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Gergely Csurgai-Horváth

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Pázmány Péter Katolikus Egyetem
Pázmány Péter Catholic University Budapest

<http://www.plwp.eu>

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Gergely Csurgai-Horváth*

Abstract

This paper addresses the rules applicable to algorithmic bias taking the form of self-favouring by hybrid digital platforms in the EU. In this paper, it is argued that the recently introduced prohibition of self-favouring by digital platforms should not apply across the board in the same manner. It may be necessary to consider the nature of the underlying products or services, the business models, and the monetisation strategies of digital platforms. Differences in these aspects may alter their ability and incentives to engage in self-favouring potentially leading to foreclosing rivals and harming consumers. This suggests that the approach put forward by Section 19a of the German Competition Act may be better from an error-cost perspective than that of the Digital Markets Act. Section 19a of the GWB grants more discretion to enforcers and allows for a broader justification of the impugned conduct. In the context of the DMA, some sort of balancing exercise seems to be possible only if the European Commission makes extensive use of the possibility to further specify the prohibition of self-favouring contained in Article 6(5) of the DMA in light of the principles of effectiveness and proportionality. Finally, the paper touches upon the potential disproportionate burden, legal fragmentation, and legal uncertainty across the EU resulting from the interplay between EU competition law, the DMA, and national laws tackling similar self-favouring practices.

Keywords: Algorithmic bias, Algorithmic foreclosure, Self-favouring, Digital platforms, Digital Markets Act, Competition law, Economic market regulation, Platform to Business Regulation, Section 19a of the German Competition Act

1. Introduction

In the early days, the Internet was viewed as a private object autonomous from state control.¹ It was believed that interactions on the Internet would be more just as compared to those previously conducted offline.² By now, the “Zeitgeist” has changed and concerns about digital businesses started to grow leading to a plethora of regulations applicable to them. Concerns against digital businesses grew simultaneously with their rapid growth, sometimes durable market position, entry into adjacent markets, new business models, and novel monetization strategies. Algorithmic bias taking the form of self-favouring in essence refers to situations whereby vertically and/or horizontally integrated hybrid digital platforms favour their own products or services as compared to those offered by rivals on the same platform. These types of practices are perceived to be one of the most important challenges of digital market regulation in Europe.³ The perceived threat in connection with these kinds of self-favouring practices is that large digital platforms acting as intermediaries may free ride on and appropriate the innovations of complementors that are dependent on the platform.⁴

By now, in addition to Article 102 TFEU⁵ – which aims to prevent that undertakings having a certain level of economic strength misuse their power⁶ – a growing number of legislative instruments contain provisions on different forms of self-favouring. On a European level these are the transparency requirement enshrined in the Platform to Business Regulation (P2B Regulation),⁷ and the overarching prohibition of different self-favouring mechanisms in the Digital Markets Act (DMA).⁸ Moreover, on a national level Section 19a of the German Competition Act (GWB) explicitly prohibits self-favouring by ‘undertakings of paramount

¹ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, at the Annual Meeting of the World Economic Forum, Davos, Switzerland (February 8, 1996), transcript available at <https://www.eff.org/cyberspace-independence>.

² See Jeremy Katz et al., *The Digital Social Contract* (Ogilvy and Mather 2015).

³ Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, 63 (March 2019); OECD, *Abuse of Dominance in Digital Markets* 54-55 (2020) www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf; Stigler Committee on Digital Platforms, *Final Report*, 33 (September 2019) <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>; Luís Cabral et al., *The EU Digital Markets Act: A Report from a Panel of Economic Experts* (Publications Office of the European Union 2021) 13; Jacques Crémer et al., *Competition Policy for the Digital Era, Final report* (Publications Office of the European Union 2019) 66.

⁴ Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161(6) *University of Pennsylvania Law Review* 1663, 1699 (2013).

⁵ Consolidated version of the Treaty on the Functioning of the European Union OJ C 326/47, 26.10.2012.

⁶ Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2020) 3-13.

⁷ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57, 11.7.2019.

⁸ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265/1, 12.10.2022.

significance for competition across markets'.⁹ These legislative instruments can be mapped as steps toward imposing platform neutrality across Europe, albeit not in a coherent manner.

The different approaches pursued by different pieces of legislation raise the question of how we shall regulate algorithmic bias by digital platforms taking the form of self-favouring. Arguably, the close connection of these practices to vertical integration, conglomerate synergies, product design, and having regard to their ambiguous effects on consumer welfare and innovation warrant some sort of individualized assessment. Questions also arise as to the interplay between the different regulatory instruments trying to tackle these practices. In this regard, arguably a need arises to limit at least to some extent the concurrent application of these different regulatory instruments tackling essentially the same conduct and having an overlapping personal scope of application. Otherwise, their parallel application may lead to larger compliance costs, conflicting decisions, and as a result legal uncertainty, and double, or triple jeopardy of platforms falling within the ambit of the various legislative instruments.¹⁰

Accordingly, first, the foundations of the prohibition of preferential treatment are explored which helps us understand the later regulatory prohibition of this type of conduct. Then, the new rules specifically targeting digital platforms are addressed and their different approaches are compared. Finally, the tension that might arise as a result of the potential concurrent application and parallel operation of the analysed different instruments are explored.

2. The foundations of the prohibition of self-favouring

2.1. Article 102 TFEU

The topic of self-favouring was introduced to EU competition law as early as 2010 when the European Commission started its formal investigation into Google's practices relating to search bias.¹¹ The Commission held that Google abused its dominance in general search services by positioning and displaying on its general search results page its own comparison shopping service more favourably than the services of rivals.¹² In addition, the Commission took issue with rival comparison shopping services being demoted within the general search

⁹ Competition Act of 26 June 2013, Bundesgesetzblatt 2013 I, 1750, 3245, as last amended by Article 2 of the Act of 19 July 2022, Bundesgesetzblatt I, 1214 https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0071.

