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Analysing Self-Preferencing in EU Competition Law

Understanding the Similarities and Differences Between Article 102 TFEU and the Digital Markets Act

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Contents

Abstract

Article 102 of the Treaty on the Functioning of the European Union (TFEU) has long been the legal framework for addressing dominant undertakings abusing their position. In the new digital era, these undertakings have been found to favour themselves through self-preferencing. Therefore, the European Commission (EC) proposed the Digital Markets Act (DMA) to address the structural problems that Article 102 TFEU could not. The DMA targets gatekeepers, who often hold dominant positions. This results in two legal frameworks potentially applying to and being enforced for the same offence, as it may be regulated in both of these frameworks. One such offence is the practice of self-preferencing, which has increased in recent years due to advanced technical instruments, such as ranking. The relation between Article 102 TFEU and the DMA has raised concerns about the applicability of the principle of *ne bis in idem*.

The purpose of this thesis is to describe, analyse and compare how self-preferencing is regulated in Article 102 TFEU and Article 6 DMA. Additionally, the thesis aims to describe and analyse whether the principle of *ne bis in idem* applies to this relation and, if not, why it is inapplicable. To answer these research questions, two methods will be employed: a legal dogmatic method and an EU legal method.

After examining and analysing how self-preferencing is regulated in Article 102 TFEU and Article 6 DMA, the thesis finds that the main similarities lie in the objectives, while the differences lie in the regulatory legal frameworks. Furthermore, the terms “more favourably” and “fairness” are unclear and unprecise in Article 6(5) DMA. The thesis concludes that the principle of *ne bis in idem* is unlikely to apply to proceedings under both Article 102 TFEU and DMA in general, and specifically in a case of self-preferencing.

Keywords: Article 102 TFEU, DMA, Self-Preferencing, ne bis in idem, Applicability, ex ante, ex post, Google Shopping

Abbreviations

App Store	Software Application Store
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
EEA	European Economic Area
EU	European Union
EUFR	European Charter of Fundamental Rights
GAFAM	Google, Apple, Facebook, Amazon and Microsoft
GC	General Court
GREDEG	Group of Research in Law, Economics and Management
IIC	International Institute of Communications
MS	Member States
NCA	National Competition Authority
SMEs	Small and Medium Enterprises
TFEU	Treaty on the Functioning of the Union

1 Introduction

1.1 Background

Within the European Union (EU), more than 10,000 online platforms exist, the platforms operate within the digital economy, with a majority being managed by small and medium enterprises (SMEs).[1] However, a minority owns the largest online platforms, which dominate significant market shares and capture a substantial part of the total value in the market.[2] Such actors are referred to as gatekeepers which are primarily multi-billion-euro undertakings engaged in Big Tech, such as Google, Apple, Facebook, Amazon and Microsoft (GAFAM).[3] Gatekeepers wield substantial control and have a major impact in digital markets, fostering a dependence on their platforms, which may lead to unfair behaviour or practices.[4] Due to the weak competitive pressure experienced by these major businesses, the risk looms large that these markets may not function well – or may soon fail to do so.[5]

Articles 101 and 102 of the Treaty on the Functioning of the Union (TFEU)[6] have long been the rules that have tackled competition concerns, focusing on anti-competitive agreements and abuse of dominance. However, these Articles were according to National Competition Authorities (NCAs) not sufficiently effective in addressing all structural competition problems.[7]

Articles 101 and 102 TFEU are both widely applied in many different scenarios. An abuse of a dominant position can apply to any situation if the undertaking is dominant,[8] One example of such misconduct is self-preferencing or as the General Court (GC) calls "favouring"[9]. The abuse of self-preferencing by a dominant undertaking primarily pertains to Article 102 TFEU. Dominant undertakings in the digital market often offer services and products on core platforms services. By being a provider of a platform and at the same time offering services and products on it,

[1] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15.12.2020, p.1.

[2] Ibid.

[3] Cabral, Luís., Haucap Justus., Parker, Geoffrey., Petropoulos, Georgios., Valletti, Tommaso & Van Alstyne, Marshall, '*The EU Digital Markets Act a Report from a Panel of Economic Expert*' (Luxembourg: Publications Office of the European Union, 2021), p. 9.

[4] Proposal for the DMA [2020], p. 1.

[5] Ibid., p. 3.

[6] Article 101 & 102 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

[7] Summary of the contributions of the National Competition Authorities to the Impact Assessment of the new competition tool [2020], p. 1. https://competition-policy.ec.europa.eu/system/files/2021-03/summary_contributions_NCAs_responses.pdf (Accessed: 28.3.2024).

[8] Article 102 TFEU.

[9] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*) [2021] EU:T:2021:763; Favouring and self-preferencing constitute the same typical practice but are named differently in the two primary legal framework addressed in this thesis. In Article 102 TFEU, authorities and courts refer to this behaviour as favouring, while in the DMA, it is referred to as self-preferencing. The term "self-preferencing" will be used throughout this thesis.

the undertaking can easily favour its services or products due to vertical integration.[10] Such practice occurred in the case *Google Shopping*[11]. Self-preferencing reflects many practices and as defined by the EC, encompasses a broad category[12], meaning that such behaviour occurs both in digital and offline markets and constitutes several practices. However, self-preferencing is a common and serious practice among a few major digital actors (gatekeepers), leading to significant distortion within the digital market. Such practices are easy for gatekeepers to employ since they own both the platform and have competitive services and products on the platform.

In 2020, the EC asked the NCAs which have competence to apply Articles 101 and 102 TFEU, to share their experience of the application of Articles 101 and 102 TFEU.[13] The NCAs opinions were that a new competition instrument was needed.[14] In December 2020, a proposal for a new competition instrument was published and[15] according to the EC, the primary reason was the inefficacy of existing EU legislation to address gatekeeper-related problems.[16]

A few years later, the Digital Markets Act (DMA) entered into force, which specifically targets gatekeepers within the digital market.[17] The DMA pursues a complementary yet different objective from that of protecting competition against distortion within markets as defined in original EU competition law terms.[18] One of the DMA's objectives is to ensure that markets where gatekeepers operate, are and remain constable and fair.[19]

The abuse of self-preferencing is indirectly regulated in Article 102 TFEU and can only be addressed if the undertaking is dominant. Self-preferencing in the DMA is regulated in Article 6, specifically 6(5). Due to the recent adoption of the DMA, there are now two legal frameworks applicable to self-preferencing. The DMA introduces a specific ban on self-preferencing and is applicable irrespective of whether gatekeepers hold a dominant position, thus extending the scope of regulating self-preferencing. The ban marks a significant shift toward a more restrictive approach to address such practices. These two different legal frameworks differ, not only in the specific Articles to address self-preferencing but which at their core are different, such as variances in applicability, *ex ante* and *ex post* approaches, the burden of proof and more.

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[10] 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) OJ L 265, recital 51.

[11] Commission Decision of 27.6.2017 *relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area* (AT.39740 - Google Search (*Shopping*).

[12] Commission Staff Working Document Impact Assessment Report - *Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector* (Digital Markets Act), 15.12.2020 {COM(2020) 842 final} - {SEC(2020) 437 final} - {SWD(2020) 364 final}, p. 41.

[13] Summary of the contributions of the National Competition Authorities to the Impact Assessment of the new competition tool [2020], p. 1.

[14] Ibid., p. 7.

[15] Proposal for the DMA [2020].

[16] Ibid., p. 1.

[17] Article 54 DMA.

[18] Proposal for the DMA [2020], p. 10 & recital 10 DMA.

[19] Recital 11 DMA.

However, the dual applicability may create scenarios where a dominant gatekeeper risks being punished twice for the same offence. The right to not be punished twice is one of the fundamental rights within the EU, this principle is stated in Article 50 of the EU Charter of Fundamental Rights (EUCFR)[20] and is called *ne bis in idem*. Previously the principle was only applicable to criminal law cases, today the European Court of Justice (CJEU) finds the *ne bis in idem* principle also applicable to competition law cases.[21] As stipulated by regulation 1/2003[22], parallel proceedings in competition law are deemed admissible. However, the explicit relationship regarding parallel proceedings between Article 102 TFEU and the DMA is not presented. Since the possibility of parallel proceedings does exist and the abuse of self-preferencing can be addressed with the rules of Article 102 TFEU and the DMA, it is indeed of interest to examine the differences between Article 102 TFEU and Article 6(5) DMA regarding self-preferencing and the applicability of the principle of *ne bis in idem* in relation to these legal frameworks.

1.2 Purpose and research questions

The purpose of this thesis is to describe, analyse and compare the regulation of self-preferencing under Article 102 TFEU and Article 6 of the DMA. The purpose is also to describe and analyse the applicability of the *ne bis in idem* to proceedings subject to Article 102 TFEU and Article 6 of the DMA.

To fulfil the purpose set above, the following research questions will be answered:

1. What are the main similarities and differences in the regulation of self-preferencing under Article 102 TFEU and Article 6 of the DMA?

2. Is the *ne bis in idem* principle applicable to the relationship between Article 102 of the TFEU and Article 6 of the DMA, and if not, what are the reasons for its inapplicability?

1.3 Delimitations

Self-preferencing as defined by the EC, encompasses a broad category[23] and such practices in other non-digital markets will not be thoroughly examined or analysed.

1.4 Method and materials

To fulfil the objectives of this thesis, a combination of two legal methods is employed: a legal dogmatic method, and an EU legal method. The legal dogmatic method entails systematic research aimed at providing a systematic exposition of

[20] Article 50 of the Charter of Fundamental Rights of the European Union 2012/C 326/02 [2012].

[21] Case C-151/20, *Nordzucker and Others* [2022] EU:C:2022:203, p. 66.

[22] Articles 12 & 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 2023.

