497 million Euros.[293]

Following Microsoft's appeal, the Court of First Instance upheld the Commission's decision in both parts.[294] For refusal-to-license, it explained that Windows' ubiquity on

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[288] *Microsoft* (n 4) para 794.
[289] *Microsoft* (n 4) paras 821-824.
[290] *Microsoft* (n 4) paras 826-834.
[291] *Microsoft* (n 4) paras 841, 845.
[292] *Microsoft* (n 4) paras 962, 979-982.
[293] *Microsoft* (n 4) paras 999, 1011, 1080.
[294] Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3619.

client PCs made interoperability necessary for rivals to compete, encompassing both client-to-server and server-to-server interoperability.[295] Moreover, while Microsoft held several patents on its communication protocols as well as copyrights on its specifications and trade secrets, intellectual property rights were not absolute but could be restricted in cases of abuse of dominance.[296] As the question was a matter of EU law, the Commission also rightly did not consider the TRIPS agreement.[297]

Regarding Microsoft tying its operating system to the WMP, the CFI stressed that while consumers did not pay extra for the WMP,[298] they were still coerced into obtaining both products, thereby eliminating the option of buying the Windows OS without the WMP.[299] The harm lay in the negative effects on competition and innovation. While product integration could indeed be pro-competitive, this was not the case if it foreclosed rivals from the market.[300] The Commission was therefore correct in finding an abuse of dominance.[301]

5.2. *Google Android*

Aside from Google's behavior in *Google Shopping*, the EU Commission also investigated other conduct by Google, resulting in a 4.34 billion Euro fine in 2018.[302] This decision, also known as the *Google Android* case, was based on three distinct practices related to Google's mobile operating system, Android, the Google Play Store, and Google Search. Firstly, Google had tied access to its Play Store, an essential intermediary tool for app developers, to both Google Search and Chrome, which OEMs were required to pre-install on devices. Secondly, Google had not allowed OEMs to sell devices with modified versions of the Android OS, so-called "forks", through anti-fragmentation agreements, essentially preventing alternative Android versions from emerging. Thirdly, OEMs and mobile network operators had received payments from Google for the exclusive pre-installation of Google Search.[303]

[295] *Microsoft* (Court of First Instance) (n 294) paras 383-390.
[296] *Microsoft* (Court of First Instance) (n 294) para 690.
[297] *Microsoft* (Court of First Instance) (n 294) paras 801-803.
[298] Though the GC did point out that the cost of the WMP was merely integrated into the cost of Windows rather than being free; *Microsoft* (Court of First Instance) (n 294) para 968.
[299] *Microsoft* (Court of First Instance) (n 294) paras 970-971.
[300] *Microsoft* (Court of First Instance) (n 294) paras 1146, 1158, 1159.
[301] *Microsoft* (Court of First Instance) (n 294) para 1342.
[302] *Google Android* (n 4).
[303] *Google Android* (n 4) paras 752, 1015, 1192.

During its investigations, the Commission first determined that Google held a dominant position in three relevant markets: the market for general search services, as also identified in *Google Shopping*, the market for Android app stores, and the market for the licensing of smartphones.[304]

Google's first behavior was considered a classic example of tying, which is why the Commission followed the respective legal test as mentioned in chapter 5.1 and added that they needed to consider whether Google's behavior reduced the likelihood of users choosing products of different providers, disincentivized Google's customers from offering products of other providers, or pushed third-parties to only develop products using Google's technology as the basis for the tied product.[305]

After establishing that the Play Store, Google Chrome, and Google Search were distinct products,[306] the Commission continued its evaluation by pointing out that the coercion factor of tying was fulfilled. That is because it was not possible for OEMs to obtain the Google Play Store without pre-installing Google Search, and in order to do so, they had to license and pre-install Google Chrome.[307] Similar to the case concerning Microsoft's tying practices, it did not matter that OEMs did not have to pay an additional fee to obtain Google Search, as this benefit could not outweigh the competitive advantage Google granted itself through pre-installation. Because of this advantage, competitors would feel less incentive to innovate, and consumers would ultimately have fewer choices when it comes to selecting a search engine for their smartphones.[308] Clearly, the pre-installation factor played a significant role for the Commission. Like in *Microsoft*,[309] it argued that while consumers might be able to download different, competing apps, the relevant data painted a different picture: Consumers were shown to be less likely to switch to a competing provider if they already had a service pre-installed on their device.[310]

Further, Google's behavior would cause significant harm to competition, as rivals – due to Google's competitive advantage - would be less likely to invest in the development of innovative mobile web browsers, ultimately reducing consumer choice, and allowing Google to expand its dominant position in the market.[311]

[304] *Google Android* (n 4) para 439.
[305] *Google Android* (n 4) para 750.
[306] *Google Android* (n 4) paras 756-761.
[307] *Google Android* (n 4) paras 764-771.
[308] *Google Android* (n 4) paras 768-770, 773.
[309] *Microsoft* (n 4) paras 841, 845.
[310] *Google Android* (n 4) para 775.
[311] *Google Android* (n 4) paras 859-866.

When it comes to potential justifications, the Commission could not find any that could outweigh the anti-competitive effects of Google's tying. It dismissed Google's claims of simply ensuring consumer satisfaction and the argument that Google needed to tie the products to monetize its investments in developing Android. According to the Commission, without the tying, Google would still have been able to benefit from the user data it obtained from devices, as well as from search advertising.[312]

Regarding the second problematic behavior, namely the anti-fragmentation agreements, the Commission applied a different legal test to the behavior, whereby a dominant undertaking only agreed to the conclusion of a contract under the condition that a supplementary obligation was accepted.[313] For such conduct to be considered abusive under art 102 TFEU, the supplementary obligation would have to be unrelated to the contract itself, it would have to leave the other party with no choice but to accept it, and it would have to be capable of hindering competition.[314]

When applying this test to the case at hand, the Commission stated that Google only agreed to license its Play Store and search app to OEMs if they accepted the anti-fragmentation obligation, despite this obligation being unrelated to the license itself. OEMs were thus unable to pre-install the Play Store and search app unless they accepted the additional commitments. These obligations ultimately also restricted competition, as they prevented the development of Android forks and hindered innovation, despite the fact that forks compatible with Android posed no competitive threat to Google.[315] Since Google was also unable to prove that the fragmentation would harm Android or its reputation, given that Google itself contributed to the fragmentation of its ecosystem, the Commission found this behavior to fulfill all the conditions required to be considered abusive under art 102 TFEU.[316]

Regarding the third type of conduct, namely the revenue sharing agreements, the Commission pointed out that this could constitute an abuse of a dominant position under art 102 TFEU if it were an exclusivity agreement.[317] This was the case, and the revenue share payments were also capable of restricting competition. That is because they reduced the incentives of manufacturers to pre-install rival search apps, consequently making it more difficult for potential competitors to access the market for

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[312] *Google Android* (n 4) paras 994-1008.
[313] *Google Android* (n 4) para 1011.
[314] *Google Android* (n 4) para 1011.
[315] *Google Android* (n 4) paras 1019, 1032, 1036.
[316] *Google Android* (n 4) paras 1163-1183.
[317] *Google Android* (n 4) para 1188.

general search services and hindering innovation.[318] Moreover, competitors could not overcome the competitive advantage Google had granted itself through the revenue-sharing agreements, as the option of downloading rival apps could not outweigh the benefits of pre-installing Google's search app. Consumers were simply more likely to use the app that was pre-installed on their smartphones.[319]

Overall, this behavior was thus also abusive under art 102 TFEU, which is why the EU Commission ordered Google to cease its abusive conduct and pay a substantial fine of 4.3 billion Euros.[320]

After Google's appeal, the GC upheld most of the Commission's decision.[321] It emphasized that by tying its Play Store to Google Search and Chrome, and essentially coercing OEMs to pre-install both apps on their manufactured smartphones, Google maintained a significant competitive advantage.[322] Since the pre-installation created a sort of status quo bias that, as relevant data shows, customers were unlikely to move away from, for example, by downloading other apps, the behavior was also capable of foreclosing rivals.[323] Moreover, any efficiencies obtained through this practice could not outweigh its anti-competitive effects.[324]

The GC also confirmed the Commission's decision regarding the anti-fragmentation agreements.[325] While acknowledging Google's concerns about compatibility issues if Android forks were designed without restrictions, the outright ban of modified Android versions, some of which could be perfectly compatible with devices, was deemed too broad and capable of negatively impacting competition.[326]

While the GC thus found both Google's tying conduct and the anti-fragmentation agreements to be abuses of a dominant position under art 102 TFEU, it agreed with Google that the Commission had not sufficiently proven the foreclosure effects and negative impact on the market concerning the revenue-sharing agreements.[327] This part of the decision was thus annulled, and the fine was reduced to 4.125 billion

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[318] *Google Android* (n 4) para 1206.
[319] *Google Android* (n 4) paras 1305-1312.
[320] *Google Android* (n 4) paras 1393, 1480.
[321] Case T-604/18 *Google LLC and Alphabet, Inc v European Commission* (General Court, 14 September 2022).
[322] *Google Android* (General Court) (n 321) para 559.
[323] *Google Android* (General Court) (n 321) para 562.
[324] *Google Android* (General Court) (n 321) paras 602, 614, 618.
[325] *Google Android* (General Court) (n 321) para 863.
[326] *Google Android* (General Court) (n 321) paras 878-879.
[327] *Google Android* (General Court) (n 321) para 800.

Euros.[328] The reduction was therefore clearly very minimal and barely affected the negative outcome for Google. Since another appeal was filed and the parties are still awaiting judgment by the ECJ, the next couple of years will likely show further development in this case. However, in her released statement, Advocate General Kokott has called for the GC decision to be upheld, which is thus the likely result.[329]

5.3. Apple App Store Practices

Another one of the five Big Tech platforms, Apple, has had multiple proceedings initiated as a result of its behavior. While the case *Apple App Store Practices (e-books/audiobooks)* was closed in 2024,[330] a fine was imposed in the case *Apple App Store Practices (music streaming)*[331]. Issued on March 4th 2024,[332] this is currently the most recent decision with notable parallels to self-preferencing.

Before elaborating on the specific conduct displayed by Apple, it is first worth noting that Apple held 100% market share in the platform space for music streaming apps on iOS, meaning that its App Store was the only platform available to music streaming app developers for reaching iPhone and iPad users through apps.[333] This dominant position led to a strong dependency relationship between Apple and those App developers.[334]

In addition, Apple had created an in-app purchase system on the App Store for iOS users to subscribe to these apps, monetizing this mechanism through a 30% commission charged to the app providers.[335] In order for App developers to use Apple's in-app purchase system, Apple had created a set of rules that music streaming app developers were informed of in both the App Store Guidelines and Apple's Developer Program License Agreement. According to these rules, App developers were prevented from informing their users of cheaper alternatives for subscriptions outside the App Store, providing links to their own websites that might offer more affordable subscription alternatives, as well as using other means of contacting their users about

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[328] *Google Android* (General Court) (n 321) para 1113.
[329] Case C-738/22P *Google LLC, Alphabet Inc v European Commission* (ECJ, 19 June 2025), Opinion of AG Kokott, para 246.
[330] Foo Yun Chee, 'EU Regulators scrap probe into Apple's e-book rules after complaint was withdrawn' (*Reuters*, 22 November 2024) <https://www.reuters.com/technology/eu-regulators-scrap-probe-into-apples-e-book-rules-after-complaint-was-withdrawn-2024-11-22/> accessed 22 October 2025.
[331] *Apple – App Store Practices (music streaming)* (n 4) para 1026.
[332] *Apple – App Store Practices (music streaming)* (n 4).
[333] *Apple – App Store Practices (music streaming)* (n 4) para 340.
[334] *Apple – App Store Practices (music streaming)* (n 4) para 565.
[335] *Apple – App Store Practices (music streaming)* (n 4) para 124.

cheaper options.[336] As these anti-steering provisions made it significantly more difficult for consumers to find out about potentially more affordable alternatives to subscribing through Apple's in-app purchase system, the EU Commission found this behavior to be abusive under art 102 TFEU.[337]

