

C. Resulting principles for compliance with Article 6(5) DMA

There are several ways for designated gatekeepers to comply with Article 6 (5) DMA. A designated gatekeeper is free in the design of the interfaces of its OSE, provided it adheres to the principles of the DMA explained below. Such principles are to be applied consistently across all designated services and irrespective of mode (for example, desktop vs mobile), subject to the ability of the gatekeeper to convincingly justify the need for differentiation. These principles will ensure, among other things, that the boundaries are clear, creating legal certainty for the gatekeeper, while avoiding circumvention of the ban on self-preferencing. 477

I. Safe harbour

An OSE is considered compliant if, in response to a search query, any search result (as broadly defined in Article 2, point 23 to encompass any information) that it provides on the SERP remains within the scope of the definition of an OSE and does not transition into the realm of an OIS/Vertical. This depends on how such information is obtained and selected and how it is finally presented: 478

- **General retrieval and selection of web content:** The process of information retrieval stays within the realm of an OSE if the information displayed has been obtained in accordance with the following criteria: The information was (i) selected through a general algorithm that applies to all web content equally. Such general algorithm was (ii) applied to a general web index which, in principle, indexes all accessible webpages of the World Wide Web. Such general web index was gained (iii) through crawling, using a web crawler that searches through all websites (such as the GoogleBot), rather than an active uploading to a specific index (e.g. a product database) through an API, on the basis of a contractual

relationship or through a specialised crawler that only index particular type of content (such as the Google StoreBot⁴³⁹).

- **General presentation for navigating to the source:** The process of information presentation remains within the realm of an OSE if it serves the purpose of returning results related to the search of websites with relevant content. This is no longer the case where (i) content is presented directly (as this replaces the navigation and turns the OSE into a content provider), (ii) websites are not displayed in accordance to their algorithmic ranking, but are grouped according to special criteria (such as the respective business models or functionalities), or (iii) auxiliary information is added to the result for the website so as to facilitate the initiation of a direct transaction with a business user. In other words, where the OSE refrains from providing content directly or from grouping results in a way to facilitate a business transaction, but leads end users to the relevant sources, it remains compliant.

479 Beyond such “safe harbour”, an individual assessment is called for. The following 10 principles apply:

II. Individual assessment

480 In accordance with the wording and objective of the DMA in general and Article 6(5) in particular, the following ten principles should be guiding when interpreting the provision. Such ten principles can be categorised as follows:

- principles for identifying a distinct service of a gatekeeper that shall not be favoured (i.e. a First-Party Service).
- principles for identifying similar Third-Party Services that shall not be disadvantaged.
- principles for excluding a more favourable treatment of the First-Party Service as compared to the Third-Party Services.

439 *Google StoreBot* crawls through certain types of pages, including, but not limited to, product details pages, cart pages, and checkout pages.

1. Identifying a distinct service of a gatekeeper that shall not be favoured

First, the following guidelines shall be observed to identify a distinct service of the gatekeeper. 481

(1) **A service is considered distinct if it extends beyond the characteristics of an OSE, as defined in the DMA, regardless of whether it is provided through the interface of an OSE or elsewhere.** According to the DMA's definition, the function of an OSE is to perform searches across all websites and to return results mirroring content made available there to the searcher. An OSE's role is to guide end users to information that publishers provided on their websites, by (i) crawling and indexing sites automatically, (ii) storing the information temporarily, (iii) referring to it according to a particular order of preference and, (iv) finally navigating the user to such site.

(1.1) **Any economic activity with a different function or intended use than to perform searches across the Internet constitutes a distinct service.** This includes situations where the gatekeeper, rather than guiding to relevant sources, itself directly offers the information, products or services end users are seeking, thereby acting as an online publisher.

(1.2) **A service shall also be deemed distinct when aggregated information is presented in a manner not equally accessible on any crawled third-party website.** The purpose of an OSE is to retrieve and extract openly accessible information on the web in order to enable end users to access such information at its source. Thus, a distinct service is also offered whenever information is presented in a manner that cannot equally be found on any third-party website. This scenario arises, for example, when a gatekeeper curates proprietary or third-party information or combines it with other content in a way that does not reflect the original online publication. Such instances can involve displaying information not published for indexing by web crawlers but actively provided to the gatekeeper via an API or specific markup such as schema.org, if that information does not equally appear, visibly in plain text, image or video on the provider's website. Additionally, services such as translations, calculations or advice offered directly on a SERP constitute a distinct service as they do not merely retrieve but generate or significantly modify information, thus stepping beyond the OSE's function.

