B. Legal, technical, and economic background

I. Article 6(5) DMA in a nutshell

1. Equal treatment: The DMA's central obligation

Having been identified as one of three most commonly experienced problematic trading practices[1], banning gatekeepers from self-preferencing or self-favouring[2] is one of the DMA's most central objectives as such practice raises barriers to entry and expansion for those competing with the gatekeeper.[3] Originally identified in the *Google Shopping* decision[4], the significant harm of (leveraging through) self-preferencing by dominant platforms has led to several obligations in the DMA that target different forms of preferential treatments. The most central prohibition is Article 6(5) DMA relating to a favourable ranking of own services. 8

The prohibition's core area of application is the presentation or direct offering (i.e. embedding) of services on the search results pages (SERPs) of an online search engine (OSE) such as Google Search. Gatekeepers that provide an OSE and, due to their vertical integration, also other services, are not to crawl, index or display such distinct First-Party Services[5] more favourably than a similar service provided by a third party (Third-Party 9

1 Commission, "Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)", Staff Working Document, Impact Assessment Report of 15/12/2020, SWD(2020) 363 final, Part 1, Table 2, p. 57.

2 The term 'self-preferencing' is neither used in the DMA nor in the Commission's *Google Search (Shopping)* decision that established the theory of harm underlying Article 6(5) DMA. Both only refer to "favouring" or a "more favourable" treatment. However, in correspondence describing Google's behaviour, the European Commission and practitioners have extensively used the term 'self-preferencing'. This book therefore uses 'self-favouring' and 'self-preferencing' as synonyms.

3 See recitals (50)-(51) in connection with recital (31): "*This Regulation should therefore ban certain practices by gatekeepers that are liable to increase barriers to entry or expansion*".

4 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*.

5 "First-Party Service" shall refer to a distinct service of the gatekeeper which is presented, ranked, or linked within or offered through the interface of its online search engine.

Service[6]). A First-Party Service that may not be favoured can be any service of the gatekeeper as defined in Article 2(1) and (27) DMA, thus including any service provided by linked or connected undertakings that form a group through the direct or indirect control[7] by another undertaking.

10 However, the ban is designed broadly and does not just address how an OSE produces, displays, and ranks services on its SERPs following a search query. Article 6(5) DMA prohibits favouring in any OSE interface. Such OSE interfaces entail any information displayed prior, during or in response to a search query. Thus, the favourable display of content on the "home screen" of an OSE may be prohibited. For Google Search, for example, this encompasses the homepage www.google.com (and its national equivalents), as well as the starting screens of other access points that any searchers use to access the service, including the Google Search widget on Android mobile devices, syndicated Google Search input boxes on third-party websites, and discover feeds (which show results utilising end users' search history as implicit query).[8]

11 With such broad prohibition, Article 6(5) DMA addresses two interrelated[9] harms associated with platform envelopment and leveraging strategies more generally. First, by preferencing First-Party Services operating on ancillary markets, the gatekeeper may extend its core platform's dominance into such ancillary markets (dominance expansion effect). The prohibition thus secures undistorted (i.e. fair) competition for all those services that are distinct from the gatekeeper's OSE. Second, by preferencing distinct but related First-Party Services, a gatekeeper may also increase barriers to enter the market for the core platform service itself as it impedes rivals' growth and their abilities to expand (dominance maintenance effect).[10] In

6 "Third-Party Service" shall refer to 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 online search engine.

7 As defined in Article 2(28) DMA.

8 Regarding such access points of Google Search, see Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 89.

9 See recital (34) DMA: "*Contestability and fairness are intertwined. The lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices by a gatekeeper can reduce the possibility of business users or others to contest the gatekeeper's position. A particular obligation in this Regulation may, therefore, address both elements*".

10 Both, the anti-competitive expansion and the anti-competitive maintenance effect of a platform leveraging by self-preferencing in search results, had been identified in the Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*.

the case of an OSE, the prohibition of self-preferencing thus keeps the OSE itself contestable. This is achieved by ensuring that an OSE may not prevent providers of specialised search services, such as for flights, hotels or products or a combination thereof, from reaching a critical mass of users that would allow them to successively expand their search capabilities, possibly even one day into that of a full OSE.[11]

By definition, designated gatekeepers enjoy a particular strategic market status by controlling crucial gateways for business users to reach end users. A gatekeeper therefore shall not take advantage of the critical intermediary role to shield its OSE from competition and thereby further entrench its position or to unfairly leverage such position to enter the market for a distinct service, simply by ranking its own service more prominently, or by partly or entirely embedding it into the online interfaces of its OSE.[12] 12

To ensure maximum effectiveness, the DMA clarifies that favourable "*[r]anking should in this context cover all forms of relative prominence*".[13] Its prohibition "*should also apply to any measure that has an equivalent effect to the differentiated or preferential treatment in ranking*".[14] The gatekeeper shall "*ensure the compliance with this Regulation by design.*"[15] For such compliance by design, any necessary measures should be "*integrated as much as possible into the technological design*" used by the gatekeeper.[16] Moreover, the gatekeeper bears the burden of demonstrating compliance, including 13

However, (unlike in the U.S. Google Search case), the strengthening of the markets for general search services had only an additional argument, dealt with in merely three recitals (641-643). The General Court, while not denying the potential harm, considered that the Commission had not sufficiently substantiated the detrimental effects.

11 Both harms of leveraging by self-preferencing in OSE rankings had been identified in Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*. However, the defensive element (strengthening of the markets for general search) had only been dealt with as a side-line. The General Court, while not denying the concerns, found that the Commission had not provided sufficient evidence to substantiate them.

12 See recital (51) sub-para 2 DMA: *"[S]uch gatekeepers have the ability to undermine directly the contestability for those* [own separate] *products or services on those core platform services, to the detriment of business users which are not controlled by the gatekeeper*".

13 Recital (52) sentence 3 DMA.

14 Recital (52) sentence 4 DMA.

15 Recital (65) sentence 2 DMA.

16 Recital (65) sentence 3 DMA.

that any measures implemented are "*effective in achieving the objectives of this Regulation and of the relevant obligation*".[17]

2. Objectives: contestability and fairness

a. Addressing gatekeeper's conflicts of interest

14 At its core, Article 6(5) DMA is targeted at resolving a gatekeeper's conflict of interest.[18] A conflict of interest arises where a gatekeeper is in a dual role as an (i) intermediary for third-party businesses (and as a rule-maker in such capability) and an (ii) undertaking directly providing products or services competing with such businesses (i.e. a downstream market participant).[19] For the operator of an OSE, such conflict arises from providing services that are distinct from its OSE but are ranked and displayed by it in its SERPs or other interfaces. A gatekeeper providing a certain service has the incentive to present such service more prominently on the online interfaces of its OSE. A relevant conflict thus exists whenever a gatekeeper's OSE may respond to a query with search results that favour a distinct gatekeeper service over a third party providing a similar service.

15 Favouring of a distinct First-Party Service through an OSE may come in various forms. Article 6(5) DMA prohibits the use of "search results" as a means to this end. Article 2(23) DMA defines those "search results" that a gatekeeper may not use to favour itself.

According to such definition, self-preferencing may occur through

> "*any information in any format, including textual, graphic, vocal or other outputs, returned in response to, and related to, a search query, irrespective of whether the information returned is a paid or an unpaid result, a direct answer or any product, service or information offered in connection with the organic results, or displayed along with or partly or entirely embedded in them*".

17 Article 8(1) DMA.

18 Recital (51) DMA: "*Gatekeepers are often vertically integrated and offer certain products or services to end users through their own core platform services, or through a business user over which they exercise control which frequently leads to conflicts of interest*".

19 Recital (51) sub-para 2 DMA.

It follows from this definition that the provision of any specific information on any online interface[20] of an OSE can have a dual role: It may appear as a "search result" of the OSE while simultaneously providing a first-party "product" or "service" that is distinct from the OSE.[21] This is the case whenever the provision of such specific information goes beyond the functionality of an OSE, as defined in Article 2(6) DMA, thereby constituting a distinct service. Where the offering of certain information via an OSE constitutes such distinct service, Article 6(5) DMA obliges the gatekeeper to ensure that any third party providing a similar service is not disfavoured. Such party needs to obtain an equivalent opportunity to provide its service through the OSE. 16

b. Addressing platform envelopment strategies

As a specific example for illegitimate self-preferencing, recital (51) mentions "*the situation whereby a gatekeeper provides its own online intermediation services through an online search engine*". This relates to the situation where a gatekeeper offers a special search or intermediation service, such as for the comparison of hotels, flights, or products, directly on the SERPs of its OSE or within any other interface, in particular through dedicated 'OneBoxes' – groups of results specialised in a particular topic.[22] By doing so, a gatekeeper is effectively tying, in a technical sense, the functionalities of its designated OSE to that of its distinct intermediation service so as to leverage shared user relationships and common components to create a multi-platform bundle. Being referred to in economics as "platform envel- 17

20 "Online interface" shall mean any software, including a website or a part thereof, and applications, including mobile applications, through which end users may access or receive information. In case of an OSE, the most relevant interfaces are the home-screen and results pages of any website or application that serves as an access point for end users to use the search service.

21 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 96.

22 See CMA, "Online platforms and digital advertising", Market Study Final Report, 2020, at 3.132 "*specialised search providers expressed concerns about Google self-preferencing its Google Flights, Google Hotel Ads, and Google Local Search One-Boxes. They submitted that Google places these boxes prominently at the top of the SERP where the user is more inclined to click. They argued that the prominence of 'One-Boxes' has the effect of diverting traffic away from specialised search providers, making it more difficult for them to compete*".

opment"[23], such strategies are one of the central harms the DMA seeks to curb.[24] Envelopment by self-preferencing or outright tying is particularly problematic if as a next step the gatekeeper denies third parties, providing a similar intermediation service, equal access to its OSE and user base, thereby ultimately foreclosing competition.[25]

18 To effectively prevent harmful enveloping by digital gatekeepers, recital (51) DMA clarifies that unlawful self-preferencing occurs not just where a gatekeeper service is preferably "*ranked in the results communicated by online search engines*" but also where it is "*partly or entirely embedded in online search engines results*" or "*groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine*".

19 Moreover, according to Article 6(5) sentence 2 DMA, the ranking of any service by the gatekeeper in relation to a similar third-party service must be "fair" and "non-discriminatory". To be "fair, any intended or implemented measures to achieve an equal ranking need to "*ensure that there is no remaining imbalance of rights and obligations on business users and that the measures do not themselves confer an advantage upon the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users*".[26] To be "non-discriminatory", any intended or implemented measures to achieve an equal ranking of a First-Party and a similar Third-Party-Service may not discriminate against other business users of the OSE.

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23 *Eisenmann/Parker/Van Alstyne*, "Platform Envelopment", (2011), Strategic Management Journal Vol. 32, No. 12. See further below at 3.a.

24 *de Streel/Liebhaberg/Fletcher/Feasey/Krämer/ Monti*, "The European Proposal for a Digital Markets Act: A First Assessment", (2021), CERRE Assessment Paper, (distinguishing four underlying theories of harm, i.e., lack of transparency, platform envelopment/lack of access to gatekeepers' platforms and data, lack of mobility, and lack of balance), p. 6, 18, 20; equally *Monti*, "The Digital Markets Act – Institutional Design and Suggestions for Improvement", (2021), TILEC Discussion Paper No. 2021–04, p. 3; *Schweitzer*, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal", (2021), ZEuP 2021, p. 22; see also *Portuese*, "The Digital Markets Act: European Precautionary Antitrust", (2021), ITIF, p. 49 "*the DMA prohibits the envelopment strategy not only for gatekeepers' core services but also for third-party services*. See further below at 3.a.aa.

25 *Cennamo*, "Competing in Digital Markets: A Platform-Based Perspective", (2019), Academy of Management Perspectives, p. 28 et sub.

26 Article 8(8) DMA.

In effect, this means that gatekeepers may neither implement measures to further strengthen their core platform service nor discriminate against certain business users under the disguise of ensuring equal treatment in ranking vis-à-vis other business users.[27]

c. Covering any form of self-preferencing in online search

Article 6(5) DMA covers a wide range of self-preferencing practices relating to search. In general, the prohibition has a presentational component, relating to how services are presented within the online interfaces of an OSE, and an algorithmic component, relating to the selection of the services that are presented.[28] Recitals (51) and (52) DMA identify the following three most relevant scenarios of self-preferencing in search: 20

- **Favouring teasers to a distinct service on the OSE interface:** The query is answered with a SERP that ranks "teasers" (links, snippets, logos, etc.) for the First-Party Service more prominently than corresponding teasers for a similar Third-Party Service. As such "teasers" encourage users to click, their prominent ranking shifts users to the gatekeeper's teased service.[29]
- **Directly offering the distinct service through the OSE interface:** The online interface of the OSE is used to provide a distinct service. A query entered on an OSE may suggest a commercial interest to use a particular online service or to purchase a particular product. The gatekeeper may seek to expand its activities by providing such sought-after service to the end user directly through the interface of its OSE, rather than to lead the user to the websites of third parties providing such service. To this end, the gatekeeper may provide its own respective First-Party Service anywhere above, within or along the (normal) results of the OSE. The most prominent example is the offering of a specialised search service

27 See below at IV.3.d-e.

28 *Thomas Kramler*, DG Comp Head of Unit, on the panel "Meet the Enforcers: the EC's DMA Team", ABA 2024 Antitrust Spring Meetings, 11 April 2024 concerning the Article 6(5) investigation.

29 See recital (51) DMA: "*This can occur for instance with products or services [...] which are ranked in the results communicated by online search engines*".

through the groupings of commercial offerings relating to a particular sector (such as hotels, flights, products).[30]

– **Favouring the output or the content of the First-Party Service on the OSE interface:** The query is answered with a SERP in which the output or content of the distinct First-Party Service is displayed more prominently than the output or content of a third party providing a similar service (i.e. of a Third-Party Service).[31] Short of directly offering its distinct service (as in the second scenario), here the gatekeeper "merely" favours the output or the content that its First-Party Service generates. The output can be the result of any online intermediation, information retrieval (such as in the form of a Knowledge Panel) or an AI-based generation system (such as through an AI-chatbot). The content may be any information provided to the First-Party Service by its respective business users. There are various ways how a gatekeeper may implement such preferential integration of its First-Party Services into its OSE. It may, for instance, share the query data entered on its OSE with its First-Party Services in real-time, retrieve their corresponding content or output and then display it prominently on the SERP of the OSE. Examples are the prominent display of specialised results for products, hotels or flights that an OSE draws not from its general search index and algorithm but from the proprietary indexes of its distinct specialised search services (such as Google Shopping, Hotel, Flights) in real time.

3. Gatekeeper's choice: (i) disintegrate own service, or (ii) integrate third parties equally without conferring an advantage upon the gatekeeper

21 The DMA does not take an issue with a gatekeeper's interest to expand the number of services it provides through the interface of its OSE. Article 6(5) DMA is only concerned about the gatekeeper's incentives to (i) integrate its own service only, to the exclusion of others, or (ii) integrate several services

30 See recital (51) DMA: "*This can occur for instance with products or services [...] which are partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine*".

31 See recital (51) sub-para 2 DMA: "*the gatekeeper can favour its own content over that of third parties*", "*Other instances are those of [...] videos distributed through a video-sharing platform*".

in a way that confers a disproportionate advantage upon the gatekeeper. Article 6(5) DMA therefore does not outright prohibit the embedding of a First-Party Service or the display of content or output of a service that goes beyond online search. The gatekeeper may go beyond the functions of an OSE if it ensures that any third party providing a similar distinct service (i.e. a Third-Party Service) obtains the same opportunity to provide its service through the OSE. The option to integrate the Third-Party Service ensures that a gatekeeper may always expand its offerings, just not necessarily by using only its own technology, and not in a way that confers an unjustified advantage upon it. This reflects the observation in tying cases that "*it is quite possible that customers will wish to obtain [separate] products together, but from different sources*".[32]

In any of the three scenarios outlined above, where an OSE may answer a particular query with information that would favour its First-Party Service, the gatekeeper has **two options**: 22

- **Either refrain from displaying information relating to its First-Party Service** (i.e. the teaser to its own service, the provision of such service, or its output) on the online interface of its OSE altogether,[33] which does not preclude an equivalent display outside of the OSE.
- **Or ensuring equal treatment of any third party that offers a service "similar"** to that of the gatekeeper (i.e. Third-Party Service) through a neutral mechanism for selecting and displaying the relevant information:
  - *Equal teasing of Third-Party Services:* tease any Third-Party Service in a non-discriminatory manner on the OSE interface.
  - *Equal embedding of Third-Party Services*: allow and technically enable a third party to embed their similar service into the OSE interface in the same manner and with the same capabilities that the OSE intends to embed its own service – and select the most suitable providers for ultimately appearing on the interface on a non-discriminatory basis.
  - *Equal embedding of content of Third-Party Services:* allow and technically enable any Third-Party Service to display the special output/con-

32 Court of First Instance, judgment of 17/9/2007, Case T-201/04, *Microsoft/Commission*, para. 922.

33 See General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 222: "*The contested decision thus envisages equal access by Google's [CSS] and competing [CSSs] to Google's [SERPs] [...] 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]*".

tent of its similar service in the same manner as the gatekeeper intends to display output/content of its First-Party Service.

23 If the gatekeeper aims for the second option, the obligation to apply "fair" and "non-discriminatory" conditions in Article 6(5) sentence 2 DMA requires that the measures implemented to ensure equal treatment (i) leave no imbalance of rights and obligations on the third party, (ii) do not themselves confer an advantage upon the gatekeeper that is disproportionate to the service it provides to the third party[34] or (iii) discriminate against any business users that may not operate a similar business but a comparable website. As pursuant to Article 8(1) DMA the burden of compliance is upon the gatekeeper, such solution has to be developed at the costs of the gatekeeper and integrated as much as possible into the technological design used by it.[35] Where it fails to develop a solution fulfilling the legal requirements of equality, it may not proceed with its plan to display information relating to its First-Party Service, that is, revert to the first option.

4. The relevant criteria for compliance

24 Article 6(5) DMA sets out three criteria for an infringement:

(1) **Distinct First-Party Service:** The gatekeeper needs to operate a service that is distinct from its OSE, referred to here as First-Party Service. It may offer such service to end users, business users or both on a standalone basis or partly or entirely through the gatekeeper's OSE interface.

(2) **Similar Third-Party Service:** The gatekeeper's distinct service must be "similar" to a service provided by a third party, referred to here as Third-Party Service.

(3) **Favouring of First-Party Service:** The gatekeeper treats its First-Party Service more favourably than the similar Third-Party Service in the ranking, crawling, or indexing of its OSE.

- **Treatment:** There needs to be a conduct prior, during or after the entry of a query that impacts the appearance of a service on the interface of an OSE.
- **More favourable:** The treatment must advantage the First-Party Service.

34 Article 8(8) DMA.

35 Recital (65) sentences 2 and 3 DMA, see also below at III.4.

- **Advantage for First-Party Service:** The treatment must confer an advantage in terms of relative prominence upon an OSE interface.
- **No equivalent for Third-Party Service:** The advantage conferred upon the First-Party Service is not outweighed by an equivalent opportunity for a third party providing a similar service.
- **Remaining imbalances of rights and obligations:** The measures intended or implemented to outweigh the advantage conferred leave an imbalance of rights and obligations to the detriment of a Third-Party Service.
- **Conferral of a disproportionate advantage upon the gatekeeper:** The measures intended or implemented confer an advantage upon the gatekeeper as a whole, such as by entrenching the position of the OSE itself.
- **Discrimination of dissimilar Third-Party Services operating comparable websites:** The measures intended or implemented to outweigh the advantage conferred discriminate against business users other than the providers of a similar Third-Party Service.

Each of those criteria require a further assessment. Overall, they pose three interrelated questions: (i) What constitutes a distinct service (i.e. a First-Party Service), (ii) which service of a third party is similar to that (i.e. a Third-Party Service), and (iii) what constitutes a favourable treatment of a First-Party Service as compared to a Third-Party Service? 25

II. Identifying a distinct First-Party Service

Article 6(5) DMA prohibits the favouring of any distinct "*service or product offered by the gatekeeper itself*". It is irrelevant whether such product or service qualifies as a "core platform service" in the meaning of Article 2(2) DMA. It may consist of any economic activity, whether currently defined or mentioned in the DMA or not. 26

To determine whether a gatekeeper provides a distinct service, it is necessary, as a preliminary step, to identify any activity that may constitute a "service". As a second step, it is necessary to determine whether such activity is to be seen as being "distinct" from that of the gatekeeper's OSE or as an inseparable part thereof. As will be set out below, a relevant criterion for identifying and delineating a distinct service is the purpose for which it is used by either end users or business users or both. The starting point for such analysis is the DMA's definition of the purpose of an OSE. 27

I. Legal framework for the delineation of digital services

28 Article 2(2) DMA lists ten categories of a "core platform service" (CPS). Among others, those categories include (i) online intermediation services (OIS), (ii) online search engines (OSE), (iii) online social networking services and (iv) web browsers. Each of those are further defined and may encompass several distinct services. The OIS category, for example, includes diverse and distinct services such as online marketplaces, software app stores, and specialised search services.[36]

29 To determine whether a gatekeeper's economic activity is distinct from its OSE within the meaning of Article 6(5) DMA, it is first necessary to delineate the boundaries of such service. To delineate those boundaries, a number of provisions in the DMA are relevant, including in particular the following.[37]

a. Annex D(2): integrated services with different purposes or falling within different categories of CPS are always distinct

30 A service that fulfils the characteristics of any of the CPSs listed in Article 2(2) DMA other than an OSE is to be considered as a distinct service, even if there are significant overlaps with the OSE in terms of the service's purposes and user bases. This follows from section D of the Annex to the DMA. The Annex's direct area of application concerns the calculation of 'active end users' and 'active business users' to assess whether identified CPSs meet the quantitative thresholds set out in Article 3(2)(b) DMA. However, by laying out principles for identifying such services in the first place, section D of the Annex is crucial for the delineation of services throughout the DMA.[38]

31 Section D(2)(a) of the Annex determines that services that belong to the same category of CPSs listed in Article 2(2) DMA shall *not* be considered as distinct mainly on the basis that they are provided using different domain names, whether country code top-level domains or generic top-level domains, or any geographic attributes.

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36 See recital (10) P2B-Regulation (fn. 50) and below at 4.d.

37 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, paras. 14–15.

38 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, paras. 14–15.

According to section D(2)(b), CPSs shall be considered as distinct if they are used for different purposes by either their end users or their business users, or both, even if their end users or business users may be the same and even if they belong to the same category of CPSs. 32

Finally, according to section **D(2)(c),** in the case of CPSs that a gatekeeper "*offers in an integrated way*", such services shall be considered distinct if they 33

(i) do not belong to the same category of CPSs pursuant to Article 2(2) DMA; or
(ii) are used for different purposes by either their end users or their business users, or both, even if their end users or business users may be the same and even if they belong to the same category of CPS pursuant to Article 2(2) DMA.

It follows that CPSs may be considered distinct even if they fall within the same category of CPSs if the purpose for which they are used differs. The same applies when the gatekeeper offers services to end users or business users "in an integrated way", i.e. through the same online interfaces. Furthermore, services that do *not* fall within the same category of CPSs, always need to be considered as distinct, even if they are provided together in an integrated way, section D(2)(c)(ii). In other words, despite a common provision to the same user base, services may be considered as forming a single service only if they are used for the same purpose from both an end user and a business user perspective, or if they belong to the same category of CPSs listed in Article 2(2) DMA.[39] 34

The Annex deals specifically with the delineation of one CPS from another CPS for the purpose of the designation process. This explains why section D only refers to the separation of "core" platform services. However, the legal requirements for the delineation of CPSs must equally apply to the delineation of other digital services under the DMA, including in the context of Article 6(5), as conceptually there is no difference.[40] 35

39 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 17.

40 Each CPS started off as a distinct service. The only difference is the high number of users of CPSs. However, the number of users bears no relevance for the identification of a distinct service.

b. Application to Article 6(5) DMA

36 The Annex to the DMA is crucial in particular for identifying a distinct service that a gatekeeper provides "through" the online interfaces of its OSE, i.e. "in an integrated way". Section D(2)(c) establishes that, in any event, a CPS that is integrated in another CPS should be considered distinct from the latter, if both belong to different categories of CPSs pursuant to Article 2(2) DMA.[41]

aa) Consequences for designated CPS

37 In case of Alphabet, the Commission has designated the general search service Google Search as a CPS in the form of an OSE. In addition, it designated the "*comparison-shopping service*" Google Shopping as well as the "*online-based consumer map and navigation service*" Google Maps both as CPSs, both respectively in the form of an OIS.[42]

38 OSE and OIS belong to different categories of CPSs. It follows from section D(2)(c) of the Annex to the DMA that if Google provides parts, or all, of such comparison-shopping or map- and navigation services "in an integrated way", i.e. through the interfaces of its OSE, they still do not belong to the same category of CPSs and therefore constitute distinct services.[43] Such delineation must be applied consistently across the DMA. It therefore also applies in the context of Article 6(5) DMA.

39 Such character as a distinct service is irrespective of whether end users or business users consider the provision of comparison-shopping or map- and navigation OISs as forming part of an "*integrated Google Search experience*".[44] Section D(2)(b) of the Annex explicitly prevents the assumption of a "single service" when the services in question belong to different categories of CPSs, such as an OSE on one hand and an OIS on the other.

41 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 222.

42 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*.

43 Commission decision of 5/9/2023, Cases DMA.100018 et sub., *Amazon (designation)*, para. 50: "*Therefore, even though parts of Amazon's online advertising services may be provided in an integrated way with the Amazon marketplace CPC, they do not belong to the same category of CPS and therefore constitute distinct CPSs*".

44 Commission decision of 5/9/2023, Cases DMA.100018 et sub., *Amazon (designation)*, para. 27: "*The Commission considers that 'Amazon Retail' and the logistics service 'Fulfilment by Amazon' constitute distinct services […] notwithstanding the fact that*

It follows from the above that, regardless of whether Google provides its Google Shopping and Google Maps OISs on a standalone basis or through its OSE, into which it integrates such services, these services are considered distinct from the OSE. As such, pursuant to Article 6(5) DMA, they shall not be favoured. 40

bb) Application to other gatekeeper services

The principles laid out in the Annex to the DMA do not just apply to the delineation of those CPSs that were ultimately designated as they passed the quantitative thresholds of Article 3(1)(b) DMA but to any service that falls under the definition of a CPS. Accordingly, whenever a gatekeeper offers all, or parts, of any activity that qualifies as any CPS, as defined in the DMA, "in an integrated way" with another CPS, such services are considered distinct. 41

For example, the Commission found that 42

> *"even if the online intermediation CPS [Facebook] Marketplace is integrated into Meta's online social networking CPS Facebook, those services do not belong to the same category of CPSs and should therefore be considered to constitute distinct CPSs."*[45]

Transferred to an OSE as one category of CPSs, this means that any activity entirely or partially offered by the gatekeeper "in an integrated way" through the online interfaces of its OSE, which fulfils a different purpose for either end users, business users or both, including the characteristics of any other CPS listed in Article 2(2) DMA, is considered a distinct service in the context of Article 6(5) DMA. This applies even where certain end users, business users or both consider the services as part of an "integrated Google Search experience"[46] and irrespective of whether the services are also offered on a standalone basis or only through the interface of the OSE. 43

both services are provided through 'Amazon Store' and that they form part of an integrated 'Amazon Store' experience from an end user's perspective".

