

Thomas Höppner

# Self-Preferencing in Online Search

under Article 6(5) DMA



Nomos

Thomas Höppner

# Self-Preferencing in Online Search

under Article 6(5) DMA



Nomos

© Coverpicture: Tasphong – stock.adobe.com

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-7560-1831-4 (Print)  
978-3-7489-4494-2 (ePDF)

#### **British Library Cataloguing-in-Publication Data**

A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-1831-4 (Print)  
978-3-7489-4494-2 (ePDF)

#### **Library of Congress Cataloguing-in-Publication Data**

Höppner, Thomas

Self-Referencing in Online Search under Article 6(5) DMA

Thomas Höppner

218 pp.

Includes bibliographic references and index.

ISBN 978-3-7560-1831-4 (Print)  
978-3-7489-4494-2 (ePDF)

1st Edition 2024

© Thomas Höppner

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

[www.nomos.de](http://www.nomos.de)

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-1831-4 (Print)

ISBN 978-3-7489-4494-2 (ePDF)

DOI <https://doi.org/10.5771/9783748944942>



Online Version  
Nomos eLibrary



This work is licensed under a Creative Commons Attribution – ShareAlike 4.0 International License.

## Foreword

*Over the span of 15 years, competition authorities and courts have analysed Alphabet's practices directed at favouring its own services within Google Search results pages. Nonetheless, some uncertainty persists regarding what constitutes illegitimate self-preferencing. As a result, on 25 March 2024, as one of the first measures taken under the Digital Markets Act (DMA) by the European Commission, a proceeding against Alphabet was opened, to determine whether the display of Google Search results leads to self-preferencing in relation to Alphabet's services. The Commission is concerned that Alphabet's measures may not ensure that third-party services featuring on Google's search results pages are treated in a fair and non-discriminatory manner in comparison with Alphabet's own services, as required by Article 6(5) DMA. The investigation delves into fundamental topics of the DMA, extending well beyond the domain of search engines.*

*This book aims to establish a foundational understanding of the prohibition of self-preferencing by digital gatekeepers as stipulated in Article 6(5) DMA. It delineates current concerns while offering guidance for effective compliance.*

*Until now, little attention has been paid to the intricate interrelations among online search engines and other digital services. This book seeks to elucidate this landscape, delineating, in particular the boundaries between online search engines, online intermediation services and online information services that designated gatekeepers need to consider when designing their systems to comply with the DMA.*

*Article 6(5) DMA targets 'platform envelopment' strategies that detrimentally impact consumers and businesses. The core concern is the presentation or the direct offering (i.e., embedding) of distinct first-party services on the results pages of an online search engine. Such practices are permissible only if third parties providing a similar service are granted an equal opportunity for presentation or offering their service. Equivalence necessitates that no imbalances in rights or obligations remain and no disproportionate advantage is conferred upon the gatekeeper's embedded first-party service, its online search engine or any other core platform service.*

## Foreword

*This book sets out precise legal guidelines for achieving compliance with these obligations.*

*The work is based on an expert opinion provided to idealo Internet GmbH prior to the opening of the European Commission's probe into Article 6(5) DMA. The expertise has been gained in the course of representing BDZV, VDZ (now MVFP) since 2009 and Visual Meta (now Ladenzeile) since 2012 as complainants in the Google Search (Shopping) case and as interveners in the subsequent appeal proceeding before the Court of Justice, referred to in this opinion. The book follows on the author's empirical and legal study on "Google's (Non-) Compliance with the EU Shopping Decision", published in year 2020.*

*The author would like to thank Albrecht von Sonntag, Malte Landwehr, Steve Thomas and Björn Borrmann for comments on earlier drafts, as well as Philipp Westerhoff of Hausfeld for support with the research and final counter-reading. All mistakes remain those of the author.*

Berlin, Mai 2024

Thomas Höppner

Direct reproduction, involving no generative AI, is authorised, provided the source is acknowledged. Any rights relating to text and data mining are reserved.