(2) Online Intermediation Services constitute a distinct service, regardless of how they are provided. The existence of a distinct service is determined if the criteria for another core platform service are met, in particular, if it satisfies the DMA's criteria for an OIS. A gatekeeper operates an OIS, distinct from its OSE function, when rather than guiding end users to websites, it facilitates the initiating of direct transactions between them and business users, irrespective of where those transactions are ultimately concluded. Where an OSE, designated as a CPS, passes on a query entered on its search bar or elsewhere to a specialised algorithm applied to a specialised index with content from business users, any result such specialised service returns to the OSE is distinct from that of the OSE. If the OSE then displays such result more prominently on its general search results page as compared to specialised results generated by providers of similar intermediation services, the OSE favours its own specialised service. The finding of a distinct OIS being provided on a SERP is not precluded if that service (i) is of poor quality, (ii) has no separate search bar, filter or name or (iii) is only provided through the SERP and is not on a standalone website. The crucial consideration boils down to this: Does the feature, when integrated with all other elements on the SERP, offer end users a more comprehensive experience than the standard navigation to all websites defined for an OSE? To assess whether a gatekeeper facilitates the initiation of transactions, the following factors shall be considered:

(2.1) Groupings of results that co-mingle business users or their offerings for end-user discovery or comparison are indicative of a distinct OIS. This includes scenarios where the gatekeeper facilitates, directly or indirectly, (i) discovery, (ii) assessment, (iii) comparison, or (iv) acquisition of offerings from specific business users and ancillary delivery and payment services. It is then aligning more with the functionalities of an OIS than with those of an OSE. The defining characteristic of an OSE, in contrast to an OIS such as a Vertical Search Service for commercial offerings, is that it compares all websites across the web using a general algorithm that is applied to a general index that encompasses all websites and treats them equally. Where a search query implies a commercial interest for a particular type of content (for example, products, hotels, flights, jobs, etc.), such general search algorithms have always weighed, and must continue to weigh, the various websites and provided a ranking that may encompass intermediaries for such content (for example,

comparison sites, marketplaces) along with websites directly offering the content (for example, merchants, shops, hotels) or relevant non-commercial websites with corresponding information (for example, information concerning the searched-for product), without pre-sorting them into respective tabs or groups based on their business type or functionalities. In line with the definition and function of an OSE, this approach needs to be maintained. Regardless of whether such service includes (i) direct suppliers (e.g. merchants, hotels, airlines) or (ii) those who already act as an intermediary (e.g. specialised search services, marketplaces, online travel agencies) for such suppliers, any co-mingling or aggregation of businesses or their respective offerings on the SERP, signifies a transition from navigating to websites (OSE) to facilitating transactions (OIS) because this assists end users discovering and comparing offerings or otherwise making decisions for a transaction such as a specific booking or purchase. An OSE should not presume to know the intentions of its users and deny them the full spectrum of choice to compare products and prices. Since the grouping of businesses according to their functionalities constitutes an OIS, an OSE may only do so if third parties that could equally compare those types of businesses are given the opportunity to compile and display such groupings, using their algorithms and indexes.

Moreover “*Groups of results specialised in a certain topic*” that are displayed along with the general results of an OSE may constitute a distinct OIS (for such topic). This is always the case where the results were generated by a corresponding specialised search service of the gatekeeper (see point 1.). However, when such groups were compiled not by a Vertical but exclusively with the technology of the OSE itself, they only constitute a distinct service if they “*are considered or used by certain end users as a service distinct or additional to the online search engine*” (recital (51)). A relevant “*group of results specialised in a certain topic*” can be identified in two ways: Firstly, whenever results are not ranked in the order of the relevance of the corresponding URL as determined by the general algorithm, but are grouped together based on certain common characteristics (for example, URLs from 2nd, 4th and 6th place in generic ranking are grouped together because their operators carry out the same business

activity⁴⁴⁰). Secondly, a “group” may also be formed through a visual separation of particular results from the rest, such as through a separate frame, hyphen, icon or background colour.