[23] Impact Assessment for the DMA, p. 41.

principles, rules, and concepts governing a specific legal field or institution.[24] It also involves analysing the relationship between these elements to address ambiguities and gaps in existing law.[25] The method is used to investigate and analyse *de lege lata* (present law) with accepted sources of law.[26] The focus will therefore be on present applicable legislation, specifically Article 102 TFEU and the DMA. Both decisions from the EC and the CJEU will be addressed. Case law is thoroughly addressed to explain essential purposes and principles of self-preferencing in general and within digital markets. Both older and recent case law are examined: Older case law to establish an understanding of general principles in Article 102 TFEU, such as the principle of equal treatment and fair conditions, which courts have stated are distorted by the abuse of self-preferencing. More modern case law is examined to establish an understanding of how the abuse of self-preferencing manifests in the digital market.[27] Furthermore, literature will be assessed with care due to authors' involvement of personal reasoning and opinions. It requires thoughtful and deeper analysis, along with arguments, to clarify the area in which an author expresses their opinions, to establish an understanding of such reasoning and to present my own opinions.

There are tensions between scholars regarding the legal dogmatic method, the method has also faced criticism for merely describing the law without delving into how the law applies in practice.[28] According to Kleineman, when employing the legal dogmatic method, it is crucial to analyse the law from a critical point of view.[29] Therefore, a careful examination of the similarities and differences between Article 102 TFEU and the DMA will be conducted, with a particular focus on the recent adopted rules concerning self-preferencing in Article 6 DMA.

The legal dogmatic analysis requires an analysis of the various elements within legal source doctrine to ensure that the conclusions drawn in this thesis reflect how the presented research questions should be perceived in a concrete context.[30] Further, to successfully analyse these elements, an internal perspective must be adopted to thoroughly understand the law and its system.[31]

To succeed in answering the research questions in this thesis, it is important to examine the different objectives of Article 102 TFEU and the DMA, as well as the approaches in EU competition law by legislators and courts. This approach involves looking at legal doctrine as a system that is constantly developing.[32] When the law is viewed as a system, it becomes important to organize and reorganize the instruments of the institutions responsible for creating law into coherent principles,

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[24] Smits, Jan M., '*What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research'* (2015) in Gestel V, Rob., Micklitz, W-Hans and Rubin, L, Edward (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, New York (Cambridge University Press, 2017 pp. 207-228), p. 5. [cit: Smits, 2015].

[25] Ibid.

[26] Ibid., p. 6.

[27] Commission Decision C(2017) 4444 final of 27 June 2017 *relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement* (Case AT.39740 – Google Search (*Shopping*).

[28] Kleineman,Jan 'Rättsdogmatisk metod', in Nääv, Maria & Zamboni, Mauro (eds) '*Juridisk Metodlära'*, (Studentlitteratur 2nd ed. 2018), p. 24.

[29] Ibid., p. 24.

[30] Ibid., p. 26.

[31] Smits, 2015, p. 6.

[32] Ibid., p. 6 & 7.

rules, and concepts.[33] This thesis will, therefore, involve rigorous analysis and connections between doctrinal sources and primary materials. To interpret and present important principles, reasonings, and statements, the primary focus will be on case law, such as the principle of *ne bis in idem* and the extended responsibility of dominant undertakings. Legal doctrine also encompasses literature which will be approached with caution due to its inclusion of personal reasoning, arguments, and opinions. Nevertheless, these personal aspects are important sources for fulfilling a comprehensive assessment of the aims of this thesis.

The thesis will address EU law; hence, an EU legal method will be employed in addition to the legal dogmatic method. The EU legal method is used to interpret and apply EU law which is divided into primary and secondary law which the EU distinguishes.[34] Primary law exists of the treaties (TEU & TFEU) and legal acts that can be adopted based on the EU treaties are referred to as secondary law. Such acts are primarily the binding legal acts that the institutions can issue based on Article 288 TFEU, such as directives, regulations (such as the DMA), and decisions (recommendations and opinions do not have binding force).[35] Decisions from the EC will be extensively utilised to explain important rationales from essential proceedings. In the event of a conflict between primary law and secondary law, primary law takes precedence.[36] This particular scenario is an important part of the final result considering the different frameworks of *ex ante* and *ex post* provisions in the DMA and TFEU, as well regarding the principle *ne bis in idem*. Since this thesis aims to compare Article 102 TFEU and Article 6 DMA which is aimed to complement the former, it becomes necessary to assess preparatory works for the DMA. The assessment of preparatory works will also have significant importance when analysing the applicability of *ne bis in idem*.

Another source of law within the EU is case law from the CJEU.[37] The CJEU is divided into two courts, the *CJEU* and the *GC*. Decisions from the GC have precedent value and its jurisprudence holds a relatively strong position as a legal source.[38] However, decisions from the CJEU have higher precedence.[39] If the CJEU have not expressed its opinion but the GC has, the statements from the GC carry higher precedence than other legal sources (except primary and secondary law).[40] Decisions and statements from the GC will therefore be examined, e.g., the GC's statements in *Google Shopping*[41] regarding the characterisation of Google's abuse and the principle of equal treatment.[42] The CJEU is known for employing a teleological interpretation.[43] The teleological approach is aimed at interpreting the law with an emphasis on its purpose. It is primarily used to determine the purpose of

[33] Ibid., p. 6.

[34] Hettne Jörgen & Eriksson O. Ida, (red.) '*EU-rättslig Metod: Teori och Genomslag i Svensk* Rättstillämpning' (Norstedts Juridik 2nd ed. 2011), p. 41 & 42. [cit: Hettne & Eriksson, 2011].

[35] Cf. Ibid., p. 42. & TFEU Article 288.

[36] Article 263 TFEU.

[37] Summaries of EU Legislation – "Sources of European Law" (Eurolex, 21.04.2022) https://eur-lex.europa.eu/EN/legal-content/summary/sources-of-european-union-law.html (Accessed 2 May 2024).

[38] Hettne & Eriksson, *EU-rättslig Metod: Teori och Genomslag i Svensk* Rättstillämpning, p. 56.

[39] Ibid.

[40] Ibid.

[41] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*).

[42] Ibid., paras 143 & 155.

[43] Hettne & Eriksson, 2011, p.168.

an unclear wording or a contextual context. Given that some provisions in Union law can be vague and imprecise, it is important to supplement them with provisions from secondary sources. The vague and imprecise provisions result in a responsibility for the CJEU to provide sensible and coherent content to these provisions.

The teleological interpretation fulfils three different purposes in Union law; Promote the purpose pursued with certain provisions; prevent unreasonable consequences that may arise from a literal interpretation; and fill gaps that would otherwise exist in the Union.[44] With the newly applicable DMA and Article 102 TFEU, it becomes necessary to look at the purpose of the DMA when these two regulatory frameworks intersect. Therefore, to investigate the purpose of the DMA, sources such as the Impact Assessment of the DMA, the proposal for the DMA, and the DMA itself will be assessed.

Article 6 of the DMA entails restrictive prohibitions that have faced criticism, and an important purpose of the teleological interpretation is to prevent unreasonable consequences resulting from a literal reading.[45] Such outcomes, could potentially stifle innovation, highlighting the importance of considering the purpose behind the DMA to ensure that significant negative effects are avoided[46] Since the DMA aims to ensure markets where gatekeepers operate, are and remain constable and fair [47] it becomes essential to delve into how the law applies in practice. In other words, the provisions in the DMA will partly be analysed for their efficiency. This is vital to fulfil the purpose of the thesis and the legal dogmatic method employed, considering the existing differences in objectives and the regulation of self-preferencing between Article 102 TFEU and the DMA.

1.5 Outline

The second chapter of this thesis will present self-preferencing in practice and under EU competition law, with a focus on a key legal case. The principle of *ne bis in idem* will also be addressed in this chapter. Chapter three will examine the DMA and its regulation of self-preferencing, comparing relevant aspects with Article 102 TFEU and Article 6 DMA. Additionally, the application of *ne bis in idem* in relation to Article 102 TFEU and the DMA will be explored. Finally, chapter four will offer an analysis and conclusions that address the research questions outlined in section 1.2.

[44] Ibid.
[45] Hettne & Eriksson, 2011, p. 168.
[46] Hettne & Eriksson, 2011, p. 168 & 169.
[47] Proposal for the DMA, p. 10.

2 Self-Preferencing in EU Competition Law and the Application of the *ne bis in idem* principle

2.1 Introduction

One common practice that distorts competition is when an undertaking abuses the practice of self-preferencing by treating its services and products more favourably than its competitors. Such behaviour has become increasingly more prevalent, especially in digital markets due to innovation and instruments to execute such practices. The abusive practice of self-preferencing by a dominant undertaking is addressed with Article 102 TFEU. A notable instance illustrating self-preferencing in EU competition law is the case *Google Shopping*, in which significant statements regarding the practice of self-preferencing were made. As such, this chapter will present essential information in terms of self-preferencing in practice and under EU competition law. Essentially, the chapter aims to elucidate the practice of self-preferential behaviour exhibited by undertakings within the EU's single market. In essence, the chapter will provide a clarification of the challenges stemming from such abuse by dominant positions within the internal market, as well as an understanding of the principle *ne bis in idem* and its relevance in EU competition law.

2.2 Self-Preferencing

Self-preferencing is primarily used to gain an advantage as opposed to its competitors. While this behaviour often results in abuse, self-preferencing is not per se unfair, it occurs in many markets, both in the digital and offline world (e.g. supermarkets promoting their clothes in-store).[48] It is a rational business strategy to capitalize on market opportunities by incorporating the ability to engage in such activities. However, such behaviour is not always fair. Unfair practices of self-preferencing have become more prevalent in the digital era. With advancements in technology, undertakings at the technological forefront have found ways to vertically integrate their services into each other and treat their services more favourably. Such behaviour is common among large Big Tech companies.[49] The practice is primarily a prevalent leveraging strategy amongst core platform providers[50], leading to a two-folded anticompetitive effect: First, excluding competitors with the fair ability to compete on the platform (defensive leveraging) and second, extending their market power to related markets (offensive leveraging).[51] Such anti-competitive effects

[48] Commission Staff Woking Document Impact Assessment Report of the DMA, p. 41.
[49] Colangelo, Giuseppe, '*Antitrust Unchained: The EU's Case Against Self-Preferencing*, (2023), p. 538.
[50] Ibid.
[51] Ibid.

primarily arise from the dual role of vertically integrated undertakings, acting as both host and competitor.[52] The debate on self-preferencing has persisted for many years, primarily revolving around its novelty[53], meaning that increased innovation leads to larger risks of self-preferencing.