45 Commission decision of 5/9/2023, Cases DMA.100020 et sub., *Meta (designation)*, para. 250.

46 Commission decision of 5/9/2023, Cases DMA.100018 et sub., *Amazon (designation)*, para. 27.

44 Such finding is particularly relevant against the background of recital (51) DMA, which explains that services "*distinct or additional to*" an OSE may be (i) displayed along with, (ii) ranked in, or (iii) embedded in the results of that OSE. According to recital (51), the offering of groups of specialised search results shall constitute a distinct service if considered or used by certain end users as fulfilling a purpose distinct or additional to that of an OSE. In light of that explanation, read in conjunction with the Annex to the DMA, services offered to end users or business users through the SERPs of an OSE that either fall in a different category of CPSs, such as any OIS, or which are considered or used by certain users for different purposes than that of an OSE, are considered distinct services for the purpose of Article 6(5) DMA[47] and may therefore not be favoured.

45 To prevent any circumvention, Article 13(1) DMA provides that no practice by an undertaking providing CPSs which consists of segmenting, dividing, subdividing, fragmenting, or splitting those services through contractual, commercial, technical or any other means in order to evade the quantitative thresholds laid down in Article 3(2) DMA shall prevent the Commission from designating it as a gatekeeper. Moreover, according to Article 13(4) DMA, a designated gatekeeper shall not engage in any behaviour that undermines effective compliance with the obligations of Article 6 DMA. Read in conjunction, a gatekeeper may not segment, divide, subdivide, fragment, or split its services to circumvent the finding of distinct services pursuant to Article 6(5) DMA.

46 It follows from the above that to identify whether a service is distinct from an OSE, it is essential to determine the purpose and characteristics of such OSE (see next section). Any activity ranked in, or directly provided through, the interface of an OSE that serves a different purpose than an OSE, as defined in Article 2(5) DMA, is to be regarded as a distinct service.

2. Definition of an OSE

a. Irrelevance of the current design of search engines

47 Part of the problem that the DMA aims to solve is the fact that over the last 20 years, gatekeepers have consistently tied further services to their OSEs, often without providing users a choice to obtain such services separately

47 Commission decision of 5/9/2023, Cases DMA.100017 et sub., *Microsoft (Bing) (designation)*, para. 49.

or from a third party via the OSE. By enveloping ever more seemingly free services around the core search engine, gatekeepers have created a multi-platform service bundle. The attractiveness of such free bundles, in turn, raised end users' expectations as to what an OSE should look like and encompass. As a result, also competing, smaller OSEs were often obligated to adopt equivalent bundling strategies to remain competitive from the end users' perspective. They had to try their best to provide a similar 'all-out-of-one-hand' user experience, even where this made no commercial sense and went well beyond the function of an OSE.

48 Against the background of such previous platform envelopments, it is not possible today to establish which activities are genuinely part of an OSE and which constitute a distinct service simply by looking at the status quo, i.e. the current configuration of the designated OSE or other OSEs on the market.[48] It is neither possible to confer the purpose of an OSE for end users, business users or both from their current user experience. It is apparent that the more distinct services (i.e. First-Party Services) a gatekeeper integrates into its platform, the more purposes such platform may cater for.

49 For instance, if instead of pulling results from crawled webpages, an OSE presents proprietary content that it obtained through another core platform service (e.g. profile data from a social network or guides, maps or offers from an online intermediation service), it may of course cater for similar purposes as the corresponding core platform service. However, such ability then only resulted from the envelopment of distinct services, which is the very practice Article 6(5) DMA seeks to prevent.[49] Accordingly, for determining the purpose of an OSE for its users, one may not take offerings of the OSE platform into account that only resulted from embedding functionalities of other CPSs, as such reasoning would be circular.

50 Rather, for the purpose of applying Article 6(5) DMA, the borderline between an OSE and a distinct service needs to be drawn by the respective purposes of the services. The DMA's definitions of CPSs legally define the core purpose of the respective service. The starting point for any assess-

48 See General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping),* para. 335: "*Google cannot impose a general definition of a [CSS] based on Google's own configuration of its specialised web page, Product Universals or Shopping Units*".

49 See below at 3.a.

ment of whether the gatekeeper provides a "distinct service" to an OSE is therefore the legal definition of an OSE and its purpose in the DMA.

b. Definition in the DMA

51 By referring to Article 2(5) of the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services ("Platform-to-Business" or "**P2B-Regulation**")[50], Article 2(6) DMA defines an "online search engine" as

> *"a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found."*

52 According to recital (51) DMA, an OSE uses "*crawling*"[51] and "*indexing*".[52] The recital also distinguishes "*results of an online search engine*" from "*groups of results specialised in a certain topic*". It follows that an OSE means a general search service, not a specialised search service that may qualify as an OIS. General search services generate so called 'generic' unpaid search results leading to webpages, along with equally generic paid results (ads) that are available to any website operator.[53] OSEs generate these results by 'crawling' webpages – where software known as a 'bot' automatically collects data from webpages on the World Wide Web. The crawled data is stored in a database known as 'web index' that is organised based on the characteristics of webpages. The OSE then ranks those webpages based on generic criteria (known as 'signals') related to the indexed characteristics of the webpage (such as how closely the text and title in the webpage matched the query).

50 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20/6/2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11/7/2019, pp. 57–79.

51 Defined "*as a discovery process by which new and updated content is being found*".

52 Defined as entailing "*storing and organising of the content found during the crawling process*".

53 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 12, 19, 166 et sub. (among others).

Overall, the definition of an OSE in the DMA can be broken down to five cumulative criteria: (1) An OSE is a digital service that allows end users to input queries in order to perform searches on the basis of a query. (2) Such searches must relate to information on crawlable and indexable websites. (3) It must be possible to enter a query on any subject. (4) The search must, in principle, be possible across all crawlable and indexable websites, or (at least) across all websites in a particular language. (5) Finally, end users must obtain results in relation to the requested content of any type.[54] 53

- **Performing searches on the basis of a query:** The service must allow end users to perform "*searches [...] on the basis of a query*", which can be a keyword, voice request or any "*other input*". The service must enable a consumer to express a request for particular information which is then retrieved and made accessible by means of a corresponding search result. As follows from the fact that several other core platform services also allow queries by end users[55], this is not the essential criterion of an OSE.
- **Searches of websites:** The service is limited to the retrieval of information from "websites", i.e. content that has been published on any standalone webpage in the World Wide Web. Accordingly, services to retrieve information from proprietary datasets (e.g. internal databases, content indexes, encyclopaedia, etc.), software applications, podcasts, webinars, large language models, or other sources rather than websites do not fall under the definition.[56]
- **On any subject:** Searches must be possible "on any subject". Accordingly, a search and intermediation service that focusses on websites or other sources with specific topics such as travel, football, health or accommodation do not fall under the definition.[57] Specialised search services may qualify as OIS.

54 See *Schulte-Nölke*, in: Busch (editor), „Verordnung (EU) 2019/1150 zur Förderung von Fairness und Transparenz für gewerbliche Nutzer von Online-Vermittlungsdiensten (P2B-VO) ", (2022), Art. 2 para. 58.

55 See the list of CPS mentioning "a query" in the table of Section E of the Annex to the DMA.

56 See the distinction between websites and other data sources in recital (36) DMA as well as, for example, recitals (4), (16) and (26) P2B-Regulation and in the Directive (EU) 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies (OJ L 327, 2.12.2016, p. 1).

57 *Schulte-Nölke,* ibid., para. 63; *Bongartz/Kirk*, (2024), in: Podszun (editor), Digital Markets Act, Art. 2 para. 40.

– **Across all websites:** Searches must be possible, in principle, across "all websites" or, at least, "all websites in a particular language". Accordingly, only general web search engines that automatically crawl and index websites across the entire World Wide Web are covered. This precludes services that focus on the search across proprietary datasets or the websites of a particular provider (e.g. the search for the content of an individual website owner).[58]
– **Results relating to the requested website content:** The service must return "*results in any format in which information related to the requested content can be found*". Thus, the results must contain information in a form that "can be found" on websites searched, and such information must relate to the query entered. The information displayed as a result must have been extracted from the websites that the engine crawled and indexed for such purpose.[59] A service that returns results in a way that differs from how the relevant information can, originally, be found (and crawled) on the respective website does not fall under this definition. Rather, the results must 'mirror' the information that end users would find if they visited the webpage directly.[60]

c. Qualification in the case law of the Court of Justice

54 The DMA's definition of an OSE reflects the traditional understanding and technical purpose of such service in the overall Internet ecosystem. Such understanding is equally mirrored in the relevant jurisprudence.

55 Based on submissions by Google, the Court of Justice of the European Union already found

> *"that the activity of a search engine [is] consisting in finding information published or placed on the internet by third parties, indexing it automat-*

58 *Schulte-Nölke,* ibid., para. 66–67; *Bongartz/Kirk*, ibid., Art. 2 para. 40.

59 *Schulte-Nölke,* ibid., para. 66: "*The decisive factor is [...] that the result was found on the basis of websites of the companies displayed, which the search engine crawls and indexes*" (translation by author from German original). See also Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, para. 11, explaining that in contrast to CSSs, OSEs "*extract information from websites, index it, add it to Google's 'web index', sort it by relevance and display it".*

60 A "direct" visit relates to end users navigating to a webpage without involving an OSE, in particular by calling up a site via a browser, thereby bypassing an OSE.

> *ically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference.*"[61]

In the Court's view, the purpose of an OSE was "*the organisation and aggregation of information published on the internet [...] with the aim of facilitating their users' access to that information*".[62] Through the list of results, users carrying out searches are "*obtaining [...] a structured overview of the information [...] that can be found on the internet*".[63] 56

Advocate General *Szpunar* further concluded that 57

> *"the task of the operator of a search engine is, as its title indicates, to search, find, point to and make available, by means of an algorithm that allows information to be found in the most effective manner. Conversely, it is not for the operator of a search engine to monitor, indeed to censure."*[64]

The latter observation is linked to legal exemptions from liability for illegal content under EU law.[65] To benefit from such exemptions, OSEs, including Google Search, present themselves as being mere "neutral" transmitters of information provided by third parties, "*in the sense that their conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data*" which they process.[66] Thus, Google itself highlights that its OSE is not a publisher of such information (which it would be if it took over ownership or control over any information, e.g. by aggregating or co-mingling it with other information). 58

Overall, the characteristic feature of an OSE is thus to facilitate their end users' access to information that operators of websites (publishers) have placed on the internet. An OSE does not provide its own information, as a publisher would do. Nor is its function to open access to any information of a third party that users could not equally access if they visited the website of 59

61 CJEU, judgment of 8/12/2020, Case C-460/20, EU:C:2022:962, *TU/Google*, para. 49.
62 CJEU, judgment of 8/12/2020, Case C-460/20, EU:C:2022:962, *TU/Google*, para. 50.
63 CJEU, judgment of 24/9/2019, Case C-136/17, EU:C:2019:773, *G.C. and others (de-referencing of personal data)*, para. 36.
64 Opinion of AG Szpunar of 10/10/2019, Case C-136/17, EU:C:2019:14, *G.C. and others (de-referencing of personal data)*, para. 54.
65 Such rules are laid down in Directive 2000/31/EC. For very large digital platforms and online search engines, the liability framework has been incorporated into Regulation (EU) 2022/2065 (Digital Services Act), see recitals (16)-(17) DSA.
66 See CJEU, judgment of 23/3/2010, Joined Cases C-236/08 to C-238/08, EU:C:2010:159, *Google France*, para. 114 establishing the cited criteria with a view to Google text ads.

such third party directly. As follows from the definition and purpose of an OSE, its SERPs need to 'mirror' and guide to information that end users can openly find on the Internet, nothing more and nothing less.

3. Identifying a distinct service

60 Once the purpose of an OSE has been determined, as set out above, a distinct First-Party Service may be identified if the gatekeeper offers an activity with a different purpose. As outlined above at II.1., the Annex to the DMA provides a legal framework for identifying distinct services. However, there is no exhaustive list of activities that pursue different purposes and may therefore qualify as distinct services. This opens up a broad scope of application for the ban on self-preferencing. Such broad scope is in line with the DMA's objective to effectively curb platform envelopment strategies.

a. Objective: the DMA's aim to effectively curb platform envelopment strategies

61 This broad scope of what may constitute a product or service distinct from the gatekeeper's OSE reflects the objective of the DMA in general and of Article 6(5) DMA in particular to effectively curb 'platform envelopment' strategies by digital gatekeepers.

aa) The economic concept of platform envelopment

62 Platform envelopment refers to (anti-)competitive behaviour that a digital platform may engage in to enter an adjacent market already served by a third party. Enveloping occurs where a gatekeeper (enveloper) ties together services in its core platform market with those offered in the adjacent market, thereby creating a multi-platform bundle, and then forecloses user access to the established third party, for example by demoting them on their core platform.[67] In short, in a first step, "*the enveloper ties its services in the*

67 *Hermes/Kaufmann-Ludwig/Schreieck/Weking/Böhm*, "A Taxonomy of Platform Envelopment: Revealing Patterns and Particularities", (2020), AMCIS 2020 Proceedings. 17, p. 1, 2.

origin [core platform] market [such as online search] with those offered in the targeted market [such as that of an OIS] and creates a multi-platform bundle that leverages shared user relationships." In the next step, *"the enveloper forecloses the target platform [i.e. a third party providing a similar OIS] access to the core platform [online search] and users and thereby captures the network effects of the target platform.*"[68]

For the first step of entering the market, the enveloper offers its adjacent activity by bundling its own core platform's functionality with that of the target's so as to leverage shared user relationships and common components.[69] For the second step of foreclosing third parties, the most effectively and frequently used practice is plain self-preferencing on the gatekeeper's core platform as gateway to reach end users. As *Hermes* et. Al. summarise: 63

> "*This type of envelopment uses self-preferencing practices (such as higher rankings and prominent placements) as well as interference mechanisms (such as demoting rivals, algorithmic opacity, and limiting interoperability) to envelop vertical platform competitors. A typical example is Google Search and Google Shopping. In this case, Google Search, as a dominant entry point for consumers to online information, is leveraged for prominent Google Shopping placement and to demote rivals in its search results.*"[70]

In 2017, the European Commission found that, given the specific market circumstances, such conduct constitutes an abuse of dominance, which was later confirmed by the General Court.[71] In addition to the case of Google, anti-competitive envelopment strategies had also been identified in Europe 64

68 *Hermes/Kaufmann-Ludwig/Schreieck/Weking/Böhm*, "A Taxonomy of Platform Envelopment: Revealing Patterns and Particularities", (2020), AMCIS 2020 Proceedings. 17, p. 1, 2.

69 *Eisenmann/Parker/Van Alstyne*, "Platform Envelopment", (2011), Strategic Management Journal Vol. 32, No. 12, p. 1271; *Condorelli/Padilla*, "Harnessing Platform Envelopment in the Digital World", (2020), Journal of Competition Law & Economics Vol. 16, Issue 2, p. 2.

70 *Hermes/Kaufmann-Ludwig/Schreieck/Weking/Böhm*, "A Taxonomy of Platform Envelopment: Revealing Patterns and Particularities", (2020), AMCIS 2020 Proceedings. 17, p. 6.

71 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, confirmed in General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*. On January 11, 2024, AG Kokott opined that the CJEU should uphold the judgment, Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*.

in relation to other designated gatekeepers[72], namely Apple[73], Amazon[74], Meta[75], and Microsoft.[76]

65 There are strong arguments that platform envelopment in the hands of dominant digital firms "*impedes new market entry, creates immense barriers to entry, increases the concentration of private power, and restricts effective competition*".[77] However, thus far, competition law investigations against these strategies often did not achieve their objectives as the ex-post abuse of dominance control came too late to prevent irreversible harm. This is why effectively curbing envelopment strategies ex-ante was one of the main objectives pursued by the DMA legislator.

bb) Platform envelopment pursuant to the DMA

66 As is common for legislation, the DMA does not explicitly mention the economic theories it relies upon, such as the concept of platform envelopment or leveraging[78] more generally. However, these concepts were prominent

72 For an early overview see *Visnjic/Cennamo*, "The Gang of Four: Acquaintances, Friends or Foes? Towards an Integrated Perspective on Platform Competition.", (2013), ESADE Business School Research Paper No. 245; recital (51) DMA contains its own list.

73 See Case AT.40452, *Apple – Mobile payments*; Case AT.40437, *Apple – App Store Practices (music streaming)*; Case AT.40652, *Apple – App Store Practices (e-books/ audiobooks)*.

74 See Case AT.40462, *Amazon Marketplace*; Case AT.40703, *Amazon – Buy Box*.

75 See Case AT.40684, *Facebook Marketplace*.

76 See Case AT.39530, *Microsoft (tying)*; Commission decision of 24/3/2004, Case AT.37792, *Microsoft (Media Player)*, paras. 792–989, confirmed by the General Court, judgment of 17/09/2007, Case T-201/04, EU:T:2007:289, paras. 839–1193; see also the pending Cases AT.40721, *Teams I* and Case AT.40783, *Teams II* into the tying of a collaboration services to Office.

77 *Hermes/Kaufmann-Ludwig/Schreieck/Weking/Böhm*, "A Taxonomy of Platform Envelopment: Revealing Patterns and Particularities", (2020), AMCIS 2020 Proceedings. 17, p. 7.

78 Under competition law, leveraging relates to practices where an undertaking seeks to use its vertical integration as a lever to gain anti-competitive advantages; either to manifest its position on an already dominated upstream market (maintenance leveraging) or to extend its dominance into downstream markets (expansion leveraging). The theory of harm formed the basis for the *Google Shopping* case, as was first developed here *Höppner*, "Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse", CoRe 2017, pp. 208-221.

part of the political debate[79] and subsequently applied by European competition authorities.[80] The DMA ended up describing specific practices that economically qualify as a platform envelopment strategy as problematic if carried out by gatekeepers.[81] Based on such premise, the DMA contains several obligations to prevent particular forms of platform envelopment and leveraging more generally.[82] As *Monti* rightly summarises:

79 See *Bourreau/de Streel*, "Digital Conglomerates and EU Competition Policy" (2019), SSRN, p. 16 et seq.; *Crémer/Montjoye/Schweitzer*, "Competition policy for the digital era", (2019), European Commission, Directorate-General for Competition, p. 108 "*The expansion of the power of established platforms [..] into new markets pioneered by other platforms or firms is currently debated under the heading of 'platform envelopment'*".

80 See most recently European Commission, Press Release of 25/9/2023, "Commission Prohibits Proposed Acquisition of eTraveli by Booking", https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573 (finding that the integration of flight product would expand Booking's ecosystem around its hotel online-travel-agency (OTA) as it would generate further traffic to such platform, making it more difficult for competitors to contest Booking's position on the hotel OTA). Similar envelopment concerns were raised in Commission decision 15/5/2023, Case M.10646 – *Microsoft/Activision Blizzard*.

81 See Article 2(11) "*including standalone web browsers as well as web browsers integrated or embedded in software*"; Article 3(8)(f) "*leverage its position*"; Recitals (3) "*leverage their advantages [...] from one area of activity to another*"; Recital (14) "*embedded digital services*"; Recital (17) "*leverage their access to financial markets to reinforce their position*"; Recital (31) "*gatekeepers leverage their gateway positions, which are often provided together with, or in support of, the core platform services*"; Recital (51) "*Gatekeepers [...] offer certain products or services to end users through their own [CPS]*" "*whereby a gatekeeper provides its own [OIS] services through an [OSE]*" "*Other instances are those of software applications which are distributed through software applications stores, or videos distributed through a video platform, or products or service are given prominence and display in the newsfeeds of an online social networking service, or products or services ranked in search results or displayed on an online marketplace, or products or services offered through a virtual assistant*"; Recital (58) "*online advertising services [...] fully integrated with other [CPS]*"; D(2)(c) Annex "*in an integrated way*".

82 In particular Article 5(2); (7); Article 6(2); (3); (4); (5); (6) DMA. Some read those provisions as implying a general ban of enveloping practices, *Portuese*, "The Digital Markets Act: European Precautionary Antitrust", (2021), ITIF, p. 47: "*The DMA appears to [...] command gatekeepers to refrain from engaging in envelopment strategies at the expense of both new entries into some markets and the lowering of prices [...] Furthermore, the DMA prohibits the envelopment strategy not only for gatekeepers' core services but also for third-party services. This reflects the so-called ´conflict of interest` that has recently appeared as an antitrust concern.*".

> "*By systematically targeting a range of platform envelopment strategies, the DMA seeks to contain gatekeepers. This systematic approach goes beyond what could be achieved under Article 102 TFEU.*"[83]

67 As outlined above, section D(2)(b) of the Annex to the DMA further supports such obligations by clarifying that activities for different purposes are to be considered as different services even they offered "in an integrated way", i.e. where a gatekeeper aims at combining them to a bundle of services.[84] The prevention of platform envelopment by digital gatekeepers to ensure contestability and fairness has been identified as one of just four theories of harm underlying the DMA.[85] Such prevention can be seen as one of the DMA's core objectives and the ban on self-preferencing in Article 6(5) DMA as its central instrument.

cc) Legal consequence: 'Distinct services' despite common components

68 The DMA's objective to effectively prevent gatekeepers from "*leverage[ing] their advantages, such as their access to large amounts of data, from one area of activity to another*,"[86] explains why those obligations addressing envelopment strategies, including Article 6(5) DMA, do not further specify or limit the type of "*service*" that may not be enveloped by the gatekeeper.

69 Article 6(5) DMA does not require that the (enveloped) service as such forms a separate and distinct market.[87] Conceptually, this distinguishes the

83 *Monti*, "The Digital Markets Act – Institutional Design and Suggestions for Improvement", (2021), TILEC Discussion Paper No. 2021–04, page. 19.

84 See above at I.1.

85 *Monti*, "The Digital Markets Act – Institutional Design and Suggestions for Improvement", (2021), TILEC Discussion Paper No. 2021–04, p. 19; *de Streel/Liebhaberg/Fletcher/Feasey/Krämer/ Monti*, "The European Proposal for a Digital Markets Act: A First Assessment", (2021), CERRE Assessment Paper, p. 6, 18, 20; *Schweitzer*, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal", (2021), ZEuP 2021, p. 22.

86 Recital (3) DMA.

87 See Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 19: *"[T]he delineation of CPS under [DMA-] Regulation [...] has no bearing on the definition of the relevant market for the purpose of applying EU competition rules (and vice versa) and those two types of analyses may thus lead to different results.*" See also Recital (11) DMA on the "complementary" nature of EU competition law and DMA.

ban on leveraging under general competition law[88], which requires the establishment of two different markets, from the broader ban on platform envelopment in Article 6(5) DMA, which only requires two distinguishable digital services. It is neither required that the enveloped service constitutes a (multi-sided) platform service offered to separate user groups or that the service is provided against renumeration. Any service offered to either end users or business users is covered, implying a broad scope of what constitutes a relevant "*service*".[89] It includes, in any event, "*Information Society Services*", as defined in Article 1(1b) of Directive (EU) 2015/1535.[90] Such services have already been identified for a wide range of activities. They include online retail services (e-commerce platforms)[91], online marketplaces[92], online advertising services[93], online travel and accommodation booking services[94], online mapping services[95], online comparison shopping services ("**CSSs**")[96], online gaming and gambling services[97], streaming and

88 Leveraging was the theory of harm relied upon in the *Google Search (Shopping)* case, see *Höppner,* "Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse", 1 CoRE (2017), pp. 208–221.

89 *Heinz*, (2024), in: Podszun (editor), Digital Markets Act, Art. 6 para. 88; *de Streel*, "Recommendations for the effective and proportionate DMA implementation", (2022), CERRE, p. 14.

90 Directive (EU) 2015/1535 of 9/9/2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, EU Official Journal, L 241/1 of 17/9/15.

91 CJEU, judgment of 12/07/2011, Case C-324/09, EU:C:2011:474, *L'Oréal/eBay,* para. 109.

92 CJEU, judgment of 12/07/2011, Case C-324/09, EU:C:2011:474, *L'Oréal/eBay,* para. 109; Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (Google Play) (designation)*, para. 55.

93 CJEU, judgment of 15/9/2016, Case C-484/14, EU:C:2016:689, *McFadden/Sony Music*, para. 43; CJEU, judgment of 23/3/2010, Case C-236/08, EU:C:2010:159, *Google France*, para. 210; Commission decision of 5/9/2023, Cases DMA.100018 et sub., *Amazon (designation)*, para. 26.

94 CJEU, judgment of 19/12/2019, Case C-390/18, EU:C:2019:1112, *Airbnb Ireland*, paras. 39 et sub.

95 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (Google Maps*) *(designation)*, para. 75.

96 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (Google Shopping) (designation)*, para. 35.

97 CJEU, judgment of 20/12/2017, Case C-255/16, EU:C:2017:983, *Falbert and Others,* para. 29.

video on demand services[98], as well as online news and media services.[99] And alongside the advancement in technology and changes in consumer behaviour and demands, the landscape of Information Society Services is continually evolving and expanding.

70 The crucial question ultimately is, which digital activity is sufficiently *distinct* from that of an OSE to be considered as a *distinct service*. The following factors assist with such assessment.

- **Common technical features do not preclude distinct services:** To begin, the DMA's economic aim of restraining certain "platform envelopment" strategies by digital gatekeepers (as discussed above) implies that (i) common technical and functional elements, along with (ii) a shared user base between an OSE and a separate activity, do not prevent the enveloped activity to be considered as constituting a distinct "*service*". It forms the basis for platform envelopment strategies that the core platform and the enveloped activity share common elements and an overlap in user base.[100] If a gatekeeper opts to share components (such as technology, interfaces, or data) of its core platform service with an ancillary service, which serves a different purpose, in order to enhance the latter's market position, this action leaves the different purposes and hence the distinct character of the two services unchanged. As the very goal of enveloping is to utilise such common components to foreclose competition for the enveloped service, the shared features may not rule out the finding of distinct services. This is reflected in section D(2)(c) of Annex D to the DMA, clarifying that the offering of services "in an integrated way" does not affect their status as being distinct.
- **Common user interface does not preclude distinct services:** Most digital services are provided on a standalone basis such as through a separate website or app. However, with a view to platform enveloping (mentioned above), the DMA explains in several contexts that services "*are often provided together with, or in support of, the core platform*

98 CJEU, judgment of 22/6/2021, Joined Cases C-682/18 and C-683/18, EU:C:2021:503, *YouTube and Cyando*, para. 86.

99 CJEU, judgment of 5/6/2019, Case C-142/18, EU:C:2019:460, *Skype Communications*, para. 46.

100 See *Eisenmann/Parker/Van Alstyne*, "Platform Envelopment", (2011), Strategic Management Journal Vol. 32, No. 12, p. 15 (on proposition 3) "*Since functions depend on components, functionally unrelated platforms will not normally share common components*".

service"[101] or may even be fully "*embedded*" or "*integrated*"[102] in them. In other words, gatekeepers use multi-service platforms to bundle distinct services and make them accessible to users through a common online interface. There are also hybrid versions, where a service is offered to users both on a standalone basis and through the interface of another platform. As follows from recital (14)[103], the DMA pursues a principle of technological neutrality. Accordingly, the legal characterisation of a service as being distinct may not depend on the online interface used to access that service and the form in which the service is presented, i.e. whether it is offered on a standalone basis or through another platform, or both.[104]

– **Partial or entire embedding does not preclude a distinct service:** The DMA terms the service as being "*partly embedded*" in the results of the OSE in cases where a gatekeeper offers a distinct service both on a standalone website or app and through the interface of its OSE. This is the case, for example, with Google Shopping and Google Maps which are offered on a standalone basis on through general results pages. Conversely, when the gatekeeper offers a distinct service solely through the interface of its OSE, with no corresponding standalone basis, the DMA describes the service as being "*entirely embedded*" within the OSE results.[105] Section D(2)(c) of the Annex refers to the offering of services "in an integrated way". The terms "embedding" and "integrating" as largely used as synonyms. The distinction between "partial" and "entire" embedding is not new. It was adopted from Google Shopping.[106]

101 Recitals (31), (56), (57) DMA.

102 Article 2(11) DMA ("*web browsers integrated or embedded in software or similar*"); Annex D(2)(c): "*The undertaking providing [CPSs] shall consider as distinct core platform services those services which the relevant undertaking offers in an integrated way*"; see also recitals (51), (58).

