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How to Apply the Self-Preferencing Prohibition in the DMA

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How to apply the self-preferencing prohibition in the DMA[1]

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Abstract:

Platforms in dual mode are concerned about the well-functioning of the ecosystem they manage. A regulator imposing a certain behaviour on platforms, which may amount to picking a particular market design, runs the risk of not acting in the best interest of consumers, especially in the long term, which is the ultimate goal of market contestability. When applying Art 6(5) DMA, the European Commission must make a judgement on the meaning and scope of self-preferencing; and has a discretionary power as to which possible/potential violations of the prohibition it will examine at all. This paper provides some guidance on how to determine which practices would fall under Art 6(5) DMA.

Keywords: self-preferencing, contestability, fairness, Digital Markets Act

JEL-Classification: K21, K23

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1. INTRODUCTION

In the years preceding the adoption of the Digital Markets Act (DMA), the issue of self-preferencing has appeared in the context of e-commerce platforms (Amazon), search engines (Google Search, Google Shopping), and mobile app stores (Google and Apple), but it is of broader concern. Self-preferencing can be seen as part of the platform's design decision (Belleflamme and Peitz, 2021, chap. 6), how a platform manages its ecosystem, which includes decisions about the treatment of third-party products and services relative to its own products and services.

The case against self-preferencing may look clear from an economic theory point of view to the extent that it amounts to unequal treatment of equal offers. As such, several economists have taken the view that self-preferencing should, in general, be prohibited. For instance, Cabral et al. (2021, p. 14) have written: "*We would suggest that any form of discrimination against third parties be deemed unlawful. In other words, we believe self-preferencing is a natural candidate for the 'blacklist' of practices to be deemed anti-competitive and 'per se' disallowed.*" Such an unequivocal statement from a diverse set of academic economists is quite remarkable.[2] In their report to Commissioner Vestager, another group of academics (only one of whom is an economist) are more careful: "*In a market with particularly high barriers to entry and where the platform serves as an intermediation infrastructure of particular relevance, we propose that, to the extent that the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets*." (Crémer et al., 2019, p. 7)

Article 6(5) of the DMA prohibits the practice of self-preferencing by gatekeeper platforms when self-preferencing is understood to be a more favourable treatment *in ranking and related indexing and crawling* of first-party products and services than third-party offers. This paper elaborates on the prohibition of self-preferencing in Article 6(5) of the DMA, focusing on interpretation issues.[3]

2. SELF-PREFERENCING IN THE DMA

2.1 Self-Preferencing in relation to the overall objectives of the DMA

The DMA has two overarching aims: contestability and fairness. Recital 7 states that the DMA aims at "*contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular.*" The DMA focuses on digital services that feature "*extreme scale economies, very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, lock-in effects, a lack of multi-homing or vertical integration*" (Recital 13). While this is a potpourri of certain market characteristics (which are partly determined by the decisions of the economic actors), it provides the context for which services are to be addressed. The concern about gatekeeper platforms stems from the claim that undertakings providing certain core platform services have "*gained the ability to easily*

[2] The same set of authors acknowledge difficulties when trying to implement such a prohibition.

[3] The DMA (Article 6(1)) also addresses self-preferencing in a broader sense, as it is concerned with the privileged access and use of data as way to treat first-party products and services more favourably. Furthermore, the required use of choice screens by a gatekeeper's operating system (regarding online search engine, virtual assistant and web browser in Art 6(3)(iii) and software applications and software application stores in Art 6(4)(i)) are provisions against self-preferencing by the gatekeeper (as explained in Fletcher, 2022). In this paper paper, I acknowledge self-preferencing practices in a broad sense, but focus on the provision in Article 6(5).

set commercial conditions and terms in a unilateral and detrimental manner for their business users and end users" (Recital 13). While several commercial conditions have differential impacts on business users and end users (Belleflamme and Peitz, 2021, chapter 6), self-preferencing is a candidate for harming third-party sellers and end users alike.

Contestability – The DMA aims to rectify weak contestability where contestability is defined in Recital 32 as "*the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services*." The emphasis on contestability can be seen as reflecting the German ordo-liberal school of economic thought according to which the State has to protect or restore the well-functioning of markets. The same recital continues with two statements: "*The features of core platform services in the digital sector, such as network effects, strong economies of scale, and benefits from data have limited the contestability of those services and the related ecosystems. Such a weak contestability reduces the incentives to innovate and improve products and services for the gatekeeper, its business users, its challengers and customers and thus negatively affects the innovation potential of the wider online platform economy.*" While these statements deserve some qualifications, they reflect the spirit in which the DMA was written.