¹⁰ Giuseppe Colangelo, *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*, 47(5) *European Law Review* 597, 603 (2022).

¹¹ Pablo Ibanez Colomo, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, 43(4) *World Competition* 417, 417 (2020).

¹² Case AT.39740, *Google Search (Shopping)*, Commission Decision of June 27 2017, para. 344. See also Eduardo Aguilera Valdivia, *The Scope of the 'Special Responsibility' upon Vertically Integrated Dominant Firms after the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Related Business?* 41(1) *World Competition* 43, 45-48 (2018).

results page by adjustment algorithms.¹³ The General Court (GC) in its *Google Shopping* judgment largely upheld the decision of the Commission which is currently pending on appeal before the European Court of Justice (ECJ).¹⁴ Thus, the more than a decade old question of whether self-favouring constitutes an abuse of dominant position under Article 102 TFEU still remains open.

2.2. Article 106 TFEU and the European Electronic Communications Code

It is already established by the case law of the ECJ that a situation of conflicting interests may lead to self-favouring by undertakings protected by special or exclusive rights. This may in certain circumstances breach Article 106 TFEU.¹⁵ The *MOTOE*, *RTT*, and *ERT* cases provide such examples. In the *MOTOE* case the ECJ, sitting in Grand Chamber, referred to a conflict of interest that persist when an entity is granted the right to authorise the organisation of motorcycling events by third parties when such entity itself organises those events.¹⁶ In the *RTT* case, the ECJ similarly held that it is unlawful for a Member State to grant an entity the power to lay down standards and check compliance with those standards when that entity is in competition with those undertakings it is supposed to supervise.¹⁷ Self-favouring was also a concern in the *ERT* case. Accordingly, the ECJ held that it is unlawful for a Member State to grant exclusive rights to an undertaking when such rights are liable to lead to the infringement of Article 102 TFEU via a discriminatory broadcasting policy favouring ERT's own programmes.¹⁸

The mutual concern in these cases seemed to relate to the concept of 'leveraged dominance'. That is, undertakings protected by special or exclusive rights are possibly able to extend and confer their power from protected markets to adjacent liberalized markets.¹⁹ This concept of

¹³ Peter Georg Picht & Gaspare Tazio Loderer, *Framing Algorithms: Competition Law and (Other) Regulatory Tools*, 42(3) *World Competition* 391, 408 (2019).

¹⁴ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763.

¹⁵ Article 106 TFEU, in essence, aims to prevent, amongst others, competition law infringements resulting from State-conferred privileges on public undertakings, or on undertakings to which Member States grant special or exclusive rights.

¹⁶ Case C-49/07, *MOTOE*, ECLI:EU:C:2008:376, para. 52: 'a rule, which gives a legal person [...] the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates'.

¹⁷ Case C-18/88, *RTT and GB-Inno-BM SA*, ECLI:EU:C:1991:474, para. 28: 'Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.'

¹⁸ Case C-260-89, *ERT v DEP*, ECLI:EU:C:1991:254, para. 37: 'it should be observed that Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.'

¹⁹ Pablo Ibáñez Colomo, *Will Article 106 TFEU Case Law Transform EU Competition Law?* 13(6) *Journal of European Competition Law & Practice* 385, 385 (2022).

‘leveraged dominance’ under Article 106 TFEU seems to be broader than the principle of leveraging developed under Article 102 TFEU. This is partly because Article 106 TFEU, contrary to Article 102 TFEU, does not rely on the finding of anti-competitive effects to establish a violation. Article 106 TFEU rather rests on structural considerations and imposes a stricter duty on Member States not to impair effective competition. That said, the obligations enshrined in Article 106 TFEU are only applicable to undertakings that are protected by the State by way of special or exclusive rights. The scope of Article 106 TFEU is, thus, narrower than that of Article 102 TFEU which lays down asymmetric obligations on private undertakings that did not necessarily benefit from exclusive or special rights but nevertheless achieved dominance in a particular market.

The importance of Article 106 TFEU cannot be overstated as, despite its differences as compared to Article 102 TFEU, Article 106 TFEU precedents may shed light on the incentives and the ability of vertically integrated undertakings to leverage their market power to adjacent markets.²⁰ As a result, the application of Article 106 TFEU in conjunction with Article 102 TFEU arguably led to the introduction of self-favouring as a stand-alone abuse of dominance in digital markets.²¹ The situation may, thus, somewhat be similar to the notion of ‘equality of opportunity’ discussed by the ECJ in the context of Article 102 TFEU for instance in the *Deutsche Bahn*²² case relying on Article 106 TFEU precedents such as the C-18/88 *GB-Inno-BM*,²³ C-462/99 *Connect Austria*,²⁴ and C-49/07 *MOTOE*²⁵ cases. Just as the notion of ‘equality of opportunity’, a broader notion of leveraging and the stringent non-discrimination requirements seem to have made their way from Article 106 TFEU into Article 102 TFEU. These principles were recently cited by the GC in its *Google Shopping* judgment.²⁶ Subsequently, the perceived inefficiency of Article 102 TFEU in tackling these kinds of concerns has led to the adoption of the DMA.²⁷

The issue of potentially conflicting interests is equally present in the area of telecommunications. As a result, the European Electronic Communications Code (EECC) contains a wide principle of non-discrimination as an asymmetric wholesale access remedy in

²⁰ Peter Alexiadis & Alexandre de Stree, *Designing an EU Intervention Standard for Digital Platforms* 24 (EUI, Working Paper RSCAS 2020/14, 2020) <https://cadmus.eui.eu/handle/1814/66307>.