# Table of Contents

|   |    |
|---|----|
| List of abbreviations   | 13 |
| A. Executive summary  | 15 |
| I. Principles for identifying a distinct First-Party Service that shall not be favoured   | 16 |
| II. Principles for identifying a Third-Party Service that shall not be disadvantaged  | 19 |
| III. Principles for excluding a more favourable treatment of the First-Party Service  | 19 |
| B. Legal, technical, and economic background  | 25 |
| I. Article 6(5) DMA in a nutshell   | 25 |
| 1. Equal treatment: The DMA's central obligation  | 25 |
| 2. Objectives: contestability and fairness  | 28 |
| a. Addressing gatekeeper's conflicts of interest  | 28 |
| b. Addressing platform envelopment strategies   | 29 |
| c. Covering any form of self-preferencing in online search  | 31 |
| 3. Gatekeeper's choice: (i) disintegrate own service, or (ii) integrate third parties equally without conferring an advantage upon the gatekeeper | 32 |
| 4. The relevant criteria for compliance   | 34 |
| II. Identifying a distinct First-Party Service  | 35 |
| 1. Legal framework for the delineation of digital services  | 36 |
| a. Annex D(2): integrated services with different purposes or falling within different categories of CPS are always distinct                      | 36 |
| b. Application to Article 6(5) DMA  | 38 |
| aa) Consequences for designated CPS   | 38 |
| bb) Application to other gatekeeper services  | 39 |

## Table of Contents

|  |    |
|--|----|
| 2. Definition of an OSE  | 40 |
| a. Irrelevance of the current design of search engines   | 40 |
| b. Definition in the DMA   | 42 |
| c. Qualification in the case law of the Court of Justice   | 44 |
| 3. Identifying a distinct service  | 46 |
| a. Objective: the DMA's aim to effectively curb platform envelopment strategies                              | 46 |
| aa) The economic concept of platform envelopment   | 46 |
| bb) Platform envelopment pursuant to the DMA   | 48 |
| cc) Legal consequence: 'Distinct services' despite common components   | 50 |
| b. Services found to be distinct from an OSE   | 57 |
| 4. Delineation of OSEs from particular other services  | 59 |
| a. OSE vs non-search related services  | 59 |
| b. OSE vs search-related content   | 60 |
| c. OSE vs (generative AI) answering services   | 61 |
| d. OSE vs OISs   | 63 |
| aa) OSE and OIS cannot form a single service   | 63 |
| bb) Differences between an OSE and an OIS  | 64 |
| (1) Definition of an OIS   | 64 |
| (2) Navigating the web vs facilitating transactions  | 65 |
| i. End users' perspective  | 66 |
| ii. Business users' perspective  | 69 |
| iii. Relevant factors  | 71 |
| (3) Crawling of websites vs direct contracts with business users   | 72 |
| cc) The example of Alphabet: on Google's shift to integrating specialised search and intermediation services | 76 |
| (1) Google Search became market leader by limiting itself to an OSE  | 76 |
| (2) Limits of Google's OSE in facilitating transactions  | 79 |
| (3) Google's specialised search technology to facilitate transactions  | 80 |
| dd) Google's OISs as distinct services – findings in Google Search (Shopping)                                | 82 |