Favouring first-party products and services can be seen as distorting the competition between the various undertakings in a sector and may limit the contestability of the market. For example, if a gatekeeper reduces the visibility of superior third-party offers, third-party sellers have weaker incentives to provide such quality in the first place. Similarly, if any effort in cost reduction by a third-party seller is offset by an equivalent increase in fees charged by the gatekeeper, third-party sellers do not have an incentive to reduce their costs. This shows that the prohibition of self-preferencing can be derived from the overarching aim of contestability.

Fairness – As stated in Recital 7, the DMA is concerned with both end users and business users. However, regarding fairness, Recital 33 states more specifically that "*for the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage*."[4]

A differential treatment of first-party and third-party offers may be deemed unfair. While there are different notions of fairness and self-preferencing should primarily be seen as a contestability issue, it may also be argued that fairness is violated if business users could not fully anticipate a differential treatment when making their participation or investment decisions.[5] Then, rules against self-preferencing protect vulnerable providers of third-party content (when transparency obligations as part of Article 5 of the DMA and the EU Regulation on platform-to-business relations (P2B Regulation) are deemed insufficient to protect those providers).[6]

[4] In some contexts, such as social networks, there is no clear dividing line between business users and end users.

[5] An example for an investment in an e-commerce setting is the long-term rental of a storage facility.

[6] Such rules may even help the gatekeeper platform in the long run as it may solve a gatekeeper's self-commitment problem. In other words, it may help the gatekeeper to maintain a healthy and attractive eco-system, as it protects third-party users from unfair treatment. The problem with such asymmetric regulation in the case of self-commitment problems is that entrants offering substitutes to core platform services are not subject to this regulation and, therefore, are in a worse position to convince third-party providers to join. Such a self-commitment problem exists if a platform cannot credibly promise third-party sellers that it presents first-party products and services more favourably. Absent such self-commitment, there is the risk that such regulation increases entry costs for firms offering substitutes to core platform services. This would work against contestability of platform services.

2.2 The Prohibition of Self-Preferencing in Art. 6(5)

Articles 5 and 6 of the DMA specify the general obligations of gatekeepers. Article 6(5) deals explicitly with self-preferencing.

> ***Article 6(5)***
>
> *The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking and related indexing and crawling.*

When implementing the prohibition of self-preferencing, its scope will have to be defined. The obligation spelled out in the second sentence arguably applies to ranking (and related indexing and crawling) in cases when the gatekeeper offers first-party services or products. The DMA has a broad notion of rankings, which includes, but is not restricted to algorithmic rankings. Article 2(22) defines it: *"'Ranking' means the relative prominence given to goods or services offered through online intermediation services, online social networking services, video-sharing platform services or virtual assistants, or the relevance given to search results by online search engines, as presented, organised or communicated by the undertakings providing online intermediation services, online social networking services, video-sharing platform services, virtual assistants or online search engines, irrespective of the technological means used for such presentation, organisation or communication and irrespective of whether only one result is presented or communicated."*

3. INTERPRETING THE PROVISIONS OF ARTICLE 6(5)

3.1 What is a Separate Service or Product under Article 6(5)?

The first question for Article 6(5) is what constitutes a separate service or product. There is no definition in the DMA that helps in answering this question. Where may ambiguities arise? Consider the Google search engine. Its purpose is to present (and thereby rank) search results after a systematic search of the internet in response to a user's web search query. The general question becomes: should only material presented in the organic search results be considered as a product or service or should also material such as Google's knowledge panels (information boxes that appear on the Google search engine after certain search queries for people, places, and organizations, for instance) count as a gatekeeper's product or service for the purposes of the DMA?

To assess whether a particular offer by the gatekeeper is subject to the Article 6(5), the following specific questions may be helpful:

- Does the offer have a distinct destination (such as an app)?
- Are there alternative providers that make a comparable offer on a self-standing basis (or have there been such instances in the past or would they be likely to emerge in the future)? To assess whether an alternative offer is a comparable offer, one would have to understand whether the user experience with the offer can be seen as comparable to the one with alternative offers.