²¹ Colomo, *supra* n. 19, at 385.

²² Case C-280/08 P, *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, para. 230.

²³ Case C-18/88, *RTT and GB-Inno-BM SA*, ECLI:EU:C:1991:474.

²⁴ Case C-462/99, *Connect Austria*, ECLI:EU:C:2003:297.

²⁵ Case C-49/07, *MOTOE*, ECLI:EU:C:2008:376.

²⁶ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, *supra* n. 14, para. 180: ‘a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators’.

²⁷ Regulation (EU) 2022/1925, *supra* n. 8, at Recital 5: ‘Although Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis’.

relation to interconnection and access. Article 70(2) imposes the obligation to apply ‘equivalent conditions in equivalent circumstances to other providers of equivalent services’ under ‘the same conditions and of the same quality as it provides to its own services or those of its subsidiaries or partners’.²⁸ The obligation contained in Article 70(2) is asymmetric. This means that the obligations contained therein can only be imposed by National Regulatory Authorities on undertakings that have a significant market power within the meaning of the EEC. This non-discrimination obligation relates to various aspects of the relationship between undertakings considered as having significant market power and their smaller rivals. It relates amongst others to the timescale, and terms and conditions of access, including those relating to price and service levels. It encompasses not only external discrimination but also internal discrimination. It, thus, applies not only to discrimination between third parties but also to discriminatory practices between the incumbent itself and third parties. This broad prohibition of discrimination under the EEC equally stems from the incentives of vertically integrated companies to raise the costs of their rivals when they are in competition with them on a downstream market.²⁹

3. New instruments relating to preferential treatment by digital platforms

3.1. The P2B Regulation, the starting point for tackling self-favouring by digital platforms

In the context of digital platforms as a starting point, Article 5 of the P2B Regulation imposes transparency requirements on online intermediation services and general online search engines with regard to the main parameters of ranking corporate websites and their relative importance.³⁰ These transparency requirements in practice mandate the disclosure of principles governing ranking, including how ranking is affected by for instance remuneration or affiliation to the operator of the platform.³¹ These obligations albeit not as intrusive as the ones described below can help overcome this important information asymmetry that exists between platforms and their users as well as public authorities.³² The importance of this cannot be understated as, in order to detect algorithmic bias and potential foreclosure, there is a need to “look under the hood” of algorithms that change frequently. For instance, Google’s general search algorithm reportedly changed 516 times during 2010 alone.³³

²⁸ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321/36, 17.12.2018, Art. 70 (2).

²⁹ Alexiadis & de Streel, *supra* n. 20, at 12.

³⁰ Regulation (EU) 2019/1150, *supra* n. 7, at Art. 5.

³¹ Christian Bergqvist, *Discrimination and Self-favoring in the Digital Economy*, 2 SSRN (2020), <https://ssrn.com/abstract=3531688>.

³² Luís Cabral et al., *supra* n. 3, at 28-29.

³³ Robert Bork & George Sidak, *What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google?*, 4 Journal of Competition Law and Economics 663, 685 (2012).

3.2. The Digital Markets Act

The DMA takes a giant step forward, as compared to the transparency obligations of the P2B Regulation or the anti-competitive presumption of Section 19a of the GWB. The outright prohibition of self-favouring is an overarching principle of the DMA. In addition to Article 6(5), which explicitly proscribes self-favouring in ranking, crawling, and indexing various other provisions concern favouring practices. Amongst others, banning anti-steering practices in Article 5(4) and mandating side-loading in Article 6(4) were also considered as specific forms of self-favouring in a previous internal document of the Commission.³⁴ Under the former clause app developers will be able to contact their users by means of other channels than those prescribed by a gatekeeper. And mandating side-loading allows users to download and install applications through channels other than the application stores of a gatekeeper. Moreover, Recital 49 of the DMA explicitly refers to limiting gatekeepers' opportunities to favour their own or third-party services in relation to Article 6(3) mandating the possibility for the uninstallation of software applications and changing default settings for instance for search engines or web browsers. Lastly, the obligation enshrined in Article 6(2) prohibiting gatekeepers from the use of confidential business data generated by users can also be considered a manifestation of data-driven self-favouring.³⁵ Thus, self-favouring under these regulatory obligations seems to encompass a much broader scope than that of Article 102 TFEU.

It is important to note that the DMA does not apply across the board. It is an asymmetric economic regulation meaning that the obligations contained in it are expected to apply only to a handful of large digital platforms that meet certain quantitative or qualitative criteria in ten core platform services and that are designated as gatekeepers by the decision of the EC.³⁶ Nevertheless, there seems to be a significant overlap between the DMA and Article 102 TFEU in terms of the addressees of the obligations. Moreover, the DMA imposes obligations that largely mirror investigations previously conducted under Article 102 TFEU by the EC creating not only a 'personal' but also a substantive overlap between the instruments.³⁷ In addition, in contrast to the ex-post case-by-case competition law enforcement, under the DMA it is not required to show anti-competitive effects. The harm is said to be already assessed ex-ante by the co-legislators.³⁸ Moreover, efficiency as a defence does not seem to be acceptable either.³⁹

³⁴ DGs CNECT/GROW informal working document, *Politico* https://www.politico.eu/wp-content/uploads/2020/09/SKM_C45820093011040.pdf.

³⁵ Luís Cabral et al., *supra* n. 3, at 21.