Given prior case law, the precise meaning of self-preferencing is unclear.[54] This ambiguity arises from the fact that self-preferencing encompasses a broad spectrum of different practises[55], thereby making it difficult to explicitly formulate a precise definition of self-preferencing.[56] However, in *Google Shopping*, the GC characterised the abuse of Google to be different from those that govern "normal competition", leading to a hindering of regular market conditions.[57] More specifically, in a typical self-preferencing case, the abusive player is a dominant operator on a downstream market[58] (such as a marketplace, an operating system (OS), a search engine, a recommendation algorithm and others)[59]. The crucial and common feature is the openness to third-party services.[60]

Self-preferencing is often manifested by favouring a service through ranking[61] (e.g. a market player securing its service a better ranking on a search result page), in other cases, the imposition of various technical and contractual conditions leading to restrictions regarding interoperability of various products or services.[62] Even the tying of a service can constitute self-preferencing, making it impossible for consumers and business users to access one service without obtaining another.[63]

Self-preferencing is primarily a leveraging strategy, leveraging is according to the GC a "generic term" and it may reflect several other abusive practices.[64] Nonetheless, it is important to recognise that at its core, self-preferencing involves favouring services and products through vertical integration. It simply can be executed under other forms than just leveraging, such as indirect predatory strategies or exploitive abuses. Self-preferencing can be argued to exhibit a two-sided nature,[65] as these practices can occur in both downstream and upstream stages of the value chain.[66] Such practices can either be beneficial or harmful to consumers which

[52] Ibid, p. 540.

[53] Ibid.

[54] Ibid.

[55] Ibid, p. 540 & 546.

[56] Ibid, p. 540.

[57] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*), p. 151.

[58] "Downstream market" refers to the faze in the chain where components or services are produced or provided.

[59] Cf. Patrice Bougette., Budzinski, Oliver & Marty, Frédéric, '*Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses'* [2022], page 193. [cit: Bougette et al. 2022]; Commission Staff Woking Document Impact Assessment Report of the DMA, p. 130.

[60] Bougette et al. 2022, page 193.

[61] Case AT.39740 *Google Search* (*Shopping*).

[62] Commission Decision C(2018) 4761 final of the European Commission of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android).

[63] Cf. Bougette et al. 2022, p. 191; Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 – Microsoft).

[64] Cf. Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*), p. 26;. Bougette et al. 2022, page 192.

[65] Commission Staff Woking Document Impact Assessment Report of the DMA, p. 20.

[66] Bougette et al. 2022, p. 192.

requires a case-by-case analysis since it depends on the specific situation and the underlying circumstances.[67]

In summary, self-preferencing becomes an issue when it is detected by complementors or consumers, as well as the emergence of lock-in effects.[68] While the ability to show the practice of self-preferencing, undertakings must have incentives to engage in such activities, such activities need to result in a form of benefit or profit to constitute self-preferencing.[69] Essentially, the presence of complementary products in the marketplace owned by the undertaking must exist to show different treatment to its services or products as compared to its competitors.[70]

2.3 Self-Preferencing by Dominant Undertakings

Self-preferencing by dominant undertakings that violate EU competition law is addressed in Article 102 TFEU. It is well established that Article 102 TFEU consist of two elements: the dominance of the undertaking – the structural element – and the abuse of this dominance – the behavioural element.[71] Primarily two types of abuses under Article 102 TFEU are prohibited, exploitive and exclusionary.[72]

The EC in the case *Google Shopping* discussed the concept of abuse and stated, "*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition on the merits, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*".[73] This reasoning was later confirmed by the GC.[74]

Furthermore, fair trading conditions are a fundamental element of competition and self-preferencing if mishandled, completely undermines these conditions. Fair and equal treatment is thus a central part of EU competition law, as affirmed by the GC, which stated that dominant undertakings must adhere to the general principle of equal treatment.[75] Moreover, the court also established that practices by dominant undertakings which result in exclusionary effects by employing methods other than competition on the merits are prohibited.[76] Even if improvement of services that consumers may benefit from can be prohibited, especially if such improvements

[67] Bougette et al. 2022, p. 192.

[68] Cf. Proposal for the DMA, p. 2 & Bougette et al. 2022, p. 197.

[69] Bougette et al. 2022, p. 197.

[70] Ibid., p. 196.

[71] Ghezzi, Frederico & Maggiolino, Mariateresa, '*Is Self-preferencing an Autonomous Model Situation?*' in: T. Kalpana., A. S. Kamperman., & C. Cauffman (eds) '*Digital Platforms, Competition Law, and Regulation'* (Bloomsbury Academic; Hart Publishing 2024), p. 31. [cit: Ghezzi & Maggiolino, *Is Self-preferencing an Autonomous Model Situation?*].

[72] Cf. Ghezzi & Maggiolino, '*Is Self-preferencing an Autonomous Model Situation?*' p. 31; Monti, Giorgio, *The General Court's Google Shopping Judgment and the scope of Article 102 TFEU* "The General Court's Google Shopping Judgment and the scope of Article 102 TFEU" [2021], p. 6 & 7.

[73] Case AT.39740 *Google Search* (*Shopping*), p. 333.

[74] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*), p. 264.

[75] Ibid.

[76] Ibid, p. 152.

result in a dominant undertaking favouring its services with methods other than those of competition on merits, potentially inducing anticompetitive effects.[77]

As presented, Article 102 TFEU is only applicable to undertakings with a dominant position. However, regarding self-preferencing, such conduct is not solely employed by dominant undertakings. This can arguably be seen as an existing gap, as there exist large undertakings that may not necessarily be dominant but still have a significant impact on markets.[78] Article 102 TFEU is therefore not sufficient to address all undertakings exploiting the practice of self-preferencing. Furthermore, the practice of self-preferencing by a dominant undertaking cannot be captured by Article 102 TFEU if the conduct at hand is not capable of producing exclusionary or exploitative effects that lead to anti-competitiveness.[79] The abusive practice of such preferencing by a dominant or important[80] undertakings can significantly distort competition. Therefore, an intervention with speed is sometimes required to successfully address those practices in the timeliest and thus effective manner.[81] However, Article 102 TFEU imposes an *ex post* framework, meaning that interventions can only be executed after abuse of a dominant position has occurred.

2.3.1 Google Shopping Case

The business model of Google is based on the interaction between its free online products and services, the online advertising service is not free and is Google's main source of revenue. The most important service that Google provides is the search engine "Google Search". Google is also managing search functions of some specific third-party websites.

On the 30th of November 2010, the EC initiated its proceedings against Google.[82] Some years later, on the 13th of March 2014, the EC adopted a preliminary assessment. The EC viewed that Google was engaged in business practices that could infringe Article 102 TFEU, as well as Article 54 of the European Economic Area (EEA) Agreement.[83] The following four business practices were communicated by the EC:

- "The favourable treatment, within Google's general search results pages, of links to Google's own specialised search services as compared to links to competing specialised search services ("first business practice")
- The copying and use by Google without consent of original content from third party websites in its own specialised search services ("second business practice");
- Agreements that de jure or de facto oblige websites owned by third parties (referred to in the industry as "publishers") to obtain all or most of their

[77] Ibid, p. 146.
[78] Proposal for the DMA [2020], p. 7.
[79] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*), paras. 144-157.
[80] "Important" in this aspect refers to non-dominant undertakings with significant impact on markets.
[81] Commission Staff Woking Document Impact Assessment Report, paragraph 107.
[82] Case AT.39740 *Google Search* (*Shopping*), p. 43.
[83] Case AT.39740 *Google Search* (*Shopping*), p. 63.

online search advertisement requirements from Google ("third business practice"); and

- Contractual restrictions on the management and transferability of online search advertising campaigns across online search advertising platforms ("fourth business practice")".[84]

Article 102 TFEU presents several abusive practices which only are examples and other types of abusive practices can constitute abuse of a dominant position.[85] For example the limiting of markets stated in Article 102(b) TFEU, the legal characterisation is not based on the specific text, but on the substantive criteria.[86] In a previous case, it was stated that an undertaking that holds a dominant position must avoid adopting a course of conduct which would be unproblematic if adopted by non-dominant undertakings.[87] Likewise, the CJEU stated that an abuse of dominant position is prohibited (under Article 102 TFEU and Article 54 EEA agreement) "[…] regardless of the means and procedure by which it is achieved"[88], as well as "[…] irrespective of any fault"[89]. Article 102 TFEU does not only prohibit unfair practices to strengthen an undertaking's position but they are also aimed at the behaviour of a dominant undertaking in a given market that distorts competition by extending its dominance to a neighbouring but separate market.[90]

The EC concluded Google's behaviour to be abusive since it constituted a practice outside the scope of fair competition on the basis that it: (i) diverts traffic by decreasing traffic from Google's general search results to competing comparison services and increases the traffic from Google search results to Google's own comparison service;[91] and (ii) having or potentially leading to anti-competitive consequences in national market for shopping comparison services and general search services.[92] The EC further stated that Google did not invent comparison shopping, in fact, Google's first comparison search service "Froogle" was at first not very successful due to its visibility on Google Search. It was not until Google started to manipulate ranking algorithms in each of the thirteen national markets that the traffic to Google's own comparison service increased, and at the same time, decreased traffic to the majority of the competitive comparison services.[93]

[84] Case AT.39740 *Google Search* (*Shopping*), p. 63.

[85] Case C-6/72, *Europemballage and Continental Can v Commission*, [1973] EU:C:1973:22, p. 26.

[86] Case T-286/09, *Intel v Commission* [2014] EU:T:2014:547, p. 219.

[87] Cf. Case C- 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] EU:C:1983:313, p. 57; Case T-111/96, ITT *Promedia v Commission* [1998] EU:T:1998:183, p. 139.