- (2.2) **Providing tools for end users to specify commercial intentions, such as filters or date selectors for bookings, or presenting transaction-facilitating information exemplifies the transition into a separate OIS.** Features that enable end users to filter commercial offers by attributes such as price, product details, availability, reviews, location, or brand, or tools for setting service booking dates, constitute distinct OIS functionalities. Compiling, organising, and showcasing details like pricing, availability, shipping terms, payment options, reviews and/or ratings, distinctly indicate an OIS operation, surpassing the mere search facilitation of an OSE.

The following features can be presumed to facilitate transactions and therefore belong to an OIS, since they help end users decide which product or service to buy:

- product information (for example, descriptions of hotels, flights, products; product images);
- product price information, including price ranges, minimum prices or discounts;
- delivery information (for example, delivery time, delivery provider, delivery costs);
- star ratings, user reviews, etc. for particular businesses or their commercial offers;
- direct payment/checkout links;
- any filter for prices, business users, brands, location of shops, deliverability, etc.;
- any other advanced search capabilities or displaying of results allowing for a comparison between different products or offers for a particular product from different businesses.

- (2.3) **The display of product images, videos, maps, or any other type of rich media transforms the OES into an OIS when paired with product or pricing details.** Given the significant role of visual content in facilitating direct transactions, gatekeepers must be particu-

440 Imagine that, in return to a query for “Hotel London”, the 1st, 3rd and 5th most relevant result (according to the general algorithm) are all hotels, while the 2nd, 4th and 6th result are hotel search services. A relevant grouping of results would be for all hotels or all hotel search services to be grouped separately.

larly careful in granting equal treatment whenever they combine visuals with crucial product information. Hence, while merely displaying a product image or video does not automatically classify the service as an OIS, pairing these visuals with product or pricing details delineates an OIS. Generative AI has made it even more easy for gatekeepers to generate any type of image for business offers at low cost. This further increases their incentive to use images as a means to facilitate a direct transaction, thereby providing an OIS directly on the SERP. Consequently, the display of a collection of pictures that relate to a specific type of content (products, hotels, etc.) and link to a business user that has a contract with the gatekeeper, constitutes an OIS. This does not apply to thumbnails that have been obtained through crawling and are displayed without any auxiliary commercial price or product information or do not link to a business user.

Further, visual promotion of particular types of businesses or their offerings on the SERP transitions an OSE into the realm of an OIS, once the OSE commences pre-filtering particular types of content or businesses through certain design features reserved to them. To prevent an OSE from utilizing these design features to attract business users to its distinct OIS, on-page placements or enriched content should not single out or favour any advertiser type or individual company. For example, direct sellers (merchants, hotels, airlines) should not be given special placements that corresponding intermediaries (comparison sites, OTAs) do not have access to, and vice versa. In line with the DMA's definition of an OSE, this ensures the neutrality of this initial gateway to the web.

- (2.4) **Information that becomes accessible through end user interaction, such as hovering or preview actions, should be considered as part of the search result.** When such interactive elements incorporate functionalities that initiate the facilitation of a transaction, the complete information set is to be regarded as forming an OIS, invoking the duty of equal treatment. The same is true for any “previews”, frames or pop-ups opening up on a SERP.
- (2.5) **Even the systematic provision of single specialised and highlighted commercial results can transform an OSE into an OIS.** Where an OSE highlights individual results that match end users and businesses (e.g. tagged as “best offer”) or expands further choices

upon end user engagement with such result (e.g. unveiling a carousel to “explore more”), even providing individual tailored offerings may embody an OIS, which may not be favoured in ranking.⁴⁴¹ Highlighting frames or icons or headings such as “best offer”, “recommended for you” or “buy now” may cause end users to perceive such ads as distinct OIS for the respective advertised content. A prominent placement suggesting a particular recommendation of the respective product or service, as an OIS would do, could have the same effect.

- (2.6) **The same equal treatment principles apply to both paid and unpaid results.** Nurturing and exploiting the end users’ advertisement blindness enables gatekeepers to provide a distinct service via an OSE through both paid and unpaid results. The arrangement of ads therefore must adhere to the same standards as unpaid results. It follows that, in principle, an OSE may offer any ad format that is available to any operator of any website. However, ad formats that are exclusively available to specific types of advertisers contradict the definition of an OSE, which is meant to enable the search of all websites. Therefore, advertisements that require an advertiser to meet specific criteria, such as those related to its individual business model or any products or services it offers, in order to be booked, are not covered by the definition of an OSE, as they are not available to “all websites”. Accordingly, the provision of such ads qualifies as a distinct service, in many cases as an OIS, in others as distinct advertising service.