103 "*For the purposes of this Regulation, the definition of core platform services should be technology neutral*".

104 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 36; see also para. 31: *"Alphabet submits that online intermediation services operate as a single service, regardless of the surfaces, form factors, or access points that a user uses to access the services."*

105 See recital (51) DMA, according to which self-preferencing "*can occur for instance with products or services [...] which are partly or entirely embedded in online search engines results*".

106 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, footnote 3: "*Throughout this Decision, whenever the Commission refers to the more favourable positioning and display in Google's [SERPs] [...], the Commission means*

– **Poor user experience does not preclude a distinct service**: Similarly, it is common for platform envelopment strategies that the enveloper is entering the target service with a comparatively "weak substitute" for any established Third-Party Service as this will offer cost savings as compared to offering a broader set of functionalities.[107] A weak substitute may serve the same broad purpose but satisfy less user needs or do so in an inferior way as it overlaps only to some extent in functionality with the targeted service.[108] Instead of investing in the full scope of functionalities (i.e. competing on the merits), the enveloper may rely on the anti-competitive effects of its envelopment strategy to transfer cross-platform network effects to its new service, allowing it to successively add further functionalities and to thereby bridge the gap to third-party providers. Considering such economic chains of investments, the fact that a gatekeeper's separate activity is of comparatively poor quality, has a rudimentary look or even bad user experience may not prevent considering such activity as a "distinct service". A low-quality service is still a distinct service that may not be granted a better ranking.[109] Otherwise, Article 6(5) DMA would fail in the most apparent cases of unjustified self-preferencing.
– **Standalone provision by third parties implies a distinct service:** Instances where any third party is providing a service separately, i.e. on a standalone basis, without also operating an OSE, imply that such activity constitutes a distinct service.[110] Such assumption continues even if an

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the more favourable positioning and display of: (i) links to Google's [CSS]; and/or (ii) parts or all of Google's [CSS]", the latter referring to Product Universals and Shopping Units (paras. 32, 412–423). In countries, in which Google operated a standalone shopping website, proving Shopping Units was only a "*part of*" its CSS. In countries without a standalone Google Shopping website, Shopping Units made up "*all of*" Google's CSS as they formed the only user interface.

107 *Eisenmann/Parker/Van Alstyne*, ibid., p. 14 on "*Envelopment of weak substitutes*".

108 *Eisenmann/Parker/Van Alstyne*, ibid., p. 14 "*bundling weak substitutes typically will offer cost savings*".

109 Cf. General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 335 explaining why Shopping Units serve as a CSS despite a low level of detail: "*a [CSS] does not merit that description only if it is capable of achieving a level of precision that allows different offers of the same product or model to be shown, as Google's specialised web page did*".

110 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 170: "*a wide variety of specialised search services have been offered on a standalone basis for several years. Examples include services specialised in search for products [...] local businesses [...] flights [...] and in search for financial services [...]. None of*

OSE subsequently envelops such activity to its core platform. This is in line with EU competition case law, according to which the existence of offers on a standalone basis constitutes "*serious evidence*" as to the existence of a separate demand and hence indicates distinct products.[111]

- **Separate provision by the gatekeeper in the past implies a distinct service:** Where a gatekeeper operating an OSE has set up and marketed a distinct service in the past[112], it can be presumed that the purpose and the functionalities of such activity are different to those of its OSE and therefore constitute a distinct service. Considering the DMA's objective to tackle "platform envelopment" to secure contestability of a gatekeeper's core services, the presumption of a distinct service may not be rebutted by the fact that the gatekeeper subsequently integrates parts or all of such service into its OSE and/or relabels it.[113] The presumption of distinct services may be rebutted, however, by demonstrating that no company provides a similar service independent of an OSE anymore.
- **Different purposes and functionalities imply a distinct service:** While technical differences may not be suitable for distinguishing services, the purpose and functionality provided to users is. As outlined above, pursuant to Annex D(2)(b) DMA, a service shall be considered as distinct if they are used for different purposes either by end users or business users. Accordingly, a distinct service is to be assumed whenever an activity offered through the interface of an OSE is considered or used by end users, business users or both as serving a different purpose than the

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these companies offers a general search service"; *Peitz*, "The prohibition of self-preferencing in the DMA", CERRE (2022), p. 8.

111 General Court, judgment of 17/9/2007, Case T-201/04, EU:T:2007:289, *Microsoft/Commission*, para. 874 (regarding the Commission's finding in this respect). See also para. 927: "*there are distributors who develop and supply streaming media players on an autonomous basis, independently of client PC operating systems. [...] It must be pointed out, in that regard, that according to the case-law the fact that there are on the market independent companies specialising in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product*" (with references to the CJEU's case law in *Tetra Pak II* and *Hilti* and deriving from this that the products are also separate within the meaning of tying, see para. 933).

112 Such as Google Shopping, Google Hotel Finder, Google Flights, Google for Jobs.

113 See General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 335 and General Court, judgment of 17/9/2007, Case T-201/04, *Microsoft/Commission*, paras. 928 et sub.; see also Article 13 (4) DMA and recital (71) DMA.

OSE, as defined in the DMA.[114] The same applies when the gatekeeper provides services in an integrated way.[115] This is again in line with the separate product test in tying cases under Article 102 TFEU, where "*the distinctness of products [...] has to be assessed by reference to customer demand*", for which the respective (differences in) core functionalities are determinative as well.[116]

– **Some end users considering an activity as additional, implies a distinct service**. Recital (51) DMA further specifies the task of identifying a distinct service. According to such recital, "*groups of results specialised in a certain topic, displayed along with the results of an online search engine*" shall constitute a distinct service, if such groupings "*are considered or used by certain end users as a service distinct or additional to the online search engine*". The focus here is on the word "certain" end users. Section D(2)(b) and (c) of Annex D to the DMA generally requires that a service is "*used for different purposes by either their end users or their business users, or both*". In contrast, for the purpose of identifying a service that is provided through a "*group of results*" displayed on SERPs, according to recital (51), it shall suffice that "certain", that is *some*, end users either "consider" or "use" such groups as a distinct or additional service to the navigation service provided by the OSE. The threshold is conceivably low.

71 The above considerations are also in line with principles developed in general competition law to define separate markets. According to the European Commission's 2024 guidance paper, to establish separate digital services, attention shall be paid to "*product functionalities*", "*intended use*" and "*evidence of past or hypothetical substitution*".[117] The latter includes instances where a third party has provided the service in question separately, without simultaneously operating an OSE.[118]

114 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 17.

115 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 17.

116 General Court, judgment of 17/9/2007, Case T-201/04, EU:T:2007:289, *Microsoft/Commission*, paras. 917, 926: "*More generally, it is clear from the description of those products [...] that client PC operating systems and streaming media players clearly differ in terms of functionalities*".

117 Commission Notice on the definition of the relevant market for the purposes of Union competition law of 8/2/2024, Case C/2023/6789, para. 98.

118 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 170.

b. Services found to be distinct from an OSE

Services that have already been identified as distinct from an OSE include online content sites, specialised search services, online marketplaces[119], social networking sites[120], app stores, online advertising services, content streaming services, digital health services, virtual assistants, digital translations, and online educational services.[121] 72

Alphabet itself has published a list of "*All Products*" the company offers. Amongst the nearly 100 products, the list identifies the following services as being distinct from Google Search: Gemini, Google Alerts, Google Assistant, Google Chat, Google Finance, Google Flights, Google Maps, Google Meet, Google News, Google Pay, Google Scholar, Google Shopping, Messages, Podcasts, Travel, Translator, YouTube, Drawings.[122] In its sub-category of products to "*explore & get answers*", Google lists Earth, Google Assistant, Google Lens, Maps, News, Search, Shopping, Travel.[123] 73

On 3 July 2023, Alphabet notified the Commission that the undertaking meets the thresholds laid down in Article 3(2) DMA in relation to the following CPSs: 74

> "*(i) its online intermediation service Google Shopping; (ii) its online intermediation service Google Play; (iii) its online intermediation service Google Maps; (iv) its online search engine Google Search; (v) its video-sharing platform service YouTube; (vi) its number-independent interpersonal communication service ("NIICS") Gmail; (vii) its operating system*

119 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 191: "*[CSSs] are specialised search services that: (i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers (also referred to as online merchants) and merchant platforms (also referred to as online marketplaces); and (ii) provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms.*" The Decision distinguishes them from merchant platforms, which, in addition, allow users to buy products from different merchants without leaving the platform.

120 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 5.

121 See the list of services in Commission decision of 28/3/2023, Case M.10796, *Google/Photomath*; Commission decision of 17/12/2020, Case M.9660, *Google/Fitbit*, Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*.

122 https://about.google/products/.

123 https://blog.google/products/.

Google Android; (viii) its web browser Google Chrome; and (ix) its online advertising services."[124]

75 As part of such notification, Alphabet submitted, in particular, that Google Shopping and Google Maps constituted OISs separate from Google Search. Google Shopping would enable merchants, based on a contractual relationship, to list product offers. As end users could then search, click, and find those product offers, Google Shopping would facilitate the initiation of direct transactions between business users and end users, thus qualifying as an OIS.[125] Similarly, Google Maps would constitute an OIS as it enables end users to search for and navigate to local entities, including local businesses, which in turn can provide information to appear on Google Maps (or Google Search) with a view to reaching end users, via Google's Business Profile interface tool.[126] Alphabet explained that Google Maps operates in the same way and serves the same purpose – enabling the search for and navigation to local entities – regardless of the type of local entity for which the information is provided. Accordingly, it would qualify as a single OIS.[127]

76 As will be outlined in greater detail below[128], there are no significant economic or technical differences between Google Shopping and Google Maps, on the one hand, and other specialised services listed by Google as "*all products*", such as Google Finance, Google Flights or Google Travel, on the other hand. All of these services extend beyond the scope of an OSE and meet the criteria for an OIS or a specialised search service (vertical).[129]

77 Furthermore, all of the services listed by Google as distinct "products" exhibit shared components with Google Search. Similar to Google Shopping and Google Maps, nearly all of them can be accessed through the online interface of Google Search. This implies that, according to Google's

124 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 1.

125 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 33.

126 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, paras. 70–71.

127 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, paras. 72–73.

128 See at 4.d.

129 Where such specialised service is provided on the basis of a contractual relationship with a business user, it constitutes an OIS. Where no such contractual relationship exists, it constitutes a specialised search service that may be financed by non-search based advertising, see at 4.e.

perspective, the distinct service designation is determined by the specific function and utility of an activity, rather than its branding or its proximity to another CPS in terms of shared technology and user interfaces.

78 Alphabet only had to notify those distinct services to the Commission that meet the quantitative thresholds, in terms of active users, laid out in Article 3(2)(b) DMA for the designation as gatekeeper. Hence, the absence of the Google products mentioned above in such notification does not mean that such services do not constitute distinct services under Article 6(5) DMA. Article 6(5) DMA prohibits the favouring of any distinct service and not just CPSs, let alone just those qualifying as an important gateway for business users to reach end users in the meaning of Article 3(b) DMA. Accordingly, the character of a particular service as being distinct needs to be assessed on a case-by-case basis.

4. Delineation of OSEs from particular other services

79 As outlined above, the guiding principle for identifying distinct services are their purpose and functionalities. Where such characteristics of a service are defined in the DMA, such definition serves as a starting point. Where a definition of a service is missing, its purpose and functionality needs to be compared to that of an OSE on an individual basis. This section provides some guidance on this.

a. OSE vs non-search related services

80 A distinct service is apparent whenever Google publishes proprietary content or offers a service that does not relate to the retrieval of equivalent information published on third-party websites. An OSE seeks to guide users to other sites and helps website operators to attract traffic. As Google emphasises on its website: "*We may be the only people in the world who can say our goal is to have people leave our website as quickly as possible.*"[130] In contrast, "*while content sites may contain references to other sites, their primary purpose is to offer directly the information, products or services users*

130 https://about.google/intl/en_us/philosophy/.

are looking for".[131] They thus provide a distinct service.[132] Content sites are no intermediaries but the source of the final information or content end users are interested in.

81 A platform acts as a content provider rather than an OSE whenever it displays information on its online interfaces, in particular within results pages, that does not mirror information findable on a webpage by crawling but stems from a proprietary content database (e.g. of maps, videos, images, encyclopaedia, directions, city guides, or yellow pages).[133] This may be one of the reasons, why in the context of DMA compliance, Google sees YouTube as a "publisher", rather than an intermediary, despite similar search and filtering technologies.

b. OSE vs search-related content

82 A distinct service is also provided by "*content sites that offer sophisticated content search functionality on their website*". That is because as such function "*remains limited to their own content or content from partners and does not allow users to search for content over the internet, let alone all information on the web*"[134], it does not fulfil the characteristics of an OSE.

83 A distinct service can equally be identified where an OSE displays own content from a proprietary database or content from partners (rather than the entire web), with the aim to directly answer a query, rather than to guide the end user to the most relevant websites containing such information.

84 This was clarified by the Regional Court of Munich in a competition law judgement concerning Google's display of boxes with special health information:

> *"[T]he integration of syndicated content [...] is ultimately less an improvement of the search engine service than a shift of the activity of [Google] to another market, specifically that of a publisher or other supplier of content*

131 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 164, confirmed in General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2007:289, *Google and Alphabet/Commission (Google Shopping)*.

132 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 163–165.

133 *Broder*, "A taxonomy of web search", (2002), SIGIR Forum, Vol. 36, No. 2., p. 4.

134 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 165.

– be it lexical or journalistic [...]. [Google] is going beyond its basic function as a search platform on the Internet to bring together people looking for products or services (for example, information) and their suppliers [...]. Ultimately, [Google] is leaving the market of the pure search engine in the sense of an intermediary of products to users and is becoming a supplier of such product itself. [...] [W]hen [Google] permanently places an infobox with the content of [its partner] above the generic search results, it is evaluating the various sources available on the Internet to answer a search query by prominently highlighting one of them in advance as the authoritative answer. In this way, it is making a content-based pre-selection that is detached from the Google algorithm."[135]

In this context, the Court also questioned whether such an expansion could be seen as an improvement: 85

"On the one hand, this is not necessarily transparent for the user, on the other hand, an evaluation of the content is made here and thus ultimately contributes to the formation of public opinion. Whether this is an improvement of a search engine seems objectively at least doubtful."[136]

c. OSE vs (generative AI) answering services

Directly answering a query with proprietary content or content from individual partners (rather than information from any website) goes beyond the function of an OSE and constitutes a distinct service.[137] 86

135 Regional Court of Munich I, judgment of 10/2/2021, Case 37 O 15720/20, *NetDoktor/Google (Health Infobox)*, para. 100 (binding; translation from German original), see also the parallel judgment in Regional Court of Munich I, judgment of 10/2/2021, Case 37 O 15721/20 and a review here *Höppner/Nobelen*, "Unhealthy Ranking Conspiracy: The German NetDoktor Judgments Banning the Favouring of a Health Portal with Google Search", Hausfeld Competition Bulletin 1/2021 and here *Persch,* "Should Google Still be Allowed to Crown the Kings in Digital Markets?", ProMarket, July 13, 2021.

136 Regional Court of Munich I, ibid*, NetDoktor/Google*.

137 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, paras 391-295; *Carugati*, "Antitrust issues raised by answer engines", (2023), Bruegel Working Paper, Issue 07/2023, p. 4: "*search engines only provide answers from information gathered from a website. Unlike answer engines, they do not generate answers to what users are looking for precisely. Therefore, search engines and answer engines provide different quality services*." As "quality" is no factor, they provide different services

> *"[I]n search we assume that referrals represent the single most important use of a platform. Users are looking to navigate to where they are going, rather than expecting immediate answers*."[138]

87 It equally exceeds the function of an OSE where a service returns results that do not mirror any crawled and indexed information but modify or even substitute it, thereby generating new content. Content generated by an AI system of a gatekeeper to answer a query directly, for example, cannot be found on any website. It constitutes the product of a separate AI service of the gatekeeper. In any event, the primary purpose of such answering service is not to navigate the end user to ranked sources of relevant information but to regenerate and provide the information they provided directly.

88 Accordingly, generative AI systems and chatbots, like ChatGPT or Gemini, are no substitutes for an OSE but form a distinct service.[139] These systems can be used to summarise results into a single answer, but they are not capable of identifying the most relevant webpages with the information that needs to be summarised.

89 Moreover, because they do not mirror what has (actually) been published online, AI generated chatbots are (i) subject to hallucinations, leading to inaccurate information, (ii) lack the ability to provide fresh information and (iii) lack links to relevant sources for end users to verify information.[140] It is therefore "*unlikely that Generative AI tools will displace the need for traditional search*."[141]

90 There is rather

> "*conventional wisdom that AI, while good at providing fast answers, is terrible at referring users to where they want to go. And as long as usage*

full stop. See to the same effect p. 8: "*the answer engine complements the search engine*" and does not substitute it.

138 *Knorp*, „Predicted 25% Drop In Search Volume Remains Unclear", Datos, 23/4/2024 https://datos.live/predicted-25-drop-in-search-volume-remains-unclear/?utm_campaign=gartner-report-23-04-2024&utm_content=290536354&utm_medium=social&utm_source=linkedin&hss_channel=lcp-42384555

139 Explicitly *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para. 391.

140 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para 394.

141 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para. 393.

behavior demands a tool that gets people where they want to go as the primary function, AI will most likely not gain meaningful ground on traditional search."[142]

It follows that providing AI-generated results or chatbot functionalities constitutes a service distinct to that of an OSE as defined in the DMA.[143] 91

The above is not called into question by the fact that the DMA's definition of "*search results*" in Article 2(23) DMA mentions "*a direct answer*". The DMA's definition of "*search results*" applies to any service that may generate results in return to a query. This includes OISs (such as vertical search services or online marketplaces), software application stores, or video-sharing services (see recital (51) DMA). Equally applying to all platform services, the definition of a "*search result*" is incapable of defining any particular service or of drawing the line between them. The definition of an OSE itself does not include any reference to "*a direct answer*", only to "*results*". 92

d. OSE vs OISs

While the DMA contains no definition of search- or non-search related content sites or direct answering engines, it does define "Online Intermediation Service" (OIS) in Article 2(5) DMA) and qualifies them as a potential "Core Platform Service" (CPC) pursuant to Article 2(2)(a) DMA. 93

aa) OSE and OIS cannot form a single service

Identifying a distinct service is particularly straightforward where it qualifies as an OIS. In line with Article D(2)(b) of the Annex to the DMA, as soon as a gatekeeper offers an activity, either on a standalone basis or integrated in the interface of its OSE, that falls under the legal definition of an OIS in Article 2(5) DMA, such activity constitutes a service distinct to the OSE. Since OISs and OSEs are, in any event, separate CPSs, it is 94

142 *Knorp*, „Predicted 25% Drop In Search Volume Remains Unclear", Datos, 23/4/2024 https://datos.live/predicted-25-drop-in-search-volume-remains-unclear/?utm_campaign=gartner-report-23-04-2024&utm_content=290536354&utm_medium=social&utm_source=linkedin&hss_channel=lcp-42384555

143 See Regional Court of Munich I, judgment of 10/2/2021, Case 37 O 15720/20, *NetDoktor/Google (Health Infobox)*, para. 100.

then not necessary to further specify the particular (sub-type) of the OIS concerned. This is the case even where such services are used for the same purpose from the perspective of both an end user and a business user. Services qualifying as distinct CPSs may never form a single service.[144]

bb) Differences between an OSE and an OIS

(1) Definition of an OIS

95 By referring to Article 2(2) P2B-Regulation, Article 2(5) DMA defines an online intermediation service as meaning

> "*services which meet all of the following requirements:*
>
> *(a) they constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council (12);*
> *(b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;*
> *(c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers*".[145]

96 According to recital (10) P2B-Regulation, *"[a] wide variety of business-to-consumer relations are intermediated online by providers operating multi-sided services [...]. In order to capture the relevant services, online intermediation services should be defined in a precise and technologically-neutral manner."* In particular, the services "*are characterised by the fact that they aim to facilitate the initiating of direct transactions between business users and consumers, irrespective of whether the transactions are ultimately concluded online, on the online portal of the provider of online intermediation services in question or that of the business user, offline or in fact not at*

144 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 17: *"different services may constitute a single CPS, if they are used for the same purpose from both an end user and a business user perspective, unless they belong to different categories of the CPSs listed in Article 2, point (2)."*

145 See also the definition in Article 1(1), point (e) of Vertical Block Exemption Regulation (EU) 2022/720.

all". In addition, the required "*contractual relationship should be deemed to exist where both parties concerned express their intention to be bound in an unequivocal manner on a durable medium, without an express written agreement necessarily being required.*"

According to recital (11) P2B-Regulation, examples of OISs should 97

> "*include online e-commerce market places [...], online software applications services, such as application stores, and online social media services, irrespective of the technology used to provide such services. In this sense, online intermediation services could also be provided by means of voice assistant technology. It should also not be relevant whether those transactions between business users and consumers involve any monetary payment or whether they are concluded in part offline.*"

Similarly, according to the Commission's guidelines on vertical restraints, 98

> "*examples of online intermediation services may include e-commerce marketplaces, app stores, price comparison tools and social media services used by undertakings*".[146]

It follows from their definitions that the DMA distinguishes OSEs from OISs on the basis of two differences: (i) their purposes and (ii) their contractual relationships with users. Both differences are intertwined. 99

(2) Navigating the web vs facilitating transactions

First, regarding their purposes, an OSE is "*a service that allows users to perform searches of, in principle, all websites*" and on "*any subject*" with a view to finding and navigating end users to the most relevant sources. 100

In contrast, OIS are defined as services that "*allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers*". 101

Thus, an OSE enables consumers to perform searches across the web to access websites with relevant information, independent of a contract between the OSE and the indexed websites and independent of what a consumer intends to do with the information it obtains on the website it is guided to. In contrast, an OIS enables business users to present their commercial 102

146 Communication from the Commission Notice, Guidelines on vertical restraints (2022/C 248/01), para. 64.

offers and engage with end users with a view to concluding a transaction, based on a contractual relationship between the OIS and the business user. These constitute different purposes from both the perspective of end users and the perspective of businesses.

i. End users' perspective

103 From an end users' perspective, an OSE facilitates a navigation to information published online, while an OIS facilitates a transaction with any supplier.

- **OSEs for web navigation journey:** For an end user, the purpose of an OSE lies in identifying the almost unmanageable wealth of information published on websites in the World Wide Web and linking to it in search results so that the end user can navigate to such information and engage with it on the source website. End users turn to an OSE as a "one-stop-shop"[147] for guidance as regards which websites contain relevant information to their query and to be led to such sites. OSEs assist with an end user's "navigation journey" around the Internet. Accordingly, "*in principle, internet users would expect to find results from the whole of the internet and for these to be provided in a non-discriminatory and transparent manner*".[148] *"The very purpose of a general search service is to browse and index the greatest possible number of web pages in order to display all results corresponding to a search*".[149]
- **OISs for transaction journey:** In contrast, the purpose of an OIS, from an end user's' perspective, lies in facilitating a direct transaction for a particular product or service with a particular seller of such product or service. End users turn to an OIS for guidance as regards which product or service best suits their interests, and which supplier could provide such product or service at the best conditions in terms of (i) price, (ii) delivery, (iii) reliability, (iv) and trustworthiness. OISs thus assist with an end user's "transaction journey" from the discovery of a product, via its evaluation and comparison up to its acquisition and payment.

147 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, paras 327-333.

148 General Court, judgment General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 562.

149 General Court, ibid, para. 182.

- **Making choices on websites vs making choices on offers and suppliers:** An OSE allows end users to make better choices as to which webpages they should visit to find relevant information. In contrast, an OIS allows end users to make better choices on products or services or their respective suppliers. While OSEs provide a selection of webpages on particular topics, OISs provide a selection of products or services and corresponding commercial offerings and suppliers as well as dedicated search and filtering functionality for the purpose of concluding transactions. End users can select between different products, connections, or accommodations, then drill down further to see a list of corresponding offers from different suppliers to compare and buy.
- **Most relevant webpage vs most relevant offer:** In line with the different purposes described above, an end user expects from an OSE to return a list of results leading to the most relevant webpages on which content relating to its query can be found; weighed on the basis of characteristics of webpages. In contrast, an end user expects from an OIS to return a list of the most relevant commercial offers from the most reliable supplier matching the end user's individual commercial demand, based on attributes that matter for the respective product (e.g. price, stock, availability) and that may have nothing to do with the characteristics of a webpage.
- **Generic internet search vs specific product catalogue search:** OSEs crawl and index the entire web, while OISs do not a broad index of the web but build up their own catalogues of content. Accordingly, end users turn to OSEs for a broad internet search, while they turn to OISs to search their specific product catalogues. They may also turn to OSEs first, to obtain an overview and navigate to relevant OISs, and then carry out specific product searches there.[150]

The overlapping element between both is the end users' overarching interest in "information". However, queries and results on an OSE differ from queries and results on OISs.[151] At closer sight, there are significant differences in the information at stake: 104

150 See also the list of differences between general search services (OSEs) and specialised search services (OISs) in *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, paras 378-387.