|  |     |
|--|-----|
| e. OSE vs non-OIS specialised search services                                    | 85  |
| f. Borderline between OSE and OIS/verticals in case of overlapping elements      | 88  |
| 5. In particular: standalone, partly, and entirely embedded OIS/Vertical         | 89  |
| a. The concept of embedding as developed in Google Search (Shopping)             | 89  |
| b. Concept of embedding in Article 6(5) DMA                                      | 91  |
| c. Economic background: use of different access points for the same service      | 93  |
| aa) Relevance of access points to use a service                                  | 93  |
| bb) Different access points to use Google Search                                 | 94  |
| cc) Different access points to use Alphabet's OIS/Verticals                      | 95  |
| dd) Conclusion: specialised results in OSE serve as access point to OIS/Vertical | 96  |
| d. Clarification in the Commission's designation decision                        | 99  |
| III. Identifying a similar Third-Party Service                                   | 101 |
| 1. Similar service   | 101 |
| 2. Service of a third party  | 103 |
| 3. Protection of each third party providing a similar service                    | 103 |
| IV. Identifying a more favourable treatment                                      | 103 |
| 1. Background  | 103 |
| a. 15 years of Google Search (Shopping) proceeding clarified the abuse           | 104 |
| b. Competition law remedies failed   | 105 |
| c. Growing calls for structural remedies   | 108 |
| d. DMA's ban on self-preferencing as political compromise                        | 110 |
| 2. Relevant treatment of services  | 113 |
| a. Differentiated treatment as relevant conduct                                  | 113 |
| b. Ranking   | 114 |
| aa) Definition: relative prominence  | 114 |

## Table of Contents

|  |     |
|--|-----|
| bb) In ‘search results’  | 115 |
| (1) Any information returned, including a service directly offered                 | 116 |
| (2) In response to, and related to a search query                                  | 117 |
| (3) Including real-time interface adjustments                                      | 118 |
| cc) Results in any interface of any access point of the OSE                        | 119 |
| c. Crawling and indexing   | 120 |
| d. Other treatments having an equivalent effect                                    | 121 |
| 3. More favourable treatment of First-Party Service                                | 122 |
| a. Equal treatment vs no self-preferencing   | 122 |
| b. Conferral of advantage upon First-Party Service                                 | 123 |
| aa) Examples mentioned in recital (51) DMA   | 124 |
| (1) Better ranking of results leading to a service                                 | 125 |
| (2) Partial embedding of a service   | 126 |
| (3) Entire embedding of a service  | 128 |
| bb) Difference partial / entire embedding  | 128 |
| cc) Consequence: favouring does not require a service with a separate access point | 129 |
| (1) Groups of results specialised in a certain topic                               | 130 |
| (2) Considered or used by certain end users as a distinct service                  | 131 |
| dd) Further examples of relevant advantages  | 133 |
| c. No equivalent for similar Third-Party Service                                   | 134 |
| aa) General framework  | 134 |
| bb) Equivalence of opportunity   | 135 |
| (1) Relevant opportunities relating to search prominence                           | 135 |
| (2) Equivalence of prominence  | 137 |
| cc) No circumvention of ban on self-preferencing                                   | 138 |
| (1) Article 13(6) DMA  | 138 |
| (2) Dark patterns  | 139 |
| (3) Degradation of conditions or quality of the OSE                                | 140 |

|  |     |
|--|-----|
| dd) No remaining imbalance of rights and obligations   | 144 |
| (1) Article 6(5) sentence 2 DMA: “fairness” of “such ranking”                                    | 144 |
| (2) Inability to fully capture benefits of own innovation and efforts                            | 146 |
| (3) Inability to compete for the full service  | 146 |
| (4) Inability of all similar third parties to compete  | 148 |
| (5) Improper conditions for third parties  | 148 |
| (6) Improper pricing   | 149 |
| ee) No conferral of a disproportionate advantage upon the gatekeeper                             | 150 |
| (1) Conferral of advantage upon OSE or other CPS   | 150 |
| (2) Relevant advantages  | 154 |
| (3) Disproportionality of the advantage conferred  | 155 |
| d. No discrimination of dissimilar services with similar websites, including of direct suppliers | 157 |
| aa) Ranking concerns of dissimilar third parties   | 157 |
| bb) Technical framework: OSE’s function to rank diverse websites, not business models            | 159 |
| (1) OSEs’ side-by-side display of complementary services   | 159 |
| (2) Neutrality as competitive factor for OSEs  | 161 |
| cc) Economic framework: advantages for direct suppliers of a ban on self-preferencing            | 164 |
| (1) Harms of self-preferencing for direct suppliers  | 164 |
| (2) (No) disadvantages for direct suppliers from competition amongst indirect suppliers          | 167 |
| (3) Gatekeeper’s incentives to turn direct suppliers against rival indirect suppliers            | 171 |
| dd) Legal framework  | 173 |
| (1) Article 6(5) sentence 1 and sentence 2 DMA: relation for “non-discrimination”                | 173 |