Notably, even if an advertisement format is theoretically available to any website owner (aligning with an OSE’s definition), a gatekeeper may still design and combine such ads in a way that their display fulfils the function of a distinct service to end users. Doing so would lead users to bypass similar OIS and make a choice only based on the gatekeeper’s selection of the (advertising) merchants/business users in the ads section. For instance, a specialised search service can be provided to end users through both unpaid and paid content, including visually ‘enriched’ and purposefully co-mingled advertisement. Consequently, when a gatekeeper architects, curates, and exhibits advertisements on the results pages in a manner that empowers end

441 Note that, according to recital (52) DMA, favourable “Ranking [...] should also include instances where a core platform service presents or communicates only one result to the end user”.

users to directly assess and compare products and prices, thereby facilitating direct transactions with advertisers, such constructs transform into an OIS, thereby forming a distinct First-Party Service.

Even more obviously, a gatekeeper may not display ads on a results page that directly promote a separate product or service of the gatekeeper. The same is true for ads that mention the advertisers' usage of a particular service of the gatekeeper (for example, ad extensions like "Google Pay encrypted" or "available on Google Play Store").

2. Identifying a similar Third-Party Service that shall not be disadvantaged

The following guidelines shall be observed to identify a similar Third-Party Service of the gatekeeper. 482

(3) When a gatekeeper wishes to offer a distinct First-Party Service, as identified above, it must treat a provider of a "similar service" no less favourably. As long as no third-party provides a similar service, the gatekeeper has flexibility in offering its distinct service through its OSE. However, once a similar Third-Party Service exists, the prohibition of self-preferencing comes into play. A designated OSE may only integrate features of an OIS/Vertical into its SERP if it enables providers of similar OISs/Verticals an equivalent integration of such features of their service. This obligation is independent of how the OSE intends to power such features, i.e. whether it takes recourse to a corresponding specialised OIS that it operates or whether it uses proprietary technology (such as its general index).

(4) A service is considered "similar" if it offers the same core functionalities as the gatekeeper's distinct First-Party Service, regardless of the technology or user interface. Similarity goes beyond substitutability.⁴⁴² With a view to curbing any 'platform enveloping' strategy, the broad wording ensures protection not just for direct competitors of the gatekeeper, but for any entity providing functionally comparable services, regardless of their market focus or business model,⁴⁴³ towards either end users or

442 In contrast to recitals (52) of the P2B-Regulation, Article 6 (5) DMA does not require that the service competes with that of the gatekeeper. See *Heinz*, (2023), in: Podszun (editor), *Digital Markets Act*, Art. 6 para. 91.

443 See Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para.19: "[T]he delineation of CPS under Regulation (EU) 2022/1925 has no bearing on the definition of the relevant market for the purpose of applying EU

business users, irrespective of the technology deployed.⁴⁴⁴ For instance, this means that meta comparison services that compare aggregated results from intermediaries (e.g. specialised search services, marketplaces, online travel agencies) instead of results from direct suppliers (e.g. merchants, hotels, airlines) are to be considered “similar” in that sense as both serve the end users primary need to compare different offers, irrespective of where a final transaction might occur.

3. Principles for excluding a more favourable treatment of the First-Party Service

483 The following guidelines ensure that an identifiable First-Party Service is not treated more favourably in ranking than an identifiable similar Third-Party Service.

(5) The gatekeeper must ensure that any third-party offering a similar service is provided a commercially equivalent opportunity to present or provide its service via the OSE. (i) If the gatekeeper shows a teaser (e.g. snippet, thumbnail) leading to its distinct service, third parties need to get an opportunity which is no less favourable (the easiest example being an equivalent teaser in an equivalent position).⁴⁴⁵ (ii) If the gatekeeper wishes to partly or entirely embed its First-Party Service by directly providing it through the interface of its OSE, third parties need to obtain an equivalent opportunity to provide their similar service through the interface of the OSE, with their own technology. (iii) If the gatekeeper includes additional features like maps, images, logos, widgets, filters, or reviews in the results

competition rules (and vice versa) and those two types of analyses may thus lead to different results”.