151 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para. 326

– **OSE for access to public website information:** End users turn to an OSE to find any information that has been published on a website on the Internet. They are neither expecting nor requesting from an OSE to provide them with any information they would not equally find if they navigated the web themselves by calling up relevant websites directly. They expect a 'mirror' of the web.[152]
– **OIS for access to specific transaction information:** In contrast, end users turn to an OIS for any information and guidance regarding a potential transaction with suppliers, regardless of whether such information has been published by the supplier or anyone else online or not. On the contrary, they are often particularly interested in information that is *not* publicly available and may therefore not be extracted by an OSE via crawling, as it is fine-tuned to the end users' individual commercial needs. They are interested in characteristics, advantages, and disadvantages of particular products and services and their respective suppliers, in comparison to one another. They are keen on real-time information regarding the current availability of specific product features (size, colour, length, weight, etc.), local prices and available discounts (and the individual conditions for those), deliverability or availability dates, expected delivery times, trustworthiness of a product and particular supplier, etc. None or at least not all of such information may be published on any webpage as it requires that the end user first specifies its individual transactional needs and expectations, i.e. that the user engages with a business. Other information may not be published because it relates to offline activities (such as reliability and reputation). In fact, as has been explained by a former AltaVista engineer, "*most external factors important for users (e.g., price of goods, speed of service, quality of pictures, etc) are usually unavailable to generic search engines')*."[153] While OSEs struggle to identify accurate information such as a price or deliverability from crawled data, OISs may provide such data to end users. In any event, as the end user is ultimately interested in concluding a transaction with a suitable supplier, rather than in the navigation to a particular website, it does not matter to the end user whether the information provided or relied upon by the OIS is published anywhere on the Internet or

"*queries and results on a GSE [General Search Engine] differ from queries and results on verticals, such as Expedia, Yelp*".

152 See above at B.II.1.b on the definition of an OSE.

153 *Broder*, "A taxonomy of web search", (2002), SIGIR Forum, Vol. 36, No. 2., p. 4.

whether it has been directly obtained from the supplier or a third party. In fact, whether the supplier recommended by an OIS operates any own website or not may not matter to the end user at all. Again, the end user intends to purchase a good or service, not find a website.[154]

ii. Business users' perspective

OSEs and OISs also fulfil different purposes from the perspective of their respective business users, in particular, from the perspective of direct suppliers that may or may not operate a website. 105

– **Traffic to webpage vs real sales:** Businesses passively allow OSEs to crawl, index, and display links to their websites as this generally strengthens their brand and may lead potential future customers to their websites where they can further engage with them.[155] This makes sense irrespective of whether any such traffic ultimately leads to direct transactions. There is more to marketing than direct sales. Also, visibility in SERPs can serve as a general marketing instrument, well before the initiation of any individual transaction with an end user. This is why effectively any business, irrespective of its business model, seeks to attract potential consumer attention through organic search results within an OSE, in particular as clicks on such results do not trigger a payment obligation. In contrast, businesses actively contract with OISs for them to facilitate direct transactions with a target group of end users that the businesses may specify on the basis of the contract with the OISs. Thus, businesses turn to OISs to increase sales, not necessarily traffic, to their sites. In fact, as can be observed, for example, in the case of online marketplaces, many businesses that turn to OISs do not even operate any

154 This is evidenced, for instance, by the fact that "*a significant source of Amazon ad revenue comes from advertisers without a website to link to [as] most Amazon merchants do not have a website*". *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para. 482.

155 See General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping),* para. 177 "*The infrastructure at issue, namely Google's general results pages [..] generate traffic to other websites".*

own website but only brick and mortar facilities.[156] The lack of an own website, or its inability to generate sales, may even be a main driver for a business to turn to an OIS. This is evidenced by the business model of online marketplaces such as Amazon. Most merchants selling products on the Amazon marketplace, have no website.[157] But merchants wishing to appear on an OSE, either as organic or paid result, need a website to link to.[158] In these cases, OISs bridge the gap between the physical and the digital world, a bridge that an OSE may not build.

- **Promoting a webpage vs promoting offers:** In line with the above, those website owners that purchase paid results (Google text ads, previously Google AdWords, now part of Google Ads) do so first and foremost with a view to attracting end users to their webpages. In contrast, businesses purchasing sponsored rankings or paying for OISs do so with a view to promoting the sale of a particular product or service, which is not necessarily available on their website or any website at all.
- **Findability vs sales performance**: Every operator of a website, including direct suppliers of goods, needs to be found online via an OSE and therefore allows the crawling and indexing of its site. In fact, regardless of its respective business model, nearly every website operator depends on being findable via the established OSE, Google Search, and is therefore dependent on it. In contrast, not every website operator requires an OIS to reach its target audience. OIS are only used by businesses that do not just need to be found but aim at concluding transactions. Plus, even amongst such businesses, some larger players with a strong brand may not be able to reach their audience directly, without the use of an OIS. Hence, while nearly every online business depends on an OSE, only a sub-set of them require OISs and even less depend on any particular one.
- **Public general business information vs individual specific transaction information:** Businesses operating websites may not mind that OSEs automatically crawl and index information they make publicly available on their websites and to make such information omnipresent through search results. That is because they can control what information they publish on their website for anyone to see and engage with and for OSEs to crawl and index. There may be dynamic commercial information such

156 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para. 482 (quoted in previous footnote).

157 Ibid.

158 Ibid. „*an advertiser needs a website to advertise on Google*".

as current discounts or availabilities, however, that a business would not and could not wish to make available to anybody on its website but reserve for specific user groups, such as solvent or established, registered customers. For such targeting, businesses may turn specifically and exclusively to OISs but not rely on an OSE.

iii. Relevant factors

106 While being an element of the definition of an OSE, the mere fact that a service allows end users to perform searches, returns ranked results, and navigates to websites, as such, does not preclude that such service constitutes an OIS.[159] That is because the same activities also fall under the definition of an OIS. In fact, "*finding or 'discovering', inter alia, content, products, websites, information or software applications is common to numerous services that clearly fall within very different categories of CPS*"[160], most of which are not an OSE. Accordingly, the ability to search for and find information is not the decisive criterion to distinguish the category of service to which an activity belongs.[161]

107 It does not constitute a decisive criterion to distinguish an OSE from an OIS either whether the service provides any "*search results*" as defined in Article 2(23) DMA. Such definition is not limited to an OSE. It applies to any digital service covered by the DMA that allows an end user to enter a query and returns any form of result. The table in section E of the Annex to the DMA mentions that end users may "*make a query*" or "*ask a question*" on no less than five CPSs other than an OSE.[162] All of them may return "*search results*" in response to such queries. Hence, the definition of a "*search result*" is incapable of providing any guidance for the delineating of services pursuant to the DMA.[163]

159 See Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)* designating Google Shopping and Google Maps.

160 Commission decision of 5/9/2023, Cases DMA.100020 et sub., *Meta (designation)*, para. 252.

161 Cf. to the same extent Commission decision of 5/9/2023, Cases DMA.100020 et sub., *Meta (designation)*, para. 252.

162 There are: online intermediation services, online social networking services, video-sharing platform services, virtual assistants, and web browsers; see section E of Annex to the DMA.

163 See above at c. (on GenAI answering services). Note that Alphabet and the Commission appear to over-emphasise the relevance of the definition of "*search results*"

108 Rather, the decisive difference here is that while an OSE allow end users to find information published online, its purpose is not to allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers. Google Maps, for example, has been identified by Alphabet and the Commission as constituting an OIS, rather than forming part of Google Search, because it allows local businesses "*to present a description of the business activity, opening hours, contact details, photos, replies to reviews and questions of end users. In addition, end users can add photos, reviews, questions and answers to questions of other end users.*" The same engagement may not be facilitated through an OSE. Notably, Google Maps was considered as a distinct OIS even though it serves as an "*online-based consumer map and navigation service which enables end users to search for and navigate to local entities, including local businesses*".[164] What mattered was the transaction-facilitating purpose of such service.

(3) Crawling of websites vs direct contracts with business users

109 Corresponding to the different purposes, the second significant difference between an OSE and an OIS relates to the contractual relationships between the parties involved.

110 Article 2(6) DMA in connection with Article 2(5) P2B-Regulation defines an OSE as a service that "*allows users to input queries to perform searches*". The "*users*" of an OSE are defined as consumers. The definition of an OSE mentions no "*business users*". Consequently, Article 2(6) P2B-Regulation defines the "*provider of online search engine*" as any person "*which provides, or which offers to provide, online search engines to consumers*".

111 It is only in the context of setting out material obligations, that the P2B-Regulation also mentions and protects "*corporate website users*", whose websites are crawled, indexed, and ranked by OSEs. Article 2(7) P2B-Regulation defines corporate website users as any "*person which uses an online interface, meaning any software, including a website or a part thereof [...], to offer goods or services to consumers for purposes relating to its trade, business, craft or profession.*"

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when suggesting that paid search results are an inherent part of an OSE. An OSE may also be funded by subscriptions or non-search based advertising.

164 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 70.

However, "*in the absence of a contractual relationship with corporate website users*"[165], the P2B-Regulation distinguishes "*corporate website users*" from "*business users*", which pay for the service of a platform, thereby clarifying that website owners are not "*business users*" of an OSE in the common sense of paying customers. 112

The DMA defines "*business users*" more broadly than the P2B-Regulation. The DMA's definition of a "business user" encompasses pure "*corporate website users*" (despite their lack of a contract with the OSE).[166] In fact, the Commission has already clarified that "*advertisers are not the relevant business users of online search engine services*".[167] Rather, companies purchasing paid results are business users of Alphabet's advertising service. It follows that in the context of the DMA, crawled and indexed website operators are the only "business users" of an OSE. They allow OSE to access their websites and index content in order to subsequently reach end users through organic search results. Given that such business users have no contract with the OSE, it is only consistent for the DMA to define an OSE as a service to consumers, not a service for any paying business users. OSEs provide their service without any contract with the owners of the websites they crawl, index, and rank (with or without their consent). Rather, the "lead outs" or the "traffic" that such "business users" receive from an OSE when consumers click on search results is a reflex of the OSE providing its services to consumers. 113

In its first DMA Compliance Report of 7 March 2024, Google itself described the business relationships of its OSE as follows: 113a

> *"The business users of Google Search are commercial websites that are part of the Google Search index. Google Search does not require websites to enter into any terms or conditions of access to be part of its search index. Nor does it have any contractual terms (written or unwritten) that govern the provision of services by Google Search to the websites that are*

165 Recital (4) sentence 3 P2B-Regulation.

166 The different definition of "*business users*" in the P2B-Regulation and the DMA explains the following finding in the decision to designate Microsoft (Commission decision of 5/9/2023, Cases DMA.100017 et sub., *Microsoft (designation),* para. 45) that "*Bing is offered, free of charge, to both business user and end users in the Union*". Such finding is correct, while misleading in the context of the definition of an OSE (which distinguishes between "*business users*" and "*corporate website users*").

167 Commission decision of 12/02/2024, Cases DMA.100015 et sub. *Microsoft (rebuttal decision)*, para. 30.

in Google's index. Rather, Google Search renders a service to end users and as part of that service unilaterally includes websites in its index to generate search results that it shows to end users."[168]

114 In contrast, an OIS is defined as a service that "*allows business users to offer goods or services*", "*on the basis of contractual relationships between the provider those services and business users which offer goods or services to consumers*".[169] Such "*business users*", in turn, are defined as any "*person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession*".[170] Thus, in contrast to "*corporate website users*", who are merely passively crawled, indexed and ranked (with or without their consent) by an OSE, "*business users*" of an OIS actively engage with the OIS to market their individual offerings. Consequently, in contrast to an OSE, defined as a service "*to consumers*", an OIS is defined as a service to "*business users*".

115 These differences reflect the different purposes of an OSE and an OIS from the perspective of both end users and business users (in the broader sense of the DMA: including website owners).

116 As outlined above, end users turn to an OSE to be navigated to any relevant website, regardless of whether such site has a contract with the OSE. Conversely, corporate website users passively accept, and sometimes even actively support (through Search Engine Optimisation (SEO)) the crawling, indexing, and ranking of their sites to attract end users to their sites, where they may or may not further engage with them on an individual basis, possibly leading to a transaction. Corporate websites users do not actively "turn" to an OSE to offer their individual goods or services. A central reason for that is the need for businesses to differentiate their offerings and the conditions of sale.

117 As explained in recital (30) DMA, "*to ensure that business users [...] differentiate the conditions under which they offer their products or services to end users, it should not be accepted that gatekeepers limit business users from choosing to differentiate commercial conditions, including price*". An OSE, however, does not allow such essential differentiation. OSEs operate on the basis of automatic web crawling and indexing. They crawl, in principle, any

168 Alphabet, EU Digital Markets Act (EU DMA) Compliance Report Non-Confidential Summary, 7 March 2024, para. 131.
169 Article 2(5) DMA in junction with Article 2(2) P2B-Regulation.
170 Article 2(6) DMA in junction with Article 2(5) P2B-Regulation.

website, index its content more or less regularly and then apply a general algorithm to determine the most relevant websites for a particular query.[171] Such technology is not suitable, in contrast, for matching a particular end user demand with a corresponding offering of a particular business in real-time, let alone for allowing businesses to dynamically and individually differentiate their offerings and conditions such as the price, the delivery times or the place of delivery. OSEs are designed and used to "match" websites, not to match individual offers.

118 To obtain support in facilitating transactions, business users therefore turn to OISs.[172] Over the years, a wide range of OISs has emerged for the purpose of initiating individual transactions between end users and business users on the basis of contracts with the latter. Such contracts with the OIS allow business users to differentiate the conditions under which they are prepared to offer their products and services to individual end users, thereby overcoming the shortcomings of an OSE.

119 Business users enable such differentiation of their offers by sharing individual data with an OIS that they may not share publicly, that is on their websites (where an OSE may crawl them). In other words, typically OISs have access to non-public data from their business users; data that OSEs may not easily find, crawl and display on their SERPs. OISs seek to differentiate themselves and gain a competitive edge by obtaining such non-public data from business users exclusively. The more unique business data (offers, discounts, etc.) an OIS may bundle, the more attractive it becomes in turn for end users.

120 Accordingly, a further difference is that an OSE's results pages try to mirror what can be found online because that is what end users expect. The SERPs are, "in principle, open". In contrast, OISs are particularly interested in content (business offers etc.) that is not openly available and easily accessible by anybody, but only their own end users. They may even seek to obtain offerings from business users on an exclusive basis; offers that not available anywhere else. [173]

121 The list of established OISs is long. It encompasses a wide range of specialised search services/verticals (e.g. idealo for products, GetYourGuide for travel activities, Yelp for local services, or Kayak for flights), online market-

171 See above II.2. ("definition of an OSE").

172 See Commission Notice, Guidelines on vertical restraints (2022/C 248/01), para. 67.

173 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 177.

places (e.g. Amazon and eBay), online travel agencies (e.g. Booking.com or Expedia), and job boards (e.g. StepStone and indeed). Despite different business models, constituting different markets, all those OISs have in common that they collect, compare, and present the offerings of several suppliers with a view to facilitating a transaction.

122 The differences between an OSE and an OIS can be summarised as follows:

Online Search Engine	Online Intermediation Service
*"service that allows users [..] to perform **searches of, in principle, all websites** [..] on the basis of a query **on any subject** [..] and returns results in any format in which information related to the requested content can be found".*	*"allow business users to offer goods or services to consumers, with a view to **facilitating the initiating of direct transactions** between those business users and consumers [..] provided to business users on the basis of contractual relationships [..] "*
• **Allow consumers to search the entire WWW for content of any type and links to URLs**	• **Allow to search databases to compare offers for products or services from business users**
• Crawl entire WWW to generate Web Index	• Onboard business users' offers to Product Index
• Index & show freely crawlable content that users would also find if they visited website directly	• Upload & show offers of business users that may or may not be found on any business users' website
• Navigate consumers via link to relevant sites	• Directly initiate transaction with business users
• General algorithm applied equally to Web Index	• Specialised algorithm applied only to Product Index
• Rank webpages based on crawled web data and webpage-related relevance signals	• Rank businesses and offers based on data feeds and product-related relevance signals
• In lack of contract, corporate website users have limited influence on how their offers are displayed	• Thanks to contract, business users may differentiate which of their offers are shown to which consumers
• **Mirror the freely accessible WWW**	• **Provide access only to proprietary database**

cc) The example of Alphabet: on Google's shift to integrating specialised search and intermediation services

(1) Google Search became market leader by limiting itself to an OSE

123 Between 1998 and 2004, Google grew to become the world's most popular search engine by fully focusing and limiting its activities to just that: general online search as defined in the DMA. Early providers of online search services such as AltaVista and Yahoo! had started to integrate own content or content from selected third parties providing specialised intermediation services to "*provide results from sources that are not normally available to search engines*"[174], thereby turning into "portals". Google, in contrast, had overtaken them by staying consciously away from such "all-in-one"

174 See AltaVista, Shortcuts Overview of 24/11/2002, as reported in "Alta Vista Creates Invisible Web Index", (2002), on netforlawyers.com; see also *Jansen/Spink/Pedersen*, "A Temporal Comparison of AltaVista Web Searching", (2005), JASIST.

approach. In an interview in year 2004, Google Co-Founder *Larry Page* explained the firm's successful approach as follows:

> *"Question: Portals attempt to create what they call sticky content to keep users as long as possible.*
>
> *Larry Page: That's the problem. Most portals show their own content above content elsewhere on the web. We feel that's a conflict of interest, analogous to taking money for search results. Their search engine doesn't necessarily provide the best results; it provides the portal's results. Google conscientiously tries to stay away from that. We want to get you out of Google and to the right place as fast as possible. It's a very different model."*[175]

Initially, Google applied this strategy for both paid and unpaid results. Paid 124
results were limited to text ads for which every website owner could bid. The ads led the end user directly to a landing page of the advertiser, which the end user could equally have called up directly. In addition, the ads auctions, the eligibility, and the ranking of ads were not only based on price but also on a quality score which ensured that only relevant websites were linked in such text ads. Thus, organic results and text ads served the same navigational purpose, characteristic for an OSE as defined in the DMA. This is why such results never caused any competition concerns regarding self-preferencing. In their combination they were so attractive to end users that by 2004 Google had become the largest and most profitable OSE on the planet. The General Court summarised this distinction as follows:

> *"Google is also wrong to claim, by extension, that the Commission is calling into question the legality of its text ads, which form the basis of its business model and account for its commercial success and with which the Commission has never taken issue. Unlike Shopping Units, text ads are not part of Google's [CSS] and are not being challenged for having harmed competitors in the context of a practice of favouring."*[176]

However, witnessing the commercial success of some OISs such as Amazon, 125
Booking.com, or eBay, over the years Google realised that even more can

175 Interview given by Larry Page and Sergey Brin to the Playboy in 2004, quoted in Securities and Exchange Commission, Amendment No. 7 to Form S-1 Registration Statement under the Securities Act of 1933, Google Inc., (2004), Appendix B, p. B-6.

176 General Court, judgment of 10/11/2021, Case T-612/17, *Google and Alphabet/Commission (Google Shopping)*, para. 315.

be earned by vertical integration. Instead of leading valuable end users to third parties that facilitate direct transactions with business users, Google decided to provide such intermediation services itself and to keep end users (and, by reflex, also business users) away from third-party sites.

126 By 2003, Google therefore started to change its strategy. Following some early measures taken by AltaVista and Yahoo! to enter the markets for OISs[177], (which Google itself had criticised, see above), Google decided first to (i) develop and provide its own specialised search and intermediation services and (ii) after limited success of such services on a standalone basis by 2007 to (iii) start integrating them into its OSE Google Search,[178] thereby commencing the platform envelopment strategy tackled by Article 6(5) DMA.

127 Already in Google's file to register with the US Securities and Exchange Commission on August 13, 2004, the company explained that it provides several services in addition to its online search service, most through the same online user interface.[179] They would already

> *"offer, free of charge, all of the following services at Google.com [...]: Google WebSearch; Google Image Search; Google News; Google Toolbar; Froogle; Google Web Directory; Google Local; Google Answers; Google Catalogs"*

177 In 2001 AltaVista, the leading OSE at the time, had developed a special technology, which displayed current stock price or weather data in real time for queries about share prices or the weather, or enabled users to find a relevant restaurant in their vicinity. Yahoo! followed AltaVista's example and developed specialised search technologies for specific categories such as targeted searches for images or attractions (e.g. of landmarks such as Notre Dame or of people).

178 For a description of such process see *Sullivan*, "Google Universal Search Expands", (2008), Search Engine Land.

179 See Securities and Exchange Commission, Amendment No. 7 to Form S-1 Registration Statement under the Securities Act of 1933, Google Inc., (2004), description of "Business" and Appendix A, p. A-18: "*We offer, free of charge, all of the following services at Google.com and many of them at our international sites: Google WebSearch; Google Image Search; Google News; Google Toolbar; Froogle; Google Web Directory; Google Local; Google Answers; Google Catalogs; Google Print; Google Lags; Blogger; Picasa; Google AdWords; Google AdSense [...]; "What Google does is more than just 'search' in the sense of that simple interface. As you can see, we do websearch but we also do image search. In fact, we have many new products and services in our portfolio, and we expect to continue to introduce more over time. Each product or service reflects our effort to address a new opportunity with respect to the growth of the Internet and the availability of information around us. [...] We develop and improve new products with many rounds of testing. Some of them start off working better than others.*".

and "develop and improve new products with many rounds of testing. Some of them start off working better than others."[180]

During the first years, the focus was on providing specialised search services for non-commercial content such as images and news. To benefit from the rising popularity of OISs for shopping and travel, Google later tried to offer more commercial intermediation services. However, as evidenced in the EU *Google Search (Shopping)* investigation, Google had quickly realised that for doing so, the technology of its OSE, as such, was poorly suited. 128

(2) Limits of Google's OSE in facilitating transactions

To facilitate a transaction, end users expect from an OIS to provide and compare relevant criteria such as prices, availabilities, ratings, or trustworthiness of different suppliers. Suppliers in turn expect from an OIS to allow the differentiation of commercial conditions, including prices or availabilities. Google realised that automated crawling, indexing, and ranking of websites, the cornerstone of any OSE, reaches its natural limits to achieve such OIS functionalities. 129

First, the process of crawling websites is not suited to provide the granular level of current data required to effectively facilitate and conclude transactions. The product-specific data expected by end users was simply not available through crawling as, without a contract, corporate website users were unwilling or unable to publish such data on their websites. 130

Second, the web crawling and indexing processes did not allow the kind of quality control required for providing an OIS. Quality-control mechanisms address the specific quality risks associated with commercial offerings. Such controls for showing high-quality commercial offers typically take place well before an end user enters a query and include, for example, checking the reputation and trustworthiness of a supplier, verifying price accuracy and product availability, and removing any duplicate items. The OSE technology did not allow any such pre-query controls. They were the terrain of OISs with their direct contracts with suppliers. 131

Third, the generic algorithms used to assess the relevance of crawled websites were not suitable for weighing the signals that matter when comparing 132

180 Securities and Exchange Commission, ibid., Appendix A, p. A-18.

commercials offerings with a view to concluding transactions. Because the web index was organised around the specific attributes and characteristics of webpage relevance (such as the text, title, or links to the other webpages), it did not allow Google to specifically look at and weigh the criteria that matter for commercial transactions (like prices, stock, or trustworthiness).

(3) Google's specialised search technology to facilitate transactions

133 To counter such natural limits of an OSE and nevertheless enter the markets for OISs without having to compete on the merits for end users and business users alike, Google developed its own special OIS technologies. For instance, Google developed an infrastructure that enabled suppliers to actively upload structured data about their commercial offerings directly to Google's corresponding OIS. This in turn allowed Google to receive product-specific data directly from suppliers that it could not obtain through web crawling. The data was catalogued and organised into specialised databases, typically referred to as "product indexes" (for particular types of products or services such as hotels, products, flights).[181] In contrast to Google's web index, these product indexes were organised around the specific attributes of the products or services at stake (e.g. hotels, products, flights). This in turn allowed Google to develop specialised ranking signals that measured the relevance of commercial offers for a particular query. Thus, instead of relying on generic signals based on characteristics of webpages (such as the text, title, or links to other webpages), Google's OIS technology allowed it to look at and compare criteria like price, stock, availability, or trustworthiness. In other words, only the special cataloguing systems used in the special indexes enabled Google to identify signals for any ranking in a way that would not be available in crawled web data but that end users care about when they are interested in a transaction.

134 Having set up separate indexes for particular types of content, Google then developed corresponding special algorithms to identify the most relevant commercial offerings from within such indexes, based on criteria such as price, product features, supplier trustworthiness, and availability. This allowed Google to facilitate transactions between end users and business

181 Like those of other OISs, Google's product catalogues organise, classify, and de-duplicate offers in Google's respective product index prior to any query. Such steps are crucial to surface relevant offerings that facilitate direct transactions between end users and suppliers (i.e. business users).

users by answering any queries implying an interest to compare products with corresponding specialised results based on Google's own product index and algorithms; results which would not have been possible on the basis of its OSE technology.

135 Finally, after Google had developed specialised search services, it started to integrate them into Google Search in 2007. To this end, Google forwarded any query entered on Google Search that implied an interest for an OIS to its corresponding own OIS and allowed it to return specialised results for Google Search to embed into its results pages. By sharing the query with its OISs, Google then had a choice between two, in some cases even more sets of ranked results it could show on its SERP: (i) results of its OSE (i.e. results generated on the basis of crawled web data and generic relevance signals), and (ii) results of its OIS, to which it had forwarded the query (i.e. results generated on the basis of data feeds and product-specific relevance signals). To determine which of those ranked results (lists) should be embedded into the SERP, and in which order, Google developed a mechanism that allowed it to compare on a query-by-query basis which sets of results are likely more relevant to the query at hand. Ultimately, this meant that whenever a query implied demand for an OIS, (naturally) output delivered from Google's own OIS appeared more relevant.

136 In the *Google Search (Shopping)* proceeding, Google referred to such mechanism to create ranking equivalence between specialised OIS results drawn from Google's curated feed-based product indexes and generic OSE results drawn from Google's crawling-based web index as "Universal Search".[182] However, in economic reality, Universal Search was a synonym for the abusive leveraging/platform envelopment strategy identified as an infringement of Article 102 TFEU in *Google Search (Shopping)*.[183]

137 Google operates several specialised search and intermediation services. In the past, some of them, e.g. Google Shopping (previously Froogle), Google Flights and Google Hotel, were offered to end users on a standalone basis, that is through a separate website or app. However, Google's primary means to offer its OISs was by directly embedding specialised results generated by such OISs in the SERPs of its OSE Google Search.

182 See General Court, judgment of 10/11/2021, Case T-612/17, *Google and Alphabet/Commission (Google Shopping)*, paras. 14, 273, 278, 571.

183 General Court, ibid., paras. 278 et sub.

dd) Google's OISs as distinct services – findings in Google Search (Shopping)

138 Over the years, Google has tried to present its specialised search and intermediation services as an integral part of its OSE Google Search. However, the European Commission, courts, and ultimately the DMA contradicted this view. It is by now firmly established in EU law that such services constitute services distinct from the OSE.

139 Article 2(6) DMA defines an OSE as allowing to perform searches on "*any subject*" (see above). In contrast, recital (51) DMA refers to groups of "*results specialised in a certain topic*" in the sense of a distinct service provided through an OSE.

140 Such differentiation between "*general*" search results on any subject and "*specialised*" search results on a certain topic picks up the differences between a general (or "horizontal") and specialised or ("vertical") search service. Since results displayed by an OSE are "available" to any website on the basis of a common algorithm, such results are called "*general*". In contrast, OISs index and match only those business users with whom they have contracts. Their rankings are based on algorithms specialised in the respective type of offerings that they intermediate. They therefore provide "*specialised*" results.