[88] Case C-6/72, *Europemballage and Continental Can v Commission*, p. 27.

[89] Ibid, paragraph 29.

[90] Case T-201/04, *Microsoft v Commission* [2007] EU:T:2007:289, p. 1344.

[91] Case AT.39740 *Google Search* (*Shopping*), p. 341.

[92] Ibid, p. 333.

[93] Ibid, paras 343 & 498.

"United Kingdom - Traffic from Google's general search results pages to Google's comparison shopping service compared to total traffic to a sample of competing comparison shopping services"[94].

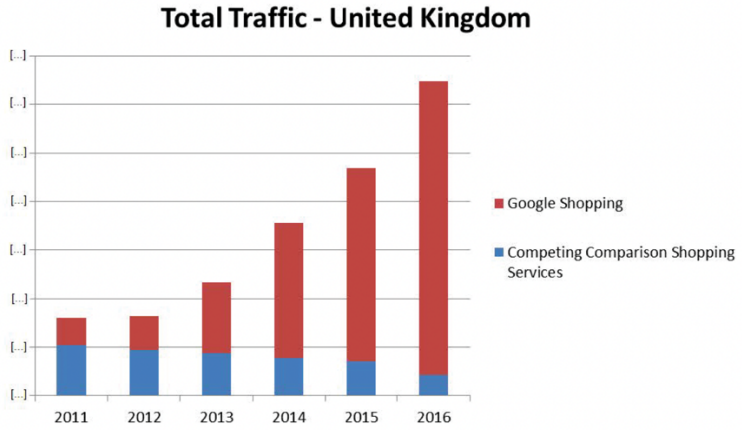

Table 1

An important insight from the case is that the EC did not rely on an established abuse, but rather on the principle outlined in Article 102 TFEU, which prohibits an abuse of dominance that falls outside the scope of competition on merits. Thus, the EC pushed the boundaries of Article 102 TFEU by asserting that self-preferencing itself could amount to an abuse of dominance, delivering a bold message to dominant digital undertakings. Furthermore, this clarification stands as one of the two important takeaways. The other significant clarification was the establishment of the general principle of equal treatment in the case of self-preferencing. In the Appeal, the GC stated that "[…] *the general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified*"[95]. The statement establishes that the principle of equal treatment also applies to self-preferencing practices within the digital market.

This decision implies that Article 102 TFEU may be invoked to interfere in the technical design of products and services, while also emphasising the obligation of equal treatment in digital markets.[96]

[94] Case AT.39740 *Google Search* (*Shopping*), p. 498.

[95] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*), p. 155.

[96] Deutscher, Elias, '*Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU*' (2022), p. 1346.

2.4 The principle of *ne bis in idem* in EU Competition Law

The principle of *ne bis in idem* protects legal individuals and undertakings from being punished twice for the same offence which is a fundamental principle in EU law.[97] The principle also matters in EU competition law as stated by the CJEU.[98] The principle is stated in Article 50 of the EU Charter of Fundamental Rights and was initially only applicable to criminal cases, today the CJEU finds the *ne bis in idem* principle applicable in competition law cases.[99] The principle applies to proceedings where the areas of laws are "*sufficiently similar in nature*"[100]. Previously, the European Court of Justice's approach regarding the requirements for the principle has not been unified due to different areas of EU law.[101] However, within the context of EU competition law, specifically the test for establishing the principle has been threefold. The test requires three aspects: the identity of acts; the unity of the offender; and the unity of the protected legal interest.[102] Furthermore, the principle is subject to a twofold condition, "[…] *first, that there must be a prior final decision (the 'bis' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions concern the same conduct (the 'idem' condition)*"[103].

In cases *bpost*[104] and *Nordzucker*[105], the CJEU considered the scope of *ne bis in idem* to be applicable in two certain circumstances: (i) when competition and sectoral rules are enforced to the same conduct;[106] and (ii) where national competition rules are applied to the same conduct.[107] The CJEU also found that different legislations must have distinct objectives, if not, a limitation cannot be justified.[108] However, the principle of *ne bis in idem* does not preclude an undertaking from being investigated and potentially fined by NCAs from different MS.[109] It was also stated that the principle of *ne bis in idem* can only occur *ex post* given that several factors may be necessary to be taken into account.[110]

[97] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P*, Limburgse Vinyl Maatschappij NV and Others v Commission* (PVC II) [2002] EU:C:2002:582, paras. 59-60.

[98] Ibid.

[99] Case C-151/20, *Nordzucker and Others*, p. 66.

[100] Tomkin, Jonathan, '*Commentary on Article 50–Right not to be tried or punished twice'* in Peers, Steve., Hervey, Tamar., Kenner, Jeff., and Ward, Angela (Eds.), '*The EU Charter of Fundamental Rights – A Commentary*' (Hart Publishing, 2nd ed, 2021). p. 50.37.

[101] Bockel, Van Bas, '*The Ne Bis In Idem Principle in EU Law*' (2010), p. 41 & 233.

[102] Case C-204/00 *P, Aalborg Portland and others v. Commission* [2004] EU:C:2004:6, p. 338.

[103] Case C-151/20, *Nordzucker and Others*, p. 33.

[104] Case C-117/20 *bpost SA v. Autorité belge de la concurrence* [2022] EU:C:2022:202.

[105] Case C-151/20 Nordzucker and others.

[106] Case C-117/20 *bpost*, p. 38.

[107] Case C-151/20 Nordzucker, p. 56.

[108] Cf. Article 52(1) of the Charter of Fundamental Rights; Case C-117/20 *bpost*, p. 43; Article 52(1).

[109] Case C-117/20 *bpost*, p. 58.

[110] Case C-117/20 *bpost*, p. 52.

2.5 Summary and Concluding Remarks

The illegal practice of self-preferencing by dominant undertakings can be enforced with Article 102 TFEU if the practice leads to exploitive or exclusionary effects that distort competition. Such as in the case of *Google Shopping* where the EC pushed the boundaries of Article 102 TFEU by stating that self-preferencing itself could amount to an abuse of dominance. However, Article 102 TFEU fails to effectively address self-preferencing practices in the digital market when there is an absence of dominance. Furthermore, Article 102 TFEU involves an *ex post* approach and the rules can only be enforced after a competition problem has emerged, leaving no room to prevent an undertaking's abuse of dominance. Moreover, Article 102 also fails to capture practices if there is no evidence of a negative impact on competition. In other words, there is a need for a new instrument to address the circumstances or areas which Article 102 TFEU fails to cover.

The statements from the case *Google Shopping* clarified that the abuse of self-preferencing itself could establish abuse of dominance and provided a definition of equal treatment. This definition should be a core part of future proceedings of self-preferencing in the digital market. Especially because self-preferencing is a leveraging strategy that, by favouring itself over competitors leads to unequal treatment which results in exclusionary or exploitative effects.

Moreover, the *ne bis in idem* apply to EU competition law, however, the principle can only be applied ex post and does not preclude an undertaking from being investigated and potentially fined. With the DMA and Article 102 TFEU, the question lies if the principle can be applied to this relationship. The CJEU has previously stated that the principle is applied to laws that are "sufficiently similar in nature" but also that different legislations must have distinct objectives. If this is the case with Article 102 TFEU and the DMA will be further elaborated in the next chapter.

3 The DMA and Self-Preferencing: Overview, Regulation, and Comparison with Article 102 TFEU

3.1 Introduction

Against some of the challenges related to self-preferencing, as discussed in Chapter 2, the EC proposed a proposal for the DMA. The proposal was met with the Parliament and the Council. After negotiation in the Parliament and the Council, the final text of the DMA was adopted in 2022. This chapter will further elaborate on the main legal provisions and framework in the DMA relating to its regulation of self-preferencing. The chapter will also provide a comparison of how self-preferencing is regulated in Article 102 TFEU and the DMA. At the end of the chapter, the principle of *ne bis in idem* concerning the relationship between Article 102 TFEU and the DMA will be elaborated.

3.2 The Scope of the DMA

The DMA regulates the conduct of gatekeeper platforms and aims to ensure that markets, where gatekeepers operate, are and remain fair and constable, as stated in Recital 11 DMA. In March 2022, after the European Parliament, Council and commission reached an agreement on the Regulation's final version, the EU's internal market commissioner Thierry Barton, told reporters "*It used to be the Wild West*"[111] and "*Now, that's no longer the case. We're taking back control*"[112].

The proposal for the DMA was presented on the 15th of December 2020,[113] the initial rules of the DMA entered into force on 1 November 2022,[114] and on May 2, 2023, all the rules in the DMA entered into force.[115] Regarding the enforcement mechanism, since the DMA is a regulation, it provides the EC to be the sole enforcement authority.[116] The reason behind this is that the DMA covers the entire single market within the EU and is legally enforceable across all the 27 MS.[117]

[111] Nielsen, Nikolaj, 'EU ends 'wild west' of Big Tech' (EUobserver, 25 Mars 2022) <https://euobserver.com/world/154591> (accessed 24 April 2024).
[112] Ibid.
[113] Proposal for the DMA [2020].
[114] Article 54 DMA *"Article 3(6) and (7) and Articles 40, 46, 47, 48, 49 and 50 shall apply from 1 November 2022"*.
[115] Ibid.
[116] Recital 91 & Article 18 DMA.
[117] Alexiadis, Peter & Streel de, Alexandre, '*The EU's Digital Markets Act: Opportunities and Challenges Ahead*' (2022), p. 168.

In September 2023, the EU designated the first six gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft).[118] These six undertakings together provide 22 core platform services. An example of the characteristics of a core platform service is the ability to extremely scale their economies. Usually, this results from close to zero marginal costs to add more business users or end users. The business is strategically developed with a focus on increasing revenue without necessarily increasing the costs at the same rate.