444 See recital (14) DMA: “*the definition of core platform services should be technology neutral*”.

445 See European Commission, “Digital Markets Act – Impact Assessment Support Study, Annexes” (2020), p. 298 (condemning that if a seller displays the text ‘Delivery by Amazon’, it is ranked higher), p. 310 “*The presentation of Amazon Basics in prominent placements such as ‘Top Rated from Our Brands’ is another way of drawing customers’ attention to Amazon’s own product line. This kind of exclusive presentation or marketing can also be seen as a form of ‘self-preferencing’*.” See also p. 312 “*Amazon Basics products are more prominently placed on Amazon’s website, a direct link on the welcome website, in the ranking of the respective individual products of a product category, advertised as best valued Amazon Basics, more customer reviews due to Amazon Vine and preferred by Alexa. Hence it must also be assumed that self-preferencing in this respect is present.*”

linking to or generated by its First-Party Service, it must ensure such features are equally available for similar Third-Party Services.⁴⁴⁶

(6) In particular, if a gatekeeper enables its own OIS to generate specialised search results or output and displays it on its results pages, it must ensure an equivalent opportunity for a similar third-party OIS to generate and display their specialised results, using their own technology. A gatekeeper may not favour the output of its own distinct online search or intermediation service (i.e. the specialised results that such service generates) on the online interface of its OSE. A gatekeeper may seek to favour its own OIS by (i) forwarding a query entered on its OSE, (ii) using any relevant user data obtained, or (iii) sharing query refinement tools offered on its OSE interface, to allow such OIS to generate specialised output in real-time and to present it on the results pages of its OSE. To prevent such self-preferencing, the simplest way for a gatekeeper to offer a commercially equivalent opportunity is to equally enable any third party providing a similar OIS to generate and display corresponding specialised results with corresponding content. Accordingly, whenever an OSE seeks to share query-related data or refinement tools with its own specialised intermediation service for it to return corresponding results, the OSE will also have to share such data and tools in a non-discriminatory manner to providers of similar intermediaries for them to return specialised results, using their own data indexes, quality-control mechanisms, and matching algorithms. Principle (7) provides further clarity on this concept:

(7) Should a gatekeeper wish to offer a distinct service through its OSE pages, it needs to grant any provider of a similar service an equivalent opportunity. Independent of the technology deployed, a gatekeeper may not provide any distinct service via its OSE, unless providers of a similar

446 See European Commission, Press Release of 27/11/2023, “Commission sends Amazon Statement of Objections over proposed acquisition of iRobot”, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990, “Amazon may have the ability and the incentive to foreclose rivals by engaging in several foreclosing strategies aimed at preventing rivals from selling RVCs [robot vacuum cleaners] on Amazon’s online marketplace and/or at degrading their access to it. This may include: (i) delisting rival RVCs; (ii) reducing visibility of rival RVCs in both non-paid (i.e., organic) and paid results (i.e., advertisements) displayed in Amazon’s marketplace; (iii) limiting access to certain widgets (e.g. ‘other products you may like’) or certain commercially-attractive product labels (e.g. ‘Amazon’s choice’ or ‘Works With Alexa’); and/or (iv) directly or indirectly raising the costs of iRobot’s rivals to advertise and sell their RVCs on Amazon’s marketplace”.

service obtain a commercially equivalent, non-discriminatory opportunity. For instance, if a gatekeeper intends to provide an OIS by co-mingling business users in a special unit (see principle (2.1)) or integrates transaction-facilitating features (e.g. product information, prices, booking dates or reviews) for its OIS (see principle (2.2)), third-party providers must be granted an equal opportunity. The simplest way is for such party to present its offerings at the same position of the SERP and with the same design features and technological abilities. Article 6 (5) DMA demands equal ranking on the entire search results page of an OSE, not just within any special section, box or grouping of results.⁴⁴⁷ Equal “prominence” does not simply relate to the order or the format in which a service is displayed, but primarily to the way a service is *perceived* by users.⁴⁴⁸ For the equality of opportunity, the following factors matter:

- (7.1) **For a gatekeeper to prevent the favouring of any embedded First-Party Service by equally embedding Third-Party Services, it is essential that the Third-Party Service is perceived by end users as independent from the gatekeeper.** Due to an anchoring bias, end users associate anything shown to them through an OSE as a service provided by the gatekeeper. To overcome such bias, a third party must be enabled to provide its Third-Party Service in a manner that end users rightly perceive it as an independent service of such third party and do not confuse it as one provided by the gatekeeper, they shall be enabled to “*challenge the gatekeeper on the merits of their*

447 See the broad definition of “search results” in Article 2, point (23) DMA, encompassing “*any information in any format [...] returned in response to, and related to, a search query*”.