141 The Commission found[184], the General Court confirmed[185], and Google ultimately did not challenge[186] that "*the nature of specialised search services and general search services is different*"[187], and that their provision therefore constitutes distinct services. For the same reasons that specialised search services were seen as distinct from Google's general search service, such services now qualify as an OIS distinct from Google's OSE:

142 First, in contrast to an OSE, OISs "*group together results for a specific category of products, services or information (for example, 'Google Shopping',*

184 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 163–165.

185 General Court, judgment of 10/11/2021, Case T-612/17, *Google and Alphabet/Commission (Google Shopping)*, paras. 327 et sub.

186 General Court, ibid. para. 327: "*[CSS] are defined as [...]. That definition is not disputed by Google*".

187 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 167.

'Google Finance', 'Google Flights', 'Google Video')" and focus on "*providing information or purchasing options*" in such specific field of specialisation.[188]

Second, reflecting the different purposes, there are a number of differences in the technical features required. In particular, the input for OSEs originates from an automated, unilateral web crawling and indexing of content that is otherwise freely accessible online. Apart from placing content on their website, the crawled website owners remain passive. Or, as recital (77) of the Digital Services Act now puts it: "*the owners of the websites indexed by an online search engine [...] do not actively engage with the service*".[189] No contractual relationship with them is required, also because they are not expected to pay for crawling, indexing and navigating to their site. 143

By contrast, most OISs typically rely on an active uploading of information by the third parties they intend to match to end users' interests. That is because they find that the information openly published on websites and thereby available to them via crawling, is insufficient to provide their intended comparison service (see above). To obtain more relevant information than that available via crawling, they typically rely on the dynamic upload of product feeds via an API. Such feeds contain detailed information on the respective type of content; such as prices, product information or availabilities, not published online.[190] To this end, 144

> *"each specialised search service therefore needs to develop and maintain a dedicated data infrastructure and structured relationships with relevant suppliers."*[191]

For example, 145

> *"[CSSs] typically employ a commercial workforce whose role is to enter into agreements with online retailers, pursuant to which these retailers send them feeds of their commercial offers. These services are only partially automated and involve commercial relationships with online retailers. Likewise, flight search services use proprietary databases of content that are usually updated in real-time to ensure that they provide the most*

188 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 24, 167.

189 Recital (77) DSA.

190 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 168.

191 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 195.

current possible information and have contractual arrangements with the booking websites, which remunerate them."[192]

146 Third, while OISs show "*offers of several products that may match the internet user's query*"[193], OSEs present a selection of results for websites where any such offers may be found and compared. An OSE provides *results for any websites* with information that corresponds to the query. OISs enable the direct comparison of *offers of different online suppliers*. Accordingly, where a user enters a query that implies an interest for the comparison of offerings, including prices or characteristics, relating to a particular topic, an OSE would return results for websites that allow such comparison (e.g. hotel, product, or flight search services); while only the latter service providers would allow a direct comparison of offers from different suppliers (e.g. hotels, shops, airlines).

147 Conversely, where, in return to a query that implies an interest in services that enable the comparison of products and prices for a particular category of content with a view to facilitating a transaction (e.g., hotels, products, jobs), an OSE no longer presents a list of the most relevant providers of such service (i.e. OISs) but instead displays its own group of specialised results to enable a direct comparison of offers and prices to facilitate a transaction, such search service no longer acts as a general intermediary between end users and specialised services but turns into a provider of such service itself.[194]

192 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 195.

193 General Court, judgment of 10/11/2021, Case T-612/17, *Google and Alphabet/Commission (Google Shopping)*, para. 327.

194 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 351: "*The alternative offered to competing [CSS] 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*". See also Regional Court of Munich I, judgment of 10/2/2021, Case 37 O 15720/20, *NetDoktor/Google (Health Infobox)*, para 100.

Hence, where an OSE does display commercial offers on its SERPs, it actually provides an OIS in the form of a specialised search service[195], triggering an obligation to treat similar search services no less favourably. 148

Fourth, (i) the separate offering of general and specialised search services on the market, (ii) Google's history of providing and describing them as distinct (e.g. in its list of "*All Products*"), and (iii) the fact that specialised search and intermediation services offer certain search functionalities (such as number of stars, price ranges, or user reviews) that are unavailable to the same extent on a general online search service further supported the conclusion that OISs in the form of specialised search services and general online search services are different.[196] 149

Referring to the example of a CSS, in January 2024, Advocate General *Kokott* summarised the differences between Google's OSE and its OISs in the form of a specialised search service as follows: 150

> *"In 2002 (in the USA) and 2004 (in Europe) Google began offering a separate product search facility additional to its general search service. A database fed by information provided by merchants and known as the 'product index' was used to sort and display search results by relevance on the basis of specific algorithms. These search algorithms were different from those that were used in online general searches, via a process known as 'crawling', to extract information from websites, index it, add it to Google's 'web index', sort it by relevance and display it."*[197]

e. OSE vs non-OIS specialised search services

As mentioned above, most commercially relevant specialised search services (verticals) qualify as an OIS and therefore as a potential core platform service in the meaning of Article 2(2)(a) DMA. By enabling end users to discover, search, find, compare and click offers from business users, based on a contractual relationship with them, they facilitate the initiation of dir- 151

195 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, footnote 3, para. 96; General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 400 et sub. (Article 102 TFEU).

196 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 169–176.

197 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, para. 11.

ect transactions between their end users and business users, thus qualifying as an OIS.

152 However, there are some types of specialised search services that do not qualify as an OIS but may nevertheless constitute a service that is distinct from an OSE. In Google Search (Shopping), the Commission found that

> "*Google operates several search services that can be described as 'specialised' because they group together results for a specific category of products, services or information (for example, 'Google Shopping', 'Google Finance', 'Google Flights', 'Google Video')*".[198]

153 'Google Finance' and 'Google Video' are not provided on the basis of contractual relationships with business users, thus likely do not qualify as an OIS. Nevertheless, the Commission rightly identified such services as distinct from Google's OSE. Because

> "*even though search results provided by a general search service may sometimes overlap with the results provided by a specialised search service, the two types of search services act as complements rather than substitutes.*"[199]

154 Specialised search services focus on providing specific information in their respective fields of specialisation, often, but not always, covering a content category which is monetizable.[200] Their common purpose, and difference to an OSE is that they allow end users to compare the information of several online publishers of any certain type of content, regardless its commercial nature. Despite not fulfilling all characteristics of an OIS, the following services may qualify as a distinct specialised search service:

– **Verticals that facilitate no transaction:** Specialised comparison and aggregation services that do not facilitate any transaction between end users and business users because they focus on non-commercial content such as news, images, finance information, recipes of events, may still

198 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 24.

199 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 174.

200 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 167.

qualify as a distinct service.[201] Such specialised services may be funded directly by the end user (through a subscription) or through general advertising displayed along unpaid search results, as is the case for news aggregators. Even if such services do not qualify as an OIS, they may thus still constitute a service that is distinct from a gatekeeper's OSE.

– **Verticals using crawlers without contractual relationships with content providers:** The same applies where a gatekeeper provides a specialised search service to end users based on a specialised algorithm but without contractual relationships with providers of the respective type of content. This may occur where a gatekeeper leverages the search technology of its OSE, or uses a specialised crawler, to compile a separate index for certain type of content and then applies special algorithms to it in order to provide specialised results to end users. Despite the lack of contractual relationship with business users, this may still constitute a distinct service that may not be favoured. Article 6(5) DMA requires a distinct "service", not a two- or multi-sided "platform". For a service to be distinct, it needs to fulfil a different purpose for either end users or business users.[202] Also considering the principle of technological neutrality (recital (14) DMA), it cannot be decisive how a gatekeeper obtains the content it uses to fulfil a different purpose than that of its OSE, such as a specialised search service. Accordingly, where a gatekeeper presents specialised results in a manner that fulfils a different purpose than an OSE, namely by directly comparing offerings (rather than websites), such activity can constitute a distinct specialised search service, even if the results are not sourced through contracts with the respective content providers but by other means such as website crawling. Such crawling-based groupings of specialised results may not achieve the same level of precision or quality as third parties that obtain (more) relevant content through contracts with content providers. However, since even "weak substitutes" can allow a gatekeeper to engage in platform envelopment[203], such lower quality may not preclude the finding of a distinct service.[204]

201 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 24.

202 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 95.

203 See above at II.3.a.

204 See also above at II.3.d. bullet (4).

f. Borderline between OSE and OIS/verticals in case of overlapping elements

155 It is characteristic for "platform envelopment" that the enveloper leverages common technology and infrastructure, including online interfaces, to anti-competitively tie a new service to its established platform and user base.[205]

156 Currently, Google shares its OSE technology and interfaces with several of its OISs and (non-OIS) verticals (subsequently jointly referred to as "**OIS/Vertical**"). Where such overlapping elements exists, the boundaries between the OSE and the OIS/Vertical are set by the purpose and functionality that the services respectively provide.[206]

> *"According to Alphabet, elements which serve the purpose of the online intermediation service are part of that CPS, while elements on the same platform serving a different purpose are not part of the respective online intermediation service CPS."*[207]

157 Alphabet had advocated this principle to distinguish an OIS (as one type of CPS) from another service that uses components of such OIS. However, there is no reason why the same principle should not equally apply to distinguish an OSE (as another type of CPS) from a service that uses components of the OSE, including from any OIS/Vertical.

158 Adopting the principle to such situation, elements which serve the purpose of an OSE are part of that service, while elements on the same platform serving a different purpose are not part of the OSE, but of a distinct service. More specifically, components on the online interface of an OSE (such as a toolbar or links) which serve the purpose of an OSE to perform searches of all websites on any subjective, are part of that OSE, while elements on the online interface of an OSE serving a different purpose (such as directly answering questions, comparing offerings, or facilitating a transaction), are not part of the respective OSE but of a corresponding distinct OIS/Vertical. Put differently, where a platform caters for both OSE and OIS purposes, as in case of a vertically integrated OSE+OIS/Vertical, elements which serve the web navigation purpose of an OSE are part of that CPS, while elements on the same platform serving an OIS/Vertical are not, but instead form part

205 See above at II.3.a.

206 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 30.

207 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 30.

of a distinct OIS/Vertical. Since such elements on the SERPs of an OSE may be highly favourable to Google's OIS/Vertical, Article 6(5) DMA requires that third parties offering a similar OIS/Vertical obtain no less favourable elements on the SERPs or that those shared features are removed.

Such principles are relevant, in particular, when a gatekeeper includes features on the online interface of its OSE that do not aim at facilitating end users' access to any website but at facilitating direct transactions with business users. Examples for such transaction-facilitating features are product filters and tools to set dates for service bookings or to refine a commercial intent. As such features serve the purpose of an OIS/Vertical, they are part of such service and not of the gatekeeper's OSE. 159

5. In particular: standalone, partly, and entirely embedded OIS/Vertical

Like other digital services, also verticals and (other) OISs may be offered to end users through various access points and in several forms. The purpose of an OIS/Vertical to compare a certain type of content through specialised results allows the provision of such service through any interface on which specialised results can be presented. Such interface can be a standalone website or app, any grouping of specialised results embedded on a third-party website or the display of specialised results along the results of another service, including that of an OSE. 160

a. The concept of embedding as developed in Google Search (Shopping)

The various ways in which a distinct OIS/Vertical can be provided was central in the *Google Search (Shopping)* case that lay the foundation for Article 6(5) DMA. 161

In *Google Search (Shopping)*, the General Court confirmed the Commission's finding that: 162

> *"Google's [CSS] has taken several forms, that is to say, a specialised page, most recently called Google Shopping [now: Google Shopping Europe], grouped product results, which evolved into the Product Universal, and product ads, which evolved into the Shopping Unit. In those circumstances [...] grouped product results, notably Product Universals, and product ads,*

notably Shopping Units, must be considered to form part of the [CSS] which Google offered to internet users".[208]

163 In paras. 11 to 13 of her compelling opinion for the Court of Justice, Advocate General *Kokott* summarised such development as follows:

"In [...] 2004 [...] Google began offering a separate product search facility additional to its general search service. A database fed by information provided by merchants and known as the 'product index' was used to sort and display search results by relevance on the basis of specific algorithms. These search algorithms were different from those that were used in online general searches, via a process known as 'crawling', to extract information from websites, index it, add it to Google's 'web index', sort it by relevance and display it.

From [...] 2005 [...] Google integrated the results of specialised product searches into the general search results. Until 2007, product search results were grouped together and displayed in a separate, visually distinct 'Product OneBox', within the general search results [...].

[I]n 2007, it changed the way in which product search results were presented in the general search results. It changed [...] Product OneBox to 'Product Universal' and, later, to 'Shopping Units'. It also supplemented the results of product searches with photographs and more detailed information, primarily on product prices and their rating by customers."[209]

164 Both "Product Universals" (i.e. groupings of unpaid specialised results for products) and "Shopping Units" (groupings of paid specialised results for products) were presented to end users along ordinary (organic or paid) results on the SERPs of Google Search. Google did not present equivalent groupings of specialised results on its standalone Google Shopping website, the design of which was much different. In fact, in six countries, in which an abuse was found, during a certain period of the infringement, Google did not operate such standalone website at all but only displayed Shopping Units in SERPs.[210]

208 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 327 et sub.

209 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, paras. 11–13.

210 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 422; General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google*

Although the specialised results displayed on Google Search did not relate to those of a corresponding Google Shopping standalone website, where such website existed, the specialised results were considered to form "*part of*" Google's distinct CSS. In markets where these standalone websites were entirely absent, the specialised results on Google's SERPs constituted "*all of*" Google's CSS, serving as the sole access point for users to interact with the service.[211] The service such consisted in an "On-SERP-CSS" only.[212] 165

What mattered was that such specialised results fulfil the same product comparison purpose than any corresponding groupings of results on a standalone website would,[213] and that this was possible only due to a shared special search technology[214]. Among others, such shared core technology included a common special product index (filled with product information by merchants) and specialised algorithms for ranking and sorting product information. 166

b. Concept of embedding in Article 6(5) DMA

The *Google Search (Shopping)* case strongly influenced the establishment of Article 6(5) DMA.[215] This influence is most evident in how the DMA 167

and Alphabet/Commission (Google Shopping), paras. 338 et sub.: "*In that regard, it must be noted that* [...] *in six EEA countries, during a certain period, 'Google Shopping existed only in the form of the Shopping Unit without an associated standalone website. In those circumstances, the Commission was fully entitled to find that Shopping Units favoured Google's [CSS] [...]'*".

211 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, footnote 3 in connection with paras. 32, 412–423.

212 "On-SERP-CSS" stands for a CSS that is provided to end users on the SERP of an OSE such as Google Search. See *Höppner*, "Google's (Non)-Compliance with the EU Shopping Decision", (2020), p. 150 et sub.

213 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 312: "*It should be pointed out that Shopping Units display results from Google's [CSS] and are in competition with competing [CSSs]. [...] Google does not [...] show how the [CSS] offered to internet users by the Shopping Units is intrinsically different from that offered by other [CSSs]. On the contrary, it appears that both are designed to compare products on the internet and that, therefore, they are substitutable from the point of view of internet users.*".

214 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 337 et sub.; Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 414–421.

215 Commission, Impact Assessment Report for a Proposal for a DMA of 15/12/2020, SWD (2020) 363 Table 2, p. 57; *Dolmans/Mostyn/Kuivalainen*, "Rigid Justice is

clarified that a distinct service can be exclusively offered through an OSE by sharing interface components and displaying the distinct service's output (such as specialised results) within the OSE's pages, thereby effectively merging both services into a single platform.

168 The DMA achieves this primarily through four relevant provisions.

169 First, the DMA specifically defines a "*search result*" in Article 2(23) as meaning any information returned irrespective of whether it is "*a paid or an unpaid result, a direct answer or any product, service or information offered in connection with the organic results, or displayed along with or partly or entirely embedded in them*". Such definition distinguishes between the return of paid or unpaid (organic) "*results*" generated by the platform itself and the return of any "*direct answer*", "*product, service or information*" that is "*offered in connection*", "*displayed along*" or "*entirely embedded*" in "*results*" of the OSE. It follows from such definition that a gatekeeper may offer a separate product or service through the SERPs of its OSE by returning information that fulfils a different purpose than that of the OSE.[216]

170 Second, confirming the above, recital (14) DMA explains that "*the definition of core platform services should be technology neutral and should be understood to encompass those provided on or through various means or devices.*" Services can thus be "*provided on or through various means and devices*". As "*devices*" refers to hardware, "*means*" must relate to software interfaces. This allows to identify a distinct service even though it is partly or entirely provided "*on*" or "*through*" the interface of another service, such as an OIS that is provided through the SERPs of an OSE.

171 Third, more specifically, and as outlined above at section I.2.c., recital (51) explains that a gatekeeper may "*provide its own online intermediation services through an online search engine*". Such distinct service may be "*ranked in the results communicated*" or "*partly or entirely embedded in online search engine results*" or "*groups of results specialised in a certain topic, displayed along with the results of an online search engine*". Results "*specialised in a certain topic*" are to be contrasted with "*general*" results on any subject that an OSE provides. Recital (51) thus reflects the distinction drawn in *Google Search (Shopping)* between general (horizontal) search engines and

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Injustice: The EU's Digital Markets Act should include an express proportionality safeguard", (2021), Ondernemingsrecht issue 2–2022, p. 17: "*The primary case*".

216 See above at II.1.b.

specialised (vertical) search and intermediation services. Displaying results of the latter within the first thus constitutes a separate On-SERP-OIS.

172 Fourth, but not least, section D(2)(c) of the Annex to the DMA clarifies that a service shall be deemed as distinct even if it is "*offered in an integrated way*" through or in connection with a designated CPS, whenever such service does not belong to the same category of CPS or is used for different purposes by either end users or their business users, or both. Read in connection with Article 2(23) and recital (51), this means that whenever a group of specialised search results displayed along or in connection with general search results is used or considered by certain users as being distinct or additional to the web search service of an OSE, as defined in the DMA, the provision of such grouping is to be deemed as an (OIS/Vertical) service distinct from the OSE.[217]

c. Economic background: use of different access points for the same service

aa) Relevance of access points to use a service

173 Ultimately, the legal reasoning that a distinct service may be provided through another service, including the scenario that an OIS is offered through the SERPs of an OSE, reflects the characteristics of digital services covered by the DMA. As explained in recital (3) DMA, such characteristics involve "*very strong network effects, an ability to connect many business users with many end users through the multisidedness of these services [...], vertical integration, and data-driven advantages*". Due to such factors, the economic success of a platform ultimately depends on the size of the user groups it may connect. As the benefit of a platform for each user increases, the more users the platform is able to connect, the number of such connections matters. To increase scale, platforms are keen on providing their respective platform connection through a broad variety of interfaces. To grant their end users or business users access to their respective connection services, companies frequently offer their services through different access points.[218] In addition to standalone websites this may include interfaces that are integrated in other channels or platforms.

217 See above at II.1.b.

218 However, all such access points are part of the same service. This is illustrated by OSEs, where all search entry points (desktop and mobile, search apps, widgets, browsers, search buttons, voice search, bookmarks etc.) all form part of the same

bb) Different access points to use Google Search

174 For example, in its notification submission pursuant to Article 3 DMA, Alphabet, explained that

> "*Google Search operates as a single service, regardless of the surfaces, form factors, or access points that a user uses to access the service. Access points for the Google Search online search engine include the Google Search website (google.com or its localised versions), the Google Search mobile app, the Google Search widget on Android mobile devices, syndicated Google Search input boxes on third-party websites, Google Lens, and the Discover feed (which shows search results that are based on an implicit query).*"[219]

175 As regards specifically the end user access to Google Search through "*info boxes on third party websites*", Alphabet explained

> "*that when a user enters a query into the search bar on third-party websites, the query is passed on to Alphabet's online search engine that then provides the results directly back to the user on their browser. [...] Alphabet argues that from a technical perspective, Alphabet's online search engine generates these results that are then returned on the third-party website (i.e., a page is displayed in a frame within another page). According to Alphabet, both free and paid search results on third-party websites should, for this reason, form part of the online search engine CPS Google Search, just like on Alphabet-owned and operated properties.*"[220]

176 According to Alphabet, a central incentive for the third-party website to display info boxes with results powered by Google Search is the fact such results include paid ads, the display of which help the third-party website to monetise its advertising space.[221] This is further facilitated through the service AdSense for Search, a tool provided by Google to those third-party website embedding its Google Search info boxes in order to allow them

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OSE, see Commission decision of 18/7/2018, Case AT.40099, *Google Android*, paras. 101, 353 et sub., 358 et sub., 363 et sub.

219 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 89. This is in line with the Commission's assessment in *Google Android*, see fn. 218.

220 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 197.

221 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, footnote 206.

"*to outsource to Alphabet the delivery and display of paid search results (e.g., advertisements) on their websites and apps*". In other words, those third-party websites agree to serve as access points for end users to Google Search by embedding info boxes of such OSE in order to monetise the real estate[222] on their websites and apps.[223]

cc) Different access points to use Alphabet's OIS/Verticals

177 In the same context that Alphabet described how third-party websites serve as access points to Alphabet's OSE, it also explained how its own OSE websites serve as access point to Alphabet's OIS/Verticals. Referring to recital (51), Alphabet explained that

> "*an online search engine might, in principle, provide access to a separate first party service on its result pages by either linking to it, showing groups of specialised results that are considered 'distinct or additional' by end users, or by embedding such a service or parts thereof.*"[224]

178 In other words, Alphabet equated third-party websites serving as access points to its OSE with its own OSE serving as access point to distinct services, in particular OISs/Verticals. This equation is justified, if not inevitable. From a technical and economic perspective, there is no difference between the situation where a user enters a query on a third-party website and obtains a ranked result from Alphabet's OSE, on the one hand (see above at bb)), and the situation described here, where a user enters a query on Alphabet's OSE and obtains a ranked result from any of Alphabet's OIS. In both scenarios it is not the website on which the query is entered that generates the respective result but the distinct service to which the query is passed on. Such distinct service then processes the query and provides results back to the end user on the interface the end user used for entering its query.

222 In online marketing (digital) "real estate" refers to digital assets such as space on a website or app that may be monetised, for example through selling it as ad inventory.

223 See by analogy Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, footnote 206 quoting Alphabet's submission that "*Publishers use AdSense or AdMob to monetise their ad space on their websites or apps.*"

224 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 90.

179 In particular, from the perspective of the website "hosting" a distinct service by providing an access point and embedding its results, the commercial incentives are the same. Just as much as third-party publishers integrate Google Search "*to monetise their ad space on their websites and apps*", Google Search integrates its own OIS/Verticals, including specialised paid results, to better monetise its ad space on its OSE website and apps. Economically, the situation is not much different. A website or app both serve as access points to a distinct service because such service can monetise the ad space on the website or app better. Third-party publishers integrate Google Search via AdSense for Search because it monetises their ad space better. Google itself integrates OISs into Google Search via what it used to call "Universal Search" because these OISs can monetise ad space better. The technical implementation of such integrations is very similar.[225]

dd) Conclusion: specialised results in OSE serve as access point to OIS/Vertical

180 Alphabet's submissions on access points used by its OSE and access points used by its OISs concern the same issue. Alphabet explains that the OSE Google Search is accessible by its users through various access points,

225 See in particular for the display of search ads on third-party websites via AdSense for Search: Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 232: "*The Commission acknowledges that the display of paid results in response to a search query on a third-party website appears to be substantially based on the same underlying services as when the display happens on the first party service.*" The same is true in the relation between OIS and OSE: The display of specialised paid results (of an OIS) in response to a search query entered on Alphabet's OSE is substantially based on the same underlying services as when the display happens on any other interface of the OIS such as a standalone website. "*The difference in case of the display of an AdSense for Search advertisement on the third-party service, is that the online search engine Google Search supports Alphabet's online advertising services by providing the search query as an input to the selection of the advertisement which is carried out by the interaction of several different services within Alphabet's online advertising CPS. However, this does not amount to AdSense for Search becoming part of the online search engine CPS.*" The same applies in relation to specialised ads being displayed on OSEs: In case of the display of a specialised result (an advertisement powered by an Alphabet OIS), the OSE Google Search supports Alphabet's OIS by providing the search query as an input to the selection of the advertisement which is carried out within Alphabet's OIS and/or corresponding online advertising service. As in case of AdSense for Search, this does not amount to Alphabet's OIS becoming part of the Google Search OSE CPS.

including via "info boxes on third-party websites". Alphabet also explains that equally other online platform services, including OISs operated by Alphabet, may be accessible by users through various access points, including via the SERPs of an OSE such as Google Search. Read in conjunction, Alphabet thus acknowledges that its own OSE may serve as an access point for distinct OISs, including its own. Akin to a third-party website providing an access point to Google Search by displaying "*info boxes*" with results generated by Google Search technology, Google Search itself provides an access point to distinct services, including its OISs, by either linking to it, showing "*groups of specialised results*" generated by its technology, and/or by directly embedding such OIS or parts thereof.

181 In addition, it follows from its submissions that Alphabet itself considers any "*input boxes on third-party websites*" or other integrations of interfaces to access Google Search as part of this OSE, not as part of the service provided by the third-party website. Conversely, Alphabet views the groups of specialised results as well as any partly or entirely embedded OIS functionalities as access points to such OIS and hence as part of such service, not as part of the OSE (Google Search) integrating these results and features. Such distinction is consistent: Where general search results powered by Alphabet's OSE technology are displayed on interfaces belonging to other services (such as Android or third-party websites), such results are the culmination of the entire web search and ranking process of Alphabet's OSE and therefore form a part of that OSE[226] – not of the platform merely providing the interface to present the output of its OSE service. In reverse, the same must hold true for specialised results powered by any of Alphabet's OIS/Verticals: Where specialised search results powered by any of Alphabet's OIS/Vertical technology are displayed on interfaces belonging to other services (such as its OSE or another OIS/Vertical), such results are the culmination of the transaction facilitating process of the corresponding Alphabet OIS/Vertical and therefore form part of such service – not of the platform (such as OSE) merely providing the interface to present the output of its OIS/Vertical.

226 On the relevance of such criterion see Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 38: "*the Commission considers the display of an advertisement to be the culmination of Alphabet's online advertising service and therefore to form part of that service*" in line with General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 337: "*a click in a Shopping Unit was indeed to be regarded as a manifestation of the use of Google's [CSS] from the [SERP]".*

182 Such reading is in line with the findings in the *Google Search (Shopping)* case. In para. 23 of its decision of 2017, the Commission explained that

> "*[i]n response to a user query, Google's general search results pages may also return specialised search results from Google's specialised search services*".[227]

183 Para. 24 of the Decision specifies that

> "*[i]n addition to the results returned in 'Universals' or 'OneBoxes', Google's specialised search services can also be accessed through menu-type links displayed at the top of Google's search results pages.*"[228]

184 This is fully in line with Alphabet's description of "access points" being part of the service to which they lead (rather than of the platform on which they are positioned). The Commission clearly distinguished between the "*general search results pages*" of the OSE on the one hand, and "*specialised search results from Google's specialised search services*" on the other. The fact that the output (the specialised results) of Google's OIS were embedded in the general search results pages of its OSE, did not turn such output into a part of the OSE, let alone did they call the distinct character of the services provided through such different types of results into question. Rather, the quotes above clarify that by displaying specialised search results, which facilitate a transaction and therefore qualify as an OIS, along with general search results, which facilitate a search across the web and therefore qualify as OSE, Google provided an access point to its corresponding OIS on the OSE interface.