That is because, as described, Apple held a monopoly in the market for platforms providing music streaming apps to iOS users. This dominance made the platform essential for developers of music streaming apps.[338] Based on Apple's strong position, the EU Commission evaluated the anti-steering provisions as exploitative, rather than exclusionary. It focused mainly on the unfairness of the conditions imposed on app developers, who depended on the Apple App Store and were thus in a less powerful position to negotiate.[339]

These rules would severely restrict music streaming app developers, who had no means to inform consumers of cheaper alternatives.[340] Contrary to Apple's arguments, this behavior would ultimately have a negative impact on the market and consumers, who had no realistic way to learn about less expensive subscription options outside the App Store. Ultimately, this lessened consumer choice led to higher prices.[341]

The conduct could not be justified on quality grounds, such as ensuring positive consumer experiences or preventing loss of control over the payment infrastructure, either.[342] After all, consumers had a legitimate interest in learning about less expensive subscription alternatives.[343] The anti-steering provisions were therefore neither necessary nor proportionate to the circumstances but rather anti-competitive and could easily be replaced by less restrictive rules.[344]

Since Apple's provisions were thus considered an abuse of a dominant position under art 102 TFEU, the Commission found that Apple had to remove these rules from its App Store and imposed a significant fine of 1.84 billion Euros.[345]

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336 *Apple – App Store Practices (music streaming)* (n 4) para 588.
337 *Apple – App Store Practices (music streaming)* (n 4) paras 2, 589.
338 *Apple – App Store Practices (music streaming)* (n 4) para 564.
339 Cf *Apple – App Store Practices (music streaming)* (n 4) paras 547, 555.
340 *Apple – App Store Practices (music streaming)* (n 4) para 577.
341 *Apple – App Store Practices (music streaming)* (n 4) paras 591, 650.
342 *Apple – App Store Practices (music streaming)* (n 4) paras 822-824.
343 *Apple – App Store Practices (music streaming)* (n 4) para 644.
344 *Apple – App Store Practices (music streaming)* (n 4) para 555.
345 *Apple – App Store Practices (music streaming)* (n 4) paras 871, 1026.

5.4. Comparison to *Google Shopping* and the Amazon cases

It should be emphasized that in the three cases, *Microsoft*, *Google Android*, and *Apple App Store (music streaming services)*, the EU Commission did not refer to self-preferencing. Instead, it subsumed the platforms' behaviors under other abuse categories. These included the Essential Facilities Doctrine,[346] tying,[347] making a contract dependent on the acceptance of a supplementary obligation under art 102 (c) TFEU,[348] and exclusionary abuse through unfair trading conditions under art 102 (a) TFEU[349].

Nevertheless, when analyzing the platforms' specific conduct, one cannot ignore the striking similarities to the behaviors, which were regarded as self-preferencing in *Google Shopping* and the cases involving Amazon. The broad legal test applied in those cases involved two main elements, which the GC identified in *Google Shopping*: A platform granting its own products or services favorable treatment and competitors being put at a competitive disadvantage because of this discrimination.[350] It appears that some of the behaviors displayed by Microsoft, Apple, and Google in *Google Android* fulfill both of these elements. To illustrate, by refusing to share its interoperability information with rivals, Microsoft ensured that its specifications favored its own workgroup servers, while denying its rivals the benefit of interoperability.[351] Similarly, Microsoft and Google both granted preferential treatment to their products, specifically Microsoft's Windows Media Player and Google's search app and Chrome, by integrating them with their operating systems and Play Store, respectively.[352] Since the tying products were indispensable to manufacturers, the dominant firms ensured that consumers would also use the tied products, thereby foreclosing competitors.[353] The same can be said about Google's ban on Android forks, which was capable of preventing innovative rival products from being developed, subsequently leading more users to Android.[354] Lastly, by contractually preventing music streaming app developers from steering their users towards cheaper subscription options, Apple

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346 *Microsoft* (n 4).
347 *Microsoft* (n 4); *Google Android* (n 4).
348 *Google Android* (n 4).
349 *Apple – App Store Practices (music streaming)* (n 4).
350 *Google Shopping* (General Court) (n 13) para 123.
351 *Microsoft* (n 4).
352 *Microsoft* (n 4); *Google Android* (n4).
353 *Microsoft* (n 4) para 669; *Google Android* (n 4) para 52.
354 *Google Android* (n 4) paras 1019, 1032, 1036.

indirectly favored its own music streaming app, Apple Music, as well.[355] While this might not seem evident at first glance, Apple essentially forced its rival app developers to pass on their high commission fee to the consumer, considering they could not effectively lead their users away from Apple's in-app purchase system.[356] This would have the effect of making rival apps more expensive than Apple Music, thereby incentivizing consumers to choose Apple's music streaming service over competing providers.

That being said, the behaviors displayed by Microsoft, Google, and Apple were quite distinct from one another. This justified the application of different theories of harm. Nevertheless, the fact that all these types of conduct could also fall under the category of self-preferencing raises the suspicion that the classification of self-preferencing as a standalone abuse, as highlighted in *Google Shopping*, might be too broad and uncertain.

The Commission's tendency to assess only certain behaviors as self-preferencing seems particularly arbitrary, considering that Amazon's practice of tying its marketplace to logistics is not significantly different from the tying practices in *Microsoft* and *Google Android*.[357] Moreover, some scholars believe that even the *Google Shopping* case, if not analyzed under the Essential Facilities Doctrine, could be classified as a tying arrangement.[358] As Iacobucci and Ducci observed, this approach would require some modifications to the traditional definition of tying, which involves a tying product, a tied product, and an element of coercion. Although it could be argued that Google tied its comparison shopping service to Google Search, thus the tying product, not through traditional coercion, it did so through a coercive element that involved inducing consumers via prominent display, leading them from the tying product to the tied product.[359] Nonetheless, there are flaws in this interpretation: Unlike in the cases of *Microsoft* or *Google Android*, Google's behavior did not involve a tying contract or technical restraints, as consumers were not prevented from navigating to a rival comparison shopping service.[360]

[355] *Apple – App Store Practices (music streaming)* (n 4).
[356] *Apple – App Store Practices (music streaming)* (n 4) paras 591, 650.
[357] Ferrari (n 2) 141.
[358] Ferrari (n 2) 108; Colangelo (n 83) para 42.
[359] Ferrari (n 2) 108.
[360] Ferrari (n 2) 108.

Rather than applying tying to *Google Shopping*, the Commission could have also considered applying the Essential Facilities Doctrine, as it did in *Microsoft*.[361] While it might be true that *Google Shopping* was only similar to a strict refusal-to-deal, the *Microsoft* case shows that the Commission did not hesitate to apply the strict Bronner criteria even to cases that were not a complete refusal to share certain facilities but technically only a case of "disruption to supply".[362] After all, Microsoft had in fact provided information in the past. Thus, it might have been more appropriate to apply the reasoning established in *Commercial Solvents* rather than the stringent Bronner requirements.[363] At the same time, this demonstrates that the Commission showed some flexibility in applying the strict conditions outlined under the Essential Facilities Doctrine. It should be considered that both Microsoft and, later, Google, as demonstrated in its arguments in *Google Shopping,* had an interest in protecting their intellectual property, which is the legal reasoning for why stricter criteria apply to cases in which undertakings are forced to grant competitors full access to their facilities.[364] It would, therefore, not be too far-fetched to apply similar legal tests to both cases. Moreover, the two cases seemed to have a comparable outcome: being forced to apply equal treatment to their own products and those of others. That is apparent in the *Google Shopping* case.[365] In *Microsoft*, the CFI, applying the Bronner criteria, stated that 'non-Microsoft work group operating systems must be capable of interoperating with the Windows domain architecture on an equal footing with Windows work group server operating systems'.[366] In doing so, it essentially required that rivals compete "equally", meaning effectively and viably. While this might have technically lowered the Bronner standards, which required absolute indispensability, as not suggested by the CFI's wording in *Microsoft*, the Essential Facilities Doctrine was nonetheless applied to the case, despite there being no absolute refusal to supply and the outcome being similar to *Google Shopping*.[367]

All this might suggest that it would be best to categorize self-preferencing not as a standalone abuse but rather under traditional theories of harm. However, it seems that this does not address the fact that self-preferencing as a standalone abuse was

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[361] *Microsoft* (n 4); Colangelo (n 83) para 40.
[362] Graef (n 1) 481.
[363] Joined Cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECR 225; Graef (n 1) 482.
[364] *Google Shopping* (Opinion of AG Kokott) (n 250) para 84.
[365] Graef (n 1) 476.
[366] *Microsoft* (Court of First Instance) (n 294) para 421.
[367] Graef (n 1) 476.

developed to capture modern digital leveraging strategies that do not precisely fit traditional categories of harm.[368] An example is the *Google Android* case compared to *Amazon Logistics*. While it is true that both cases could be classified as tying, this ignores some key differences. Amazon did not contractually or technically oblige its users to use its own logistics system. Instead, it allowed them to choose its own logistics system, with the consequence that users without the FBA would be downgraded on Amazon's platform.[369] In contrast, in *Google Android*, Google used contractual restrictions, making it conditional for OEMs to pre-install Google Search and Chrome to access the Google Play Store.[370] While Google thus contractually coerced OEMs to obtain both the tying and the tied product, Amazon merely used its internal algorithmic design to put sellers without the FBA at a disadvantage, without taking away their option to use a different logistics service.[371] Amazon's behavior, therefore, does not fall in the traditional category of tying, deeming it necessary for the ICA to apply self-preferencing as a new category of harm instead. Clearly, self-preferencing is intended to address situations where platforms do not impose contractual or technical limitations.[372] Instead, they utilize their own platform and internal mechanisms to favor their own products and services. This pattern also appears in *Google Shopping*. Google did not employ means of contractual coercion or unfair terms but rather took advantage of the control it had over its own design to benefit its own products.[373]

Ultimately, it becomes clear that banning the existence of self-preferencing as a standalone abuse and rather pushing self-preferencing conduct into existing theories of harm does not seem like a sufficient solution that accounts for the modern changes of platform behavior.[374] However, the case law on tying, refusal to deal, and other established forms of abuse highlights the lack of a clear legal test, similar to the step-by-step assessments made for existing theories of harm.[375]

While this can be inferred from the relevant decisions by the European Commission and the European Courts, the case of *Amazon Logistics*, investigated by the ICA, demonstrates that national authorities have also spent time attempting to find a place

[368] Ferrari (n 2) 116.
[369] Graef (n 1) 470.
[370] *Google Android* (n 4).
[371] Provvedimento AGCM, *Amazon*, n 29925 (n 14).
[372] Graef (n 1) 470.
[373] *Google Search (Shopping)* (Commission) (n 4).
[374] Ferrari (n 2) 116.
[375] Cf the Essential Facilities Doctrine and tying; *Microsoft* (n 4); *Google Android* (n 4).

for self-preferencing within their jurisdictions.[376] It seems necessary to analyze the actions taken by other national authorities to gain a complete picture of how self-preferencing is assessed within the EU.

6. National Jurisdiction

The behaviors of Big Tech firms have come under scrutiny not only by the EU Commission but also within various national jurisdictions, highlighting the widespread regulatory and legal attention they are receiving.[377] This has not only been happening within the EU, but in some cases, has involved civil lawsuits initiated by private companies, particularly in the United States, as exemplified by the *Epic v Apple* case, in which Epic Games filed a lawsuit against Apple for self-preferencing behavior.[378] While the outcome of such cases certainly seems interesting to evaluate in light of the overall concept of self-preferencing, it would exceed the scope of this thesis, focusing solely on the EU and its Member States.

However, the ICA's investigation into *Amazon Logistics* reveals that Member States have also been playing an active role in scrutinizing large tech companies.[379] Beyond Amazon, the behaviors of both Google and Apple have, therefore, been condemned not only by the Commission but also by several National Competition Authorities. For example, the Italian Competition Authority has not only investigated Amazon's abusive behavior, but also Google's regarding Google Android Auto, an extension to the Android operating system.[380] Moreover, the German Competition Authority has been investigating Apple[381] and the Dutch Competition Authority has initiated a Market Study on Apple's and Google's app store practices and their effects on competition.[382]

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[376] Provvedimento AGCM, *Amazon*, n 29925 (n 14).

[377] Cf Provvedimento AGCM, *Amazon*, n 29925 (n 14); Colangelo (n 83) para 29.