448 See Article 13(4) DMA: “*The gatekeeper shall not engage in any behaviour that undermines effective compliance with the obligations of Articles 5, 6 and 7 [...] regardless of whether that behaviour [...] consists in the use of behavioural techniques or interface design.*” Recital 51 requires that a service is “*considered or used by certain end users a service distinct or additional to the online search engine*”. Recitals 52 sentence 2 and Recital 71 “*Gatekeepers should not engage in behaviour that would undermine the effectiveness of the prohibitions [...]. Such behaviour includes the design used by the gatekeeper, the presentation of end-user choices in a non-neutral manner, or using the structure, function or manner of operation of a user interface or a part thereof to subvert or impair user autonomy, decision-making, or choice*”. It follows that ultimately it matters how users perceive (= consider) a measure and (are made to) react to it.

products and services".⁴⁴⁹ This pre-supposes that users may rightly attribute the merits of products or services to their respective providers. Accordingly, where end users attribute any OIS functionality on a SERP (such as boxes for hotels, flights, etc.) to Google, ensuring non-discrimination requires that third parties providing similar OIS need to be perceived by end users in the same way. This will typically require a distinct and visually clear branding as Third-Party Service. It is not sufficient if end users consider the features as belonging to Google, any of its affiliated services or subsidiaries or a business user that it controls.⁴⁵⁰ This is crucial for any compliance solution that is based on "integrating" rival OISs into any OIS feature that the OSE presents on its results page (such as Product Listings Ads or Hotel Listing Ads); as long as end users perceive the feature on the SERP as a service of Google, rather than a service of a rival OIS, such "integration" does not provide equal prominence. This can be assumed where, from an end user's perspective, any boxes, filters or grouping of specialised results "look and feel" the same, regardless of which OIS or business user provided the content therein. In such cases, end users consider all these features as a service provided by Google to them. As this would render the gatekeeper even more attractive from a users' perspective and hence less contestable, any such solution would run counter the objective of the DMA.

- (7.2) **Ensuring equal opportunities implies that the gatekeeper must enable third parties to use their own technology to provide their similar Third-Party Service through the interface of the OSE equally.** To allow for competition and innovation, similar Third-Party Services should be able to deploy their own specialised technology to provide their service and compete on the interfaces of the OSE. For instance, when a gatekeeper intends to provide a First-Party Service, such as an OIS, on the results pages through units that compare offerings of business users on the basis of specialised algorithms, third parties providing a similar OIS need a commer-

449 See recital (32) DMA: "*For the purpose of this Regulation, contestability should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services*".

450 Regarding the ban of favouring a controlled business partner see recital (51): "*Gatekeepers are often vertically integrated and offer certain products [...] through their own core platform services, or through a business user over which they exercise control*".

cially equivalent opportunity. The simplest way to achieve this is for them to be able to curate equivalent units based on their own data pools of offerings of business users and their own specialised matching algorithms, cataloguing and indexing systems, quality controls and query interpretation. The requirement of equivalence of opportunity weighs strongly against any approach where the gatekeeper monopolises (i) control over the onboarding of business user and offerings, (ii) their matching with end users, and (iii) the curation of units available for Third-Party Services to equally appear on the SERP. Merely inviting third parties to provide data feeds to enhance a gatekeeper’s proprietary database for it to curate units on their behalf and from which Google, for example, then selects certain products, offers or accompanying information in accordance with its own algorithms, in order to display them in a format Google designed itself, in return of keywords of its choosing, runs counter to this principle and the objective of the DMA.⁴⁵¹ In such cases, it is still Google alone that matches the relevant offers, thereby facilitating transactions, based on its own index and algorithms. It is also Google and not the invited “rivals” that ultimately compile the correspondent user interface. Accordingly, end users (and final business users) will perceive any such output (boxes, groupings, etc.) as an OIS provided by Google, even though third parties contributed to and appear within such output. Thus, solutions in which third parties merely provide data feeds and the OSE then decides how such feeds are used and displayed are never compliant. Equal treatment mandates independence and equal opportunities in service provision.

Even where every company has non-discriminatory access to a particular element such as a box or a grouping of results, offering such element on the SERP may in itself constitute a service distinct from the OSE. To prevent a favouring of such service on the OSE’s results page, the gatekeeper will have to allow third parties that provide similar elements to compile and display them on the SERP, based upon their own technology.⁴⁵²

451 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 351.

