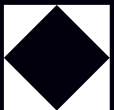


Thomas Höppner

Self-Preferencing in Online Search

under Article 6(5) DMA



Nomos

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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.

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

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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