[378] *Epic Games, Inc v Apple, Inc*, 67 F 4th 946 (9th Cir 2023).

[379] Provvedimento AGCM, *Amazon*, n 29925 (n 14).

[380] Provvedimento AGCM, (Caso A529 - *Google/Compatibilità App Enel X Italia con sistema Android Auto*), 27 aprile 2021, n 27771; Ferrari (n 2) 142ff.

[381] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (*Bundeskartellamt*, 13 February 2025) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2025/02_13_2025_ATTF.html> accessed 22 October 2025; Bundeskartellamt, 'Proceedings against Apple' (*Bundeskartellamt*, 2025) <https://www.bundeskartellamt.de/EN/Digital_economy/proceedings_against_large_digital_companies/Apple/Apple.html> accessed 15 October 2025.

[382] Autoriteit Consument & Markt, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (*ACM*, 11 April 2019) <https:// www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 22 October 2025; Autoriteit Consument & Markt, 'Market study into mobile app stores' (*ACM*, 11 April 2019) <https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf> accessed 22 October 2025.

The Commission's and NCAs' focus on app stores, as demonstrated in the cases of *Google Android* and *Apple App Store (music streaming services)*,[383] as well as national case law,[384] highlights the fact that app store providers constitute classic examples of modern intermediary platforms. They are critical gateways for other businesses, particularly app developers, who rely on them for visibility to consumers.[385] Additionally, both Google and Apple have vertically integrated business models that further this dependency, as they operate across multiple stages of the supply chain. This includes not only providing their app stores but also selling the phones on which their apps are installed, as well as offering their own apps within these app stores.[386] They therefore benefit greatly from the indirect network effects strengthened by the fact that the Apple App Store and the Google Play Store are currently the largest app stores in the market.[387] Consequently, particularly smaller app providers also profit from their large consumer bases, increasing their dependency. In fact, displaying their apps on these app stores is often their primary way to reach a large global audience.[388] At the same time, they are forced to compete with Google's and Apple's own apps.[389] Altogether, it can be said that the platforms' intermediary function, their vertically integrated business models, and their market dominance all have the potential to make Google and Apple more prone to anti-competitive behavior, including self-preferencing. It is thus not surprising that both the EU Commission and National Competition Authorities have been carefully inspecting their behavior.

6.1. German Competition Authority v Apple

An example of an investigation into Apple's app store practices is a case initiated by the German Competition Authority, the Bundeskartellamt, which examined Apple's

[383] *Google Android* (n 4); *Apple – App Store Practices (music streaming)* (n 4).
[384] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381); Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380); Bundeskartellamt, 'Proceedings against Apple' (n 380):
[385] Cf Autoriteit Consument & Markt, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (n 381); Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 3-4; Ferrari (n 2) 44, 49; Meredith Broadbent, 'Implications of the Digital Markets Act for Transatlantic Cooperation' (*Center for Strategic and International Studies*, 15 September 2021) <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation> accessed 22 October 2025, 12.
[386] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4; Ferrari (n 2) 44.
[387] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 3.
[388] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4.
[389] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4.

behavior regarding the use of consumer data.[390] Initiated in June 2022, it is a relatively recent example, following the Commission's previous investigations into Apple.[391]

In its preliminary legal assessment, the Bundeskartellamt referred to three different practices related to Apple's App Tracking Transparency Framework, which it classified as self-preferencing under § 19a(2) of the German Competition Act and art 102 TFEU.[392] Under the ATTF, app developers were required to obtain user permission before tracking their behavior on other apps and websites.[393] While some might argue that this looks like a privacy-enhancing measure at first glance, the Bundeskartellamt identified three aspects that, in their opinion, amounted to self-preferencing:

First, the ATTF contains a narrow definition of "tracking", which only includes data processing for advertising across apps and websites from different companies. By doing so, Apple essentially exempts itself, as it can process the so-called first-party data it obtains from its own products and services, namely the App Store, the Apple ID, and all connected iOS devices. This ultimately means that Apple has an advantage in advertising that it does not grant to third-party app developers.[394]

Secondly, there are additional requirements for third-party app providers when it comes to obtaining consumer consent to process data across services. Particularly, there are up to four separate consent dialogues for third-party developers. In contrast, Apple's own app displays a maximum of two pop-ups, which also fail to highlight the fact that Apple itself processes the data it obtains across its ecosystem and uses it for advertising purposes. Again, this puts Apple at an advantage, considering third-party app providers have to overcome a higher burden for consumers to give their consent.[395]

This is further exacerbated by the fact that, lastly, the consent dialogues displayed for third-party apps are also designed differently than those for Apple's own apps.

[390] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380); Bundeskartellamt, 'Proceedings against Apple' (n 380).
[391] Bundeskartellamt, 'Proceedings against Apple' (n 380).
[392] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).
[393] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380); Bundeskartellamt, 'Proceedings against Apple' (n 380).
[394] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).
[395] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

Particularly, third-party dialogues nudge users towards refusing consent, while the dialogues for Apple's own apps encourage users to allow Apple to process their data.[396] That being said, while it is true that Apple also allowed users to restrict its data, the ATTF subjected third-party app developers to stricter and additional requirements than its own apps, underlining the self-preferencing allegation.[397]

The Bundeskartellamt assessed this conduct both under art 102 TFEU and its national provision in § 19a(2)(1) GWB. The latter states that the Bundeskartellamt may forbid dominant companies from granting preferential treatment to their own offers, particularly by favorably displaying their own products or pre-installing them on devices.[398] Unlike art 102 TFEU, German law has thus introduced an explicit provision outlawing self-preferencing and provided a, based on the phrasing "in particular", non-exhaustive list of examples, which behaviors can be classified as such.[399] Based on this, it was concluded that Apple had, in fact, engaged in self-preferencing behavior by giving itself an advantage in its advertising services when it comes to processing user data. This put their own services in a more beneficial position compared to their competitors.[400]

It should be clarified that the preliminary legal assessment by the Bundeskartellamt did not require Apple to introduce a system that would not require user consent, making it easier for third-party app providers to process their information. After all, consumers should decide for themselves how their data is used.[401] Instead, Andreas Mundt, president of the Bundeskartellamt, stressed a different point. He stated that Apple's preferential treatment of its own services was illegal under competition law and should therefore cease. Both Apple's own apps and third-party apps should be required to meet the same standards before being allowed to process consumer data.[402]

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[396] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

[397] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

[398] § 19a(2)(1) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013 (BGBl I S 1750, 3245), das zuletzt durch Artikel 6 des Gesetzes vom 5. Dezember 2024 (BGBl 2024 I Nr 400) geändert worden ist (GWB).

[399] § 19a(2)(1) GWB.

[400] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

[401] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

[402] Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

Despite this conclusion, uncertainties remained about whether the Bundeskartellamt could effectively demand that Apple cease its particular conduct. In that regard, the Bundeskartellamt had decided in 2023 that due to Apple's significant role in the market and thus its influence on competition, it was subject to extended abuse control pursuant to § 19a GWB, meaning that it was in fact in the Bundeskartellamt's power to demand that a certain behavior by a platform be brought to an end.[403] This earlier decision was confirmed in proceedings by the German Bundesgerichtshof in March 2025, meaning that the Bundeskartellamt could, in fact, rule Apple's behavior as anti-competitive self-preferencing and demand that Apple stop this discriminatory conduct.[404]

6.2. Dutch Competition Authority: market study on mobile app stores

The German Bundeskartellamt was not the only National Competition Authority to criticize Apple's conduct regarding its app store. Similarly, the Dutch Competition Authority, the ACM, investigated the app store behaviors of both Apple and Google and requested that app developers provide relevant information on their interactions with both platforms.[405] Based on the data they obtained, the Dutch Competition Authority then conducted a market study.[406]

The investigation confirmed that Apple and Google were dominant in their respective markets, with app providers reliant on them for visibility due to a lack of viable alternatives. In fact, the ACM found that Apple's App Store was the only app store compatible with iOS devices, and, as the EU Commission had also determined in the case of *Google Android*, the Play Store was pre-installed on Android devices. Both companies had complete control over the apps displayed in their app stores, including their functionality and any benefits available to third-party providers.[407]

Moreover, they pointed out that both Apple and Google had a dual role in the market, meaning they both provided their app stores and also offered their own apps, competing with third-party developers.[408]

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403 Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

404 MDR, 'Bundeskartellamt darf Apple schärfer kontrollieren' (*MDR*, 18 March 2025) <https://www.mdr.de/nachrichten/deutschland/politik/bgh-urteil-apple-bundeskartellamt-kontrolle-100.html> accessed 15 October 2025.

405 Autoriteit Consument & Markt, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (n 381).

406 Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381).

407 Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 3, 4.

408 Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4.

Naturally, these factors raised the question of whether Apple and Google exploited their strong positions in relation to third-party app developers and possibly engaged in self-preferencing. This suspicion grew after multiple app providers had complained about the platforms' behaviors, claiming that third-party developers faced a competitive disadvantage compared to Apple's and Google's own, sometimes pre-installed, apps.[409] Similar to the EU Commission's investigations into Apple's behavior, they also voiced complaints about the platforms' payment systems, such as Apple's in-app purchase system, and the fact that they were charged a 30% commission fee on app subscriptions made within the app store. Lastly, they argued that they were unable to use all iOS functionalities.[410]

Based on these claims, the ACM assessed whether Apple and Google exploited their bottleneck power within the app ecosystem. The key finding was that third-party app providers had no viable alternatives to app stores for reaching consumers. Firstly, resorting to browser or web apps was not seen as a realistic option due to compatibility issues and low discoverability. That also explains why sideloading, meaning the installation of apps on devices outside an app store, was impractical for most consumers aside from established brands. Moreover, while Android devices allow for the installation of app stores by other companies, these often come with significant drawbacks for consumers, such as not being updated automatically. Lastly, while app developers could try to have their apps pre-installed on phones by manufacturers, this was often quite costly and thus not viable. Also, most smartphone manufacturers were unwilling to pre-install large numbers of third-party apps.[411]

Due to this lack of alternatives, the ACM concluded that third-party app developers strongly depended on both Google and Apple. Due to this dependency, it seemed that the platforms exerted their power and engaged in self-preferencing behavior of their own apps, while putting their competitors at a disadvantage.[412] Particularly, and similar to the conclusions in the *Google Android* case, they granted preferential treatment to their own apps through pre-installation by OEMs, a practice unavailable to many smaller competitors. Additionally, Apple's in-app purchase system and the 30% commission charged to third-party app developers for subscriptions within the App Store gave Apple a direct financial advantage, increasing its profits while making it

[409] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 5.
[410] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 5-6.
[411] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4-5.
[412] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 6-7.

more costly for third parties to distribute their apps. The ACM also determined that the terms and conditions for app providers set by Apple and Google were unclear, and that third parties faced significant difficulties in communicating with or obtaining transparency from the platforms.[413]

In response to these allegations, Google and Apple argued their main concern was the quality of their ecosystems. They said they had invested in them to improve their services. Thus, according to Apple, it had no incentive to engage in self-preferencing.[414]

The ACM was not convinced by Google's and Apple's arguments. Although the platforms offered value by connecting app developers and consumers, their opaque algorithms made it difficult for third-party developers to compete with the platforms' own apps. Ultimately, three types of behaviors were concerning and warranted further investigation under competition law. To start with, based on the conduct described, the ACM had reasonable suspicion that Google and Apple might engage in self-preferencing by favoring their own apps over those of competitors. Secondly, even comparable apps were not treated equally at times. Thirdly, the lack of transparency and communication was unfair to app developers.[415]

Although the ACM has not conducted further investigations in this case as of this point, it is notable that it reached conclusions similar to those of the EU Commission regarding Apple.[416] Nevertheless, unlike the Commission, the ACM explicitly referred to the platform's conduct as "favoring" itself, thus "self-preferencing".[417]

Given these developments, it is likely that the ACM will continue with a formal investigation, considering it has already imposed a penalty on Apple for requiring dating app providers to use its in-app purchase system, thereby restricting the providers' choice of payment processor.[418] While this conduct was arguably a case of tying,[419] it is not too different from some of the ACM's conclusions found in its market study, which is why it will be interesting to watch the outcome of further investigations, particularly the ACM's classifications of the individual types of conduct.