The definition of a gatekeeper under the DMA is stated in Article 2, "*gatekeeper means an undertaking providing core platform services, designated pursuant to Article 3*"[119]. The scope of the DMA is restricted to core platform services meaning it will not cover all platforms within the digital market. The definition of core platform services is stated in the DMA, ten services are listed:

a) *"online intermediation services;*

b) *online search engines;*

c) *online social networking services;*

d) *video-sharing platform services;*

e) *number-independent interpersonal communications services;*

f) *operating systems;*

g) *web browsers;*

h) *virtual assistants;*

i) *cloud computing services;*

j) *online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)"*[120].

Article 3(1) DMA sets out three cumulative conditions, the Article states that an undertaking shall be designated as a gatekeeper if:

a) *"it has significant impact on the internal market; and*

b) *if it provides a core platform service which is an important gateway for business users to reach end users; and*

c) *it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future".*[121]

[118] European Commission, *Digital Markets Act: Commission designates six gatekeepers* (Press Release 6 September 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328. (Accessed 1 May 2024).
[119] Article 2(1) DMA.
[120] Article 2(2) DMA.
[121] Article 3(1) DMA.

Article 3(2) further outlines three conditions for each of the cumulative conditions in Article 3(1) to be fulfilled, thus designating a core platform provider as a gatekeeper. The conditions are aimed at the undertakings market share, market valuation, and monthly users on the core platforms within the Member States.[122] The first condition refers to 3(1)(a)) and is presumed to be fulfilled if the undertaking have achieved an annual turnover equal to or over EUR 7,5 billion in each of the last three financial years or if its average market capitalization or market value exceeded EUR 7,5 billion in the last financial year and offers the same specific platform service in at least three EU MS.[123] The second condition refers to Article 3(1)(b)) and is presumed to be fulfilled when an undertaking offers a core platform service and its monthly active end users exceeds 45 million and its end users are established or located within the Union and more than 10 000 yearly active business users established in the Union.[124] The third condition refers to Article(1)(c), if the conditions in Article(3)(2) (b) were met in each of the last three financial years.[125]

The thresholds are of significant magnitude, targeting undertakings of extremely large size. Thus, the primary implication of the DMA is a focus on multi-billion-euro undertakings engaged in Big Tech such as the GAFAM tech giants.[126] However, the DMA is not limited to those undertakings, if an undertaking fulfils the thresholds, it shall be designated a gatekeeper.

3.3 Self-Preferencing in Article 6 DMA

Self-preferencing is a broad category within EU competition law. Typically associated with gatekeepers' practices of vertical integration. Gatekeepers possess a dual role which it provides a core platform service for business users, while also competing with them with its ancillary services.[127] By offering its services on a core platform service which it owns and manages, a gatekeeper may apply more favourable conditions to its services, creating an unfair competitive market.[128]

Regarding self-preferencing, it is important to make a distinction of a fair balancing of interests which in this case are, the interests of the gatekeeper's platform and its business users.[129] One example is an app store where the provider of the app store markets its apps, ending up competing with other app providers on the platform. Unfair self-preferencing would in this case occur if the gatekeeper applies more favourable conditions to its apps, e.g. in terms of better ranking as seen in *Google Shopping*.[130]

Self-preferencing is specifically addressed in Article 6(5) DMA. The Article introduces a concrete ban on self-preferencing, as well as other responsibilities and

[122] Article 3(1)(a-c) DMA.
[123] Article 3(2)(a) DMA.
[124] Article 3(2)(b) DMA.
[125] Article 3(2)c) DMA.
[126] Cabral et.al, 2021, '*The EU Digital Markets Act a Report from a Panel of Economic Expert'*, p. 9.
[127] Proposal for the DMA, p. 43.
[128] Commission Staff Woking Document Impact Assessment Report of the DMA, p. 41.
[129] Ibid.
[130] Case AT.39740 *Google Search* (*Shopping*).

prohibitions which indirectly constitute a sort of self-preferencing, such as the tying of two products as seen in *Microsoft*.[131] These prohibitions are stated in Articles 6(3) and 6(4), such as the prevention of end users' possibility to change default settings on the gatekeeper's OS (Article 6(3)), the prevention of end-user to un-install gatekeeper's software applications or app stores (Article 6(4)) and the favourable conduct through ranking, indexing, and crawling (Article 6(5)).[132]

Article 6(5) introduces a concrete ban on self-preferencing for gatekeepers and states the following: "*The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking*"[133].

Ranking refers to the presentation and how information about products, services, and search outcomes are displayed, structured and, communicated through various methods like a visual representation, rating, linking or voice-based outcomes.[134] Crawling refers to the process of discovering and indexing content, in other words, the discovery process of information.[135] Indexing refers to the process of storing and organising this information.[136] Due to crawling and indexing, a gatekeeper can favour its services and products even before ranking followed by a user's query.[137] Furthermore, the demand for transparency means that the gatekeepers shall be transparent about their parameters and how these determine ranking, crawling and indexing.[138] The criterion of fairness implies that gatekeepers' conduct shall be non-discriminatory.[139]

The general principle of equal treatment was discussed by the GC in the case *Google Shopping*, as previously mentioned.[140] However, even though the GC provided clarification on equal treatment in the context of self-preferencing in digital markets, neither Article 6(5) nor the DMA, defines equal treatment. It creates uncertainty if the statement from the GC can be assumed in the DMA, especially since the DMA is not adopted as a competition tool.[141] Since the DMA is not adopted as a competition tool, there is a significant difference in its legal basis and objective compared to Article 102 TFEU.

Article 6(5) states that gatekeepers shall not treat their services "more favourably" than services or products offered by a third party. However, neither the Articles nor the Recitals "explicitly" defines "more favourably". The only "non-explicit" guidance to understand the definition is provided in the Recitals, where references

[131] Cf. Bougette et al. 2022, p. 7 & 191; Case COMP/C-3/37.792 – *Microsoft*.
[132] Alexiadis & de Streel (2022), p. 181.
[133] Article 6(5) DMA.
[134] Article 2(22) DMA.
[135] Recital 51 DMA.
[136] Recital 51 DMA.
[137] Recital 51 DMA.
[138] Recital 58 DMA.
[139] Curugati, Christophe, '*How to implement the self-preferencing ban in the European Union's Digital Markets Act'* (2022), p. 6.
[140] See Chapter 2.3.1.
[141] Cf. Article 103 TFEU; Article 114 TFEU; Colangelo, Giuseppe, '*Antitrust Unchained: The EU's Case Against Self-Preferencing*, (2023), p. 446.

to "better position"[142] and "prominence"[143] are made. According to Christophe Carugati, is the Recitals only "implying" and thus, fail to provide a clear and absolute definition.[144]

The absence of explicit provisions concerning self-preferencing in EU competition law, and the subsequent introduction of the DMA and a specific ban on self-preferencing, implies a significant shift towards a stricter regulation of self-preferencing in digital markets. The importance of self-preferencing and its significant impact on the market is thus evident. This proactive approach in regulating the practice is also found in the *ex ante* approach of the DMA.

Although the prohibitions listed in Article 6 DMA are important to ensure market compliance in digital markets, Peter Alexiadis, the official advisor to the International Institute of Communications (IIC), who provides council to multiple competition and regulatory agencies around the world, along with his co-author Alexandre de Streel, argue that Article 6 require greater emphasis on the principle of *proportionality.*[145] Alexiadis and de Streel's reasoning indicates that according to their meaning, Article 6 contains strict prohibitions that have the risk of deterring innovation.[146] This process will be particularly sensitive in the selection of measures to address contestability concerns, especially in cases where gatekeepers raise technical regulatory reasons for their inability to adhere or be compliant with certain measures. Such measures can for instance be access to essential inputs, data portability, or full interoperability.[147] Thus, according to Alexiadis and de Streel, the ultimate success of the DMA, in the long run, will depend on the effectiveness of these targeted measures outlined in Article 6.[148] It shall also be mentioned that Article 6 allows the EC to further specify further obligations under Article 8.[149]. Such extended obligations may be further specified on a case-by-case basis. Even though Article 6 outlines restrictive provisions, (specifically in 6(5)) the ability of gatekeepers to have a regulatory dialogue with the EC regarding some measures is proof of emphasis on the principle of proportionality.[150]

[142] Recital 51 DMA.
[143] Recitals 51 & 52 DMA.
[144] Curugati (2022), p. 6.
[145] Alexiadis & de Streel (2022), p. 181.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Article 6 DMA.
[150] Recitals 27-29 DMA.

3.4 Comparing the Regulation of Self-Preferencing: Article 102 TFEU and Article 6 DMA

3.4.1 Comparison Aspects

The key considerations when comparing self-preferencing in Article 6 DMA with Article 102 TFEU are not solely the explicit textual wording in Article 6(5) DMA. The importance also lies in the similarities and differences in the objectives, applicability, specific responsibilities and prohibitions, *ex ante* and *ex post* approaches, the burden of proof, the room for the EC to further specify obligations in the DMA and the efficiency claims in Article 102 TFEU.

3.4.2 Applicability

The scope and applicability of Article 6 DMA are restricted to undertakings identified as gatekeepers. To be identified as a gatekeeper, an undertaking must meet certain cumulative conditions. The gatekeepers wield substantial control over digital markets and Article 6 DMA specifically aims at core platform services provided by gatekeepers. Compared to Article 102 TFEU which applies to all undertakings with dominant positions, regardless of whether the undertaking is designated a gatekeeper. There is in other words a possibility that these two legal frameworks apply to an undertaking that is both dominant and a gatekeeper. However, Article 102 TFEU holds precedence due to its status as primary law, thus posing a direct effect[151] as compared to Article 6 DMA, which is secondary law.[152]

3.4.3 The Legal Framework: *Ex ante* and *Ex post* Approaches

In a scenario of self-preferencing employed by a dominant gatekeeper, great focus needs to be placed on determining the appropriate legal framework to enforce. Enforcement can occur under either or both of these legal frameworks. However, the DMA and TFEU possess different enforcement mechanisms. The DMA introduces an *ex ante* framework which provides the EC as a sole enforcement authority[153] with the possibility to intervene before such abuse has occurred. Article 102 TFEU consists of an *ex post* framework, resulting in an incapability to prevent market distortion. It requires demonstrable evidence to litigate, which can only exist after an abuse. The disadvantage is that a market distortion is already underway, something that is difficult to restore.[154] The *ex ante* approach, however, enables the EC to avoid such scenarios and prevent a serious impact on the digital market due to

[151] Case C-6/64, *Costa v. ENEL* [1964] EU:C:1964:66.