³⁶ Regulation 2022/1925, *supra* n. 8, at Arts 3 and 17.

³⁷ Alexandre de Streel & Pierre Larouche, *The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution*, 2 *Concurrences* 46, 50-52 (2021).

³⁸ Regulation 2022/1925, *supra* n. 8, at Recitals 2-5.

³⁹ Filomena Chirico, *Digital Markets Act: A Regulatory Perspective*, 12(7) *Journal of European Competition Law & Practice* 493, 495 (2021).

The only room for manoeuvre seems to be present with regards to the obligations contained in Article 6 of the DMA that are 'susceptible of being further specified'. Thus, with regard to these obligations, a regulatory dialogue could take place if the EC intends to adopt an implementing act pursuant to Article 8(2) specifying the measures to be adopted by gatekeepers to comply with Article 6. In this context, compliance shall be assessed in the light of effectiveness and proportionality.⁴⁰ In order for the regulatory oversight to comply with the requirement of effectiveness, the obligations set out in Article 6 must foster the goals pursued by the DMA. That is contestability, fairness, and market integration. And to comply with the proportionality requirement the intrusiveness of the compliance measure shall not exceed what is necessary for the attainment of those objectives.⁴¹

There are a number of reasons why the EC shall make extensive use of the possibility to further specify the obligations of Article 6 of the DMA in a regulatory dialogue. This would allow the Commission to account for the diverging business models, and monetization strategies employed by gatekeepers. Indeed, potential gatekeepers' ability and incentive to foreclose rivals may be context-dependent.⁴² And it may significantly vary based on for instance a subscription- or commission-based monetization strategy, and in an ad-funded or hardware-based business model.⁴³ Moreover, similarly, to the assessment under Article 102 TFEU, the specification could also take account of the nature of the products or services in question. One crucial aspect in this regard could be whether the products or services subject to the proscription of self-favouring are intrinsically open or not. Consequently, as a result of making extensive use of the regulatory dialogue provided for in Article 8, Article 6(5) could apply in a more differentiated manner when ranking for instance content on video-sharing platforms, social networks, different products on online marketplaces, search results on general search results' pages.

Some sort of individualized assessment would also be needed as potential gatekeepers seem to be not only heterogeneous across different core platform services but also within one core platform service. Video-sharing services may provide a useful example in this regard. For instance, on Google's video-sharing platform *YouTube*, all content available is provided free of monetary charges to end-users. Most content is even available without registration. Only the ad-free version of *YouTube Premium* requires users to pay a monthly subscription. The business model is thus primarily ad funded. This contrasts with *Amazon Prime Video* or *Netflix* which have a subscription-based business model where users must subscribe to be able

⁴⁰ Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, 12(7) *Journal of European Competition Law & Practice* 529, 535 and 539 (2021).

⁴¹ Alexandre de Stree & Pierre Larouche, *The European Digital Markets Act proposal: How to improve a regulatory revolution*, 2 *Concurrences* 46, 47 (2021).

⁴² Christina Caffarra, *Business Models, Incentives, and Theories of Harm*, 1 *CPI Antitrust Chronicle* October 29, 30 (2019).

⁴³ Jorge Padilla et al., *Self-Preferencing in Markets with Vertically Integrated Gatekeeper Platforms*, 70(2) *The Journal of Industrial Economics* 371, 390 (2022).

to use the platform. Moreover, even within the same business model, there may be notable differences. On *Amazon Prime Video* users are allowed to rent or buy “extra” content in addition to those provided within the framework of the subscription. On *Netflix*, for now, all content is provided without any extra charge within the subscription. Moreover, the subscription to *Amazon Prime Video* is part of the larger service called *Amazon Prime* that includes other services amongst others fast delivery. Similarly, *YouTube Premium* comes in a bundle with *YouTube Music*, the music-sharing service of Google which is not even listed as a core platform service in the DMA. These differences may warrant a more individualized assessment. It remains to be seen to what extent can the above considerations be subsumed under the principles of proportionality and effectiveness.⁴⁴ In any event, it is foreseeable that this will be part of intense legal debates.

Business models and monetization strategies may also influence whether an undertaking is designated as a gatekeeper in the first place. This is because the DMA uses the same crude criteria – partially based on user numbers – for designating gatekeepers.⁴⁵ One could, therefore, expect that ad-founded business models fall more easily within the ambit of the rules as they attract more users by lower transaction costs as compared to subscription-based models where users have to register or subscribe in order to be able to use the service.

3.3. Section 19a of the GWB and the prohibition of self-favouring

On a national level the first measure specifically designed to target the perceived concerns posed by digital platforms was Section 19a of the GWB. This provision sets out obligations on undertakings declared by the decision of the German Competition Authority, the Bundeskartellamt (BKA) having ‘paramount significance for competition across markets’.⁴⁶ One of the seven practices that are presumed to be abusive in this context is self-favouring. Within the scope of Section 19a of the GWB, self-favouring refers to designated undertakings favouring their own offers over the competitors’ offers when acting as intermediaries.⁴⁷

However, this definition under Section 19a is much broader as compared to the scope of self-preferencing under Article 102 TFEU which seems to relate only to favourable positioning and display of first-party offers in contrast to competing third-party offers. According to Section 19a (2), self-favouring encompasses not only favourable positioning, and display, but also exclusive pre-installation, and the integration of offers. However, arguably in contrast to the DMA, Section 19a is not self-executory as the BKA enjoys administrative discretion on whether to intervene or not.⁴⁸ Furthermore, undertakings under Section 19a have the opportunity to

⁴⁴ Regulation (EU) 2022/1925, *supra* n. 8, at Recitals 27-29.