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[413] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 7.
[414] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 6.
[415] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 6-7.
[416] *Apple – App Store Practices (music streaming)* (n 4).
[417] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 7.
[418] Jacobson and Wang (n 12) 18.
[419] Jacobson and Wang (n 12) 18.

6.3. *Google Android Auto*

Another case that is not directly related to Google's app store practices but concerns anti-competitive behavior toward third-party app developers was initiated by the ICA in 2019.[420] The investigations followed a complaint by Enel X Italia. They had developed an electric vehicle charging app, Juice Pass, which they requested to integrate into Google's Android Auto platform.[421] The latter functions as a tool through which drivers can use selected apps through their car's interface. With Enel's app, drivers would be able to view the locations of charging stations on a map as well as access relevant charging information, book the charging points, and otherwise manage the charging process.[422] This integration request by Enel X Italia was, however, denied by Google, as Juice Pass was considered a utility app excluded from Android Auto at the time.[423] As an alternative to the full integration, Google offered to only incorporate some of the app's features into Google's own app, Google Maps. Otherwise, Enel could also develop customized versions of Juice Pass, using the Software Development Kits for Android Auto.[424]

Nevertheless, both options were found to be insufficient and not economically viable by the ICA. That is, because by integrating some of Juice Pass's data into Google Maps, Enel would not be able to share all of its app's functionalities with its users. This would ultimately harm innovation, as Google would also have full control over the information it chooses to display in Maps rather than allowing an independently developed app to thrive. Regarding the creation of other versions of Juice Pass, the ICA argued that this was not a viable solution due to the high costs associated with developing such versions. After all, the Software Development Kits were provided to individual car manufacturers, meaning that Enel would be forced to negotiate and coordinate with each manufacturer, leading to multiple, fragmented versions rather than a single, integrated app. Maintaining these multiple versions would naturally involve high effort and significant transaction costs.[425] Also, the outcome of this option would still not be the full integration of Juice Pass but rather the existence of fragmented solutions with limited consistency. That is why both alternatives essentially

[420] Provvedimento AGCM, (Caso A529 - *Google/Compatibilità App Enel X Italia con sistema Android Auto*), 27 aprile 2021, n 27771.
[421] Ferrari (n 2) 142.
[422] Ferrari (n 2) 143.
[423] Ferrari (n 2) 144.
[424] Ferrari (n 2) 145.
[425] Ferrari (n 2) 145.

amounted to a refusal to grant access, assessed under the Essential Facilities Doctrine.[426]

Overall, the ICA argued that Google's behavior was not objectively justified and would significantly harm competition.[427] After all, it would not only demote Enel, as a competing app developer, but also impair consumer choice and innovation. Also, while Google claimed its main objective was to ensure the safety of drivers when using apps in their cars,[428] the ICA noted that Google had only expanded the app categories for Google Android Auto after Enel's request, and it had also failed to provide plausible safety reasons.[429] That is why the ICA ruled the conduct to be abusive under art 102 TFEU and issued a fine of 102 million Euros.[430]

Due to the complex issues discussed in the case, particularly the application of the Bronner criteria, preliminary proceedings by the ECJ were eventually requested. What stands out about the ECJ's ruling is that, while the Court confirmed that the case amounted to an abuse under the Essential Facilities Doctrine, it significantly reduced the importance of the indispensability criteria. The Court reasoned that Android Auto was essentially created for third-party use, rather than targeting Google's own business. Due to this business model, the argument of which is similar to the General Court's elaborations on Google's "open" platform in *Google Shopping*,[431] strict indispensability was not required to force Google to grant access to a competitor, provided that its platform makes the competitor's app more attractive to consumers and that a refusal would restrict competition.[432] However, it was sufficient to show a potential for anti-competitive harm rather than proving that Google had actually succeeded in excluding competitors.[433] Moreover, Google not having a template available for apps relating to electric vehicle charging services at the time of Enel's request could only constitute an objective justification for the refusal if the development of such a template would compromise the platform's integrity or if its development was technically impossible. If that was not the case, Google should have developed such a

[426] Ferrari (n 2) 147.
[427] Ferrari (n 2) 146-147.
[428] Ferrari (n 2) 148.
[429] Ferrari (n 2) 148.
[430] Provvedimento AGCM, *Google/Compatibilità App Enel X Italia con sistema Android Auto*, n 27771 (n 380).
[431] *Google Shopping* (General Court) (n 13) para 557.
[432] Case C-233/23 *Alphabet Inc and others v Autorità Garante della Concorrenza e del Mercato* (ECJ, 25 February 2025), para 44.
[433] *Google Android Auto* (n 432) para 61.

template within a reasonable amount of time, rather than outright refusing to integrate Enel's app.[434] Though the ECJ's ruling was only preliminary and not a decision in the case, the interpretative guidance provided thus essentially confirmed the ICA's ruling in favor of Enel.

It particularly stands out that both the ICA and the ECJ relied on the Essential Facilities Doctrine when assessing the case. Self-preferencing, therefore, did not seem to be the primary issue.[435] Nonetheless, it appears that some similarities to self-preferencing exist in the case. Particularly, Google's conduct – as the ICA highlighted – was capable of reinforcing Google's own app, Google Maps, while demoting its competitor's app.[436] Also, the case of *Amazon Logistics* proves that the ICA was not hesitant to identify self-preferencing when assessing platform behavior.[437] The distinction between Amazon's and Google's behaviors thus require a closer look. A comparison between the cases investigated by the NCAs will therefore be conducted in the next section.

6.4. Comparison to *Google Shopping* and the Amazon cases

As can be seen, the specific behaviors displayed by Apple and Google regarding their app stores and the Android Auto platform, as investigated by the German, Dutch, and Italian Competition Authorities, differ from the specific conduct qualified as self-preferencing in *Google Shopping* and the cases concerning Amazon. Unlike in *Google Shopping*, Apple's and Google's own apps were not necessarily displayed more favorably than those of their competitors.[438] It was also not a case like *Amazon Logistics* and *Amazon Marketplace*, in which third-party users were incentivized to use the platform's own complimentary service to avoid disadvantages.[439] Though it could be said that Apple's and Google's practice of favoring their own payment systems by having consumers pay for their subscription within the respective app store and forcing third-party app providers to pay a 30% commission fee was a somewhat similar scenario, in which the platforms granted preferential treatment to an additional service

[434] *Google Android Auto* (n 432) paras 73-74.
[435] Ferrari (n 2) 147.
[436] Ferrari (n 2) 149.
[437] Provvedimento AGCM, *Amazon*, n 29925 (n 14).
[438] Cf *Google Shopping* (Commission) (n 4); Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380); Bundeskartellamt, 'Proceedings against Apple' (n 380); Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381).
[439] *Amazon Marketplace* and *Amazon Buy Box* (n 4); Provvedimento AGCM, *Amazon*, n 29925 (n 14).

provided within their app store, aside from its main function to connect app developers and consumers.[440]

Additionally, it is evident that Google and Apple, regarding their app stores, displayed the typical factors associated with self-preferencing, namely vertical integration by a dominant platform.[441] Moreover, the roles of the platforms in the app store market mirrored Google's role in *Google Shopping* and Amazon's role in their marketplaces, specifically in their ability to control access to essential services.[442] For app stores, this gatekeeper role is particularly pronounced, as the ACM noted that app developers have no alternative but to use these app stores.[443] This is particularly the case for iOS devices, which do not allow their users to download an alternative app store, thereby preventing rival app stores from emerging. In contrast, Google's search services do not provide the only means for third-party users to access consumers, but a gatekeeper role can still exist if a platform controls access to a large, significant user base critical for competition.[444] Both Google's search pages, which generate substantial search traffic, and Amazon's marketplace, crucial for reseller profits, fit this description.[445]

Overall, the similarities between the cases conducted on Apple's and Google's behaviors regarding their app stores and *Google Shopping,* as well as *Amazon Logistics* and *Amazon Marketplace,* thus show in their gatekeeping roles in the market and their practice of vertical integration, which is then abused by granting preferential treatment to the platforms' own products and services. It is therefore not surprising that the National Competition Authorities have concluded that the app store-related practices constituted self-preferencing.[446] On the other hand, it is notable that the investigations conducted by the ACM share some striking similarities with the case of *Google Android*, in which Google's pre-installation of the app store was also criticized.[447] However, *Google Android* had no mention of self-preferencing, while the ACM referred only to the act of "favoring" itself with no regard for other theories of harm

[440] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 88-89.
[441] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4.
[442] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4-5; Ferrari (n 2) 44, 49.
[443] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381) 4-5.
[444] Ferrari (n 2) 49.
[445] Ferrari (n 2) 49.
[446] Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381); Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).
[447] *Google Android* (n 4).

that might also apply.[448] This again highlights the uncertainties surrounding the specific behaviors that fall under the new term “self-preferencing”.

These uncertainties are amplified when looking at the ICA’s ruling in *Google Android Auto*, which was solely based on refusal to deal with no mention of self-preferencing.[449] This raises further questions, as Google not only refused to integrate Enel’s app into its Android Auto platform, but also – by doing so and only allowing Enel to incorporate parts of its app into Google Maps - attempted to strengthen its own app through its platform.[450] While the behavior in question might differ from Google’s behavior in *Google Shopping*, as Google did not display its own app more favorably,[451] Google nonetheless granted preferential treatment to its own app.

Moreover, the ECJ highlighting the “openness” of the Android Auto platform for third-party app developers, which is why the indispensability of the platform was not required, seems to further reveal the case’s differences from classic refusal-to-deal scenarios. That is, because the Essential Facilities Doctrine was ultimately developed to protect a business’s own facilities from rivals by creating a stringent legal test.[452] However, this rationale does not seem to accurately fit the Android Auto platform. One might therefore argue that the case should have been evaluated under self-preferencing instead.

However, this conclusion does not take into account the specific nature of the conduct. After all, self-preferencing requires two elements: the favorable treatment of a platform’s own products and the demotion of its competitors.[453] Both in *Google Shopping* and *Amazon Logistics*, the platforms not only favored their own products but also fulfilled the second element, namely the demotion of competitors, through active, unconventional methods. In *Google Shopping,* for instance, Google used different algorithms on rival comparison shopping services,[454] while in *Amazon Logistics*, Amazon used unfair methods of choosing who to display more favorably.[455] On the other hand, Google in *Google Android Auto* did not actively demote its competitors

[448] *Google Android* (n 4); Autoriteit Consument & Markt, ‘Market study into mobile app stores’ (n 381) 7.
[449] Ferrari (n 2) 147.
[450] Ferrari (n 2) 149.
[451] Cf *Google Shopping* (Commission) (n 4).
[452] Cf *Google Shopping* (Opinion of AG Kokott) (n 250) para 84.
[453] Ferrari (n 2) 149.
[454] *Google Shopping* (Commission) (n 4).
[455] Provvedimento AGCM, *Amazon*, n 29925 (n 14).

through unconventional sabotage. The harm to competitors was rather an effect of its choice not to fully integrate Juice Pass.[456]

To conclude, the second element of self-preferencing, namely the demotion of competitors, appears to require an active conduct, rather than being a reflex response to other behavior, even if said behavior grants preferential treatment to the platform's own products.

Nevertheless, this again shows that identifying self-preferencing and distinguishing it from other behavior can be quite challenging. In this regard, the German provision on self-preferencing stands out, as it provides some guidance.[457] By contrast, art 102 TFEU, as pointed out in chapter 6.1, does not explicitly list self-preferencing as abusive.[458]

However, in 2022, the EU issued the Digital Markets Act, which prohibits self-preferencing in art 6(5) and may finally bring needed clarity.[459] This provision and its impact on current practices are analyzed in the next chapter.

7. Digital Markets Act

7.1. Background

With the increasing influence of gatekeeping platforms on competition, European authorities have recognized the need for a comprehensive regulatory framework to address this issue. As a result, the Digital Markets Act was implemented in 2022.[460] Its objective is to improve the competitive balance between dominant platforms and other market players, particularly businesses that are dependent on the services provided by gatekeepers, through the establishment of harmonized rules.[461] As such, it explicitly mentions the need to ensure 'contestable and fair markets in the digital sector across the Union where gatekeepers are present'.[462]

Aside from other provisions aimed at safeguarding competition, the Digital Markets Act also constitutes a groundbreaking development in the case of self-preferencing: For the first time, an ex ante ban of self-preferencing was developed, shifting away from

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[456] Ferrari (n 2) 149.