[152] Article 288 TFEU.

[153] Recital 91 & Article 18 DMA.

[154] Cf. Recital 5 of the DMA; Laurine, Signoret, '*Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants'* (2020), p. 239; Andreangeli, '*The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets*' (2022), p. 498.

self-preferencing, as seen in *Google Shopping* which resulted in extremely negative effects for its competitors.[155]

3.4.4 Responsibilities and Prohibitions of Self-Preferencing

The term self-preferencing is not explicitly stated in Article 102 TFEU and is typically referred to by authorities and courts as "favouring". The article is applicable among other conducts, to all practices of self-preferencing that constitute an abuse of dominant position. A significant difference between Article 102 TFEU and Article 6(5) DMA lies in the textual ban on self-preferencing in Article 6(5). Other provisions in Article 6 can arguably be considered as a type of self-preferencing and introduce responsibilities that gatekeepers need to follow and not infringe. For example, the responsibility to make it technically feasible for consumers to switch OS or access to install third-party software applications or app stores.[156] Article 6 DMA also provides the EC to further specify obligations, emphasising the principle of proportionality, and providing gatekeepers the opportunity to have a regulatory dialogue with the EC to ensure proportionate measures, thus a clear distinction compared to Article 102 TFEU.[157]

3.4.5 Burden of proof

The DMA reverses the burden of proof, as it previously has been. In practice, if the EC notifies a gatekeeper of unlawful self-preferencing, the gatekeeper is responsible for proving its innocence, hence the burden of proof applies to the defendant.[158] This marks a shift from the burden of proof under Article 102 TFEU, where the burden of proof rests on the party alleging the infringement.[159] Another major difference between these two legal frameworks is the "efficiency claims" which do not exist in DMA. A dominant undertaking can under EU competition law show that its practice of self-preferencing enhances the market and has positive outcomes.[160] This possibility does not exist in the DMA, where the principle of proportionality instead is a central aspect.[161]

3.4.6 The Objectives of Article 102 TFEU and DMA

The objective of Article 102 TFEU is to ensure that competition is not distorted in the internal market.[162] Moreover, according to Article 26 TFEU, "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions*

[155] See Chapter 2.3.1. Table 1.

[156] DMA Articles 6(4) & 6(6).

[157] Cf. Alexiadis & de Streel (2022), p. 18 & Article 8 DMA.

[158] Bilal, Mehmet, The EU's DMA in: T. Kalpana., A. S. Kamperman., & C. Cauffman (eds) '*Digital Platforms, Competition Law, and Regulation*' (Bloomsbury Academic; Hart Publishing 2024), p. 185.

[159] Article 2 Council Regulation (EC) No 1/2003.

[160] DMA Recital 10.

[161] Streel d. Alexandre, '*DMA Compass'* (Centre on Regulation in Europe, Issue, November 2022), https://cerre.eu/wp-content/uploads/2022/11/DMACompass_Final.pdf (Accessed 4 May 2024) p. 11.

[162] Cf. Case C-117/20, *bpost*, p. 46. & Article 26 TFEU.

of the Treaties"[163]. The CJEU has also stated that ensuring the internal market is indispensable for its functioning.[164]

The objective of the DMA is to contribute to the proper functioning of the internal market as stated in Article 1(1) DMA. Moreover, this objective has its specific aim in the digital market where gatekeepers are present.[165] According to Recital 11 DMA, the objective is also "[…]*to ensure that markets, where gatekeepers are present, are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market*"[166]. Recital 107 also provides that the objective is "[…] *namely to ensure a contestable and fair digital sector in general and core platform services in particular, to promote innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector*"[167]. Finally, Recital 11 of the DMA states that the DMA is a complementary yet different objective from that of protecting competition against distortion within markets as defined in original competition law terms.[168]

Harrison, Zdzieborska and Wise believe that it is ironic that one of the key aims of the DMA is to ensure a proper functioning of the market and prevent fragmentation.[169] They argue that the DMA is more likely to impose gatekeepers with several overlapping and contradictory regulatory regimes.[170] They mean that the overlap between DMA and competition law shares many similar interests and aims. Furthermore, they argue that there is an issue with the DMA being aimed at promoting innovation in digital markets, fair pricing, and high-quality digital products and services, hence reflecting the goals of EU competition law.[171] Moreover, even though the application of the DMA is without prejudice to the application of Article 101 and 102 TFEU,[172] and the legal interests safeguarded by the DMA differ from those in EU competition law,[173] there will most likely be a significant overlap.[174] Both in terms of the enforcement of EU competition law and the application of the DMA.[175] Without additional guidance specifying circumstances under which conduct will be investigated by the DMA instead of other legal frameworks, there exists a risk of several overlapping investigations and proceedings in the EU.[176]

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[163] Article 26(2) TFEU.
[164] Case C-117/20, *bpost,* p. 46.
[165] Article 1(1) DMA.
[166] Ibid., Recital 11.
[167] Ibid., Recital 107.
[168] Ibid., 11.
[169] Harrison, Patrick., Zdzieborska, Monika & Wise, Bethany, '*Navigating ne bis in idem: bpost, Nordzucker and the Digital Markets Act*' (2022) (Competition Law Journal. 21(2) September, 2022 pp 55-59) p. 57.
[170] Ibid.
[171] Cf. Harrison et al. (2022), p. 58. & DMA Recital 10.
[172] Recital 10 DMA.
[173] Ibid., Recital 11.
[174] Harrison et al. (2022), p. 58.
[175] Ibid.
[176] Ibid., p. 59.

These difficulties in separating the DMA from Article 102 TFEU are also confirmed by Šmejkal. In her view, the DMA does not aim at something "fundamentally different just because its focus is to address gatekeepers. The difference lies in "how" the core aims of the DMA will be achieved and its instruments, which are distinct from Article 102 TFEU.[177]

3.5 The *ne bis in idem* Principle: Article 102 TFEU and the DMA

The DMA and Article 102 TFEU share numerous objectives, and a potential overlap between these two legal frameworks may occur. According to Harrison, Zdzieborska and Wise, the CJEU's interpretation in *bpost* will be extremely important for establishing a potential overlap between the DMA and EU competition law.[178] In *bpost*, the CJEU clarified the scope of the protection of *ne bis in idem* in terms of due process and proportionality.[179] The CJEU stated that in the context of cumulative proceedings and penalties, the following rules must be observed to not invoke the principle of *ne bis in idem*.[180]

- The rules need to be clear and precise so it is possible to predict which acts or omissions may be duplicated; and

- the authorities need to coordinate overlapping proceedings and carry them out within a near time frame; and

- the penalties imposed should reflect the seriousness of the offence.

Furthermore, the DMA does not prevent double proceedings which most likely will result in parallel proceedings to dominant gatekeepers and thus the principle of *ne bis in idem* will set the limits of such proceedings.[181] In parallel proceedings aimed at the same legal person for an identical offence, there will be a limitation to *ne bis in idem* principle.[182] A limitation can only be justified if it adheres to the core of the rights provided and upholds the principle of proportionality.[183] Moreover, the significance of whether or not the principle of *ne bis in idem* may be applicable concerning the DMA and Article 102 TFEU is the respective objectives. It was stated in *bpost* that different legislations must have distinct objectives, if not, a limitation cannot be justified.[184]

[177] Šmejkal, Václav, '*Abuse of Dominance and the DMA – Differing Objectives or Prevailing Continuity?*' (2023), p. 49.
[178] Harrison et al. (2022), p. 56.
[179] Case C-117/20 *bpost.* p. 41, 48 & 49.
[180] Case C-117/20 *bpost.* p. *51 & 58.*
[181] Harrison et al. (2022) p. 57.
[182] Case C-117/20 *bpost*, p. 28, 32 & 38.
[183] Article 52(1) of the Charter of Fundamental Rights.
[184] Cf. Ibid. & Case C-117/20 *bpost*, p. 43; Article 52(1).

3.6 Summary and Concluding Remarks

The DMA aims to complement Article 102 TFEU with different methods and instruments than previously existed in EU competition law. Thus, extending the scope of enforcement towards gatekeepers. Unfortunately, no case law exists due to its recent adoption. However, the specific ban on self-preferencing, stated in Article 6(5) introduces several prohibitions in terms of self-preferencing (ranking, indexing, and crawling). Alexiadis and de Streel mean that Article 6 still requires greater emphasis on the principle of proportionality since it might stifle innovation.[185] Even though gatekeepers will have the possibility to have regulatory dialogues with the EC to ensure proportionate measures. Such proportionate measures will most likely pertain to gatekeepers' access to essential inputs and interoperability to pursue its operations and platforms. In other words, technical aspects that naturally are part of their platforms. However, regarding the specific regulation on self-preferencing in terms of unfavourably ranking, indexing, and crawling, such as stated in Article 6(5), in my opinion, such practices cannot be argued to be a natural part of a gatekeeper's platform and not an essential part for the functioning of an OS. Therefore, regarding the possibility of having a dialogue, those dialogues will rather in my opinion, involve specific technical aspects, such as the un-installation of OS which Article 6(3) aims to address, or the gatekeepers' responsibility to technically enable the installation of third-party software applications or app stores which Article 6(4) aims to address.

Harrison, Zdzieborska, and Wise argue that the DMA have the same objectives and aims as EU competition law.[186] Even if the DMA is without prejudice to Article 102 TFEU, in Harrison, Zdzieborska, and Wise's view, there will most likely be an overlap (even if only looking at the main objectives of the DMA). This reasoning is partly confirmed by Šmejkal with the distinction that even though the DMA aims to promote competition and fairness. which are not different from EU competition law, one should relatively easily understand what and why DMA and Article 102 TFEU aim to protect.[187]

To have two completely different legal frameworks that fundamentally differ would be insufficient due to confusion and required consistency. This is not the case with the DMA either, since they share similar objectives. It should be highlighted that both legal frameworks apply to circumstances of a "dominant gatekeeper" abusing its dominance. Therefore, while Harrison, Zdzieborska and Wise provide arguments that are not necessarily untrue, it would be misleading to conclude that DMA and Article 102 TFEU share the "exact" same objectives on all fronts. However, there is a great possibility that the CJEU finds the objectives to overlap.