185 The General Court confirmed and further specified this. In its judgement of 2021, the Court held that "*grouped product results, notably Product Universals, and product ads, notably Shopping Units*", powered by a specialised search technology and displayed on general search results pages of Google Search,

> "*must be considered to form part of the [CSS] which Google offered to internet users. [I]n relation to Shopping Units specifically, the Commission pointed out [...] that the Shopping Unit was based on the same database as*

227 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 23.

228 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 24.

> *the specialised page, that their technical and seller relations infrastructure was very largely the same [...] Consequently, a click in a Shopping Unit was indeed to be regarded as a manifestation of the use of Google's [CSS] from the general results page, that is to say, as traffic for that [CSS] from that page."*[229]

The Court thus confirmed that results that are not generated by Google's general online web search technology (on the basis of crawling and indexing any website and ranking them based on an algorithm applying to all those websites) but on the basis of specialised technology, with a view to facilitating transactions in the meaning of an OIS, and which are displayed along with the general search results, are to be seen not as part of the general search service but of a distinct specialised search service, and may therefore not be favoured. 186

d. Clarification in the Commission's designation decision

In its decision to designate Alphabet as a gatekeeper, the Commission confirmed the above distinction between "embedded" services. Its assessment contains important conclusions. 187

To begin, the Commission finds that Google Shopping constitutes a distinct service from the other services provided by Alphabet, "*such as the online search engine Google Search and Alphabet's online advertising services*".[230] The Commission further considers that Google Shopping "*operates as a single online intermediation service, irrespective of the underlying technology used to access that service and the form in which it is presented.*" Accordingly, even where end users access the underlying technology through another CPS, such as by clicking on specialised product comparison results presented within the SERPs of Alphabet's OSE, such results are to be seen as part of Google Shopping and hence a distinct service. That is because, also if displayed on such OSE results pages, the specialised results generated 188

229 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 337.

230 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 37.

by the underlying technology allow end users to "*visit, compare, and eventually transact on the offers of the business users of Google Shopping.*"[231]

189 For the same reason, the Commission considers the consumer-side map and navigation system Google Maps as a distinct service[232], even though it is (also) offered to end users through Google Search.

190 Regarding the borderline between such OIS and the OSE, the Commission made the following observation:

> *"Recital (51) [...] explains that services distinct or additional to an online search engine may be displayed along with, ranked in, or embedded in the results of that search engine. In light of that explanation, the Commission considers that services that either fall in a different category of CPS or that are used for different purposes by either end users or business users or both, and which are considered or used by certain end users as a distinct or additional services, are distinct services to the online search engine CPS Google Search for the purposes of Regulation (EU) 2022/1925."*[233]

191 OISs fall in a different category of CPS (Article 1(2) DMA). Hence, any information provided by a gatekeeper that directly facilitate a transaction based on contractual relationships, thereby qualifying as an OIS, constitutes a distinct service, even if such information is provided exclusively through the online interface of an OSE, such as general results pages. It is sufficient in this regard, that "*certain end users*", i.e. some end users, consider or use such service in addition to the service of the OSE. Considering the DMA's objectives, the threshold cannot be high.

192 The Commission, in particular, provided further clarification on the borderline between Google's OSE and its separate OISs:

> *"In particular, as regards the boundaries between Google Search and the online intermediation services that Alphabet provides through Google Search, the Commission notes that recital (51) [...] specifically refers to a situation in which a 'gatekeeper provides its own online intermediation services through an online search engine'. [...] Consequently, the Commission*

231 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 36.

232 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 74.

233 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 95.

> *finds that results from the online intermediation services that Alphabet provides through Google Search, which are ranked in the results of Google Search, embedded in those results or displayed alongside those results constitute a distinct or additional online intermediation service from Google Search. Those results, even if provided through Google Search, form part of the respective online intermediation service of Alphabet."*[234]

193 This reading aligns with the Court's findings in the *Google Search (Shopping)* case and the underlying rational of different "access points" to a service, as outlined above. It means that the display of specialised results to end users, even if they are solely provided through the interfaces of an OSE (in particular on its SERPs), may constitute a distinct service from such OSE; a service that may not be favoured in ranking. If such favouring occurs depends on whether a similar service provided by a third party is disadvantaged in its prominence on the OSE interface.

III. Identifying a similar Third-Party Service

194 Article 6(5) DMA prohibits the favourable treatment of a separate gatekeeper service or product as compared to "*similar services or products of a third party*". For as long as no third-party provides a similar service, the gatekeeper has flexibility in offering its distinct service (i.e. its First-Party Service) through its OSE. However, once a similar Third-Party Service exists, the prohibition of self-preferencing comes into play.

1. Similar service

195 The DMA clearly distinguishes between "*same or similar services*".[235] Article 6(5) DMA does not require that a third party provides the "same" service. A "similar" service is sufficient. It follows that the service provided by the third party does not have to be identical or necessarily compete on the same market.[236] A service may be considered "similar" if it is comparable to that of the gatekeeper because it may be used by certain end users, business

234 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 96.

235 See recitals (46) sentence 1; (49) sentence 1, (62) sub-paragraph 2, sentence 2 and 3.

236 See recitals (10) and (11) DMA on the independent interpretation of the DMA from competition law.

users, or both for a similar purpose. This will typically be the case if the service offers comparable functionalities as the gatekeeper's service, regardless of the technology or user interface deployed. In line with the DMA's objective to effectively curb a gatekeeper's 'platform enveloping' strategies, the broad wording ensures protection for any entity providing functionally comparable services, regardless of their market focus or business model.

196 Given that the service only needs to be "similar", it may not fall in the same category of service as the First-Party Service. Distinct services may pursue comparable purposes. Accordingly, the First-Party Service may qualify as a different service than the Third-Party Service, in particular as a different type of OIS. For example, while online marketplaces such as Amazon and specialised CSSs constitute distinct OISs, falling into different markets[237], their purpose may still be comparable for either end users, business users, or both. Similarly, while online travel agencies (OTAs) and meta travel search engines (metas) may be distinct services, they are still "similar" in the context of Article 6(5) DMA.[238]

237 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, confirmed in General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*.

238 For such closeness between metas and OTAs see for example Commission decision of 17/7/2017, Case M.8416, *Priceline/Momondo*, paras. 24 et sub., 34 et sub. Notably, para. 38: "*Respondents who considered that both types of services are interchangeable referred to the fact that both MSS [i.e. metasearch services] and OTAs compete to attract consumers' attention and lead them to their websites through a variety of channels; that consumers often do not realise that they are not completing their booking on the MSS website, and thus see MSS as interchangeable with OTAs; and that an increasing number of MSS have begun to offer booking functionalities on their websites*." Ultimately, the Commission could leave the question of whether both are active on separate markets open and merely concluded that metas and OTAs "*are both active in the intermediation of travel services online and both aim to attract consumers interested in organising their travel*" (para. 39). However, the investigation clearly revealed that OTAs and metas saw Google's verticals as the strongest competitive threat, see para. 106 of such decision as well as para. 115: "*Google has become a major competitor to existing travel MSS in recent years. Google has already become the market leader in the US, where its two MSS brands [i.e. Google Flights and Google Hotels] were launched in 2011, and a comparable strengthening of its market position is likely to materialise also in Europe. As also noted by an industry report, Google is on the cusp of being one of the globe's most important metasearch companies*." The investigation also revealed that Google's metas were not part of its OSE activity: "*The Parties view Google's specialised travel services Google Flights and Google Hotels as competing MSS operators and not as part of the general search service provided by Google*" (para. 22).

2. Service of a third party

Article 6(5) DMA does not require that a similar service is provided by several companies, let alone that there is an established market for it. As clarified by the reference to "a third party", the obligation is triggered as soon as there is at least one provider of a similar service. To reflect the equal treatment principle, it is irrelevant whether such third party provides its service on a standalone basis or in an integrated way, i.e. by partly or entirely embedding it into another of its services. It is equally irrelevant whether such third party has formally requested to be treated equally or not. It neither matters which market position such Third-Party Service currently enjoys. 197

3. Protection of each third party providing a similar service

The use of the singular ("a third party") is not just relevant for identifying the type of service that may not be discriminated against. It is equally relevant for identifying the protected undertakings. Article 6(5) DMA does not limit the number of protected third parties. Moreover, Article 6(5) DMA does not refer to a minimum size or an equal efficiency as the First-Party Service. Each provider of a similar service is protected, not just a group of equal third parties. It follows that Article 6(5) DMA is infringed as soon the First-Party Service is treated more favourably vis-à-vis any third party providing a similar service. This is the case even where any other provider of a similar services may not be discriminated against. 198

IV. Identifying a more favourable treatment

1. Background

As outlined above, in the early 2000s, Google commenced developing and offering specialised search and intermediation services (OIS/Verticals) that are distinct from its OSE Google Search.[239] This created a conflict of interest as since then Google has had an incentive to give its own OIS/Verticals more prominence in the search results of its OSE Google Search. Competition concerns first arose when, starting around mid-2006, Google 199

239 See above at II.3.d.cc.

fell victim to its conflict of interest and indeed started to favour its OIS/Verticals in general search, under the label "Universal Search". To this end, Google started showing both general results (generated by its OSE through crawling the entire web) and specialised results (generated by its respective OIS/Vertical) on the same general search results page.[240]

a. 15 years of Google Search (Shopping) proceeding clarified the abuse

200 After several years of intensive investigation of the economic impact, the Commission[241] and the courts[242] found that such joined display gives more prominence to the Google vertical that generates the respective specialised results, as compared to competing specialised search providers. As a remedy Google was obligated to treat competing services equally within the SERPs of its OSE.[243]

201 Summarising the findings of the preceding 15 years of administrative and subsequent court proceedings, in January 2024, Advocate General *Kokott* described the problematic conduct that forms the subject matter of these proceedings as follows:

> *"search results from Google's own [CSS] being favoured on general results pages over search results from competing comparison shopping services ('the alleged practices')".*[244]

202 The "*abuse expressed itself in 'active' behaviour in the form of positive discrimination in favour of search results from Google's [CSS]*".[245]

240 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, confirmed in General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*.

241 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*.

242 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping);* for similar observations see Regional Court of Munich I, judgment of 10/2/2021, Case 37 O 15720/20, *NetDoktor/Google (Health Infobox)*, paras. 86 *et sub*.

243 See the remedy imposed in Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, Article 3 in conjunction with Article 1. Such operative part is explained in more detail at paras. 699 et sub. of the decision.

244 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, para. 17.

245 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, para. 116. For similar observations see

There was an 203

> *"abnormality in that context that search results from Google's own [CSS] should be promoted over those from competing [CSSs]".*[246]

As outlined by Advocate General *Kokott*, the abusive favouring was seen in the fact that the specialised search results generated by Google's OIS/Verticals gained more prominence on the general search results pages of Google Search than any specialised search results generated by rival OIS/Verticals. This was due to the fact that within its general search results pages, Google's displayed groupings with results on particular topics (such as shopping) which were compiled by using special product indexes and specialised (product) algorithms that formed an OIS/Vertical distinct from its OSE. No provider of a similar OIS/Vertical obtained the opportunity to return corresponding queries with specialised results on the basis on their product indexes and specialised algorithms. 204

b. Competition law remedies failed

While the *Google Search (Shopping)* proceedings brought clarity as to the anti-competitive effects of self-preferencing in search rankings, it failed to prevent such behaviour in the future. For one single reason: Google chose to misinterpret the remedy imposed by the Commission to bring the abuse to an end in its own favour. 205

Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 650 and General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 212, 240: "*the practices at issue are an independent form of leveraging abuse which involve [...] 'active' behaviour in the form of positive acts of discrimination in the treatment of the results of Google's [CSS], which are promoted within its [SERPs], and the results of competing [CSSs], which are prone to being demoted*".

246 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, para. 150. For a more in-depth assessment of such abnormality – given the universal vocation, rationale, and value of Google's OSE as a necessarily open infrastructure –, see General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 176 to 179.

206 Article 1 of the Commission Decision found that Google abused its dominance

> *"by positioning and displaying more favourably, in Google Inc.'s general search results pages, Google's Inc. own [CSS] compared to competing [CSSs]".*[247]

207 The General Court[248] and Advocate General *Kokott* subsequently confirmed that

> *"the discrimination [...] has to do with the way in which Google's general results pages are accessed [by rival CSSs], but is not about access to an allegedly separate infrastructure in the form of the Shopping Units boxes".*[249]

208 In diametrical contrast, Google decided to 'comply' with the Decision only "*by giving aggregators the same opportunity as the Google CSS to bid for product ads in Shopping Units*".[250] Thus, the Commission had demanded Google to treat all competing CSSs equally, across the entire SERP. This included an equal treatment regarding the right to directly offer a service within general search results pages, such as through a grouping of specialised results. However, Google and its legal advisers[251] and lobbyists[252]

247 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, Article 1.

248 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 327, 331.

249 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/ Commission (Google Shopping)*, para. 115.

250 Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, EU:T:2021:763 of 22 January 2020 as quoted in *Höppner*, "The European Google Shopping Competition Saga, Compliance and the Rule of Law", (2022), Global Competition Litigation Review (G.C.L.R.) 1/2022, footnote 34.

251 *Graf/Mostyn*, "Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives", JECL&P (2020), pp. 561-574; *Vesterdorf/Fountoukakos*, "An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a guide to its interpretation in Light of an Analytical Reading of the Case Law", JECL&P (2018), pp. 3-18. Equally (acting for Alphabet in the US): *Jacobson/Wang*, "Competition or Competitors? The Case of Self-Preferencing" Antitrust Vo. 48(1) 2023, pp. 13-20 who misleadingly claim that the preferential display and positioning of Google's own service "was not in and by itself deemed abusive" (p. 15).

252 *Auer*, "Case Closed: Google's Wins (for now)", Truth on the Market (counting Google as its sponsors), November 19, 2021, https://truthonthemarket.com/2021/11/19/case-closed-google-wins-for-now/ The author first misinterprets the Decision, assuming a far narrower remedy than the one imposes, then twists the General

narrowed down this obligation to an equal treatment only regarding the 'right' to bid and pay for ads that Google may display to fill up its own, proprietary boxes with which Google itself compares products and prices on the SERPs. In other words, disregarding the imposed remedy, Google retained the exclusive right to compile and display Shopping Units, based on Google's specialised technology, thereby integrating such distinct service into its OSE. In contrast, rivals were limited to bidding for individual ads that Google may or may not include in its integrated (On-SERP) OIS – just as they could do prior to the decision.[253]

Despite Google's non-compliance since 2017,[254] the EU Commission did not launch a formal non-compliance investigation. However, the Commission has consistently confirmed that it never approved Google's solution[255] 209

Court judgment and ignores that Google's so-called Compliance Mechanism did not comply with neither ruling, only to then appear surprised that the Decision was a 'pyrrhic victory' because such remedy would not have improved anything. And such pyrrhic victory and the fact that "Google won" should warn any other authority to follow suit banning self-preferencing. A textbook example of lobbying-driven circular reasoning.

253 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* para. 439; General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 341: "*Google submits that it already includes product ads from [CSSs] in the Shopping Units; accordingly it cannot be accused of favouring its own [CSS]*". In fact, Google explicitly submitted to the General Court that it did not materially change its approach of integrating third-party CSSs into the Shopping Units when "implementing" the remedy, see Google, Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17, EU:T:2021:763 of 22 January 2020, paras. 6.1, 6.6, 6.9 – 6.12.

254 See judgment of the Regional Court of Warsaw, 22 IP Division, Case file XXII GWO 24/2414/3/2024, *Ceneo/Google*, granting a preliminary injunction against Alphabet's post 2017 Shopping Units as they constitute an abusive self-preferencing. This is in line with an amicus curia statement of the President of the Polish Competition Authority, Sygn. akt: XXII GWO 24/24, DOK-3.415.1.2023. Both consider that the current Shopping Units are not consistent with the EU Google Shopping case. The finding of non-compliance is shared by *Marsden*, "Google Shopping for the Empress's New Clothes -When a Remedy Isn't a Remedy (and How to Fix it)", (2020), JECLP, Vol. 11, Issue 10, pages 553–560; for a comprehensive analysis see *Höppner*, "Google's (Non-) Compliance with EU Shopping Decision" (2020); "Antitrust Remedies in Digital Markets: Lessons For Enforcement Authorities From Non-Compliance With EU Google Decisions", Hausfeld Comp. Bull (Fall 2020); as well as "The European Google Shopping Competition Saga, Compliance and the Rule of Law", G.C.L.R. 1/2022, pp. 9–21.

255 See Commission submission to the President and Members of the General Court of 21/1/2020, Reply to the Court's Written Questions of 20/12/2019, para. 8: "*The Commission has not 'approved' those measures, given Google is solely responsible*

and confirmed that it failed the economic objective of the decision.[256] It was Google's responsibility to comply, and the Commission had full discretion as to whether it should launch a formal non-compliance investigation or not. There were good reasons not to prioritise such a high-profile case, including (i) the aim to avoid a further game of cat and mouse, (ii) the pending court litigation, and (iii) the upcoming DMA with its more fine-tuned and powerful tools to combat self-preferencing.

c. Growing calls for structural remedies

210 Because Google's chosen "Compliance Mechanism" missed the equal treatment remedy actually imposed in the *Google Search (Shopping)* decision, such mechanism had no positive impact on the market but made matters worse in terms of traffic to rivals.[257] Google's lobbyist even mocked the decision as "pyrrhic victory".[258] This lack of impact as result of non-compliance led to a broad alliance of affected OIS/Verticals calling for stricter measures against Google's self-preferencing.[259] A committee for competition at the European Parliament openly called for a structural separation

for implementing measures to end the infringement."; see also General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 593.

256 See *Chee/Waldersee*, "EU's Vestager says Google's antitrust proposal not helping shopping rivals", (2019), Reuters, quoting Commissioner *Vestager*: "*We may see a show of rivals in the Shopping Box. We may see a pickup when it comes to clicks for merchants. But we still do not see much traffic for viable competitors when it comes to shopping comparison*".

257 See the economic impact assessment based on empirical traffic data from 25 comparison sites in *Höppner*, "Google's (Non)-Compliance with the EU Shopping Decision", (2020), Chapter 3; see also *Marsden*, ibid: (Fn. 253); *Bostoen/Madrescu*, "Assessing abuse of dominance in the platform economy: a case study of app stores", (2020), ECJ 2020, Vol- 16(2–3), p.491 *"the Google Shopping remedy saga cautions against insufficiently detailed decisions*".

258 *Auer*, "Case Closed: Google's Wins (for now)", Truth on the Market, November 19, 2021, https://truthonthemarket.com/2021/11/19/case-closed-google-wins-for-now/ Sadly, the article misrepresents and confuses about everything relating to the Google Shopping case.

259 See, for instance, Joint Industry Letter of 130 companies and 30 industry associations of 12/11/2020 to the EU Commission calling for an end of Google's self-preferencing, "Joint Industry Letter Against Google's Self-Preferencing", (2020), ENPA.

of Google's online search service from its OIS/Verticals.[260] Also, calls in the academic literature on (vertical) platform envelopment[261] for structural instruments increased, including a full ban to enter separate markets to avoid any profound conflict of interest of providers of crucial infrastructure such as online search services.[262]

Recognising the adverse societal ramifications of such practices, including within Alphabet's home market, the United States, the issue of platform envelopment via self-preferencing in search results garnered further attention when (even) the Department of Justice, along with several states, lodged an antitrust complaint against Google. Echoing analogous conclusions reached in the European Union, US authorities articulated the following: 211

> *"Google's monopoly in general search services also has given the company extraordinary power as the gateway to the internet, which it uses to promote its own web content and increase its profits.*
>
> *Google originally prided itself as being the 'turnstile' to the internet, sending users off its results pages through organic links designed to connect the user with a third-party website that would best 'answer' a user query.*

260 In November 2014, the Parliament passed a (first) resolution by 384 votes to 174, with 56 abstentions supporting the call for an "*unbundling [of] search engines from other commercial services*" "*to prevent any abuse in the marketing of interlinked services by operators of search engines*" see European Parliament, press release of 27 November 2014, " MEPs zero in on internet search companies and clouds", Plenary Session. In 2019, members of the parliament renewed their call for such separation, Committee on Economic and Monetary Affairs, REPORT on the Annual Report on Competition Policy, A8–0049/2018.

261 See above II.3.a.bb).

262 *Hermes/Kaufmann-Ludwig/Schreieck/Weking/Böhm*, "A Taxonomy of Platform Envelopment: Revealing Patterns and Particularities", (2020), AMCIS 2020 Proceedings. 17, pp. 7–8: "*Our findings suggest that vertical envelopment leads to conflicts of interest, for example,]..] Google owning general search and participating in specialised search [...]. These vertical envelopments create tensions that often involve anti-competitive conduct, either between the core platform and the target or the core platform and the new entity. Related industries, such as American banking, faced similar challenges in the past. As a result, banking laws were changed to require and prohibit banks from entering markets other than those in the business of banking. The laws are maintained to ensure the fair and efficient allocation of credit, prevent the concentration of power in the banking industry and counteract possible anti-competitive banking practices [...]. Similar to banks, platform conglomerates are prone to concentration and conflicts of interest. Moreover, their core platforms can be considered critical infrastructure (e.g., [...] Google Search). Therefore, in order to limit these issues, it might be worth drawing on related laws and considering banning or restricting vertical envelopment practices.*".

> *Over time, however, Google has pushed the organic links further and further down the results page and featured more search advertising results and Google's own vertical or specialized search offerings. This, in turn, has demoted organic links of third-party verticals, pushing these links 'below-the-fold' (i.e., on the portion of the SERP that is visible only if the user scrolls down) and requiring them to buy more search advertising from Google to remain relevant. This raises their costs, reduces their competitiveness, and limits their incentive and ability to invest in innovations that could be attractive to users. Not surprisingly, investors also report being unwilling to provide funding to vertical startups with business models similar to or potentially competitive with Google's search advertising monopoly.*"[263]

d. DMA's ban on self-preferencing as political compromise

212 Instead of obliging Alphabet to structurally unbundle its OSE from any other services, with the establishment of Article 6(5) DMA, the legislator opted for behavioural obligations to achieve a similar levering of the conflict of interest that arise from Alphabet's vertical integrations. This reflects the "*quite remarkable*"[264] "*unequivocal statement from a diverse set of academic economists*"[265] in a report for the Commission, which found that "*self-preferencing is a natural candidate for the 'blacklist' of practices to be deemed anti-competitive and 'per se' disallowed.*"[266] However, the final

263 *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), amended complaint of 15 January 2021, para. 170. Such competition concern was described in more detail in a parallel complaint of 38 US States under the leadership of Colorado that was later consolidated with the DOJ's case for discovery, see *Colorado et al. v. Google*, Case No. 1:30-cv-03715 (D.D.C.), complaint of 17 December 2020.

264 *Peitz,* "The prohibition of self-preferencing in the DMA", CERRE 2022, p. 21.

265 *Peitz,* ibid.

266 *Cabral/Haucap/Parker/Petropoulos/Valetti/Van Alstyne*, "The Eu Digital Markets Act. A Report from a Panel of Economic Experts", (2021), SSRN, p. 13. In the same vein for OSEs *Motta*, "Self- Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases", International Journal of Industrial Organization, September 2023, Vol. 90. Such broad economic position for a per-se rule contradicts *Duguesne* et. all ("What Constitutes Self-Preferencing and its Proliferation in Digital Markets", GCR Digital Markets Guide), who claim that there was "consensus that the effects of favouring the downstream entity depend on the specifics of the case". They quote academic papers arguing that self-preferencing may have some positive impact (see *Hagiu/TehWright*: "Should Platforms Be Allowed to Sell on Their Own Marketplaces?", (2022) RAND Journal of Economics, pp. 297–237; *Dryden/Khod-*

version of Article 6(5) DMA also took account of the view[267] that not every self-preferencing, not even by a dominant player, may be problematic: While some had proposed a comprehensive prohibition of any gatekeeper self-preferencing[268], Article 6(5) DMA only prohibits one of the undeniably most problematic types of self-favouring, namely the more favourable treatment in "ranking and related indexing and crawling". As follows from the definition of "ranking" in Article 2(23) DMA, this narrows down the prohibition to favouring as regards the "relative prominence given" to goods or services through an OIS, social networking service, video-sharing platform

jamirian/Padilla, "The simple economics of hybrid marketplaces", Competition, 23(2) (2020), pp. 85–99; *Wen/Zhu*, "Threat of platform-owner entry and complementor responses: Evidence from the mobile app market", Strategic Management Journal, 40(9) (2019), pp. 1336–1367; *Zhu/Liu*, "Competing with complementors: An empirical look at Amazon", Strategic Management Journal, 39(10) (2018), pp. 2618–2642; *Aguiar/Waldfogel/Waldfogel*, "Playlisting favorites: Measuring platform bias in the music industry", International Journal of Industrial Organization (2021), Vol. 78; *Zennyo,* "Platform encroachment and own-content bias", The Journal of Industrial Economics, 70(3) (2022), pp. 684–710. See also *Feyler/Postal,* "Can Self-Preferencing Algorithms Be Pro-Competitive?", CPI Antitrust Chronicle June 2023, Article 4). However, these papers looked at self-preferencing in digital markets generally, or even as a means to enter dominated markets. They did not assess self-preferencing by a digital gatekeeper, i.e. by a company controlling an essential gateway between end users and business users; let alone self-preferencing on the most central digital gateway: online search. Even *Duquesne* et all. agree that *"[c]oncern about self-preferencing in digital markets is greater, generally speaking, because it is assumed that upstream competition (i.e., between platforms) is weak and therefore it is less able to discipline a platform's incentive to self-preference downstream products or the (negative) impact of it doing so*". In line with this economic logic, competition concerns are greatest where a platform market has already 'tipped' in favour of one player and disruption is unlikely due to barriers to enter and grow with a gatekeeper-controlled ecosystem (see *Höppner*, "From Creative Destruction to Destruction of the Creatives: Innovation in Walled-Off Ecosystems", JLMI 2022, p. 10-28). This is typically the case for designated CPSs because by definition they "*enjoy an entrenched and durable position [..] or will enjoy such a position in the near future*" (Article 3(1)(c) DMA). An entrenched position is enjoyed, in any event, by Google Search. As the General Court noted "*Google's general results page has characteristics akin to those of an essential facility*", (judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping),* para. 622).

267 See references in the previous footnote as well as *Buchardi*, "Die Selbstbegünstigung von Plattformunternehmen im Fokus des Kartell- und Regulierungsrechts", NZKart 2021, 610, 612.