[457] § 19a(2)(1) GWB.

[458] TFEU, art 102.

[459] DMA, art 6(5).

[460] Christophe Carugati, ‚How to implement the self-preferencing ban in the European Digital Markets Act' (2022) 22/22 Bruegel Policy Contribution Issue 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366700> accessed 22 October 2025, 2.

[461] Bougette (n 12) 18.

[462] DMA, recital 97; Ferrari (n 2) 17; Broadbent (n 384) 2.

the uncertainties arising from the ex post assessments conducted by the EU Commission on the sole basis of art 102 TFEU.[463] To illustrate, while art 102 TFEU merely states that an abuse of a dominant position shall be prohibited, which is enforced by the Commission investigating potentially infringing behaviors ex post, the DMA intends to deviate from this practice of evidence-based, case-by-case evaluations and rather seeks to tackle the systematic anti-competitive behaviors depicted by gatekeeping platforms at their roots and through the means of legal prevention as an addition to retrospective prosecution.[464]

The cause of this shift lies in the EU authorities acknowledging that the existing legal framework is insufficient to regulate tech giants effectively, whose dominance and ability to control essential platforms have been shown to significantly impact competition.[465] The EU Commission thus pointed out:

> The Digital Markets Act addresses unfair practices by gatekeepers that either (i) fall outside the existing EU competition control rules, or (ii) cannot always be effectively tackled by these rules because of the systemic nature of some behaviors, as well as the ex post nature of competition law. The Digital Markets Act will thus minimise the harmful structural effects of these unfair practices ex ante, without limiting the EU's ability to intervene ex post via the enforcement of existing EU competition rules.[466]

Therefore, rather than replacing the previous system of ex post assessments conducted by the EU Commission, the DMA intends to strengthen the existing system by adding a form of ex ante regulation of platform behavior.[467] This shift is also indicated in recital 3 of the Regulation, which states that the DMA is not aimed at addressing already evident harm but instead at protecting the market from future harm.[468]

Consistent with the DMA's goal to tackle systemic forms of abuse, it targets platforms that are particularly prone to anti-competitive conduct, namely gatekeepers,

[463] Broadbent (n 384) 2.
[464] Broadbent (n 384) 1-2.
[465] DMA, recitals 5-6; Broadbent (n 384) 2.
[466] European Commission, 'Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets' (*European Commission*, 6 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349> accessed 15 October 2025.
[467] Broadbent (n 384) 2.
[468] DMA, recital 3.

specifically the category of U.S. tech giants comprising Google, Amazon, Apple, Microsoft, and Meta.[469] These platforms fit the overall definition of gatekeeping platforms, which, generally speaking, are entities that have a monumental influence on the Internal Market, have had the ability to control companies' access to end users and consumers, and have maintained their size for at least three years.[470] Specifically, gatekeepers must meet the criteria of having a minimum of 45 million monthly users, a global turnover of at least 6.5 billion Euros, and operations in three or more Member States.[471] In addition to these clearly defined platforms, the EU Commission also has the authority to investigate other businesses if suspicions arise.[472] This demonstrates that, while the provisions of the DMA are particularly aimed at giant platforms, the EU does not exclude the possibility of other companies, that may not formally qualify as gatekeepers, engaging in the anti-competitive behaviors systemically displayed by tech giants.

When it comes to regulating platforms, two provisions in the DMA are of particular relevance: While art 5 lays out specific obligations for gatekeepers, such as making it unlawful to combine the personal data obtained from different services offered by the same platform,[473] art 6 deals with broader types of abuse, including self-preferencing[474]. In that regard, art 6(5) directly addresses gatekeepers by prohibiting them from providing favorable treatment for their own services and products.[475]

This obligation directed at gatekeepers is complemented by a reversal of the burden of proof in art 8 of the DMA, according to which platforms must demonstrate themselves that they are complying with the Regulation, rather than requiring the Commission to prove non-compliance.[476]

Additionally, the DMA also outlines other rules for enforcement and incentivizes companies to comply with their obligations. It does so by allowing for additional remedies, including fines reaching as high as ten percent of the platform's global turnover, as well as addressing investigative measures.[477] Specifically, the DMA is

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[469] Broadbent (n 384) 1; Carugati (n 432) 2.
[470] Broadbent (n 384) 3.
[471] DMA, art 3.
[472] DMA, art 3(8).
[473] DMA, art 5.
[474] DMA, art 6.
[475] DMA, art 6(5).
[476] DMA, art 8(1); Carugati (n 432) 9.
[477] Broadbent (n 384) 4.

adamant in making its enforcement an obligation of not only the EU but also of Member States through their National Competition Authorities.[478]

Overall, it can be said that the DMA serves as a significant addition and enhancement to the prohibition of abusive conduct under art 102 TFEU. While art 102 TFEU broadly prohibits abusive conduct, the DMA goes further by banning specific practices that have been proven to be systemically applied by dominant tech platforms. In addition, the DMA ensures the effective enforcement of these bans through additional remedies and by aiming at the cooperation between EU and national authorities to supervise platform behavior and take action where needed.[479] By adding this ex ante regulation to the existing practice of investigating evidenced signs of abusive conduct, the DMA has undoubtedly been a significant step towards protecting fair competition. However, its implementation also introduces challenging ambiguities, particularly regarding self-preferencing, which raises important questions. Addressing these questions is necessary to understand the DMA's impact on the handling of self-preferencing in the digital market.

7.2. Self-preferencing in the DMA

Art 6(5) DMA explicitly prohibits self-preferencing. It states:

> The gatekeeper shall not treat more favorably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products or a third party. The gatekeeper shall apply transparent, fair, and non-discriminatory conditions to such ranking.[480]

The phrasing of this provision indicates that self-preferencing under art 6(5) of the DMA has two elements: first, there is a negative obligation for a platform to abstain from treating its own services and products more favorably through legal, technical, or commercial means.[481] However, it appears that the definition of the practices to which this ban applies is quite narrow. Art 6(5) DMA specifically limits it to ranking, relating to the organization and display of information on products and services, as well as

[478] Broadbent (n 384) 4-5.
[479] DMA, arts 5, 6; Broadbent (n 384) 4-5.
[480] DMA, art 6(5).
[481] DMA, recital 52; Carugati (n 432) 3.

crawling and indexing, which describe the upstream process of finding and storing content before it is ultimately ranked.[482] On the other hand, art 6(5) DMA mentions the positive obligation to apply conditions to itself and its competitors that are "transparent, fair, and non-discriminatory".[483] This means that necessary information on the ranking mechanism should be shared, and the parameters applied to the ranking should be fair and maintain a balance between the rights and obligations of gatekeepers and third-party providers.[484] Through this positive obligation, gatekeeping platforms should be prevented from obtaining a disproportionate advantage.[485] To avoid this unfairness, it is essential to ensure equal treatment, as defined in case law, which means not treating comparable situations differently and not treating different situations in the same way unless there is a justification for such treatment.[486] This can only be achieved through the use of objective parameters, provided that companies are transparent about their algorithmic mechanisms, allowing third-party providers to ensure the absence of self-favoring bias. This demonstrates a tight connection between transparency, fairness, and non-discriminatory treatment.

The provision in art 6(5) DMA, therefore, should not be understood as an obligation for gatekeepers to refrain from promoting their own services or products. Instead, promotion is allowed on the condition that it is not related to the products' affiliation with the gatekeepers but rather on objective criteria that equally apply to third-party providers.[487] To illustrate this concept, a gatekeeper could not favorably display its own products solely on the grounds that they are their own, but it could base this ranking on objective parameters, such as the amount of consumer traffic generated by the services.[488]

However, compliance with the requirements under art 6(5) DMA is quite a challenging task. First, it should be noted that its transparency guidelines should always be interpreted in light of the previously issued P2B Regulation, which requires, for instance, the listing of the parameters used to determine how services are ranked in a platform's terms and conditions.[489] Moreover, the Commission has issued guidelines

[482] DMA, art 6(5); Carugati (n 432) 3.
[483] Carugati (n 432) 3.
[484] Carugati (n 432) 3.
[485] DMA, recital 33; Carugati (n 432) 3.
[486] *Google Shopping* (General Court) (n 13) para 155.
[487] Carugati (n 432) 3.
[488] Carugati (n 432) 3.
[489] Carugati (n 432) 4.

on ranking transparency, which should be taken into account.[490] That being said, while the P2B Regulation and the respective guidelines may aid in fulfilling the conditions under art 6(5) of the DMA, determining whether algorithms are unbiased and objective remains challenging, as it is assessed on a case-by-case basis and ultimately subjective.[491] After all, one cannot ignore the information imbalance to the advantage of platforms. While a platform might claim to be using objective ranking parameters and those parameters may be perceived as such on the outside, there may be underlying motives for these parameters that only the platform knows, and which the Commission is not aware of.[492] For example, seemingly objective criteria, such as ranking based on price, which is quantifiable, could be used by the gatekeeper only because the platform is aware of its underlying competitive advantage in terms of those specific parameters.[493] The Commission might simply not have access to the particular information that led the platform to choose certain parameters, and upon knowing this, the outcome of the Commission's conclusion on the existence of non-biased parameters might be vastly different.

Another difficulty in enforcing the ban on self-preferencing in art 6(5) DMA is the lack of a clear definition of what exactly constitutes "more favorable" treatment of a platform's own products compared to those of its rivals.[494] While recitals 51 and 52 of the DMA offer some form of explanation, it is limited to examples of self-preferencing, such as products displayed prominently in the newsfeed of a social networking service, and broad terms like "better position" or "prominence".[495] While it is listed that prominence includes "display, rating, linking or voice results", these terms are not further defined.[496] The EU legislator may have intentionally used broad language to encompass a range of behaviors. Nevertheless, this vagueness may actually hinder the detection of self-preferencing. This is especially problematic, given that past case law indicates that self-preferencing is a broad concept, and certain behaviors could fall under different theories of harm.[497]

While not related to self-preferencing, but rather to overall DMA compliance, the reversal of the burden of proof in art 8(1) DMA raises issues. On the one hand, shifting

[490] Carugati (n 432) 4.
[491] Carugati (n 432) 4.
[492] Carugati (n 432) 5.
[493] Carugati (n 432) 5.
[494] Carugati (n 432) 6.
[495] DMA, recitals 51, 52.
[496] DMA, recital 52; Carugati (n 432) 6.
[497] Carugati (n 432) 6.

the burden of proof on the existence of an infringement from the Commission to platforms may facilitate enforcement, as the Commission often lacks the complex information needed to assess digital platform behavior.[498] On the other hand, the DMA does not define how gatekeepers must comply with the self-preferencing ban, leaving platforms to demonstrate compliance in ways that benefit them and align with their own expectations and needs.[499] They could, for instance, be selective in presenting facts to the Commission and omit information that might be unfavorable to their interests.[500] While art 8(2) of the DMA gives the Commission the power to implement additional acts specifying compliance measures, these acts must be tailored to specific types of conduct, due to the wide range of behaviors that may constitute self-preferencing. Considering the effort and often limited knowledge of the specifics surrounding individual gatekeepers, this task would be quite complex and may be impractical.[501]

Moreover, to ensure compliance, it is essential for gatekeepers to keep the Commission informed about their behavior. For this purpose, the platforms have to provide regular reports.[502] However, since these reports are submitted only annually, do not reflect third-party user opinions, and may not account for changes in platform conduct between submissions, they may fail to provide a complete and current picture. If the Commission relies solely on these reports, self-preferencing conduct can go undetected.[503] Third-party input is likely essential, as these parties are less biased and can offer unique perspectives otherwise unavailable to the Commission. Although the DMA permits third parties to comment after preliminary findings,[504] this ex post approach may therefore not be enough to meet the Regulation's goal of addressing self-preferencing proactively.