3.2 What is a First-Party Offer and What is a Third-Party Offer?

A broad interpretation of Article 6(5) would be that the prohibition of a more favourable treatment of a gatekeeper's products or services compared to third-party offers applies both on the end user *and* the business user side since no specific statement is made about the users receiving the offer.[7]

- Regarding end users, an example would be a more favourable treatment of AmazonBasics products compared to third-party offers in the ranking presented to them (scenario 1). Here, the gatekeeper offers its own services or products to end user and operates a gatekeeper for end users to reach these services or products as well as similar services and products provided by other business users.

- Regarding business users, if an e-commerce platform operates as a pure marketplace in a particular product category, self-preferencing may play out as follows: it may offer its own fulfilment (or payment) service as well as third-party fulfilment (or payment) services. If it treats its own service more favourably than third-party fulfilment services in its ranking given to the sellers on the platform this can also be seen as an instance of self-preferencing and thus fall under Article 6(5) (scenario 2).

- The more favourable treatment of the gatekeeper's services that are offered to business users may also happen indirectly through self-preferencing on the end user side (scenario 3): if a seller on a marketplace knows that its offer will receive a more favourable ranking if it uses fulfilment by the gatekeeper (such as Amazon), this may also be seen as an instance of self-preferencing and fall under Article 6(5) because a vertically integrated service is treated more favourably than a third-party service. For example, this would be the case if a seller is more likely to appear in the buy box of Amazon when it uses the 'Fulfilment by Amazon' service.

These three scenarios are illustrated in Figure 1, where vertically integrated offers are shown as a square and substitute third-party offers as a circle. Scenario 1 applies to products or services offered to end users and is clearly within the scope of Article 6(5); scenarios 2 and 3 feature products or services that the gatekeeper offers to business users, which are offered to them as part of a bundle with their own product or service to end users.

When implementing the DMA, the European Commission will have to decide whether to include also scenarios 2 and 3. An argument against including scenario 2 could be that first-party and third-party services are offered to business users, and end users are not exposed to "manipulated" rankings. However, in this scenario end users are still clearly part of the picture given that the business users are active on the platform only because they can reach end users.

[7] While it is useful to distinguish the different sides of a multi-sided platform, it is important to keep in mind that neither end users nor business users are necessarily a homogeneous group. In particular, there may exist different types of business users whose interest may not be aligned.

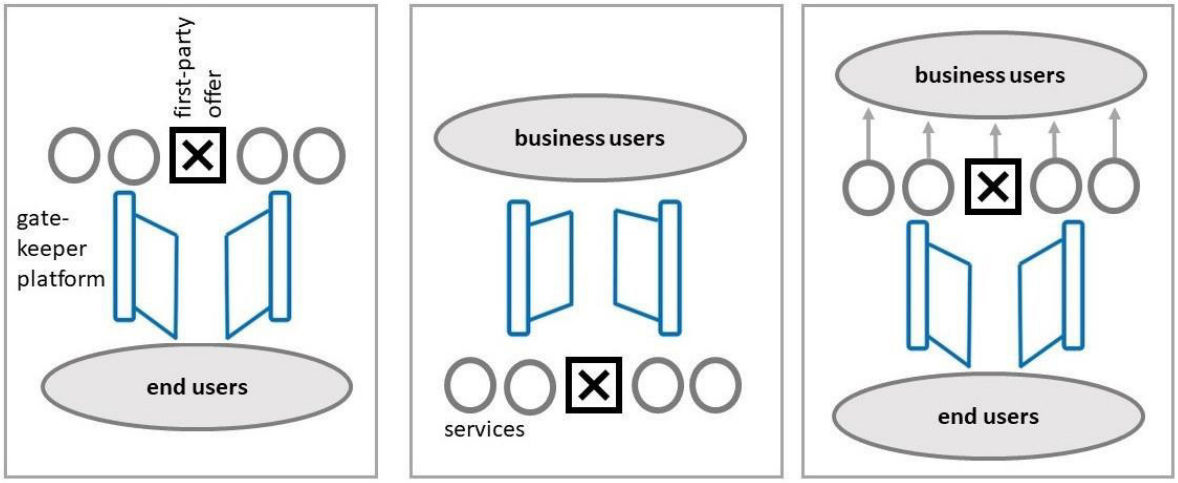

Figure 1: Scenarios with self-preferencing

In scenario 3, first-party and third-party services are also offered to business users. Here, the use of self-preferencing and other forms of steering can also be seen as means for the platform to indirectly ensure a certain behaviour of business users when directly imposing such behaviour is prohibited elsewhere in Articles 5 or 6 of the DMA (in particular, Article 5(3-8)). For example, Recital 43 states that:

> "*In order to avoid a situation in which gatekeepers indirectly impose on business users their own services provided together with, or in support of, core platform services, gatekeepers should also be prohibited from requiring end users to use such services, when that requirement would be imposed in the context of the service provided to end users by the business user using the core platform service of the gatekeeper*."