268 For instance, *Monopolkommission* (German Monopoly Commission), "Sondergutachten 82: Empfehlungen für einen effektiven und effizienten Digital Markets Act", 2021, recitals 111 et. sub.

service, virtual assistant or OSE. This reflects the fact that there can be no economic justification for such kind of self-preferencing as rankings directly impact end users' decision makings and any twisting of such rankings distorts competition.[269] As a result of such compromise, the risk of over-enforcement is largely eliminated.

213 To achieve an effectiveness comparable to a structural divesture, Article 6(5) DMA adopts and further fine-tunes the distinctions drawn in *Google Search (Shopping)*. Recital (51) DMA explicitly explains that SERPs of an OSE may contain and rank distinct first-party OIS/Verticals[270], and that this causes a relevant conflict of interest triggering the need for equal treatment.

214 The Commission already rightly pointed out this conflict in its decision to designate Alphabet as a gatekeeper under the DMA. Reflecting the principles outlined above (at a.-c.), according to the Commission, specialised

> "*results from the online intermediation services* [such as for travel, shopping, or jobs] *that Alphabet provides through Google Search, which are ranked in the* [general] *results of Google Search, embedded in those results or displayed alongside those results constitute a distinct or additional online intermediation service from Google Search. Those* [specialised] *results, even if provided through Google Search, form part of the respective online intermediation service of Alphabet*".[271]

215 In other words: Results that appear on a SERP of Google Search but were not generated on the basis of general web crawling, indexing, and ranking processes, but on the basis of a specialised index, specialised algorithms, or a contractual relationship with the content provider, are not to be seen as results of the OSE but of a corresponding distinct OIS/Vertical.

216 Accordingly, to avoid a violation of Article 6(5) DMA, the gatekeeper needs to treat any similar Third-Party Service equally, by granting the third party an equivalent opportunity to provide its OIS/Vertical through the interfaces of the OSE.

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269 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras 660-671; General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras 551-595; see also below at IV.6.d..

270 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 95.

271 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 96.

To assess whether a First-Party Service is favoured, it is necessary, first, to identify any relevant treatment of services, and then to assess whether such treatment confers advantages upon the First-Party Service over a Third-Party Service. 217

2. Relevant treatment of services

Article 6(5) DMA prohibits a different treatment in "*ranking and related indexing and crawling*" of the First-Party Service towards the similar Third-Party Service that confers an advantage upon the former. 218

a. Differentiated treatment as relevant conduct

Article 6(5) DMA is not limited to prohibiting a favourable ranking, indexing, or crawling. It prohibits to "*treat*" a First-Party Service more favourable than a similar Third-Party Service "*in ranking, indexing or crawling*". Recital (52) DMA explains that a gatekeeper 219

> "*should not engage in any form of differentiated or preferential treatment in ranking on the [CPS], and related indexing and crawling, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls*".

The relevant conduct is thus a different or preferential "*treatment*" in relation to ranking, indexing, or crawling or "*any measure that has an equivalent effect*".[272] The principle of equal treatment is a general principle in EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights. "*According to settled case-law that principle requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified*".[273] In platform-to-business relations such differentiated treatment may come in many shapes.[274] Article 6(5) DMA therefore covers any conduct, irrespect- 220

272 Recital (52) sentence 4 DMA.

273 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 622 with further case-law.

274 See *Graef*, "Differentiated Treatment in Platform-to-Business-Relations: EU Competition Law and Economic Dependence", 1 Yearbook of European Law (2019) pp. 448–499.

ive of its form and irrespective of whether it is of a contractual, commercial, technical or any other nature, insofar as it may directly or indirectly impact the relative prominence of a service on a CPS.[275] This includes any measure taking place before, during or after the entry of a query by an end user.[276]

b. Ranking

aa) Definition: relative prominence

221 As defined in Article 2(22) DMA, "ranking" means

> "*the relevance given to search results by online search engines, as presented, organised or communicated by the undertakings providing [...] online search engines, irrespective of the technological means used for such presentation, organisation or communication and irrespective of whether only one result is presented or communicated*".

222 According to recital (52) sentence 3 DMA, "*[r]anking should in this context cover all forms of relative prominence*". In line with the reading of the same term in Article 2(8) P2B-Regulation, a "ranking" can be thought of as a form of data-driven, algorithmic decision-making.[277] The concept is further described in the Commission's guidelines on ranking transparency, which recital (52) sentence 5 DMA refers to as facilitating the implementation and enforcement of Article 6(5) DMA. According to the guidelines

> "*when providers present, organise or communicate [...] search results, they 'rank' results on the basis of certain parameters. [T]he ranking [...] has an important impact on consumer choice and, consequently, on the commercial success of the [business] users offering those goods and services to consumers.*"[278]

223 Overall, when it comes to online search, there is a high "*degree of complexity of ranking*". At the heart of it is the notion of "*relative prominence*": A service gains an advantage if it obtains more prominence in search results

275 Recital (70) sentence 2 DMA.
276 Recital (51) sub-paragraph 2 sentence 2 DMA. See below at c.
277 Commission Notice of 8/12/20, Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, Case 2020/C 424/01, para. 11.
278 Commission Notice of 8/12/20, ibid., para. 12.

relative to similar services. Such prominence needs to be determined in a "*technologically neutral*"[279] manner and includes not just the allocation (position) but also the design of any appearance in search results.

As follows from Article 2(22) in connection with recital (52) DMA and the Commission's guidelines on ranking transparency[280], the concept of 'relative prominence' relates to how services are presented or offered through an OSE in a broad variety of circumstances. This is confirmed in recital (24) sentence 2 P2B-Regulation, which states that 224

> *"[r]anking refers to the relative [..] relevance given to search results as presented, organised or communicated [..] by providers of online search engines [..] resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof".*

Thus, algorithmic sequencing of results in response to a query, which is traditionally understood to determine the 'ranking' of results, is just one example of how services can be presented, organised or communicated as part of a ranking mechanism of an OSE covered by Article 6(5) DMA. An OSE can present, organise, or communicate services to end users in numerous manners.[281] 225

bb) In 'search results'

Pursuant to Article 2(22) DMA, 'ranking' means the relative prominence "*given to search results*". According to Article 2(23) DMA, 226

> *"'search results' means any information in any format, including textual, graphic, vocal or other outputs, returned in response to, and related to, a search query, irrespective of whether the information returned is a paid or an unpaid result, a direct answer or any product, service or information offered in connection with the organic results, or displayed along with or partly or entirely embedded in them".*

279 Commission Notice of 8/12/20, ibid., para. 38.
280 Commission Notice of 8/12/20, ibid., para. 35.
281 Commission Notice of 8/12/20, ibid., para. 36.

(1) Any information returned, including a service directly offered

227 The definition does not only cover any paid or unpaid links to any separate product. Rather, it refers to "*any information*", including "*any product*" or "*service*" "*offered in connection with the organic results, or displayed along with or partly or entirely embedded in them*". The inclusion in the definition of the words "*a paid or an unpaid result*", "*a direct answer*" or any "*product, service or information offered in connection [...] or along with or [...] or embedded*" within a SERP is fundamental for Article 6(5) DMA, for several reasons.

228 As outlined above[282], according to its definition, a "search result" of an OSE, can, as such be a "product" or "service" – not just a link or reference for another service. This means that an OSE may not just favour a First-Party Service by ranking links to it more prominently but also by providing such service directly within its SERPs. Any specific information on a SERP of an OSE can thus have a dual role: It may constitute a "search result" of the OSE and, simultaneously, provide a distinct First-Party Service because the provision of such specific information fulfils a different purpose than that of an OSE, as defined in Article 2(6) DMA. The self-preferencing in this case lies in the fact that the gatekeeper uses its OSE to directly offer a First-Party Service, while a similar third-party provider has no equivalent option to offer its service through the OSE.

229 It follows that a prohibited favouring takes place whenever a gatekeeper uses its OSE to present a First-Party Service in a manner unavailable to any similar Third-Party Service. In particular, the definition of a "search result" means that the prohibition to grant a more relative prominence to a "service or product offered by the gatekeeper" covers any of the following scenarios:

- the display of a **paid result** for the First-Party Service (such as a text ad or a Product Listing Ad);
- the display of an **unpaid result** for a First-Party Service (such as an organic result or an unpaid listing of any offer);
- the display of a **direct answer** provided by a First-Party Service (such as via a Featured Snippet, a Knowledge Panel, or a chatbot);

282 See above IV.2.b.bb).

- the direct offering of a first-party **product or service in connection** with organic results (such as specialised information that is presented side-by-side with organic links), or
  - the display of such First-Party Service **along** with organic results (such as specialised information that is presented together with organic links), or
  - the partial or entire **embedding** of a First-Party Service **within** organic results (such as a separate group of specialised information that is displayed amongst organic results).

By covering both, the more prominent display of *results* leading to a First-Pary Service and the direct *embedding* of such a service into the OSE to offer it there, the DMA reflects the fact that "*services can be presented, organised or communicated to consumers in numerous manners*".[283] As outlined above, the ban on favouring thus covers all relevant forms in which a service may be presented or offered on the online interface of an OSE. The three most relevant scenarios are described above at B.I.1. 230

(2) In response to, and related to a search query

According to its definition in the DMA, a 'search result' encompasses information returned "*in response to, and related to a search query*". According to the definition of an OSE, a query can be made "*in the form of a keyword, voice request, phrase or other input*". 231

The term "*other input*" implies a broad interpretation of the term 'query'. It is only necessary that the end user provided some form of 'input' to express their query, which triggers the selection of results. This definition does not mandate that the query be entered immediately prior to the display of information. This flexibility allows for scenarios where user interest is inferred from queries entered in previous sessions, such as during the end user's last search session. These prior actions may include queries made on any interface of the gatekeeper. This interpretation aligns with recital (61) DMA, which elucidates that gatekeepers providing "*online search engines collect and store aggregated datasets containing information about what* 232

283 Commission Notice of 8/12/20, Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, Case 2020/C 424/01, para. 89.

users searched for, and how they interacted with, the results with which they were provided". Consequently, an OSE can utilise an end user's search history to predict subsequent queries within the same or the next search session.[284]

233 For instance, if a user enters a query for "red shoes" on Google Shopping (or Google Search), then abandons the search, returning later to Google Search to continue the search, the gatekeeper may infer an implied query for the same information and display corresponding results for "red shoes" even before a new query is entered. This displayed content would constitute a 'search result' despite the absence of a new query entry.

234 However, merely relying on signals other than previously communicated queries, such as language settings, location or user device type, appears insufficient to constitute aa 'search result'. While such contextual data can enhance the quality of search results in response to a query, they cannot be considered queries themselves or substitutes for queries. Therefore, organic results, including discover feeds or advertisements appearing on an OSE, may be categorised as 'search results' only if they are generated in response to a prior active action by the end user expressing interest.

(3) Including real-time interface adjustments

235 Crucially, when end users have previously expressed their interest and return to the OSE, any information appearing on the screen that relates to such interest constitutes a 'search result'. Equally, any information presented on the interface in reaction and related to any activity of an end user, e.g. the typing of a keyword, is to be seen a 'search result'. This includes the display of information aimed at refining or specifying the query or to categorise the answers. Specifically, features such as filters, refinement chips, toggles, shortcuts, or options to input booking dates, presented during or after the entry of a query, fall under the definition of a 'search result'.[285]

284 See Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 232.

285 See the list of potential preferential treatments in the search results of the Amazon marketplace listed here 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 iRobot's rivals by engaging in several foreclosing strategies aimed at preventing rivals from selling RVCs*

Such interpretation is in line with the Commission's guidelines on ranking transparency, referred to in recital (52) DMA. In the context of outlining the concept of 'ranking', the guidelines explain that goods and services can be ranked in numerous manners. 236

> "*These include 'default' ordering of goods or services that consumers may navigate without using search queries, through the seamless use of different online intermediation services through 'buy buttons' [..], visual exposure (including in online intermediation services that take the form of maps or directories), highlighting, lead generation and editorial interventions, etc.*"[286]

Article 2(22) DMA contains the same definition of "ranking" for OIS and OSE. It follows that the same principle must apply to OSEs. 237

Such interpretation is confirmed further by recital (52) sentence 4 DMA which states that Article 6(5) should "*apply to any measure that has an equivalent effect to the differentiated or preferential treatment in ranking*". A differentiated or preferential access to features appearing on a results page in reaction to any end user engagement can have such equivalent effect. Consequently, Article 6(5) DMA prohibits the gatekeeper from leveraging such elements to promote a distinct First-Party Service. 238

cc) Results in any interface of any access point of the OSE

Article 6(5) DMA prohibits any favourable treatment of a First-Party Service in any ranking of a designated OSE. According to Alphabet, 239

> "*Google Search operates as a single service, regardless of the surfaces, form factors, or access points that a user uses to access the service. Access points for the Google Search online search engine include the Google Search web-*

[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".

286 Commission Notice of 8/12/20, Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, Case 2020/C 424/01, para. 36.

> *site (google.com or its localised versions), the Google Search mobile app, the Google Search widget on Android mobile devices, syndicated Google Search input boxes on third-party websites, Google Lens, and the Discover feed (which shows search results that are based on an implicit query)*".[287]

240 Based on such understanding of Google Search as the designated OSE, Article 6(5) DMA precludes any more favourable treatment of a First-Party Service through the ranking on any of such access points. Accordingly, if Alphabet offers a First-Party Service, for example through syndicated input boxes displayed on third-party websites (i.e. Google's syndication partners) or through Discover feeds embedded in its Chrome or Search App, Alphabet must grant parties providing a similar service an equal opportunity to appear on the pages of its syndication partners or within Discover feeds.[288]

c. Crawling and indexing

241 Article 6(5) DMA prohibits a more favourable treatment in ranking "*and related indexing and crawling*". Pursuant to recital (51) DMA, a problematic

> "*reserving of a better position of gatekeeper's own offering can take place even before ranking following a query, such as during crawling and indexing. For example, already during crawling, as a discovery process by which new and updated content is being found, as well as indexing, which entails storing and organising of the content found during the crawling process, the gatekeeper can favour its own content over that of third parties.*"

242 It follows from such explanation that the core concern lies in addressing any treatment that may directly or indirectly allow the gatekeeper to "*reserve a better position*" for its First-Party Service on the interface of its OSE.[289] The First-Party Service is in the "best" position if it may directly offer its service through the OSE interface, thereby using it as an access point to reach end users. However, a "better position" is also achieved if

287 Commission decision of 5/9/2023, Cases DMA.100011 et sub., *Alphabet (designation)*, para. 89.

288 This may be relevant, for instance, where Google includes any groupings of results that provide an OIS into the info boxes displayed on syndication partners' websites. Similarly, if Google embeds a special news service, such as panels of Google News Showcase, within Discover feeds, it must equally enable similar news services to appear in an equal manner in such interface of its OSE.

289 See also recital (52) sentence 4 DMA.

links leading to, or content generated by, the First-Party Service obtain more prominence relative to a similar Third-Party Service.

d. Other treatments having an equivalent effect

According to recital (52) sentence 4 DMA, to ensure that Article 6(5) DMA "*is effective and cannot be circumvented, it should also apply to any measure that as equivalent effect to the differentiated or preferential treatment in ranking*". Recital (51) sub-paragraph 2, sentence 2 DMA explains that measures ensuring a better positioning "*can take place even before ranking*", that is before the returning of any search results. To this end, recital (51) mentions a differential "crawling" or "indexing" as mere "examples" for such measures prior to a query. In line with the broad focus on a differential "treatment" (see above at a.), it follows that any measure before, during or after the entry of a query is in the scope of Article 6(5) DMA as it may ultimately lead to a better position of a First-Party Service. 243

One example of measures that may have an equivalent effect to a preferential ranking and are taken prior to the entry of any query is the setting of conditions for corporate websites to be crawled, indexed or displayed in a certain manner. Another example are any practices regarding the sharing of information that relate to the ranking of paid or unpaid results. For instance, by sharing more information with its First-Party Service about relevant crawling, indexing, or ranking criteria than with third parties, a gatekeeper can enable its service to get a better position in ranking.[290] Informing the First-Party Service about upcoming algorithmic updates sooner or in greater detail may have the same impact. Accordingly, any such conduct is covered as a relevant "treatment" of services in the meaning of Article 6(5) DMA. 244

290 Such concerns were at the heart of the investigation into Amazon's self-preferencing practice. See the conclusion drawn in European Commission, Digital Markets Act – Impact Assessment Support Study, Annex (2020), p. 304 *"Amazon has a clear advantage over its competitors in the evaluation of product, sales and customer data, which are being generated due to the processing of related transactions on the Amazon platform. This data can be launched to order or produce own brands and sell them on the platform. 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. In fact, this seems to be the case."*

245 Similarly, also the sharing of features on the online interfaces of an OSE with a First-Party Service may constitute a measure that relates to and affects its ranking. For example, Google passes on the queries that an end user enters into the search bar displayed on Google Search to Google's relevant verticals in real-time. It also forwards any refinements of the query (such as mouse hovering, clicks on filters, chips, etc). As a result of such co-use of the search bar and filter features provided by the OSE, in contrast to third parties, Google's verticals do not need to present their own search bar, filters or tools to refine a query on Google Search (and its SERPs) to be able to obtain all user data they need to provide their respective OIS to end users through Google Search. Thus, Google may require less features on its results pages to offer any OIS as compared to similar services. Google's verticals may use the Google Search interface to process the user's request and instantly provide the respective results. This may be perceived as an even more intense favouring of such vertical than the prominent display of their output along the general search results.[291]

3. More favourable treatment of First-Party Service

a. Equal treatment vs no self-preferencing

246 As follows from its wording, Article 6(5) DMA does not oblige a gatekeeper to treat similar services "equally". The provision prohibits to treat its own service "more favourably". The wording originates from Article 1 of the operative part of the *Google Search (Shopping)* decision which had described Alphabet's abuse of dominance as follows:

> "*By positioning and displaying more favourably, in Google Inc.'s general search results pages, Google Inc.'s own comparison shopping service compared to competing comparison shopping services, the undertaking [..] has infringed Article 102 [TFEU]*"

247 As the General Court explained,

> "*In order to reach that conclusion, the Commission compared the way in which results from competing comparison shopping services were 'posi-*

291 Note Recital (52), sentence 4 DMA: "*To ensure that this obligation is effective [...], it should also apply to any measure that has an equivalent effect to the differentiated or preferential treatment in ranking*".

tioned' and 'displayed' on Google's general results pages [..] and the way in which results from Google's comparison shopping service, in this case, Product Universals, were 'positioned' and 'displayed' on those pages".[292]

In line with the identified abuse, as a remedy the Decision obliged Alphabet to 248

"ensure that Google treats competing comparison shopping services not less favourably than its own comparison shopping services within its general search results pages".[293]

This distinction between (strict) "equal treatment" and "no more favourable treatment" pays tribute to the fact that intermediaries, in a broader sense, may treat business users technically different without necessarily advantaging one over the other. In fact, there are instances where a gatekeeper may have to treat providers of similar services technically differently to ensure that they obtain an economically equal opportunity. This may be the case, for example, where technical differences between the similar services call for different technical solutions to embed them equally into an OSE. 249

A differentiated treatment becomes problematic only once it confers an advantage upon the gatekeeper's First-Party Service over a similar Third-Party Service. As follows from the definition of "ranking" and recital (51) DMA, such advantage is conferred whenever, in effect, the gatekeeper enables its First-Party Service to obtain more relative prominence as compared to third parties vis-à-vis either end user, business users or both anywhere on an online interface of the OSE. 250

To assess whether a gatekeeper treats its service "more favourable", it is helpful to first identify any technical, contractual, or other benefit that a First-Party Service obtains and to then evaluate whether similar third parties obtain an equivalent benefit, so as to preclude any self-preferencing. 251

b. Conferral of advantage upon First-Party Service

Article 6(5) DMA prohibits any relevant favouring. There is no minimum threshold in terms of the impact of such favouring on the commercial suc- 252

292 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 281.

293 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 699.

cess of either the gatekeeper or the third party for a preferential treatment to be prohibited.

253 This is in line with the overall concept of the DMA. Recital (10) DMA explains that general competition law involves the assessment of the actual impact of a conduct as well as of any efficiency and objective justification arguments. Such assessment shall "*not affect the obligations imposed on gatekeepers under the DMA*." According to recital (11) DMA, this is because the DMA pursues a complementary objective

> "*which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market*."

254 Transferred to Article 6(5) DMA, recital (11) DMA suggests that it is immaterial whether the advantage granted to a gatekeeper's First-Party Service is substantial or not. Since, by definition, a gatekeeper already enjoys an entrenched market position[294], Article 6(5) DMA shall prevent the gaining of any further advantage that reduces contestability by means of a platform envelopment.[295] In line with this objective, any advantage granted to a First-Party Service triggers an obligation to ensure that a similar third party obtains an equivalent advantage to preclude self-preferencing.

255 The list of advantages that a gatekeeper may grant its First-Party Service in relation to ranking and which therefore trigger an obligation to grant an equivalent advantage to every provider of a similar Third-Party Service, is extensive, and potentially endless.

aa) Examples mentioned in recital (51) DMA

256 Recital (51) DMA explicitly mentions just a few examples of how gatekeepers may advantage a First-Party Service. Particular prominence is given to the "*situation whereby a gatekeeper provides its own intermediation services through an online search engine*". The direct offer of a First-Party Service through an online interface of an OSE is to be distinguished from the mere linking to a First-Party Service from the SERPs of an OSE. Recital (51) sentence 4 DMA therefore lists the following examples for self-preferencing:

294 See Recital (13) DMA.
295 Recital (51) DMA. On platform envelopment see above at I.2.b.

> "*This can occur for instance with products or services, including other core platform services, which are ranked in the results communicated by online search engines, or which are partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine.*"

Such explanation can be broken down to five relevant scenarios. 257

(1) Better ranking of results leading to a service

The first example refers to a First-Party Service that is favourably "*ranked in the results communicated*" by an OSE. This primarily relates to the situation that a gatekeeper offers a distinct service on any website and then prominently presents links ("teasers") to it on its OSE. This may take place through placing general unpaid (organic) or paid (text ads) results leading end users to such website higher on the SERPs as compared to more a relevant similar Third-Party Service. 258

Such "teasers" to the gatekeeper's distinct service may also have a more eye-catching design, such as through more text or richer visual features like a thumbnail. Similarly, any prominent or even exclusive presentation of a feature leading to or advertising a First-Party Service draws customer's attention to such service and therefore constitutes self-preferencing.[296] 259

Technically, the favouring may be achieved by sparing the websites of its own service from certain demotion algorithms that apply to websites of similar services or by subjecting its service to promotion algorithm that give its websites more weight than similar websites. Such algorithmic 260

296 European Commission, "Digital Markets Act – Impact Assessment Support Study, Annexes" (2020), p. 298 "*the following factors can improve the visibility of a product: - The product is displayed with the text 'Delivery by Amazon'", 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 "*It appears that 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. (Self-preferencing)*"

favouring within organic or paid results can be seen as the textbook case of search manipulation.

(2) Partial embedding of a service

261 The second example in recital (51) sentence 3 DMA refers to a First-Party Service being "*partly embedded*" in the results pages of the OSE. In this scenario, the gatekeeper operates a distinct service (somewhere) on a standalone basis (as in example (1) above) and includes components of such service into the interface of its OSE.

262 As explained in detail above, the most prominent example is the display of specialised search results that are generated by an OIS/Vertical of the gatekeeper on the SERPs of the OSE. This was the subject of the *Google Search (Shopping)* case. The OSE passes on any query entered on its interfaces which suggests an interest in an OIS/Vertical service to its own corresponding specialised OIS/Verticals. Those services may then apply their specialised algorithms to their specialised indexes and return corresponding outputs to the OSE in real-time for it to present them within its SERPs.

263 The display, in such interfaces, of specialised results generated with the technology of a gatekeeper's own OIS/Verticals confers significant advantages for such OIS/Verticals.[297] In particular, it allows such OIS/Vertical to generate positive network effects by reaching a broader audience of end users and becoming more attractive to business users in turn.

264 As outlined above, the identified abuse of dominance consisted in *"search results from Google's own [CSS] being favoured on general results pages over search results from competing [CSSs]"*.[298] Technically the favouring thus laid in the fact that the OSE forwarded queries to its own OIS/Vertical to return specialised results based on their technology but did not enable similar OIS/Verticals to do the same. No queries were passed on to them and they could not return any of their special output and present it on the OSE.

265 Because such preferential display of specialised results automatically generates advantages for the corresponding gatekeeper OIS/Vertical, it is irrelev-

297 For a list of ten reasons, see Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 409 – 324.

298 Opinion of AG Kokott of 11/1/2024, Case C-48/22 P, EU:C:2024:14, *Google and Alphabet/Commission (Google Shopping)*, para. 17.

ant whether the individual results displayed on the OSE results page, in return to a particular query, as such fulfil all criteria of an OIS/Vertical as defined above.[299] Thus, even if from an end users' perspective the specialised results (generated by the First-Party Service) may not be distinguishable from any generic results or ads (generated by the OSE) and used for the same purpose, they nevertheless form part of the distinct First-Party Service (as an effective access point to it[300]) and their display therefore favours such service vis-à-vis a similar Third-Party Service that has no option to present its results based on their specialised technology on the SERP.

Accordingly, every single information displayed on the OSE results page that is the result of a selective passing on of a query to the gatekeeper's own OIS/Vertical, to the exclusion of others, favours the gatekeeper's service. This is irrespective of whether such information by itself is considered or used by any users as a service distinct from the OSE. 266

299 This is what the Commission intended to express in paras. 408, 412 and 423 of the *Google Search (Shopping)* decision. Those recitals included the ambiguous wording that *"the Commission's case is not that the Shopping Unit is in itself a [CSS]"*. This was (merely) meant to highlight that it was irrelevant to assess which Shopping Units would constitute a CSS. However, Google subsequently misinterpreted these recitals as meaning that the provision of Product Universals (as group of unpaid specialised results) or Shopping Units (as group of specialised results) as such may never constitute a CSS – and built its entire Compliance Mechanism on such premise. As outlined elsewhere, this was not the meaning of those recitals (*Höppner*, "Google's (Non)-Compliance with the EU Shopping Decision", (2020), pp. 198–212.). The General Court agreed with the latter interpretation para. 338 of its judgment: "*It must be stated that certain formulations in the contested decision, such as those in recitals 408 and 423, can, viewed in isolation and at first sight, appear ambiguous. However, those formulations do not affect the Commission's general analysis, according to which Google's [CSS] was available in different forms. In particular, recital 423 of the contested decision must be read as following on from recitals 414 to 421, which are intended to show that Shopping Units and Google Shopping are components of a whole. In that regard, it must be noted that recital 422 indicates that, in six EEA countries, during a certain period, 'Google Shopping existed only in the form of the Shopping Unit without an associated standalone website*'". In other words, the provision of Shopping Units may constitute a CSS in itself, even if no associated standalone website exists.