Nevertheless, hearing third parties and implementing a regulatory ban on self-preferencing may not only lead to an improvement in the current market but also carry some risks, particularly for innovation, the promotion of which is explicitly mentioned in recital 107 of the DMA.[505] Pro-competitive features established through the innovative efforts of gatekeepers should still be promoted. However, rivals might use the accusation of self-preferencing to advocate for platforms to remove these pro-

[498] Carugati (n 432) 9.
[499] Carugati (n 432) 9.
[500] Carugati (n 432) 9.
[501] DMA, art 8(2); Carugati (n 432) 9.
[502] DMA, art 11; Carugati (n 432) 10.
[503] Carugati (n 432) 10.
[504] DMA, art 8(6).
[505] DMA, recital 107.

competitive features, as they believe it confers a competitive advantage on the platform.[506] This would be quite counterproductive, as the objective of competition law is not to prevent any competitive advantage obtained through technological innovation that might make it more challenging for rivals to compete.[507] In fact, preventing large platforms, which have the financial means and know-how to improve technology, from implementing their creations or forcing them to share these creations might not only infringe on their right to use their intellectual property and exclude others from such, but could also ultimately reduce their incentive to put further effort into innovation and increase product quality, thus harming consumers.

While the DMA might not be aimed at harming innovation, competitors may take advantage of its provisions simply to level the playing field and strip dominant platforms of their advantages, which could harm rather than promote competition. For example, after the DMA's implementation and following the final decision in *Google Shopping*, several of Google's competitors appealed for the removal of Google's shopping unit, displaying results with additional features. However, this shopping unit bears quality-enhancing features, and its removal could thus significantly harm users.[508] Instead of completely removing the feature, Google should ensure that it applies equal algorithms to the ranking of its own comparison shopping services and those of its rivals. However, since the DMA does not specify precisely how platforms should comply with the self-preferencing ban, the DMA has not reached a sufficient level of clarity, leaving its provisions open to misuse not only by gatekeepers but also by rivals.[509]

7.3. Implications of art 6(5) DMA for competition and IP law

Based on the considerations made regarding the self-preferencing ban in art 6(5) of the DMA, several assumptions can be made about the potential impact this provision may have on competition and IP law.

First, it should be re-emphasized that art 6(5) DMA provides a quite narrow definition of self-preferencing, which only includes a gatekeeper favoring its own products through the means of indexing, crawling, and ranking.[510] By doing so, the conduct appears to accurately describe Google's behavior in *Google Shopping*, specifically the

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[506] Carugati (n 432) 9.
[507] Cf *Google Shopping* (ECJ) (n 13) paras 163-164, 172.
[508] Carugati (n 432) 9.
[509] Carugati (n 432) 9.
[510] DMA, art 6(5); Carugati (n 432) 3.

favorable ranking of Google's own comparison shopping services in their search result pages.[511] Moreover, the DMA explicitly demarcates self-preferencing from different types of conduct, which seem to fit the behaviors displayed by platforms in other cases discussed in this thesis.[512] For instance, art 6(2) DMA outlaws gatekeepers from using non-publicly available data generated by their users, which describes the actions of Amazon in *Amazon Marketplace*.[513] Similarly, art 6(3)-(4) mandate platforms to allow users to un-install software and enable the effective installation of third-party software, resembling the case *Google Android* and the investigations on Apple's app store practices, which involved anti-competitive pre-installation of the platforms' own apps without – in the case of the Apple app store – the possibility to uninstall these apps and their ways of making it more difficult for rival app providers to compete.[514] Lastly, art 6(7) DMA contains an obligation to ensure interoperability, which resembles Microsoft's conduct, namely their refusal to provide interoperability information, found to be abusive under the Essential Facilities Doctrine.[515]

While it cannot be denied that these conducts bear some similarity to self-preferencing, the DMA appears to intentionally distinguish them from the conduct assessed under the theory of self-preferencing. This, on the one hand, may have the benefit of finally providing a definition of which conduct actually falls under self-preferencing and could thus establish a higher degree of legal certainty, as it narrows down the wide range of behaviors that could be argued to fall under the term and gives gatekeepers a better understanding of which particular behaviors to refrain from.[516] On the other hand, it could be argued that the term is now too narrow and does not accurately describe certain forms of conduct that do not exactly fall into another theory of harm either. This could defeat the practice of establishing self-preferencing as an anti-competitive concept for modern digital platform behavior that cannot be perfectly described under traditional theories of harm.[517] To illustrate, the ICA in *Amazon Logistics* argued that Amazon's practice of granting ranking benefits to third-party sellers only on the condition that they use Amazon's logistics service was to be considered abusive self-preferencing.[518] On the one hand, this was indeed a case of ranking, and therefore, at

[511] *Google Shopping* (Commission) (n 4).
[512] Ferrari (nn2) 153; Colangelo (n 83) para 5.
[513] DMA, art 6(2); cf *Amazon Marketplace* and *Amazon Buy Box* (n 4).
[514] DMA, art 6(3)-(4); cf *Google Android* (n 4).
[515] DMA, art 6(7); cf *Microsoft* (n 4).
[516] Cf DMA, art 6; Carugati (n 432) 3.
[517] Ferrari (n 2) 116.
[518] Provvedimento AGCM, *Amazon*, n 29925 (n 14).

first glance, seems to fit the conduct described in art 6(5) DMA. However, the particular product that Amazon granted preferential treatment to, as assessed by the ICA, was its own logistics service.[519] It did not do so by favorably ranking this particular service, but rather used favorable rankings as an unfair incentive for its third-party sellers to choose the FBA.[520] Nevertheless, art 6(5) defines self-preferencing as favorable treatment, where a gatekeeper ranks its own products or services higher than comparable products offered by third parties.[521] Therefore, despite the case in *Amazon Logistics* containing both an element of ranking and an element of preferential treatment of its own product, these two elements were not connected in the same way as described in the DMA. On the other hand, the conduct also couldn't be considered traditional tying, as there was no contractual tying of two distinct products, but rather the creation of an incentive for third parties to use both Amazon's marketplace and its logistics service.[522] This suggests that the behavior did not accurately fit the definition of self-preferencing under art 6(5) but also could not be fully assessed under a traditional theory of harm, such as tying. Rather, the only conduct displayed by Amazon that could be described as self-preferencing can be found in the case *Amazon Buy Box*, in which the Commission nevertheless never explicitly mentioned self-preferencing.[523] One of the anti-competitive behaviors highlighted by the Commission was that most products displayed in the Buy Box were Amazon's own products, despite the existence of similar products by third-party sellers.[524] By doing so, Amazon ranked its own products favorably, as described in art 6(5) DMA. While this particular conduct could thus fall under self-preferencing pursuant to the DMA, it does not change the fact that self-preferencing appears to be too narrow to encompass some of Amazon's other behaviors. This could ultimately lead to issues when investigating certain conduct that negatively impacts competition.

At the same time, the DMA's objective of an ex ante ban on self-preferencing and its shift could lead to a significant improvement in maintaining fair competition and even leverage the EU's position in the global markets.[525] By establishing a reversal of the burden of proof, thereby reducing the EU Commission's evidentiary burden, the DMA

[519] Ferrari (n 2) 169.
[520] Ferrari (n 2) 169-170.
[521] DMA, art 6(5).
[522] Graef (n 1) 470; Motta (n 131) 28-29.
[523] *Amazon Marketplace* and *Amazon Buy Box* (n 4).
[524] *Amazon Marketplace* and *Amazon Buy Box* (n 4) para 5.
[525] Broadbent (n 384) 1.

may provide faster and more efficient ways of investigating and fining large tech companies, particularly those based in the U.S., ultimately leading to better opportunities for European competitors.[526]

In contrast, some scholars expect the opposite: a downgrade in the EU's market position and a negative impact on competition within the Internal Market.[527] That is particularly for three reasons: First, the regulatory measures established in the DMA significantly increase the cost for platforms to ensure compliance. Smaller European companies may therefore be less incentivized to expand and potentially grow into the position of a gatekeeper under the DMA, thereby avoiding these additional obligations and ultimately preventing them from contributing to innovation within the EU.[528] Moreover, U.S. platforms that are already considered gatekeepers might also be less willing to offer additional, innovative services to European users, negatively affecting consumers.[529] Lastly, the restrictions put on U.S. platforms might not only impact consumers but also European companies. Gatekeepers like Microsoft often provide essential services to smaller European companies, which therefore rely on this partnership. Implementing extreme restrictions, such as an outright self-preferencing ban on U.S. companies, might harm these relationships, and European businesses might lose the advantages gained through cooperation with large platforms.[530] After all, while the DMA's ex ante approach to restricting particularly large platforms helps prevent these dominant businesses from engaging in anti-competitive conduct, it may not sufficiently take into account the fact that large platforms and the innovative features they introduce on the market may also contribute to dynamic competition.[531]

This failure to sufficiently consider the pro-competitive aspects of large platform behavior is also evident in the fact that the ban on self-preferencing, pursuant to art 6(5) of the DMA, does not leave room for providing objective justifications in cases where the conditions for self-preferencing conduct are met.[532] Such justification could, for instance, lie in the argument of protecting a platform's intellectual property. After all, forcing gatekeepers to rank third-party products based on equal parameters as their own does constitute an intervention into a platform's mechanisms and algorithms that

[526] Broadbent (n 384) 5.
[527] Broadbent (n 384) 10.
[528] Broadbent (n 384) 10.
[529] Broadbent (n 384) 10.
[530] Broadbent (n 384) 10.
[531] Broadbent (n 384) 6.
[532] Carugati (n 432) 2.

might be protected by, for instance, patents. Additionally, it would compel platforms to permit third-party users to utilize copyrighted designs and reap the benefits of the platform's brand and trademarks, just as the platform itself does. Moreover, by requiring transparency in how platforms rank products, they may be compelled to disclose trade secrets.[533] While this may not be as significant an intervention in their intellectual property as forcing platforms to grant access to competitors under the Essential Facilities Doctrine, it should nevertheless be considered when evaluating self-preferencing cases. That is, because while intervening in a business's intellectual property may be justified under competition law, this should not be understood as behavior that can be considered anti-competitive, automatically outweighing the protection afforded by intellectual property law. Rather, the objectives of competition law and IP law should be balanced against each other to achieve the best possible outcome for both competition and innovation.[534] Not only does the DMA not give gatekeepers the room to provide objective justifications, but it also mandates them to strictly comply with its restrictions.[535] Additionally, it does not mention any requirements for foreclosing or otherwise anti-competitive effects.[536] It could therefore be argued that the strict ban on self-preferencing is too far-reaching. While one might argue that the Commission, when investigating self-preferencing conduct under art 6(5) DMA does so in the light of the provision in art 102 TFEU,[537] which does in fact require abusive conduct to negatively affect competition in order to order a company to refrain from such conduct,[538] this still does not take into account that art 102 TFEU is an ex post provision, assessing evidenced cases of abuse, while art 6(5) DMA constitutes an ex ante restriction for gatekeepers that prohibits companies from engaging in self-preferencing without accounting for the ex post considerations the EU Commission would evaluate when investigating a platform under art 102 TFEU.[539] This outright ban, failing to take into account objective justifications and not considering the balance that should be created between competition law and IP law, could risk over-enforcement

[533] Broadbent (n 384) 4, 11.
[534] Cf the opinion of AG Kokott on the Essential Facilities Doctrine; *Google Shopping* (Opinion of AG Kokott) (n 250) para 84.
[535] Carugati (n 432) 2, 9.
[536] Cf DMA, art 6(5).
[537] Cf Broadbent (n 384) 1.
[538] TFEU, art 102.
[539] Broadbent (n 384) 1.

and may therefore disincentivize platforms from further investing in and improving their intellectual property, ultimately harming innovation and the market.[540]

The fact that the DMA does not sufficiently account for the protection of intellectual property rights is evident not only in the provision on self-preferencing but also in other obligations that gatekeepers face. For instance, the DMA requires platforms to disclose some of their intellectual property, such as proprietary information, details of their infrastructure, or internal tools to their users.[541] Moreover, the DMA's requirement of interoperability is quite ambiguous in demanding gatekeepers to 'allow providers […], free of charge, effective interoperability with […] the same hardware and software features […] as are available to services or hardware provided by the gatekeeper'[542] without accounting for the fact that some necessary interoperability information might be protected by intellectual property.[543] Although it does allow gatekeepers to take the necessary and proportionate measures needed to ensure that the integrity of their operating system is not compromised, this is still quite a broad phrasing that does not clearly entail the protection of, for instance, trade secrets or specific language in the interoperability information.[544] While this might not go so far as to forcing platforms into open-source business models, it nevertheless could obligate them to either share potential trade secrets or design their facilities in a way that benefits rivals and reduces their ability to promote their services.[545] Setting down such requirements without assessing their proportionality may therefore be capable of infringing on platforms' intellectual property rights and could, for example, violate art 39 of the TRIPS Agreement, which mandates that everyone should have the ability to choose not to disclose secret information of a commercial value that is within their control.[546]

Ultimately, while intellectual property exclusivity may be limited under certain circumstances – particularly to address anti-competitive behavior –[547] a proper balance must be maintained between competition law protections and companies' fundamental rights.[548] However, the DMA's ex ante obligations do not appear to strike such a balance.