⁴⁵ Regulation (EU) 2022/1925, *supra* n. 8, at Art. 3 (2) b).

⁴⁶ Bundesgesetzblatt, *supra* n. 9, at Section 19a.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

objectively justify their conduct based on grounds including efficiency.⁴⁹ Thus, the grounds for rebuttal seem to be broader than the possibility of suspending compliance with the DMA's obligations pursuant to Article 9 on grounds of economic viability in exceptional circumstances that are beyond the gatekeeper's control.⁵⁰ Beyond this, the DMA does not seem to leave room for economic justifications or efficiency considerations and only contains a narrow room for exemption in Article 10 based on public health and security.⁵¹

3.4. Comparison of the approaches put forward by different regulatory instruments

Section 19a of the GWB together with the transparency requirements of the P2B Regulation arguably seem to offer a better solution to tackle self-favouring practices as compared to the outright prohibition contained in Article 6(5) of the DMA. Competition law – due to the lengthy investigations, the requirement to first define markets, establish dominance, and then assess whether the conduct at hand departs from competition on the merits along with its likely effects, and causality between those effects and the conduct – was considered to be inadequate to tackle self-favouring concerns posed by large digital platforms.⁵² The burden-shifting presumption contained in Section 19a seems to address the perceived inefficiency of competition law.⁵³

From an error-cost perspective conduct, which has ambiguous effects on consumer welfare and competition may be ill-suited for a per se prohibition.⁵⁴ This treatment shall be primarily reserved for practices where 'type I errors' (false positives) are extremely unlikely, such as output restriction, and horizontal price fixing. The state-of-the-art economics and industrial organisation literature – albeit sparse and relatively nascent – also takes the position that entry by platforms into complementors' space is not in itself questionable as it may increase competition and innovation, and may enhance consumer welfare.⁵⁵ In particular, literature shows that despite following entry, self-favouring, may harm consumers,⁵⁶ a blanket

⁴⁹ Jens-Uwe Franck & Martin Peitz, *Digital Platforms and the New 19a Tool in the German Competition Act*, 12(7) *Journal of European Competition Law & Practice* 513, 526 (2021).

⁵⁰ Regulation 2022/1925, *supra* n. 8, at Art. 9.

⁵¹ *Ibid.*, Art. 10.

⁵² de Streel, *supra* n. 37, at 46. See also Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee Of The Regions: Shaping Europe's digital future Brussels, COM(2020) 67 final, 19.2.2020, 9.

⁵³ Inge Graef & Francisco Costa-Cabral, *To Regulate or Not to Regulate Big Tech*, 1 *Concurrences* 24, 24-25 (2020).

⁵⁴ Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Texas Law Review* 1 (1984).

⁵⁵ See Zhuoxin Li & Ashish Agarwal, *Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram*, 63(10) *Management Science* 3438, 3455-3456 (2017); Axel Gautier et al., *Platform duality and network externalities*, Conference presentation at Leonardo Madio University of Padova (Jan 7-8, 2021), transcript available at <https://www.tse-fr.eu/sites/default/files/TSE/documents/conf/2021/madio.pdf>.

⁵⁶ Jorge Padilla et al., *supra* n. 43, at 390.

prohibition against self-preferencing may do more harm than good.⁵⁷ The empirical literature examining the impact of these strategies on platforms, their complementors, and end-users also appears to endorse this view.⁵⁸ Thus, the *per se* prohibition of self-favouring even for a handful of large online platforms designated as gatekeepers may be costly in terms of loss of innovation.⁵⁹

The provisions on different forms of self-favouring seem to follow an *Arrowian* view on the relationship between competition and innovation.⁶⁰ They are based on an effort to inject rivalry into core-platform services and neighbouring areas.⁶¹ The aim is said to be to foster incremental innovation via increased intra-platform competition.⁶² This seems to be premised on the belief that allowing complementors to enter niches may foster inter-platform competition at a later stage if complementors themselves become platform providers.⁶³ However, it remains to be seen whether the DMA will fulfil these hopes and bring about much-desired disruptive innovation⁶⁴ or, to the contrary, it will result in cementing the existing status quo. For instance, the asymmetric nature of the DMA may equally result in complementors wishing to be present on platforms that are already designated as gatekeepers and that are subject to the obligations set out in the DMA as compared to those smaller platforms that are not designated as gatekeepers. As a result, the obligations contained in the DMA could perhaps induce in some situations complementors to stick with large incumbents as opposed to smaller platforms that are not subject to the same stringent rules. One reason for this may

⁵⁷ Andrei Hagiu et al., *Should Amazon be Allowed to Sell on its Own Marketplace?*, 53(2) *RAND Journal of Economics* 297, 298 (2020); See also Jorge Padilla et al., *Vertical Control Change and Platform Organization under Network Externalities* (June 15, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4180700> 31; Patrice Bougette et al., *Business Models and Incentives: For an Effects-Based Approach of Self-Preferencing?* (2022) 12(2) *Journal of European Competition Law & Practice* 1 (2022).

⁵⁸ See Feng Zhu, *Friends or Foes? Examining Platform Owners' Entry into Complementors' Spaces*, 28(1) *Journal of Economics & Management Strategy* 23, 27 (2019); Zhu Feng & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon*, 39(10) *Strategic Management Journal*, 2618 (2018); Wen Wen & Feng Zhu, *Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market*, 40(9) *Strategic Management Journal*, 1336 (2019); Jens Foerderer et al., *Does Platform Owner's Entry Crowd Out Innovation? Evidence from Google Photos*, 29(2) *Information Systems Research* 444, 444-446 (2018).