## Table of Contents

|  |     |
|--|-----|
| (2) Article 6(12) DMA and its relationship to Article 6(5) DMA                     | 177 |
| (3) Subjective rights of dissimilar third parties                                  | 178 |
| ee) Consequences for compliance  | 179 |
| 4. Technical constraints, efficiency justifications and burden of compliance       | 182 |
| a. Framework: DMA compliance by design   | 183 |
| b. Gatekeeper needs to bear the costs of compliance with Article 6(5) DMA          | 184 |
| c. Constraints to achieve equal opportunities justify no self-preferencing         | 185 |
| d. Objective justification arguments raised in Google Search (Shopping)            | 186 |
| aa) Google's arguments regarding technical constraints                             | 186 |
| bb) Rejection of objective justification by Commission and General Court           | 187 |
| e. No objective justification criterion in Article 6(5) DMA                        | 189 |
| V. Consequences where no fair equivalent can be found                              | 190 |
| C. Resulting principles for compliance with Article 6(5) DMA                       | 193 |
| I. Safe harbour  | 193 |
| II. Individual assessment  | 194 |
| 1. Identifying a distinct service of a gatekeeper that shall not be favoured       | 195 |
| 2. Identifying a similar Third-Party Service that shall not be disadvantaged       | 201 |
| 3. Principles for excluding a more favourable treatment of the First-Party Service | 202 |
| List of references   | 213 |
| Index  | 217 |

## List of abbreviations

The following terms and definitions are used throughout this report:

|                            |   |
|----------------------------|---|
| <i>CPS</i>                 | Core Platform Service   |
| <i>CSS(s)</i>              | Comparison Shopping Service(s)  |
| <i>Decision</i>            | The European Commission’s prohibition decision of 27 June 2017, case AT.39740   |
| <i>DMA</i>                 | Digital Markets Act – Regulation (EU) 2022/1929   |
| <i>DSA</i>                 | Digital Services Act – Regulation (EU) 2022/2065  |
| <i>First-Party Service</i> | a distinct service of the gatekeeper which is presented, ranked, or linked within or offered through the interface of its OSE                                   |
| <i>Google Shopping</i>     | Google’s CSS as described in the Decision, recitals (28)-(31)   |
| <i>OIS</i>                 | Online Intermediation Service   |
| <i>Online interface</i>    | any software, including a website or a part thereof, and applications, including mobile applications, through which end users may access or receive information |
| <i>On-SERP-OIS</i>         | Google’s OIS provided through the SERP of Google’s OSE such as through Shopping Units or equivalent groupings of results  |
| <i>OSE</i>                 | Online Search Engine  |
| <i>P2B-Regulation</i>      | Platform-to-Business Regulation (EU) 2109/1150  |
| <i>Product Universal</i>   | Grouping of specialised search results for products used by Google until 2012 – see Decision, recital (29)  |
| <i>SERP</i>                | Search engine results page  |
| <i>Shopping Unit</i>       | Grouping of specialised search results for products used by Google since 2012 – see Decision, recital (32)  |

*List of abbreviations*

|                            |   |
|----------------------------|---|
| <i>Third-Party Service</i> | a distinct service of a company not connected with the gatekeeper which is presented, ranked, or linked within or offered through the interface of the gatekeeper's OSE |
| <i>TFEU</i>                | Treaty on the functioning of the European Union   |
| <i>Vertical</i>            | a vertical (or 'specialised') search service, as distinguished from a horizontal (or 'general') search service  |