452 Regarding the crucial difference between “equal access to the SERP” and “equal access to a box within a SERP” see General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*,

- (7.3) **Third parties must be able to differentiate and individualise their similar service.** Where a gatekeeper intends to offer a First-Party Service through its OSE, it must ensure that third parties are able to differentiate their services from that of the gatekeeper. Otherwise, the provision of any Third-Party Service would be standardised by the gatekeeper, excluding any innovation. In particular, to ensure that third parties are not limited to any possibly lower performance level that the gatekeeper's First-Party Service is capable of achieving, third parties offering a similar service must be enabled to present their full technological potential and scope of innovation. This includes the ability to present their unique selling points. If, for example, in lack of additional data, the gatekeeper's own service may only display a limited amount of information within its own unit, this must not restrain third parties from offering their full potential in terms of a broader set of relevant information in their respective units. Accordingly, technological independence shall include the right to determine the content of the units that third parties must be granted to offer their Third-Party Service on an equal footing.
- (7.4) **Compliance necessitates that providers of similar services providers are not compelled to alter their business models, to offer different services, to cease competing with the gatekeeper, or to become its customer.**⁴⁵³ The DMA requires that, as a result of measures intended or implemented to ensure equal treatment, there is no remaining imbalance of rights and obligations on third parties and that the measures do not themselves confer an advantage upon the gatekeeper, including its OSE, which is disproportionate to the service it provides to third parties. This principle ensures that the conditions for obtaining equal treatment in ranking do not exclusively benefit the gatekeeper or impose competitive disadvantages

paras. 219, 222: “*The contested decision thus envisages equal access by Google’s [CSS] and competing [CSS] to Google’s [SERPs], irrespective of the type of result concerned (generic results, Product Universals or Shopping Units), and does therefore seek to provide competing [CSS] with access to Google’s [SERPs] and ensure that their positioning and display within those pages are as visible as those of Google’s [CSS], even if it does not rule out the possibility that, in order to implement the remedy required by the Commission, Google will cease to display and position its own [CSS] more favourably than competing [CSSs] on its [SERPs]*”.

453 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 351.

on third parties. Less favourable treatment exists if the gatekeeper conditions an equivalent prominence on the results pages on criteria that only the gatekeeper may fulfil or that would put third parties at a relative competitive disadvantage elsewhere. Third parties shall obtain “*the ability [...] to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.*”⁴⁵⁴ Equal treatment is compromised, in particular, if in order to achieve parity on the SERP vis-à-vis the gatekeeper service, a third party must modify its business operation and is expected to no longer provide the full scope of its own intermediation service but to transfer elements of the value chain to the gatekeeper or to rely on using a gatekeeper service instead.⁴⁵⁵ Unfair conditions arise, in particular, if equal prominence requires third parties to (i) change their business model (e.g. by selling instead of recommending products)⁴⁵⁶ (ii) provide different services (e.g. a marketplace instead of a comparison service or shop), (iii) enter in direct competition with their own customers (e.g. by being treated equally or placed in same ad auctions) (iv) transfer value to the gatekeeper (e.g. by having to upload proprietary data that is not required for the operation of an OSE)⁴⁵⁷, or (v) purchase another service from the gatekeeper⁴⁵⁸, in particular advertising services that raise its costs⁴⁵⁹, to be treated equally in ranking. This precludes any solution

454 Recital (32) DMA.

455 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 351: “Furthermore, the alternative offered to competing [CSSs] in order for them to appear in Shopping Units, namely, to act as intermediaries, also requires them to change their business model in that their role then involves placing products on Google’s [CSS] as a seller would do, and no longer to compare products. Accordingly, in order to access Shopping Units, competing [CSS] would have to become customers of Google’s [CSS] and stop being its direct competitors”.

456 General Court, *ibid.*

457 See Section 19a para. 2 No. 7 German Act Against Restraints of Competition.

458 See AGCM, Press Release of 9/12/2021, “A528 - Italian Competition Authority: Amazon fined over € 1,128 billion for abusing its dominant position”, <https://en.agcm.it/en/media/press-releases/2021/12/A528> (finding it an abuse for Amazon to penalise third parties which do not use its fulfilment services through worse search rankings).