Self-preferencing and other distortions of recommendations as a means to enforce a certain behaviour by business users fall under Article 13 of the DMA that deals with "anti-circumvention". In particular, Article 13(6) says:

> "*The gatekeeper shall not degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5, 6 and 7, or make the exercise of those rights or choices unduly difficult, including by offering choices to the end-user in a non-neutral manner, or by subverting end users and business user's autonomy, decision-making, or free choice via the structure, design, function or manner of operation of a user interface or a part thereof*."

A final consideration for distinguishing a first-party and a third-party offer is the ownership of a company. A fully vertically integrated offer by a gatekeeper clearly constitutes a service or product "*offered by the gatekeeper itself.*" Suppose instead that a gatekeeper platform holds a stake in another undertaking that competes with third parties without any cross ownership. Under which conditions does the gatekeeper's more favourable treatment of the former relative to the latter fall under Article 6(5)? According to Recital 52 the prohibition of self-preferences applies to "*products or services it offers itself or through a business user which it controls*." This requires an understanding of what constitutes control.

3.3 How to Determine the Absence of Self-Preferencing?

A more favourable treatment of first-party products or services may mean that the gatekeeper charges different fees or uses non-price strategies to treat them differently from third-party products or services.

Differential fees (conditional on the ranking position) indicate differential treatment. Even if the same fee is charged, this does not necessarily imply that this creates a level-playing field, as first-party fees are transfers within the same company. Hence, while self-preferencing consisting of lower fees for first-party content is, in principle, easy to observe, it is not obvious whether symmetric fees should be seen as sufficient to be compliant with the prohibition of self-preferencing with respect to the price dimension. It could indeed be argued that symmetric high fees charged to third parties are a means to steer users to first-party offers.

Overall, it is unclear to what extent fees associated with rankings are subject to Article 6(5) and, if so, whether charging high symmetric fees could be a violation of Article 6(5). The Commission will have to clarify whether and to what extent a gatekeeper's pricing of ranked items falls within the meaning of Article 6(5). While high or differential fees may fall under different provisions of the DMA, Article 6(5) could be restricted to the design of rankings as a non-price strategy (which does not preclude the possibility that a third party has to make a payment to be ranked).

The application of Art. 6(5) to non-price strategies is facilitated by Recital 51:

> "*Gatekeepers are often vertically integrated and offer certain products or services to end users through their own core platform services, or through a business user over which they exercise control which frequently leads to conflicts of interest. This can include the situation whereby a gatekeeper provides its own online intermediation services through an online search engine. When offering those products or services on the core platform service, gatekeepers can reserve a better position, in terms of ranking, and related indexing and crawling, for their own offering than that of the products or services of third parties also operating on that core platform service."*

The recital provides specific examples, which are possibly motivated by abuse cases at the European Commission.

> *"This can occur for instance with products or services, including other core platform services, which are ranked in the results communicated by online search engines, or which are partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine."*

In addition to search engines, the recital also refers to application stores, content platforms (video sharing, for example), social networks and e-commerce platforms.

> *"Other instances are those of software applications which are distributed through software application stores, or videos distributed through a video-sharing platform, or products or services that are given prominence and display in the newsfeed of an online social networking service, or products or services ranked in search results or displayed on an online marketplace, or products or services offered through a virtual assistant. Such reserving of a better position*

of gatekeeper's own offering can take place even before ranking following a query, such as during crawling and indexing. For example, already during crawling, as a discovery process by which new and updated content is being found, as well as indexing, which entails storing and organising of the content found during the crawling process, the gatekeeper can favour its own content over that of third parties."

Noteworthy is that Article 6(5) mentions not only rankings but also "*related indexing and crawling.*" As Recital 51 suggests, this has been done because self-preferencing may be achieved through indexing and crawling. To take an extreme example, if Google Search does not crawl or index sites that are rivals to its own then these rivals' sites will not be ranked. However, outside such an extreme case, how will the European Commission be able to assess whether indexing and crawling is transparent, fair, and non-discriminatory?