[185] Alexiadis & de Streel (2022), p. 181.
[186] Harrison et al. (2022), p. 58.
[187] Šmejkal, Václav, (2023), p. 49.

4 Analysis and Conclusion

4.1 Introduction

Self-preferencing, or as authorities and courts historically refer to it, "favouring" by a dominant undertaking, can be addressed with Article 102 TFEU. However, the EC and NCAs consider Article 102 TFEU to be insufficient to address all problems caused by gatekeepers. The specific reasons are the applicability and the *ex post* framework. Although many gatekeepers are dominant, not all of them are, resulting in some practices not being captured by Article 102 TFEU. Another issue is that in digital markets, abuses leading to unfair competition need to be addressed within a reasonable timeframe to prevent serious market distortion. The ability to implement an *ex ante* regulatory approach makes it possible to address pressing practises, such as self-preferencing, in a more timely and thus effective manner, such as in the DMA.

This chapter will provide an analysis of the most important similarities and differences in the regulation of self-preferencing between Article 102 TFEU and DMA. The chapter will also analyse the principle of *ne bis in idem*, given that a dominant gatekeeper is subject to both the DMA and Article 102 TFEU.

4.2 Similarities and Differences of Self-Preferencing in Article 102 TFEU and Article 6 DMA

The wording used to address such self-preferencing in case law regarding Article 102 TFEU is called "favouring" and "self-preferencing" in the DMA but constitutes the same practice. Article 102 TFEU does not explicitly address self-preferencing but is in case law discussed to encompass situations when a dominant undertaking favours its services or products over competitors. In contrast, Article 6 DMA introduces multiple prohibitions regarding a gatekeeper's self-preferencing.

Self-preferencing under Article 102 TFEU would be illegal if employed by a dominant undertaking and such favouring leads to exclusionary or exploitive practices that harm competition. It simply means that the abuse of such practice under Article 102 TFEU can be considered an abuse of dominance only if it leads to exclusionary or exploitive effects. One major difference is that Article 102 TFEU specifically aims to regulate dominant undertakings' impact on the market. If a practice does not lead to any exclusionary effects, and thus, no distortion of competition, it would be very difficult to successfully litigate. Notably, under the DMA, even if gatekeepers' practices of self-preferencing do not result in exclusionary effects, the prohibition of self-preferencing can still be enforced should it breach the rules outlined in Article 6(5) DMA. Given the main purpose of the DMA is to ensure that markets where gatekeepers operate, are and remain constable and fair, any practice of self-preferencing will be addressed very seriously.

Even if the practice itself does not lead to any distortion or unfairness in the market, gatekeepers will likely continuously challenge the barriers to get as close as possible to the limit of non-compliance to maximise their profits. Consequently, it remains imperative for the EC to prioritise the key objectives of the DMA in its decisions regarding self-preferencing, to uphold a teleological approach and to reach its goal of ensuring a fair and open digital market within the EU without stifling innovation.

The definition by authorities and courts of self-preferencing is extensive. However, the reasoning behind such practices implies that self-preferencing is illegal when it limits competition by employing dissimilar treatment to competitors, thereby creating an unequal market with unfair market conditions that hinder innovation and competition. The responsibilities and prohibitions outlined in Article 6(5) DMA draw inspiration from the *Google Shopping* case (consistent with the rationale presented in the Impact Assessment and the proposal for the DMA). For instance, the manipulation of search algorithms to favour itself as seen in *Google Shopping* is now under Article 6(5) DMA specifically prohibited. Such behaviour should constitute an unfavourable ranking. Consequently, the practices addressed in Article 6(5) align with the essential statements from *Google shopping*, specifically the statement that practices that have an "[…] exclusionary effect by using methods other than those that are part of competition on the merits"[188], as stated by the GC.

4.3 The Definitions "more favourably" and "fairness" in Article 6(5) DMA

Article 6(5) DMA states that a gatekeeper is prohibited from treating its services or products "more favourably" than those offered by third parties. However, the exact definition of what "more favourably" means is not provided in the DMA. The closest definitions are found in recitals 51 and 52 which refer to "better position" and "prominence", but are neither clearly defined. According to Carugati, the absence of specificity is likely intentional since it allows the EC to catch all forms of self-preferencing. The ban on self-preferencing in Article 6(5) prohibits gatekeepers' conduct of displaying and positioning their offerings over third-party offerings on a search result page. However, the absence of a precise definition of "more favourably" makes it difficult to detect such conduct.

Neither is the condition of "fairness" defined. Carugati presents a rather interesting reasoning. Curugati means that fairness implies non-discrimination and non-discrimination refers to the general principle of equal treatment which the GC in Google Shopping stated. It implies that fairness and non-discriminatory conditions entail the use of certain parameters that are objectively found and unbiased. This results in a positive outcome for gatekeepers since it implies that a gatekeeper can favour its services and products over third-party providers if the treatment remains objective and unbiased. If such practice were to be applied by a dominant undertaking (not a gatekeeper), even if the treatment is objective and unbiased, if such practice results in exclusionary or exploitive effects with a negative impact on competition, it will most likely lead to a conviction under Article 102 TFEU. Hence,

[188] Case T-612/17, *Google and Alphabet v Commission, Google Search* (*Shopping*), p. 152.

the definition of both "more favourably" and "fairness" should be defined to create a clear understanding of when self-preferencing is prohibited.

Carugati establishes that the EC should issue guidance on what practices constitute self-preferencing with a focus on two principles. The first is to issue guidance that gatekeepers, in terms of ranking, indexing and crawling should use objective and unbiased parameters. Second, there should be a requirement for gatekeepers to demonstrate equal treatment. In my opinion, the gatekeeper's demonstration of equal treatment will probably occur due to the imposition of cooperation between the EC and the gatekeepers. The gatekeeper would also be motivated to demonstrate this, as the EC may find a variety of technical aspects of self-preferencing employed by gatekeepers difficult to understand in certain scenarios. In terms of guidance on objective and unbiased parameters, ranking, indexing and crawling are explained in the DMA but the technical parameters are not and clarifying these parameters, would undoubtedly improve gatekeepers' understanding of self-preferencing.

4.4 *Ex ante* and *Ex post*

The main similarity in the regulation of self-preferencing between these two legal frameworks is that the abusive practices as seen in *Google Shopping* are still applicable under Article 102 TFEU and Article 6 DMA if the gatekeeper is dominant. This could create uncertainty regarding competing investigations or enforcement actions under these Articles against one gatekeeper that meets the criteria for both legal frameworks. This complexity may potentially result in double jeopardy for the gatekeeper and encroach on the principle *ne bis in idem*. Therefore, the investigation of a dominant gatekeeper will probably become more complex and important. The number of gatekeepers that are non-dominant is most likely very limited, the issue of potential double punishment will therefore be a major concern in most cases.

Because the EC can specify further obligations for gatekeepers than those stipulated in Article 6, one can argue for an increased risk of double jeopardy. However, Article DMA 8(3) states "*A gatekeeper may request the Commission to engage in a process to determine whether the measures that that gatekeeper intends to implement or has implemented to ensure compliance with Articles 6 and 7 are effective in achieving the objective of the relevant obligation in the specific circumstances of the gatekeeper*"[189]. It is a clear statement to emphasise the principle of proportionality, aiming to eliminate unnecessary burdens of gatekeepers. However, such regulatory dialogue would most likely be regarding other elements or practices than self-preferencing. This particular scenario will be further elaborated in chapter 4.5.

Concerning the illegal practice of self-preferencing, the enforcement mechanisms differ between the two legal frameworks. Article 102 TFEU can be enforced by NCAs or the EC, with potential fines and remedies for a dominant undertaking's violation. Conversely, the DMA can only be enforced by the EC, thereby constraining the enforcement of DMA violations. Even if NCAs can assist and

[189] DMA Article 8(3).

collaborate in the enforcement of the DMA, the enforcement of the DMA becomes limited. "Limited", in this sense, should imply a positive meaning; by having the EC as a sole enforcement authority, the enforcement of the DMA should become more precise, and create a more uniform application of the DMA. Hence, this results in a more consistent and predictable regulation for gatekeepers as opposed to Article 102 TFEU which is more fragmented and has historically been broader and more variably enforced due to the dual responsibility of the EC and NCAs. Due to this, the DMA and its responsibilities and prohibitions will in the long term probably contribute to a clearer understanding of gatekeepers and their practices.

Furthermore, there is significant importance in the enforcement of regulatory frameworks. In the event of a dominant undertaking abusing its dominance through self-preferencing under Article 102 TFEU, the EC can only intervene *after* the abusive practice has occurred, a so-called *ex post approach*. Meaning that there is a need for evidence to be displayed on whether such abusive practices have occurred or not. The contrary legal framework is the *ex ante* approach which applies in the DMA. It provides the EC with the possibility to intervene *before* the abusive practice has occurred or is underway. Unfortunately, due to the recent adoption of the DMA, there is no existing case law to address to demonstrate this framework in the realm of competition. However, given that the DMA aims to ensure the markets where gatekeepers operate, are and remain constable and fair, and with its *ex ante* approach, the EC is likely to notify gatekeepers with warnings of potential oversteps in advance. This will lead to another positive outcome of the DMA for gatekeepers, giving them the chance to adjust their conduct to show direct compliance after a warning. In the long term, however, if the general knowledge and level of compliance among gatekeepers increases, such warnings should most likely cease to exist, or at least significantly decrease. The possibility for the EC to issue such warnings creates a scenario where self-preferencing in digital markets, influenced by the DMA, has a good potential to significantly decrease. Whether this will be the case, is unclear, but it should make self-preferencing which is an operational objective of the DMA, less common in the EU digital market, and thus, fulfilling the efficiency purpose of the DMA.