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[540] Broadbent (n 384) 10.
[541] Broadbent (n 384) 4, 11.
[542] DMA, art 6(7).
[543] Broadbent (n 384) 4.
[544] Broadbent (n 384) 4.
[545] Broadbent (n 384) 4.
[546] Broadbent (n 384) 11.
[547] Cf *Google Shopping* (Commission) (n 4) paras 665-670.
[548] Cf *Google Shopping* (Opinion of AG Kokott) (n 250) para 84.

Additionally, balancing fair competition with IP rights is further complicated by the DMA's vague language and lack of clear definitions.[549] For example, terms like "favorable treatment"[550] and the criteria for identifying gatekeepers[551] are insufficiently explained. Regarding the latter, the DMA does list specific requirements. However, it still grants the Commission the power to investigate other companies that do not fall under the formal requirements.[552] Due to this discretion, companies may not be aware of the point at which they should start preparing for the obligations outlined in the DMA. They might invest in a particular algorithm and its protection under IP law, only to suddenly be restricted in using it or be forced to share its details with competitors. By placing the gatekeeper status at the discretion of the EU Commission, companies are thus faced with immense uncertainties that may make them more hesitant to create innovative features, the protection of which might be compromised by the Commission later on.[553]

To sum it up, the ban on self-preferencing under art 6(5) DMA may have both welfare-enhancing and welfare-decreasing effects on the European market. While it does finally provide a description of what constitutes self-preferencing[554] and distinguishes it from other types of abuse,[555] it still leaves some questions and uncertainties unanswered[556]. While the definition itself is quite narrow[557] and may exclude conduct that arguably should be captured, as it does not fall under traditional theories of harm, several terms are broad enough to complicate compliance for platforms[558]. Additionally, the ex ante self-preferencing ban does not adequately account for potential justifications,[559] such as IP protection, which may deter companies from developing innovative features that could benefit technology. Nevertheless, more clarity may be achieved through the development of guidelines and thorough explanations in ongoing investigations.[560] The next chapter will address how these issues could be improved,

549 Cf Broadbent (n 384) 13; Carugati (n 432) 6.
550 Carugati (n 432) 6.
551 Broadbent (n 384) 13.
552 DMA, art 3(2), (8).
553 Broadbent (n 384) 13.
554 DMA, art 6(5).
555 Ferrari (n 2) 153; Colangelo (n 83) para 5.
556 Carugati (n 432) 4-6.
557 DMA, art 6(5); Carugati (n 432) 3.
558 Carugati (n 432) 6.
559 Carugati (n 432) 2.
560 Carugati (n 432) 10-11.

taking into account the discussed case law and the DMA's regulatory framework on self-preferencing.

8. Analysis

As demonstrated by relevant case law and literature, the debate surrounding self-preferencing is indeed quite intricate. Although the DMA seeks to delineate the concept narrowly,[561] some scholars maintain that self-preferencing merely rearticulates traditional types of abuse[562]. Additionally, the economic consequences of major platforms operating as dual-mode players – that is, both as intermediaries for businesses and as downstream competitors – remain uncertain.[563]

What can be said is that vertical integration and platform self-promotion are not inherently harmful to competition and overall welfare.[564] In fact, multiple pro-competitive factors should be taken into account. For instance, platforms may integrate vertically to achieve efficiency, improve quality, and reduce costs.[565] Additionally, a platform's self-preferencing behavior may motivate competitors to enhance the features of their own offerings to remain in the market.[566] Imposing level playing fields for rivals, contrary to standard principles that companies need not treat rivals identically compared to themselves, [567] may reduce investment incentives for competitors.[568] After all, they could take equal advantage of the benefits provided by the platform's features as the platform provider itself. Consequently, large tech companies might halt further development of their platforms, as they must share the rewards of their efforts.[569] This, ultimately, could curtail platform development and ultimately hinder innovation and the market as a whole.

Nevertheless, despite these potential benefits, self-preferencing by dual-mode platforms still raises risks of competitive harm. The greatest concern appears when such conduct enables vertical or horizontal foreclosure, driving out competition and entrenching platform dominance.[570] Subsequently, this would reduce consumer choice

[561] DMA, art 6(5); Carugati (n 432) 3.
[562] Ferrari (n 2) 141; Colangelo (n 83) para 16.
[563] Jullien and Sand-Zantman (n 1) 29; Morton et al (n 10) para 4; Caminade et al (n 10) 30.
[564] Jullien and Sand-Zantman (n 1) 27-28.
[565] Jullien and Sand-Zantman (n 1) 27-28.
[566] Bowman and Prasad (n 61) para 18.
[567] Cf CFREU, arts 16, 17; Portuese (n 59) 1-2.
[568] Cf Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[569] Cf Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[570] Bougette (n 12) 2-3, 8; Jacobson and Wang (n 12) 13, 18-19.

and lessen incentives for platform investment and innovation by removing the pressure to compete.[571]

That being said, it seems that suspected self-preferencing should be evaluated on a case-by-case basis, as shown in the practice of the EU Commission, the European Courts, and National Competition Authorities within the EU,[572] to determine both its existence and its effects on the market in light of the provision under art 102 TFEU, outlawing the abuse of a dominant position[573]. However, an analysis of the case law leads to even more uncertainties. At first glance, it appears arbitrary which cases have been assessed under self-preferencing and which have been assessed under different theories of harm, despite their resemblance to self-preferencing.[574] In fact, the EU Commission has only mentioned self-preferencing once, namely in the case of *Google Shopping*.[575] On the other hand, and contrary to the Italian Competition Authority's assessment of self-preferencing in *Amazon Logistics*, the EU Commission did not specifically point out self-preferencing in its preliminary assessment of *Amazon Marketplace* and *Amazon Buy Box*, the latter of which includes the same type of behavior pointed out by the ICA.[576] Similarly, the recent cases of *Google Android*, *Apple App Store (music streaming services)*, and *Google Android Auto*, which followed the Commission's decision in *Google Shopping*, have been assessed under different theories of harm, such as tying and the Essential Facilities Doctrine.[577] Some scholars argue that the discrepancies in the Commission's decisions lead to legal unpredictability.[578] After all, the only definition of self-preferencing given by the EU Courts is quite broad: According to the GC and ECJ in Google Shopping, self-preferencing is any conduct through which a dominant firm that vertically integrates favors its own product while actively demoting rival goods.[579] However, Google's behavior in *Google Android*, for instance, could also be interpreted in this manner, as Google had favored its own apps through means such as forced pre-installation, while making it more difficult for rivals to bring their apps to consumers.[580]

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571 Cf Bowman and Prasad (n 61) paras 29ff.
572 Cf *Google Shopping* (ECJ) (n 13) paras 163-164, 172.
573 TFEU, art 102.
574 Ferrari (n 2) 141.
575 *Google Shopping* (Commission) (n 4).
576 *Amazon Marketplace* and *Amazon Buy Box* (n 4); Provvedimento AGCM, *Amazon*, n 29925 (n 14).
577 *Google Android* (n 4); *Apple – App Store Practices (music streaming)* (n 4); Provvedimento AGCM, *Google/Compatibilità App Enel X Italia con sistema Android Auto*, n 27771 (n 380).
578 Ferrari (n 2) 141.
579 *Google Shopping* (General Court) (n 13) para 123; *Google Shopping* (ECJ) (n 13) para 172.
580 Ferrari (n 2) 116.

Given that this practice was ruled to be tying rather than self-preferencing, EU authorities appear to treat self-preferencing as a fallback theory, applying it only when conduct cannot be subsumed under established categories of abuse. [581] This highlights the legal uncertainty arising from the case law on self-preferencing.

However, while adapting to new forms of gatekeeper conduct and evolving abuse theories might seem like a good approach, considering also that the list of abusive conduct in art 102 TFEU is not exhaustive,[582] the lack of a defined legal test for self-preferencing comparable to the legal tests established for traditional theories of harm, undermines the legal uncertainty surrounding this behavior. For instance, when comparing self-preferencing to the Essential Facilities Doctrine, it stands out that only the former provides a clear set of criteria.[583] Nevertheless, both forms of abuse share similarities. That is, because while the Essential Facilities Doctrine deals with cases of refusal to grant access to or license a facility,[584] self-preferencing essentially concerns cases of generally allowing access but refusing to grant equal access to the facilities of the platform[585]. By, for instance, favorably displaying its own comparison shopping services, Google had refused to grant its competitors access to the same ranking algorithms and the more appealing search boxes it reserved for its own products. While the ECJ argued that the latter did not constitute a separate facility,[586] it emphasized that the forms of abuse are nevertheless similar.[587] Although the Commission may have been correct in not applying the Essential Facilities Doctrine due to the existing differences, it seems illogical not to use criteria for self-preferencing that are at the very least similar to the Bronner conditions. After all, the absence of such stringent standards for self-preferencing complicates its consistent application and limits predictable enforcement.

Also, the rationale behind the strictness of the Bronner criteria is clear. It aims mainly at the protection of the fundamental rights of the facility's owner, particularly the rights to choose who to deal with and a company's right to its (intellectual) property.[588] Intellectual property, in particular, grants an exclusive position to its owner, giving them

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[581] Ferrari (n 2) 116.
[582] Carlton and Haria (n 83) 4.
[583] *Magill* (n 125); *Bronner* (n 89); Colangelo (n 83) para 24.
[584] Cf *Magill* (n 125); *Bronner* (n 89); *Google Shopping* (General Court) (n 13) para 232.
[585] Cf *Google Shopping* (General Court) (n 13) para 232.
[586] *Google Shopping* (ECJ) (n 13) paras 97, 105, 111.
[587] *Google Shopping* (ECJ) (n 13) paras 97, 105, 111; Colangelo (n 83) para 66.
[588] *Google Shopping* (Opinion of AG Kokott) (n 250) para 84.

the right to choose who to let use this property.[589] Moreover, not only may IP right holders choose who to share their protected facilities with, but they are also not per se prohibited from choosing only to grant limited, unequal access, as seen in cases of self-preferencing.[590] That is, because the ultimate objective behind protecting IP laws is to keep innovation thriving.[591] If an IP right holder were forced to share the benefits and profits of their property equally with competitors, they may be less inclined to continue their innovative efforts.[592]

Therefore, it seems not too far-fetched to argue that also the imposition to, for example, use equal parameters for competitors when it comes to ranking their products compared to the platform's own products should, similar to the idea behind the Essential Facilities Doctrine, only be justifiable under competition law if strict requirements are fulfilled. On the other hand, considering that such a set of even slightly less strict conditions compared to the Bronner criteria has not been developed,[593] it should at least be considered that the exclusivity of a company's IP can constitute a valid justification for self-preferencing. As such, a thorough proportionality test should be conducted by competition authorities to weigh out whether the objectives behind IP protection or the harm to competition prevail in the respective case. However, the case in *Google Shopping* suggests that the Commission seems to have dismissed Google's argument regarding the protection of its intellectual property on the grounds that an interference with its IP rights was justified under competition law, without carefully balancing the two factors to optimally protect the market and innovation.[594] Notwithstanding the argument that even the application of a more stringent legal test to self-preferencing or a more thorough evaluation of Google's argument regarding their IP might have still resulted in the same conclusion, it is nevertheless apparent that neither the Commission nor the Courts conducted such tests, which could definitely be criticized.