The general concern appears to be that self-preferencing puts third-party providers at a disadvantage, which may lead to a lack of contestability regarding third-party content and services. Recital 61 notes:

"In those circumstances, the gatekeeper is in a dual-role position as intermediary for third party undertakings and as undertaking directly providing products or services. Consequently, such gatekeepers have the ability to undermine directly the contestability for those products or services on those core platform services, to the detriment of business users which are not controlled by the gatekeeper."

Recital 52 of the DMA continues:

"*… the gatekeeper should not engage in any form of differentiated or preferential treatment in ranking on the core platform service, and related indexing and crawling, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls. To ensure that this obligation is effective, the conditions that apply to such ranking should also be generally fair and transparent. Ranking should in this context cover all forms of relative prominence, including display, rating, linking or voice results and should also include instances where a core platform service presents or communicates only one result to the end user. To ensure that this obligation is effective and cannot be circumvented, it should also apply to any measure that has an equivalent effect to the differentiated or preferential treatment in ranking…*"

Including instances in which only one result is presented, fits the Amazon Buy Box as well as voice assistants, where it is rather cumbersome for end users to be presented more than one choice at a time.

It is worth noting, however, that it can be challenging to detect self-preferencing bias as opposed to legitimate differential treatment. Differential treatment may be legitimate because of quality or match value differences between first-party and third-party offers. Detection can be particularly challenging when rankings are based on self-learning algorithms. Digital platforms may benefit from guidance by the European Commission about what kind of evidence is required to justify differential treatment of similar offers. For example, Amazon may be able to provide evidence that end users typically prefer

products from sellers that use 'Fulfilment by Amazon'.[8] It is then necessary to understand to what extent would such evidence justify more favourable treatment of products with 'Fulfilment by Amazon' (when assigning the buy box) and thus show Amazon's compliance with Article 6(5).

4. DISCUSSION AND CONCLUSION

The prohibition on self-preferencing as formulated in Article 6(5) of the DMA requires context. When applying Art 6(5), the European Commission must make a judgement on the meaning and scope of self-preferencing; and has a discretionary power as to which possible/potential violations of the prohibition it will examine at all. Moreover, since gatekeeper platforms have to show compliance, the European Commission may want to provide guidance on practices that are, and those that are not, compliant.

The European Commission and the courts would be well-advised not to use this prohibition as carte blanche and engage in mechanistic enforcement. Instead, the DMA could be used to identify those acts of self-preferencing that are likely to be against market contestability and the long-term interest of consumers, and use guidance from economics to specify adequately, under Article 8 of the DMA, the self-preferencing prohibition.[9]

This requires an understanding of when consumers consider a first-party offer superior to similar third-party offers. Giving prominence to a superior first-party offer should not be seen in conflict with Art 6(5), as such behaviour coincides with the one of a gatekeeper who acts in the best interest of consumers. Thus, even though Article 6(5) is framed as a general prohibition, economic analysis can help to distinguish between self-preferencing bias and legitimate differential treatment of different offers. Economic analysis may also play a useful role when considering the specification of the prohibition, by evaluating the effects of different measures and whether they are in line with the overall objectives of the DMA.[10] This is in line with the principles of proportionality and effectiveness, as some restrictions are more severe than others and may lead to worse outcomes for third-party business users, end users, and society at large. At the same time, the use of economics to specify the DMA prohibition does not imply the re-introduction of an antitrust efficiency defense, which has been explicitly excluded under the DMA.[11]

Recent cases under competition law may provide further insights about possible harms and benefits, as well as the appropriate choice of remedies.[12] In the context of self-preferencing under the DMA, an effective policy against foreclosure and refusal to deal may require a combination of Articles 6(5) and 6(12). Specific commitments must be seen in a broader context to avoid circumvention through other means.

[8] Chen and Tsai (forthcoming) investigate Amazon's recommendations through its 'Frequently Bought Together' algorithm. Products are sold by Amazon as a retailer, by sellers as part of the 'Fulfilment by Amazon' (FBA) program, and non-FBA sellers. The authors conclude that the steering via Amazon's FBT algorithm is driven by seller identity rather than consumer preference.

[9] For a discussion of remedies, see Feasey and Krämer (2019). As explained above, the use of economics to specify the DMA prohibition does not imply the re-introduction of an antitrust efficiency defense which is explicitly excluded under the DMA.

[10] Peitz (2022) provides a quick guide to this literature. For a more elaborate survey see Kittaka et al. (2023); see also Etro (2023).

[11] DMA, Recital 10.

[12] For a discussion of case law in the EU, see Ibáñez Colomo (2020). Peitz (2022) also points to several cases at the EU and Member State level.

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