459 See European Commission, Press Release of 27/11/2023, “Commission sends Amazon Statement of Objections over proposed acquisition of iRobot”, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990 “Amazon may have the ability

where an OSE directly compares particular types of businesses on its SERP and tries to achieve equal treatment by inviting third parties providing similar comparisons to book particular types of ads.

- (7.5) **The gatekeeper may only provide a distinct service through its OSE after it has implemented a feasible technical solution that ensures a third party to provide its similar service equally.** Gatekeepers bear the burden to ensure equal treatment. It is the essence of Article 6(5) DMA that if any ambition to showcase their distinct First-Party Service cannot be matched with a viable means for third parties to do the same, without suffering a commercial disadvantage, the gatekeeper must refrain from advancing its own service in such a manner. If, for example, a gatekeeper wishing to provide its OIS via the interface of its OSE (e.g. through units comparing commercial offers) fails to implement a technical solution enabling third parties to provide their similar intermediation service in a commercially equivalent manner without any of the disadvantages outlined above (principle (7.4)), the gatekeeper may not provide its First-Party Service through the OSE interface either. It is equally imperative that any gatekeeper-initiated features favouring its distinct service (e.g. teasers, filters, or chips) are withheld or removed until a fair integration method for Third-Party Services is operational.

- (8) **The gatekeeper is obligated to onboard (crawl, index, upload etc.), and catalogue any information related to its First-Party Service in a manner equivalent to how it onboards and catalogues content from similar Third-Party Services.** A gatekeeper may not favour a distinct service in ranking by previously onboarding its information through means unavailable to third parties. In particular, information must be onboarded with an equal frequency, level of detail and precision; and in a manner that such information may be displayed with an equivalent latency. If the gatekeeper enables its First-Party Service to adjust its offering prior, during or in response to a query, equal opportunities must be granted to a third party providing a similar service.

- (9) **Direct navigation to Third-Party Services, not to own intermediary page.** To ensure that end users are led to their intended destinations (as indicated by their click), OSEs must navigate them directly to the webpage

[...] to foreclose rivals by [...] (iv) directly or indirectly raising the costs of [...] rivals to advertise and sell [...] on Amazon's marketplace."

they have clicked, without detours through intermediary pages or services offered by the gatekeeper. This means bypassing any gatekeeper-owned pages offering functions of a distinct service. Similarly, as the prohibition of self-preferencing in Article 6(5) DMA extends to all elements with which an OSE engages with end users, the use of filters, toggles, chips or other choices or functionalities within an OSE's interface to subtly guide end users toward a distinct gatekeeper service, constitutes self-preferencing, unless such features are equally available to lead end users to a third party providing a similar service. The prohibition of self-preferencing in search thus precludes any tabs for particular types of content (such as "hotels", "shopping", "flights"), if a click on such tab leads the user to a corresponding specialised OIS of the OSE or any intermediary level of the OSE that constitutes an OIS in itself. The filters placed by an OSE, such as Google Search, at the top of the SERP can become a way to circumvent the prohibition of self-preferencing, by redirecting users towards a specific Google comparison service versus competing comparison services (for example, introducing a "Shopping" or "CSS" or "Merchants" filter that appears among the filters more easily accessible to the users).

(10) **Transparency and equal updates on rankings.** Gatekeepers must be transparent in their ranking processes, ensuring no preferential treatment is given to their services through advanced access to ranking information or prior notifications of algorithmic changes.⁴⁶⁰ Gatekeepers need to disclose ranking criteria unequivocally to all providers of similarly affected services. First-Party Services may not obtain preferential access to such information. This principle extends across all search results, paid or unpaid, and mandates timely updates to all services regarding algorithm adjustments, reinforcing the DMA's commitment to a level playing field. To ensure that the algorithms do not inherently favour Google products, Google shall be obligated to show and explain all relevant ranking criteria to the Commission in cases of suspicion. Elements that need to be disclosed, at least to the Commission, include an explanation of how relevance is established, and how fair and non-discriminatory conditions are implemented and ensured over time. Generative AI further increases the non-transparency

460 See European Commission, "Digital Markets Act – Impact Assessment Support Study, Annexes" (2020), p. 304 *"Amazon has a clear advantage over its competitors in the evaluation of product, sales and customer data [...] Since this data are not provided to third-party sellers, this can be considered as self-preferencing. This has a negative effect on the sales of third parties."*

of how outputs are generated. It needs to be ensured that gatekeepers do not leverage the “black box” of AI to grant their services further unjustified relative prominence.