4.5 The Burden of proof

Another significant aspect of the DMA is the reversed burden of proof. In cases of illegal self-preferencing by a gatekeeper, the burden of proof shifts on them to prove their innocence, if failed to do so, they risk a 10% fine of their total worldwide turnover. In cases of repeating infringing practices, the fine can escalate to 20%.[190]

One main difference in the DMA compared to Article 102 TFEU is the absence of efficiency defence. In a case of self-preferencing by a dominant undertaking, such as in *Google Shopping*, Google could "[…] *provide a justification by demonstrating that its conduct was objectively necessary or that the exclusionary effect produced could be counterbalanced by advantages in terms of efficiency gains that also*

[190] Summaries of EU Legislation – '*Digital Markets Act' (Eurolex, 02.06.2023)* https://eur-lex.europa.eu/EN/legal-content/summary/digital-markets-act.html *(Accessed 22 May 2024).*

benefited consumers"[191]. Even though such arguments are very hard to be successful with, the possibility still exists as compared to the practice of self-preferencing in the DMA. Instead, in the DMA, the absence of efficiency claims is replaced by the *principle of proportionality*. Efficiency claims are beside the point unless the gatekeeper is capable of showing that their conduct already achieves the objectives of the DMA. In other words, the principle of proportionality allows linking the goals and the objectives of the DMA in its interpretation and implementation. However, due to the absence of exceptions for pure self-preferencing practices in Article 6(5), the gatekeeper has a reduced possibility to show that its behaviour is compliant compared to Article 102 TFEU and a reduced possibility for justification compared to Articles 6(3) and 6(4). While there is no efficiency defence, there are possibilities for proportionate objective justifications/exceptions in Articles 6(3) and 6(4) as previously described. In other words, Article 6(5) does not allow for justification, highlighting the seriousness of pure self-preferencing.

One cannot avoid that the DMA aggressively restricts self-preferencing, it is obvious that the EC is aware of its aggressiveness insight and therefore the principle of proportionality is highlighted thoroughly in the proposal, as well as in the DMA. If proportionality were not a core objective of the DMA, it would in my opinion be extremely restrictive and impose significant responsibilities and prohibitions on gatekeepers, almost impossible to comply with. In other words, even if the DMA is restrictive, the principle of proportionality implies that contestability and fairness are core goals, which also applies to gatekeepers. The principle will therefore probably play a major role in decisions.

4.6 Proportionality in the DMA

The authors of the assessed journal articles highlight the principle of proportionality. Article 6 allows gatekeepers and the EC to have a regulatory dialogue process to discuss as well as to agree on suitable measures that are tailored to a specific gatekeeper. The flexibility to have such a dialogue is proof that the EC is emphasising the principle of proportionality to not impose unnecessary burdens on gatekeepers. Despite this, Alexiadis and de Streel mean that Article 6 still requires greater emphasis on proportionality, as it might deter innovation. They base their augments on gatekeepers' access to essential inputs and interoperability required to pursue their operations and platforms, in other words, technical aspects that exist naturally in their businesses. However, regarding self-preferencing in terms of ranking, indexing, and crawling, such as stated in Article 6(5), in my opinion, such practices cannot be argued to be a natural part of a gatekeeper's business and not an essential part for the functioning of an OS. Therefore, regarding the possibility of having a dialogue, those dialogues will rather in my opinion, involve specific technical details about the un-installation of OS stated in Article 6(3) or gatekeepers' responsibility to technically enable installation of third-party software applications or app stores as stated in Article 6(4), as well as additional obligations than those already stated in Article 6. Therefore, Article 6(5) imposes hard-core restrictions

[191] Case T-612/17, *Google and Alphabet v Commission*, p. 56.

without any exceptions or the possibility to argue for efficiency, in other words, completely different from Article 102 TFEU.

Finally, according to Alexaidis and de Streel, the real success of the DMA is based on the success of the measures outlined in Article 6 DMA. While that may be true, they do not specifically present in their statement why and in my opinion, such a statement is misleading. Their conclusion that the success of the DMA depends on one Article, even if it addresses important issues like self-preferencing and proportionality, the conclusion is way too narrow. Several essential aspects will contribute to the success of the DMA. One is the legal framework of *ex ante* rules and the reversal burden of proof to make proceedings more efficient which is one main objective of the DMA. Therefore, even if Alexandre and de Streel believe that the success of the DMA solely is based on Article 6's potential for proportionate and individualized application to gatekeepers, which indeed is a part of the success, it alone cannot fully reflect the entire success with DMA. It can be argued that a "significant part" of the DMA and its success will be based on the principle of proportionality. While other factors also contribute to the success, Alexiadis and de Streel's reasoning remains significant. I believe the success of the DMA is intertwined with how gatekeepers adapt to and comply with the rules. Gatekeepers have an interest in ensuring the success of the DMA to maintain their position in the market and avoid the 10% or in some cases, 20% fines. How they navigate their relationship with the EC, will likely play a crucial role in the effectiveness and impact of the DMA. However, it is yet entirely appropriate to discuss the progress of DMA; rather its potential risks should be the focus of such a discussion. Particularly, the coexistence with Article 102 TFEU, the applicability of *ne bis in idem*, and the risk of being stifled.

4.7 The Application of the *ne bis in idem* Principle to the Relationship Between Article 102 TFEU and the DMA

The principle *ne bis in idem* can only be applicable *ex post*, meaning that the principle cannot prevent eventual double proceedings, rather it prevents double penalties. After the examination of the criteria of the principle and the objectives of Article 102 TFEU and the DMA, it is not clear if the principle will apply to proceedings susceptible to DMA and Article 102 TFEU for the same offence. However, two aspects will be significantly important in assessing this relation. First, in *bpost*, the CJEU stated that different legislations must have distinct objectives, if not, a limitation cannot be justified. Second, the rules must be clear and precise. Šmejkal confirms Harrison, Zdzieborska and Wise's views of a significant overlap. She provides rather interesting reasoning and means that the difference is "how" the objectives are to be achieved, rather than the objectives per se.

Whether or not, the principle *ne bis in idem* applies, the tipping point will be an investigation of the respective legal framework focused on the objectives. The DMA and Article 102 TFEU share similar objectives; both aim to ensure the functioning of the internal market. However, even though the DMA also targets the internal market, its objective is narrower than the objective of Article 102 TFEU; the DMA specifically targets the digital market while Article 102 TFEU targets the entire

internal market, of which the digital market is a part. Article 102 TFEU thus also applies to the digital market when a gatekeeper is dominant.

The objectives of Article 102 TFEU and DMA are similar but not identical and it is unclear if the objective of the DMA includes the same as in Article 102 TFEU, especially due to the DMA's complementary objective. This ambiguity allows for a teleological interpretation to determine the core objectives in the respective legal framework. With such an interpretation, it should be possible to state that the objectives are not entirely identical, as the DMA narrowly targets gatekeepers that operate on the internal digital market, while Article 102 TFEU is aimed at the entire internal market. However, while the objectives are somewhat different, there is still a significant overlap. Whether the DMA's complementary objective is considered different is unclear. It depends entirely on how the CJEU assesses. In *Bpost*, the CJEU took a relatively restrictive view and if the CJEU had the same approach, it would be doubtful that it would establish that the objectives are similar. If the CJEU determines that Article 102 TFEU and DMA pursue the objective, a limitation would lack justification and therefore, not invoke the principle of *ne bis in idem*.

Regarding the criteria of clear and precise rules as stated in *bpost*,[192] after the examination and analysis of Article 6(5) DMA, uncertainties do exist, especially in the terms "more favourably" and "fairness" are not clear and precise. This uncertainty will hopefully in the future be clarified by case law and the ability for the EC to further specify obligations as stated in Article 6 DMA. As for right now, in terms of double proceedings for a dominant gatekeeper's practice of self-preferencing, I find it difficult for the CJEU to apply the principle of *ne bis in idem* in self-preferencing-cases due to the similarity of objectives between Article 102 TFEU and the DMA, and due to some unclear and not precise terms in Article 6(5). However, my opinion that the rules in Article 6(5) DMA are imprecise enough to upset the applicability of *ne bis in idem* should be interpreted with caution. The determinant of the principle's applicability mostly hinges upon whether the CJEU find the objectives identical or not.

[192] See Chapter 3.5.

4.8 Concluding Remarks

Article 6(5) DMA imposes in some terms clear prohibitions, such as those related to ranking, indexing and crawling which are described in the DMA. However, there are uncertainties in Article 6(5), which most likely is intentional. The uncertainties especially show themselves in terms of the absence of pure definitions in Article 6(5), such as the wording "more favourably" and "fairness". However, the possibility for the EC to specify further obligations will hopefully provide a somewhat clearer understanding of those terms, as well as extended case law. This uncertainty significantly imposes a difference compared to the well-established Article 102 TFEU and the extensive body of case law built around it.

The difference between the "Articles" is not the only significant aspect. The significant variances that also influence how self-preferencing is regulated are the distinctions between the legal "Frameworks". Such as *ex ante* and *ex post*, reversed burden of proof, efficiency claims and the principle of proportionality. The similarity lies in the objectives which also create a significant overlap.

The applicability of the principle of ne bis idem in relation to Article 102 TFEU and the DMA is currently unclear, and no definitive conclusion can be drawn. Finally, the similarity in objectives will have a significant impact on the applicability of the principle *ne bis in idem*, and the CJEU will most likely find the objectives very similar, thus, the likelihood that the CJEU will find the principle inapplicable is greatly increased. Regarding the principle's applicability to self-preferencing under Article 102 TFEU and Article 6 DMA, if the CJEU finds the objectives to be sufficiently different and considering that case law in the future (which today does not exist) under Article 6(5) DMA may clarify the unclear terms in Article 6(5), there could be a possibility that the principle becomes applicable to self-preferencing practices. This subject at that time deserves a fresh analysis with extended literature and case law.

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