⁵⁹ Daniele Condorelli & Jorge Padilla, *Harnessing Platform Envelopment in the Digital World*, 16(2) *Journal of Competition Law and Economics* 143, 175 (2020); Cf. Lina Khan, *The Separation of Platforms and Commerce*, 119(4) *Columbia Law Review* 973 (2019).

⁶⁰ Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in Richard R. Nelson, *The Rate and Direction of Inventive Activities: Economic and Social Factors* (Princeton University Press 1962); Philippe Aghion et al., *Competition and innovation: an inverted-U relationship*, 120(2) *The Quarterly Journal of Economics* 701 (2005).

⁶¹ Regulation 2022/1925, *supra* n. 8, at Recital 32.

⁶² Pierre Larouche & Alexandre de Stree, *The European Digital Markets Act: A Revolution Grounded on Traditions*, 12(7) *Journal of European Competition Law & Practice* 542, 549 (2021).

⁶³ Oles Andriychuk, *Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition*, 44(3) *World Competition* 261, 264 (2021). See also Jean Tirole, *Regulating the Disrupters*, Project Syndicate. (Jan 9, 2019), <https://www.project-syndicate.org/onpoint/regulating-the-disrupters-by-jean-tirole-2019-01>.

⁶⁴ Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (Harper and Brothers 1942).

well be that smaller platforms that are not designated as gatekeepers remain free to employ, amongst others, self-favouring strategies.

Therefore, in the light of the scarce and nascent economics, industrial organisation, and business policy literature, a similar approach that has been taken in Section 19a of the GWB would have provided an interim solution to the perceived pitfalls of Article 102 TFEU until for instance literature on ecosystems⁶⁵ and innovation capabilities⁶⁶ further develop allowing policymakers to definitely conclude on the harmful effects of self-favouring. Now, after the adoption of the DMA, this balancing exercise can only be done concerning the obligations contained in Article 6 during a regulatory dialogue provided for in Article 8 in the light of the *principles of proportionality and effectiveness*.

4. The interplay between ex-post competition law enforcement and ex-ante regulatory intervention

4.1. The parallel application of Article 102 TFEU, the DMA, and national competition law rules

It is already settled in the case law of the ECJ that sector-specific rules do not preclude the parallel application of Article 102 TFEU.⁶⁷ The only exception is the doctrine of ‘state compulsion’, where national legislation prescribes practices that are prohibited by Article 102 TFEU.⁶⁸ In this scenario not the undertakings infringing Article 102 TFEU shall be held liable but Member States themselves for a breach of Article 4(3) TEU in conjunction with Article 102 TFEU.⁶⁹ Competition law applies in parallel to sectoral rules in other cases.⁷⁰ This approach may be generally beneficial from a substantive law standpoint for a number of reasons. The DMA is only intended to cover a handful of large digital platforms that are designated as gatekeepers and not inevitably dominant within the meaning of Article 102 TFEU. Therefore, Article 102 TFEU can still play at least a residual role in enforcing self-favouring by dominant digital platforms that are not designated as gatekeepers within the meaning of the DMA. Moreover, Article 102 TFEU can also fulfil a gap-filling function and capture self-favouring

⁶⁵ See Michael G. Jacobides & Ioannis Lianos, *Ecosystems and competition law in theory and practice*, 30(5) *Industrial and Corporate Change* 1199 (2021).

⁶⁶ See Nicolas Petit & David J. Teece, *Innovating Big Tech firms and competition policy: favoring dynamic over static competition*, 30(5) *Industrial and Corporate Change* 1168 (2021).

⁶⁷ Case C-280/08, *Deutsche Telekom v Commission* [2010] ECR I-09555; Case C-123/16, *Orange Polska*, ECLI:EU:C:2018:590.

⁶⁸ Case C-359/95 P, *Commission and France v Ladbroke Racing* [1997] ECR I-06265, para. 33: ‘If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply’.

⁶⁹ Case C-13/77, *INNO v ATAB* [1977] ECR 02115, paras 30-31.

⁷⁰ Case C-123/16 P, *Orange Polska*, *supra* n. 67; Case C-280/08, *Deutsche Telekom*, *supra* n. 67.

practices that do not fall within the scope of the specific obligations of the DMA.⁷¹ From an institutional point of view, parallel application of competition law and regulation creates a rivalry between enforcers – such as the EC and national competition authorities (NCAs) – that can contribute to solving the problem of ‘regulatory capture’.⁷²

However, the close doctrinal and institutional relationship between the DMA and Article 102 TFEU may also create tensions. The concurrency between Article 102 TFEU, the DMA along with national competition rules such as Section 19a of the GWB may lead to double or triple jeopardy and diverging remedies. It may also result in legal uncertainty, increased compliance costs, and disproportionate penalties.⁷³ These concerns are especially relevant as the BkA has already designated *Meta*, *Alphabet*, *Amazon*, and *Apple* as entities subject to Section 19a of the GWB (some of them are still pending on appeal). And Microsoft could soon be included in this group.⁷⁴ This partially overlaps with the Commission designating *Alphabet*, *Amazon*, *Apple*, *ByteDance*, *Meta*, and *Microsoft* as gatekeepers.⁷⁵

For this reason, the approach taken in a similar earlier asymmetric economic regulatory regime established by the EECC could be considered as an example that arguably better manages the relationship between the different concurrent regulatory regimes. The reason for this is that the EECC is explicitly based on the inadequacy of competition law to deal with market failures in the telecommunication sector.⁷⁶ Moreover, the EECC foresees its gradual disappearance.⁷⁷ This is evident when comparing the *Relevant Markets Recommendation* of 2003 (containing 18 markets susceptible to ex-ante regulation) and of 2020 containing only two markets.⁷⁸ In contrast, the DMA foresees its complementarity and permanent concurrent

⁷¹ Lena Hornkohl, *Article 102 TFEU, Equal Treatment and Discrimination after Google Shopping*, 13(2) *Journal of European Competition Law & Practice* 99, 100 (2022).

