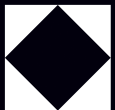



Thomas Höppner

Self-Preferencing in Online Search

under Article 6(5) DMA



Nomos

<https://doi.org/10.5771/9783748944942-1>, am 21.10.2024, 09:28:19
Open Access –  - <https://www.nomos-elibrary.de/agb>

Thomas Höppner

Self-Preferencing in Online Search

under Article 6(5) DMA



Nomos

© Coverpicture: Tasphong – stock.adobe.com

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

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

British Library Cataloguing-in-Publication Data

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

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

Library of Congress Cataloguing-in-Publication Data

Höppner, Thomas

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

Thomas Höppner

218 pp.

Includes bibliographic references and index.

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

1st Edition 2024

© Thomas Höppner

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

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

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

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



Online Version
Nomos eLibrary



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

Foreword

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

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

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

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

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

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

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

Berlin, Mai 2024

Thomas Höppner

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

Table of Contents

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

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

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

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

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

Table of Contents

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

List of abbreviations

The following terms and definitions are used throughout this report:

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

List of abbreviations

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