While the implementation of the DMA led to certain clarifications regarding which conduct falls under self-preferencing, notably by limiting it to behavior in relation to the ranking of products and explicitly distinguishing it from other forms of abuse that are

[589] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[590] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[591] Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[592] Cf Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
[593] Cf Colangelo (n 83) para 72.
[594] *Google Shopping* (Commission) (n 4) paras 665-670.

mentioned separately under art 6 DMA,[595] the provision for self-preferencing in art 6(5) does not mention any set of strict criteria that needs to be fulfilled in order for self-preferencing to be considered abusive either.[596] Rather, the DMA calls for an ex ante ban on any conduct that falls under art 6(5), without laying out further conditions or considering the existence of justifications.[597] While it is true that the provision in art 6(5) DMA is applied by the Commission in light of art 102 TFEU,[598] meaning that the behavior still needs to amount to an abuse of a dominant position to be found an infringement of competition law,[599] the ban provided for in the DMA still seems to mandate platforms to refrain from self-preferencing, no matter the circumstances. Considering that a company should not be compelled to disclose the advantages of its facilities, which are likely protected under IP law, this outright ban may disincentivize platforms from further improving their products, ultimately harming innovation.[600]

To avoid this adverse effect on the market, the provisions in the DMA should be further specified by the Commission. This should, on one hand, be done through guidelines that further explain what exactly falls under self-preferencing and when it could be considered abusive.[601] For instance, the Commission should provide detailed descriptions of the conditions under which the parameters used by platforms are considered unbiased and objective.[602] Moreover, it should further explain terms, such as "favorable treatment".[603] On the other hand, the ban on self-preferencing should be further established in future case law.[604] Particularly, the *Amazon Buy Box* case, in which, as of this point, only a commitment decision that does not explicitly mention self-preferencing has been made,[605] is interesting in that regard. Should the commitments prove ineffective, it is possible that the Commission might reopen investigations into Amazon's behavior, and it is likely that self-preferencing under art 6(5) DMA will be part of this assessment. Also, with the *Google Shopping* case as a precedent, the EU Commission might even start investigating companies that, as of

[595] Ferrari (n 2) 153; Colangelo (n 83) para 5.
[596] DMA, art 6(5).
[597] Carugati (n 432) 2.
[598] Cf Broadbent (n 384) 1.
[599] TFEU, art 102.
[600] Broadbent (n 384) 10.
[601] Carugati (n 432) 10-11.
[602] Carugati (n 432) 10.
[603] Carugati (n 432) 11.
[604] Carugati (n 432) 11.
[605] *Amazon Marketplace* and *Amazon Buy Box* (n 4).

this point, do not fall under the formal definition of gatekeepers pursuant to the DMA,[606] meaning that several investigations might be initiated in the years to come that could all lead to further precision regarding the assessment of self-preferencing.

Aside from investigations conducted by the EU Commission, guidelines are moreover necessary to assist National Competition Authorities, which, under the DMA, are also responsible for enforcing the obligations laid out in the Regulation. Past national case law, such as the ICA's assessment in *Amazon Logistics* or the German Bundeskartellamt's legal evaluation of Apple's app store behaviors, has applied the term "self-preferencing" to platform behaviors that may not have been concerned with ranking pursuant to art 6(5) DMA.[607] In order to achieve EU-wide harmonization, prevent the fragmentation of under which theories of harm platform behavior is assessed, and to avoid over-enforcement that might harm the Internal Market, it is therefore essential for the EU Commission to make the necessary clarifications so that Member States can adapt accordingly.[608]

However, it is not sufficient to properly define self-preferencing as a type of abuse. Rather, and in accordance with the objective of the DMA to achieve ex ante compliance with the obligations outlined in it, it is essential that gatekeepers not only understand which conduct falls under abusive self-preferencing but also comply with it. With the reversal of the burden of proof under the DMA, gatekeepers are required to show compliance on an annual basis.[609] However, this may not provide a complete and up-to-date picture. Often, the third-party users who actually interact with gatekeeping platforms are able to provide further insight into a platform's conduct.[610] This can be seen in the market study initiated by the Dutch Competition Authority, in which third parties were asked to provide their input so that the Competition Authority could evaluate their complaints and the platforms' behaviors.[611] It may be useful to establish a similar system for the compliance measures under the DMA. To specify, the Commission should obtain regular statements not only from the gatekeeper itself but

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[606] DMA, art 2(8).

[607] Provvedimento AGCM, *Amazon*, n 29925 (n 14); Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).

[608] Carugati (n 432) 10-11.

[609] Carugati (n 432) 9-10.

[610] Carugati (n 432) 10.

[611] Autoriteit Consument & Markt, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (n 381).

also from the businesses using its platform.[612] This could significantly increase the chances of uncovering abusive conduct, which could then lead to formal proceedings. To sum it up, the DMA has significantly contributed to the establishment of self-preferencing as its own, standalone type of abuse. Nevertheless, further guidelines should be issued to facilitate compliance.[613] Moreover, when investigating self-preferencing, the Commission should establish a thorough legal test that takes into consideration the potential pro-competitive effects of the conduct and the protection of the fundamental rights of the platforms, similar to the Essential Facilities Doctrine, and balances these against the potential harm to competition.[614] After all, the goal should be not to ban platforms from promoting their own products and force them to create an equal playing field for all their competitors, but rather to tackle behaviors that harm the market and decrease overall welfare. Therefore, and to properly protect the functioning of the Internal Market, a balance needs to be struck between a platform's own interests and those of its competitors.

9. Conclusion

The debate on self-preferencing is central to the EU Commission and National Competition Authorities when examining gatekeeping platforms in the digital market. This behavior arises particularly from vertical integration, where dominant intermediaries also compete in downstream markets by offering their own products on the same platform that connects other businesses with consumers.[615]

While vertical integration is not a modern phenomenon, doing so in the digital market provides platforms with more opportunities to promote their own products downstream, such as by favoring them in algorithms.[616] The emergence of self-preferencing as a standalone form of anti-competitive abuse thus reflects platform behaviors that are not addressed by traditional theories of harm, which fail to capture the forms of competitive harm that have emerged in the digital age.[617] With the development of self-preferencing as a new concept under competition law, these new forms of abuse were thus categorized.

[612] Carugati (n 432) 10.
[613] Carugati (n 432) 10-11.
[614] Cf Colangelo (n 83) para 9.
[615] Jullien and Sand-Zantman (n 1) 29; Morton et al (n 10) para 3; Caminade et al (n 10) 30.
[616] Jullien and Sand-Zantman (n 1) 29; Bougette (n 12) 4; Caminade et al (n 10) 30.
[617] Ferrari (n 2) 116.

As case law shows, doing so was not a simple task. Unlike National Competition Authorities, which have assessed various platform behaviors under the theory of self-preferencing,[618] the EU Commission has been more hesitant and has only explicitly mentioned self-preferencing in *Google Shopping*,[619] which appears to have later inspired the EU's definition of self-preferencing in art 6(5) DMA[620]. In other cases, the Commission has resorted to different theories of harm, although the resemblance to self-preferencing in these cases cannot be denied.[621]

Eventually, the implementation of the DMA has provided a definition of self-preferencing, limiting it to conduct related to ranking, while distinguishing it from other forms of abuse.[622] However, by doing so, it has imposed an outright ban on self-preferencing, which has left some questions unanswered. After all, it does not provide guidance on further considerations, particularly regarding the actual effects of self-preferencing on competition and potential justifications.[623]

After all, a platform promoting its own products and not treating its competitors equally in all aspects is not inherently anti-competitive, but it might even have positive effects on the market. Not only could it ensure the quality of the goods and services offered, but it may also incentivize rivals to improve their products to stay afloat in the market.[624] Moreover, a company's platform is often protected by several intellectual property rights, particularly copyrights, trademarks, and patents.[625] The exclusivity granted by those rights ensures that the platforms are not generally forced to grant competitors equal access to their facilities.[626] These considerations also illustrate the similarities of self-preferencing cases to the Essential Facilities Doctrine, which concerns cases of outright refusal to deal, while self-preferencing cases are generally less severe forms of abuse, in which competitors do in fact have access but do not enjoy the same benefits as the platform itself, which merely intends to reap the rewards of its own innovative efforts.[627]

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618 Provvedimento AGCM, *Amazon*, n 29925 (n 14); Autoriteit Consument & Markt, 'Market study into mobile app stores' (n 381); Bundeskartellamt, 'Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework (ATTF)' (n 380).
619 *Google Shopping* (Commission) (n 4).
620 DMA, art 6(5).
621 Cf *Google Android* (n 4); *Apple – App Store Practices (music streaming)* (n 4); Ferrari (n 2) 116.
622 DMA, art 6(5); Ferrari (n 2) 153; Colangelo (n 83) para 5.
623 Carugati (n 432) 2.
624 Bowman and Prasad (n 61) para 18.
625 Cf Google's arguments in *Google Shopping*; *Google Shopping* (Commission) (n 4) para 658.
626 Mukherjee (n 6) 8; Maggiolino and Zoboli (n 7) 121.
627 E. Hovenkamp (n 64) 5; Hovenkamp, ‚Antitrust and Self-Preferencing' (n 57) 7.

However, while granting favorable treatment to one's own products might not be abusive per se, it does have the potential to amount to an abuse.[628] That is, because while large platforms may enjoy the advantages of their market dominance and thus promote their own products, their function as gatekeepers, which makes them essential intermediaries for smaller businesses, also gives them greater responsibilities when it comes to ensuring fair competition.[629] If their self-preferencing conduct therefore reaches a level of unfair discrimination that negatively impacts competition, potentially foreclosing competitors, self-preferencing is indeed abusive under art 102 TFEU.[630]

Nevertheless, when evaluating whether this is the case, the considerations made under the Essential Facilities Doctrine – especially those related to intellectual property - should be taken into account, considering the similarities between the two that were confirmed by the Courts in *Google Shopping*.[631] Under the Essential Facilities Doctrine, forced competitor access happens only in rare cases, applying the strict Bronner criteria.[632] No such clear conditions exist for self-preferencing yet.[633] While the criteria for self-preferencing might arguably be less strict, considering that forcing a company to let its rivals access its facilities is a more severe interference with the company's (intellectual) property rights than forcing it to treat them equally within its facilities, the standards for assessing self-preferencing should nevertheless be stricter and defined more clearly than they are now.

Moreover, IP protection should be considered as a possible justification. After all, the safety of a company's fundamental rights on the one hand and the protection of fair competition on the other hand should be balanced against each other.[634] Rather than disregarding IP rights solely due to the existence of self-preferencing, it is essential to examine the specific effects in each case. A proportionality test should therefore determine if the impact of self-preferencing justifies limitations on a company's fundamental rights.

After all, competition law and intellectual property law are not completely separate from one another. While each focuses on different areas, both aim to promote innovation

[628] Cf Bougette (n 12) 2-3, 8.
[629] Graef (n 1) 448-449.
[630] Bougette (n 12) 2-3, 8; Jacobson and Wang (n 12) 13, 18-19.
[631] Cf *Google Shopping* (General Court) (n 13) para 224; Heimann (n 13) para 14.
[632] *Magill* (n 125); *Bronner* (n 89); Colangelo (n 83) para 24.
[633] Colangelo (n 83) para 9.
[634] Cf *Google Shopping* (Opinion of AG Kokott) (n 250) paras 85-87.

and ensure the Internal Market functions effectively.[635] This overlap should also guide evaluations of self-preferencing. The interests of the individual business and of competitors should both be considered. By doing so, a balance can be struck between fair competition and protecting the fundamental rights of competitors. Achieving this balance will enhance overall welfare and support the ultimate goal of maintaining a thriving market.

[635] Arnold et al (n 7) 122; Raju (n 6) 1-2; Mukherjee (n 6) 4, 8; Maggiolino and Zoboli (n 7) 121.

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Charter of Fundamental Rights of the European Union (CFREU) [2012] OJ 326/391, arts 16, 17

b. Regulations

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B. International Treaties

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C. National legislation

a. Germany

§ 19a (2) (1) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013 (BGBl I S 1750, 3245), das zuletzt durch Artikel 6 des Gesetzes vom 5. Dezember 2024 (BGBl 2024 I Nr 400) geändert worden ist

b. United States

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