⁷² Martin Hellwig, *Competition Policy and Sector-Specific Regulation for Network Industries*, MPI Collective Goods Preprint No. 2008/29, (2008) <https://ssrn.com/abstract=1275285>, 29. The concept of ‘regulatory capture’ refers to situations where regulatory agencies, which are intended to supervise certain industries, end up being influenced by the firms they are supposed to regulate.

⁷³ Giuseppe Colangelo, *DMA begins*, 11(1) *Journal of Antitrust Enforcement* 116, 119-120 (2023).

⁷⁴ Christophe Carugati, *Will Germany interfere in Brussels’ efforts to tame big tech?*, Bruegel. (April 12, 2023), <https://www.bruegel.org/first-glance/will-germany-interfere-brussels-efforts-tame-big-tech>.

⁷⁵ European Commission: *Commission designates six gatekeepers under the Digital Markets Act* (6 September 2023), https://digital-markets-act.ec.europa.eu/commission-designates-six-gatekeepers-under-digital-markets-act-2023-09-06_en.

⁷⁶ Directive (EU) 2018/1972, *supra* n. 28, at Arts 64 and 67. The imposition of regulatory obligations within the framework of the EECC is conditional upon a) high and non-transitory structural, legal, or regulatory barriers to entry; b) market structure which does not tend towards effective competition within the relevant time horizon within those entry barriers; and that c) *competition law alone is insufficient to adequately address the identified market failure(s)* (emphasis added).

⁷⁷ Peter Alexiadis & Caio Mario Da Silva Pereira Neto, *Competing Architectures for Regulatory and Competition Law Governance* 18 (EUI Research Report 2019) <https://fsr.eui.eu/publications/?handle=1814/63285>.

⁷⁸ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114/45, 8.05.2003. Cf. Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector

application with competition law even though the DMA is said to be based on the belief that Article 102 TFEU is not effective in tackling certain conduct of dominant digital platforms.⁷⁹ The gatekeeper designation criteria of the DMA are not connected to the inadequacy of Article 102 TFEU either. In light of the above, it would be legitimate to consider the modification of the criteria for gatekeeper designation similarly to the three-criteria test enshrined in the EEC Directive to reflect concerns of double jeopardy, larger compliance costs, and potentially conflicting decisions.

4.2. The principles of *ne bis in idem*, proportionality, sincere cooperation, and the legality of practices under regulatory statutes

The risk of double jeopardy is further exacerbated by the recent interpretations of ECJ of the principles of *ne bis in idem*, proportionality, sincere cooperation, and the (il)legality of practices under sectoral laws when applying competition law in parallel to regulation. According to the most recent judgments interpreting these principles, the EC, NCAs, and national regulatory authorities (NRAs) have few constraints to apply the DMA, EU competition law, and national competition law to essentially the same conduct against the same undertakings. Accordingly, when the issues connected to the concurrency of different regimes arise in the context of legal disputes on the subject matter of the DMA – in the absence of specific conflict of law rules – it is important that the ECJ relies on and further develops these existing principles in order to manage the relationship between the concurring regimes.

The goals of contestability, fairness, and EU market integration pursued by the DMA are arguably different from the goals pursued by competition law that seeks to ensure ‘that competition in the internal market is not distorted’.⁸⁰ Accordingly, as a result of these different goals, by analogy, pursuant to the judgment of the ECJ delivered in the *bpost* case, the principle of *ne bis in idem* may not prevent the EC acting as a competition authority from penalizing an undertaking that holds a dominant position under Article 102 TFEU for essentially the same conduct that was subject to scrutiny by the EC acting under the DMA.⁸¹ The reason for particular concern arises from the *bpost* judgment of the ECJ, where the ECJ held that given the different goals pursued by the postal regulation and competition law, it is legitimate to punish the Belgian postal incumbent under both sectoral rules and competition law for its discriminatory tariffs.⁸² The duplication of proceedings and penalties were,

susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code, OJ L 439/23, 29.12.2020.

⁷⁹ Peter Alexiadis & Alexandre de Stree, *The EU’s Digital Markets Act: Opportunities and Challenges Ahead*, 23(2) Business Law International 163, 190 (2022).

⁸⁰ Case C-117/20, *bpost*, ECLI:EU:C:2022:202, para. 46.

⁸¹ Charter of Fundamental Rights of the European Union, OJ C 326/391, 26.10.2012, Art. 50: ‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’.

⁸² Case C-117/20, *bpost*, ECLI:EU:C:2022:202, paras 57-58. Para. 58 states that ‘Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as not precluding a legal person from being fined for

however, conditional upon, inter alia, the possibility for firms to predict which acts or omissions can be covered by different proceedings.⁸³ Moreover, the ECJ ruled that competent authorities must cooperate with each other pursuant to their *duty of sincere cooperation*.⁸⁴ Lastly, in the event of the duplication of proceedings, the overall penalties imposed must be *proportional*.⁸⁵

The risk of double jeopardy is further exacerbated by the possibility for Member States to bring action against gatekeepers under either EU or national competition law. Article 1(5) of the DMA, which is supposed to resolve this issue, only stipulates that Member States must not impose additional obligations on gatekeepers to achieve contestability and fairness. This arguably does not prevent firms from being subject to investigations and possibly penalties based on national competition law rules that do not apply to 'gatekeepers' but to dominant undertakings and seek to achieve different goals as compared to the DMA. Finally, Member States arguably remain free to adopt and enforce specific national provisions such as Section 19a of the GWB targeting undertakings of paramount significance for competition across markets – and not gatekeepers – provided that these laws pursue different goals than those pursued by DMA.⁸⁶

Moreover, by analogy, based on the ECJ's recent judgment delivered in the *Meta* case, non-compliance with the DMA by a gatekeeper may be a vital clue, amongst the relevant circumstances, in the assessment of whether the conduct also amounts to an abuse under Article 102 TFEU.⁸⁷ This concern arises pursuant to the *Meta* judgment, where the ECJ ruled that an NCA may have to examine when applying Article 102 TFEU, whether the practice of a dominant firm complies with rules other than those that relate to competition law such as the GDPR in the case at hand.⁸⁸ Therefore, by analogy, based on the above NCAs could incidentally

an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed'.

⁸³ *Ibid.*

⁸⁴ Treaty on the European Union, OJ C 326/13, 26.10.2012, Art. 4(3): 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

⁸⁵ Charter of Fundamental rights of the European Union, *supra* n. 81, at Art. 52(1): 'Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

⁸⁶ de Stree, *supra* n. 37, at 55.

⁸⁷ Case C-252/21, *Meta Platforms*, ECLI:EU:C:2023:537, para. 47: 'the compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers'.

⁸⁸ *Ibid.*, para. 48: 'it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law'.

interpret the legality of a conduct under the DMA in the context of an abuse of dominance investigation and may rely on the non-compliance with the DMA to establish an abuse.⁸⁹

Provided that the obligations of the DMA are sufficiently clear and precise, they may be relied upon by individuals before Member States' courts.⁹⁰ The DMA not only foresees this possibility but seeks to foster private action by explicitly providing for the possibility of representative actions in Article 42. The tension that may arise from private litigation and public enforcement is sought to be handled by a specific cooperation mechanism laid down in Article 39. According to this, national courts cannot adopt decisions that are in conflict with the decision of the EC under the DMA. However, Article 39 and the conflict of laws rule enshrined in it does not deal with potential conflicts as a result of decisions adopted by national courts under Article 102 TFEU. Consequently, damages actions before national courts against dominant platforms that are also gatekeepers could lead to legal disputes similar to the *DB Station* case.⁹¹ The issue in this case related to the procedure to be followed in the event Article 102 TFEU is relied upon by a private party before a national court based on the alleged illegality of railway access charges when the German railway regulator has already decided on the legality of such charges based on sectoral rules. Pursuant to the ECJ's judgment in the *DB Station case*, national courts, have to wait for the adoption of a decision by the competent NRA before ruling on an Article 102 TFEU claim, in such a situation where an NRA has exclusive competence, in line with the principle of sincere cooperation.⁹² Following the same approach in the context of the DMA could, in turn, undermine the effectiveness of Article 102 TFEU.

5. Conclusion

To conclude, this paper posed the question of how we shall deal with algorithmic bias by digital platforms resulting in self-favouring given the widespread use and ambiguous effects of the practices on competition and economic welfare. The foundations of the regulatory prohibition of self-favouring under Article 106 TFEU, and the EEC suggest that the underpinning logic of Article 106 TFEU and the EEC spilled over into the case law of Article 102 TFEU. Then the paper identified the obligations set out in the recently adopted laws specifically targeting preferential treatment by digital platforms. These obligations range from imposing

⁸⁹ *Ibid.*, para. 47.

⁹⁰ Case C-26/62, *Van Gend en Loos* [1963] ECR 00003.

⁹¹ Case C-721/20, *DB Station*, ECLI:EU:C:2022:832.

⁹² *Ibid.*, para. 88: 'Article 30 of Directive 2001/14 must be interpreted as not precluding national courts from applying Article 102 TFEU and national competition law concurrently, in order to hear and determine a claim for reimbursement of infrastructure charges, *provided, however, that the competent regulatory body has previously ruled on the lawfulness of the charges in question*. In that context, a duty of sincere cooperation is incumbent upon those courts which are required to take account of decisions delivered by that body as a criterion of assessment and to give reasons for their own decisions in the light of all the documents in the files submitted to them' (emphasis added).

transparency, through an anti-competitive presumption, to an outright prohibition contained in the P2B Regulation, Section 19a of the GWB and the DMA respectively.

The comparison of these different approaches – from an error-cost perspective – suggests that the generalised statutory prohibition of the DMA on self-favouring by gatekeepers that do not take into account the diverging business models, monetization strategies, and the nature of the service or product, from a substantive law point of view, may not be well suited to deal with a practice with ambiguous effects on competition. To mitigate this concern, the Commission may want to make extensive use of the possibility to further specify the obligations set out in Article 6 of the DMA in a regulatory dialogue to account for the heterogeneity of platforms and self-favouring practices. The principles of proportionality and effectiveness may in any case warrant a more individualized assessment.

Finally, the interplay between Article 102 TFEU, the DMA, and national competition laws suggests that the concurrent application of the DMA in addition to European and national competition law rules may lead to diverging decisions, increased compliance costs, and legal uncertainty. One solution to mitigate these risks could be that the gatekeeper criteria be modified, similarly to the approach taken in the EECC, to be based upon the inadequacy of competition law alone to tackle market failures in the digital sector. Alternatively, it is left for the ECJ to further develop and rely on the existing principles – such as those relating to *ne is in idem*, *sincere cooperation*, *proportionality*, and *(un)lawfulness of conduct* under sectoral rules – to help manage the relationship between these instruments.