300 See above at II.5.c.bb.

(3) Entire embedding of a service

267 The third example in recital (51) sentence 3 DMA refers to a gatekeeper "*entirely embedding*" a distinct service into SERPs of its OSE. The difference between "*partial*" and *"entire*" embedding relates to the presence of alternative access points to use the relevant First-Party Service.

bb) Difference partial / entire embedding

268 In the case of a "*partial embedding*", the display of specialised results (generated by the First-Party Service) on an OSE interface constitutes one of several possibilities to access the gatekeeper's OIS/Vertical. Google Shopping, for instance, is also offered on a standalone website (e.g. shopping.google.com). Its travel verticals are equally available on a standalone travel metasearch site (www.google.com/travel/). Other OIS/Verticals may also be offered through an app or intermediary pages that can be accessed through an OSE or another service. Hence, end users have several interfaces through which they may enter a query to access such OIS/Vertical and receive specialised results in return. Accordingly, the display of specialised results from such OIS/Vertical within the SERPs of an OSE only constitutes a "part" of such OIS/Vertical. Thus, where a First-Party Service is also offered anywhere outside of an OSE interface, its display within the OSE falls in the category of a "partial embedding".

269 A gatekeeper may decide, however, that the offering of its OIS/Vertical outside of its OSE is not as profitable and fully focus on offering it through the OSE. In the case of Google Shopping, for instance, in six countries in which the Commission found an abusive self-preferencing, Google had not rolled out any standalone website for its CSS (Google Shopping) but exclusively offered such service to end users and business users through Shopping Units which were displayed on the results pages of Google's OSE.[301] The fact that in those six countries the Shopping Units with specialised product results were the only access point to use Google Shopping did not call the existence of two distinct services (general search and specialised search)

301 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras. 34, 35, 422: "*Google Shopping existed only in the form of the Shopping Unit without an associated standalone website in six of the thirteen EEC countries in which the Conduct takes place*".

into question. Nor did the lack of any standalone website preclude the finding of an abusive self-preferencing. In fact, dogmatically, since in such cases Google's OIS (Google Shopping) was fully integrated into its OSE (Google Search), the conduct was akin to a technical tying.[302]

However, the boundaries between tying and self-preferencing are fluid.[303] Both practices have similar effects of steering customers to own services at the expense of those provided by third parties.[304]

Article 6(5) DMA therefore rightly covers both types of platform envelopment.[305] Thus, it cannot make a difference whether the gatekeeper continues to offer its First-Party Service through any other access point or fully relies on its offering through the SERPs (or other interfaces) of an OSE.

cc) Consequence: favouring does not require a service with a separate access point

In *Google Search (Shopping)*, if there was an associated Google Shopping standalone website, the Commission referred to the powering of Shopping Units as forming "*part of*" Google's CSS. If there was no associated standalone website, the Commission referred to Shopping Units as "*all of*" of Google's specialised service.[306] By referring to a service that is either "*partially*" or "*entirely*" embedding in OSE results, recital (51) DMA adopts the distinction between "*part of*" and "*all of*" a First-Party Service. It follows 270

302 *Höppner*, "Google's (Non)-Compliance with the EU Shopping Decision", (2020), pp. 308–315.

303 *Höppner*, ibid.; Autorita Garante Della Concorrenza E Del Mercato, 2021, Case A528 – *Fulfilment by Amazon (FBA)* (defining the anti-competitive conduct as both 'tying' and 'self-preferencing') https://en.agcm.it/en/media/press-releases/2021/12/A528; *Petit*, "Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf", CLPD 2015, p. 5 "*tying cases often feature the formulation of antitrust duties of non-preference*"; *Duquesne* et. all, "What Constitutes Self-Preferencing and its Proliferation in Digital Markets", GCR Digital Markets Guide, 3rd Edn. (2023) *"although the tying and bundling concerns arising in the European Commission's cases against Microsoft long predate the origin of the self-preferencing label, the substantive issues are similar".*

304 European Commission, Digital Markets Act – Impact Assessment Support Study, Annex (2020), p. 13; *Bougette/Gautier/Marty*, "Business Models and Incentives: For an Effects-Based Approach to Self-Preferencing?", Journal of EU Comp. Law & Practice, 2022, p. 6

305 See above at II.3.a.

306 *Höppner/Schaper/Westerhoff*, "Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs", (2018), Journal

that both scenarios are covered. Accordingly, the fact that a gatekeeper does not offer a certain service to end users or business users anywhere else but through the SERPs of its OSE, does not preclude that such activity constitutes a service distinct from its OSE. Nor does such fact preclude that by providing such service through its SERPs, the OSE favours this very service in ranking as it gives it particular prominence, unless similar Third-Party Services are afforded an equivalent opportunity.

(1) Groups of results specialised in a certain topic

271 According to recital (51) DMA, a distinct service may "*partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine*." It is ambiguous how the first part and the second part of the sentence relate to each other.

272 To begin, it is worth noting that there is neither an "*or*" nor an "*and*" after the first comma. Such words would have suggested that the embedding of a service is a distinct category to the display of groups of specialised results. The absence of any conjunction after the comma suggests that the reference to "*groups of results specialised in a certain topic*" aims at specifying the previous half sentence, that is how a First-Party Service may be "partly or entirely embedded". Hence, the display of such groupings should be seen as a sub-category of the embedding of distinct service into an OSE, not as a distinct scenario.

273 Such reading would be consistent with the history and purpose of the obligation. By "*results specialised in a certain topic*", recital (51) DMA refers to paid or unpaid specialised results generated by an OIS/Vertical such as Google Shopping.[307] With "*groups of*" such results, recital (51) DMA describes boxes such as Shopping Units (with paid specialised results) or Product Universals (with unpaid specialised results), which Google also used to embed several other specialised search and intermediation services into its OSE.[308] Google displayed such 'OneBoxes' along with the organic

of European Competition Law & Practice, p. 627, 629; See *Höppner*, "Google's (Non)-Compliance with the EU Shopping Decision", (2020), pp. 175 et. sub.

307 See above at II.4.d.dd).

308 See above at II.4.d.dd).

and paid general results (i.e. those available to any website and hence qualifying as OSE results). This resulted in competition complaints from a wide range of affected industries[309], ultimately leading to Article 6(5) DMA.

(2) Considered or used by certain end users as a distinct service

The above reading that the provision of "*groups of specialised results*" constitutes a type of embedding a distinct OIS/Vertical into an OSE also sheds some light on the relevance of the last half sentence[310] of recital (51) sentence 3 DMA. 274

Article 6(5) DMA requires the favouring of a distinct service. As outlined above[311], according to section D(2)(b) of the Annex to the DMA, distinct services can always be assumed where end users, business users, or both use them for different purposes. However, the Annex does not further specify how this may be measured. For the purpose of applying Article 6(5) DMA, recital (51) sentence 3, last half sentence DMA clarifies that it suffices that "*certain*" end users either consider or use specialised results displayed along general results of an OSE as a service distinct or additional to that of an OSE. Considering the different purposes of an OSE on the one hand, and an OIS/Vertical on the other[312], it thus suffices for the finding of a distinct OIS/Vertical service that some end users use specialised results that a gatekeeper displays within its SERPs as a means to compare direct 275

309 See "Joint Industry Letter Against Google's Self-Preferencing", (2020), ENPA, "*of 135 companies and 35 industry associations*", dated 12/11/2020 to the EU Commission, calling for an end of "*Google's continuing practice of favouring its own specialised search services within [SERPs]*" highlighting that "*there is now global consensus that Google gained unjustified advantages through preferentially treating its own services within its [SERPs] by displaying various forms of grouped specialised search results (so-called "OneBoxes"). Such OneBoxes are positioned prominently above all generic search results. No competing service may compile and display equivalent boxes within Google's [SERPs], even though they could provide more relevant results than Google's service. With this exclusive use of OneBoxes, Google artificially keeps users within its own service and prevents them from visiting competing, more relevant services*".

310 "*which are considered or used by certain end users as a service distinct or additional to the online search engine*".

311 At II.1.

312 See above at II.4.d.bb).

or indirect suppliers or their respective commercial offerings with a view to facilitating and concluding a transaction with them.[313]

276 To assess whether some end users consider or use certain groups of results for a different purpose, in particular to compare suppliers, as an OIS would do, it is important to recall that the OSE may share refinement tools and further features with its OIS. Accordingly, for the purpose of assessing an end users' perception of the groups or results on a certain topic, such groups may not be viewed in isolation. Rather, all features that the OSE shares with the service powering the respective groups of results need to be taken into account. Thus, even where groups of results, as such, lack typical features of an OIS, such as special filters or refinement tools to specify commercial interests, they may still qualify as an OIS, when such groups benefit of corresponding filters or refinement tools that the OSE uses elsewhere on its online interfaces and to which the groups of results react. Such sharing of features does not eliminate the self-preferencing of the gatekeeper's corresponding OIS; it exacerbates it.[314]

277 It is worth noting that such assessment is necessary only where the gatekeeper does not provide an associated OIS/Vertical through any other access point than the general results pages of its OSE. Because where it does offer an associated OIS/Vertical (also) elsewhere, the existence of a distinct First-Party Service is out of question and any specialised results (generated by the same service) that are displayed with general results pages of an OSE, constitute a "partial" embedding of such service.[315] An assessment if some end users consider or use groups of results specialised in a certain topic, displayed on a general results page, for a different purpose than that of an OSE, is relevant only where the existence of a distinct First-Party Service is questionable. This is the case only where such specialised results are not generated by any technology that the gatekeeper shares with a distinct OIS/Vertical and which benefits of the display of its results on the OSE interface (as outlined above). In contrast, where a gatekeeper operates the technology to offer an OIS/Vertical anywhere within its ecosystem, including through any intermediate pages an end user may access through an OSE interface, the existence of a distinct First-Party Service is out of

313 See above at II.3.a cc). point ix. and II.4.d.bb).

314 According to Recital 51 DMA, a "*reserving of a better position of gatekeeper's own offering can take place even before ranking following a query*". This includes a self-preferencing during the process of the entry of a query, such as through a preferential sharing of such data with own distinct services.

315 See above at (2).

question and the only question is whether the display of any information relating to such service on the OSE interface directly or indirectly favours such service.

dd) Further examples of relevant advantages

Recital (51) DMA only mentions some "examples" for conferring an advantage upon a First-Party Service. In fact, the list of practices that may confer an advantage in favouring is long, if not endless. Some of the more obvious advantages are the following: 278

- An OSE grants a First-Party Service better access to information on ranking criteria.
- An OSE informs a First-Party Service about any algorithmic updates before Third-Party Services are informed.
- An OSE shares data of an end user making a query on the OSE exclusively with its First-Party Service to allow it to adjust its offerings in real-time.
- An OSE exempts a First-Party Service from conditions for crawling, indexing, or ranking.
- An OSE grants a First-Party Service a higher quality score due to affiliation to the gatekeeper.
- First-Party Service content is crawled and/or indexed more frequently or thoroughly than content of Third-Party Services.
- An OSE allows a First-Party Service to exclusively display particular advertisement on OSE interfaces.
- An OSE presents content from a First-Party Service more prominently or endorses it.
- A First-Party Service obtains exclusive tools to engage with end users on the OSE interfaces, e.g. for them to specify any transactional rather than navigational interest.
- An OSE ranks websites higher that primarily engage with a website of the First-Party Service.

c. No equivalent for similar Third-Party Service

aa) General framework

279 A gatekeeper favours its First-Party Service if the advantage that it affords to such service is not equally afforded to similar Third-Party Services. In other words, it is necessary to assess whether the gatekeeper has taken any measures that effectively ensure that similar Third-Party Services obtain opportunities which are no less favourable than the advantage conferred upon its First-Party Service in ranking, crawling or indexing. Where this is not yet the case, the gatekeeper can provide such equal opportunity to bring the self-preferencing to an end. However, if the gatekeeper fails to find a solution that would put a similar Third-Party Service on equal footing in order to outweigh any advantage it wishes to grant or already granted a First-Party Service, the gatekeeper cannot proceed and must cease granting the respective advantage to its service to re-create an equal footing.

280 Article 6(5) DMA leaves it at the gatekeepers' discretion how they ensure that any treatment of distinct services does not amount to a favouring of a First-Party Service. This includes flexibility as regards granting a similar Third-Party Service an opportunity equivalent to that provided to a First-Party Service. However, such discretion is limited by the framework provided by the DMA itself and applicable European law, including general competition law, the Digital Services Act, and the P2B-Regulation.[316] According, to Article 8(1) sentence 2 DMA, any measures implemented to ensure compliance with Articles 5 to 7 DMA, "*shall be effective in achieving the objectives of [the DMA] and of the relevant obligation*". Hence, measures to comply with a particular obligation may not been in isolation but need to be assessed against the DMA's overall objective to ensure contestability and fairness.

281 It follows that for the purpose of assessing if measures provide an "equal opportunity" to any provider of a similar Third-Party Service, crucial guidance does not just follow from the objectives of Article 6(5) DMA itself but also from the overarching objectives of the DMA. In particular, any measure taken by the gatekeeper to compensate for an advantage it confers upon a First-Party Service may not in itself be unlawful, circumvent any

316 Article 8(1) sentence 3 DMA.

obligations, render the gatekeeper even less contestable, or increase any unfairness in the process.

Against this background, the legal requirements to preclude a favouring in the present context can be broken down to three interrelated conditions: First, the measures taken to outweigh the advantage conferred upon the First-Party Service must create an equivalent opportunity for each third party providing a similar service. Second, the intended or implemented measures must ensure that there is no remaining imbalance in rights and obligations. Third, the measures must not themselves confer an advantage upon the gatekeeper, in particular its OSE, which is disproportionate to the service provided by the OSE to the third parties providing a similar service.[317] 282

bb) Equivalence of opportunity

(1) Relevant opportunities relating to search prominence

It follows directly from Article 6(5) sentence 1 DMA that the gatekeeper may only confer an advantage upon a First-Party Service if it provides an equal opportunity for every third party providing a similar service. The opportunity that Article 6(5) DMA seeks to ensure relates to the "ranking" of services on interfaces of an OSE. Ranking, in turn, is defined as "*relative prominence*" of any information appearing anywhere on the SERP.[318] 283

Because Article 6(5) DMA is concerned about the choices that end users make if presented with a certain SERP, the relative prominence of information is to be assessed from the perspective of such end users, not the perspective of the OSE. 284

Moreover, considering that Article 6(5) DMA and the DMA in general protect autonomous decision-making of end users and business users[319], any cognitive biases in terms of how information is perceived if presented on a SERP need to be taken into account. In this regard, in particular 285

317 See Article 8(8) DMA and below at dd).
318 Article 2(22) DMA, see above at 5.b.
319 See Article 13(6) DMA, recitals (70) DMA.

the saliency bias[320] plays a crucial role. Users typically look at the results at the top of the SERP (the so-called "above-the-fold section") and pay little or no attention to the remaining results "below-the-fold".[321] As Google acknowledged: "*users rarely scroll, and if they are looking for a group that is not above the fold, it is often difficult for them to find it.*"[322] As a result, for example, the ten highest-ranking organic results on the first Google SERP together generally received approximately 95 % of all clicks on organic search results.[323] Similarly, any graphical enhancement of a result automatically attracts user attention and hence confers relative prominence.[324] This tendency is even more accentuated on the smaller screens of smart mobile devices[325], which attract ever more user attention.

286 However, "relative prominence" is not just determined by the position and design of the information relating to a particular service. It is equally impacted by the relative frequency that any information of any service appears on SERPs, the so called "trigger rate".[326]

287 Thus, for the purpose of assessing the existence of an equal opportunity, any elements that impact the "prominence" of a service on a SERP, as perceived by end users, need to be taken into account. This includes elements having an impact on (i) the triggering, (ii) positioning on the SERP, and (iii) graphical formatting of information relating to distinct services.

320 In behavioural economics, salience bias means a cognitive bias that predisposes consumers to focus on or attend to information or stimuli that are more prominent, visible, or emotionally striking.

321 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* para. 455.

322 As quoted in Commission, ibid., para. 456.

323 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* para. 457.

324 See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* para. 376 *"the click-through rate on a link multiplied by a factor of between 2.2 and 3.7 if, instead of being displayed in the form of text accompanied by a static small icon, it is displayed in the form that includes a larger picture representing the relevant product".*

325 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* footnote 541 and para. 579.

326 The "trigger rates" are defined as the proportion of queries/keywords for which a particular information is displayed ("triggered") on SERPs. See Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* footnote 395.

(2) Equivalence of prominence

It follows from the above that equality of opportunity is ensured only where every third party providing a similar service obtains the same opportunity as regards the following factors relating to rankings. Such factors reflect what the Commission (already) required for an "equal treatment" on Google's SERPs under general competition law.[327] Article 6(5) DMA does not fall below such level[328]: 288

- **Trigger rate:** Each provider of a similar Third-Party Service should have the same chance of being triggered as often as the First-Party Service in response to any query implying an interest for the respective service. This precludes, for example, any solution where a first-party OIS is embedded in SERPs relatively more often than a similar third-party OIS. It also precludes a solution where a first-party OIS is always displayed in return to a relevant query, while all similar OISs need to compete amongst each other to displayed as well or along the first-party OIS.
- **Positioning:** Each Third-Party Service should have the same opportunity to appear at the most attractive positions at the top of a SERP as the First-Party Service. This precludes solutions where a first-party OIS is embedded at the top of the SERPs, while any similar Third-Party Service is only offered further down on the SERP.
- **Visual appearance:** The Third-Party Services should be displayed with equally attractive graphical formats as the First-Party Service. This precludes, for example, any solution where a first-party OIS is presented in a format that attracts more end user attention than the format afforded to the Third-Party Services.
- **Corporate branding:** The Third-Party Services should obtain an equal possibility to brand its service as the First-Party Service. This precludes solutions where end users might confuse both the First-Party Service and the Third-Party Services as being provided solely by the gatekeeper's OSE, or assume a direct business relationship between them. This ensures that all services are attributed correctly without bias towards the gatekeeper.

327 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* para. 700 (c).

328 Cf. *Fletcher*, in: *de Streel/Bourreau/Feasey/Fletcher/Kraemer/Monti* (ed.), "Implementing the DMA: Substantive and Procedural Principles", (2024), CERRE, p. 20 et sub., in particular 27.

- **Type and granularity of information:** The Third-Party Services should be enabled to present the same type of information and with the same granularity as the First-Party Service. This precludes, for example, any solution where a First-Party Service may present more information to facilitate the initiation of a transaction than Third-Party Services (e.g. dynamic prices, reviews, stars).
- **User interaction:** The Third-Party Services should obtain an equal opportunity to engage with end users and business users as the First-Party Service. This precludes, for example, any solution where a First-Party Service obtains features to interact with end users that are not available to the Third-Party Services (e.g. filters, chips, booking refinement tools, shortcuts).

cc) No circumvention of ban on self-preferencing

(1) Article 13(6) DMA

289 "*Given the substantial economic power of gatekeepers*"[329], the DMA is particularly strict when it comes to measures to circumvent the obligation laid down in Article 6(5) DMA.

290 According to Article 13(6) DMA, a

> "*gatekeeper shall not degrade the conditions of quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5, 6 and 7, or make the exercise of those rights or choices unduly difficult, including by offering choices to the end-user in a non-neutral manner, or by subverting end users' or business users' autonomy, decision-making, or free choice via a structure, design, function or manner of operation of a user interface or a part thereof*".

291 This obligation can be broken down to a prohibition of dark patterns and a prohibition of any degradation of the quality of the OSE as a form of hidden price increase in the context of implementing Article 6(5) DMA.

329 Recital (70) sentence 1 DMA.

(2) Dark patterns

Search rankings are all about facilitating end users' choices of the most relevant websites.[330] Accordingly, when assessing whether each Third-Party Service is conferred an equal opportunity as the First-Party Service, cognitive biases play a crucial role. 292

Accordingly, Article 13(6) DMA prohibits the exploitation of biases to circumvent the ban on self-preferencing in search. Recital (70) sentence 3 DMA explains that such circumventing behaviour may include 293

> "*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.*"

In essence, Article 6(5) in connection with Article 13(6) DMA demands an architectural neutrality of the online interfaces of an OSE. In any event, it follows from such provision that a gatekeeper is prohibited from implementing any measures that nudge end users or business users towards a particular gatekeeper service, whether it is the First-Party Service presented on the SERP, the OSE itself, or any other of its services.[331] 294

This equally follows from Article 8(1) sentence 3 DMA, which stipulates that measures to comply with the DMA must also adhere to other European laws, including the Digital Services Act. Article 25 DSA explicitly prohibits online platforms from 295

> "*deceiving or nudging recipients of the service and from distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof. This should include, but not be limited to, exploitative design choices to direct the recipient to actions that benefit the provider of online platforms, but which may not be in the recipients' interests, presenting choices in a non-neutral manner, such as giving more prominence to*

330 See above at II.2.b.

331 See *Fletcher*, in: *de Streel/Bourreau/Feasey/Fletcher/Kraemer/Monti* (ed.), "Implementing the DMA: Substantive and Procedural Principles", (2024), CERRE, pp. 22 et sub., 27.

certain choices through visual, auditory, or other components, when asking the recipient of the service for a decision."[332]

296 What applies for any online platform must apply even more so to gatekeepers when providing any choices to end users to prevent self-preferencing.

297 Overall, any measures that exploit or create behavioural biases to reduce the ability of end users or business users to opt for a Third-Party Service rather than the First-Party Service preclude an equal treatment.[333]

(3) Degradation of conditions or quality of the OSE

298 According to Article 13(6) DMA, a gatekeeper "*shall not degrade the conditions or quality*" of its OSE provided to business users, i.e. corporate websites owners, "*who avail themselves of the rights or choices laid down in Articles 5, 6 and 7*". Providers of similar third parties calling for an equal treatment in search rankings avail themselves of the right laid down in Article 6(5) DMA. It follows that the gatekeeper may not implement any measures to comply with Article 6(5) DMA which in effect degrade the conditions or quality of the service provided by its OSE.

299 Search quality is an important factor. In fact, one economic rationale for the prohibition of self-preferencing by OSEs is, as the Commission put it in Google Search (Shopping), "*to render a possible degradation by Google in the quality of its general search service unprofitable*"[334] and to repair the "*incentives of Google to improve the quality of its [..] service as it does not currently need to compete on the merits*".[335] In lack of alternatives, over the years, end users have become so loyal to their standard OSE that they no longer adequately react to quality degradations and need to be protected against them.[336] The promotion of own inferior services to the detriment of more relevant Third-Party Services constitutes such degradation of an OSE

332 Recital (67) DSA.

333 See Article 3(7)(e) DMA.

334 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 313.

335 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 596.

336 *Kuenzler*, "Promoting Quality Competition in Big Data Markets: What the European Commission's Decision in Google Search (Shopping) Achieves", (2019), SSRN, p. 1: "*Google Search (Shopping) is best understood as an attempt to ward off product quality degradations in digital markets, which are difficult to repair purely by means of the consumer's sole ability to switch. [T]he Commission's ruling must*

as it hampers the end users' access to the most relevant web content. In the context of "search platform envelopment" strategies, the circumvention of a ban on self-preferencing with quality degradations can come in several forms for end users, business users, or both.

From an end users' perspective, the quality of an OSE is determined by the perceived relevance of the results returned to a query.[337] End users turn to OSEs for relevance-based organic results[338], not for advertisement. Moreover, apart from rare queries for undisputable facts (such as the height of the Eiffel tower), end users typically prefer a choice, not a single response or "more of the same". Accordingly, from an end user's perspective, (i) more advertisement, (ii) fewer results, (iii) less relevant information or (iv) duplicated content on the SERPs constitute a quality degradation. Article 6(5) DMA allows OSEs to integrate as much information as many features as they like into their SERPs, provided providers of similar information or features obtain an equivalent opportunity. Accordingly, contrary to Alphabet's public lobbying[339], any quality degradation perceived by end users following measures taken by the gatekeeper to implement Article 6(5) DMA, is the sole result of the gatekeeper's conscious choice. The prohibition of self-preferencing in search does not necessitate any degradation of search quality, but typically improves quality, as the integration of third-party databases creates positive network effects and broadens end user choice.[340] 300

Similarly, from the perspective of corporate website owners, the quality of an OSE is determined by its ability to provide open access to end users at 301

be understood as recognition that rivalry stemming from smaller market actors will not necessarily prevent large platforms from degrading product quality, despite the consumer's ability to gain access to a variety of services that are only a click away."

337 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* para. 312–314, 446–490.

338 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 176 to 184.

339 See Google in Europe, blog post by *Adam Cohen*, Director Economic Policy, "New competition rules come with trade-offs", 5/4/2024, https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/, suggesting that it was the DMA, rather than Alphabet's choices, that had raised alleged criticism by end users and business users.

340 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 176-178, 561 et sub., incl. "*The Commission is rightly doubtful that internet users would expect to find only results from a single specialised search engine on the general results pages. [..] [A]s the Commission pointed out [..] internet users would expect to find results from the whole of the internet and for these to be provided in a non-discriminatory and transparent manner*".

the lowest transaction costs. Accordingly, for corporate website owners, any (i) loss of visibility as well as any need to either (ii) upload, give away, or license more content to the OSE or (iii) bid (more) for paid search results, in order to remain findable in the SERP of an OSE, or (iv) any reduction of traffic, in terms of end users clicking through to their sites[341], constitute a quality degradation.[342] Such conditions raise their transaction costs to reach end users through the OSE and thereby reduce its benefits. Corporate website owners would not optimise their websites for any low-quality OSE, as the return on investment into such optimisation would be negative.

302 In contrast to recital (61) sentence 5 DMA, Article 13(6) DMA does not require a "substantial degrading" of the quality. Thus, the threshold for a relevant circumvention of Article 6(5) DMA is not high. Moreover, according to recital (51) DMA, the prohibition of self-preferencing aims at tackling conflicts of interests. An OSE has an incentive to exchange (free) organic results with (paid) offers from a First-Party Service.[343] However, an OSE has also an incentive to exchange organic results with paid results in general.[344] Economically, obliging Third-Party Services to bid and pay for paid results to remain equally visible on a SERP can have the same effect as to directly demote them in organic results in favour of a First-Party Service.[345] Their relative gain in visibility (as compared to the First-Party

341 The click-through rate represents the percentage of end users clicking on a search result placed in return to a particular query.

342 Cf. Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping),* paras 444–453 outlining the relevance of traffic from the perspective of comparison shopping services.

343 *Frank/Peitz*, "The Digital Markets Act and the Whack-A-Mole Challenge", Common Market Law Review 61 (2024) (forthcoming) SSRN p. 32; *Motta*, "Self- Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases", International Journal of Industrial Organization 90 (2023): 102974, at 3.1.1.

344 See *Höppner,* "Gatekeepers' Tollbooths for Market Access: How to Safeguard Unbiased Intermediation", CPI Antitrust Chronicles, February 2021.

345 *Frank/Peitz*, p. 33 "*The economic consequences are similar to self-preferencing in the sense that end users obtain lower net benefits than in a situation with moderate fees and no self-preferencing.*" The authors are sceptical about condemning higher fees as anti-circumvention in fear that authorities or courts "*would have to regulate the fees*". However, the procedural effort of enforcing a law may not define the substantive scope of the law. Article 6(12) read in conjunction with recital (62) The DMA requires a review of "pricing conditions" in any event. Thus, price control is part of the DMA; at least of Article 6(5), which is *lex specialis* to Article 6(12) DMA (see footnote 312). As one of the authors had written previously: "*[Instead of prohibiting the dual mode, a regulator may prefer to impose a cap on the fee the platform can charge to sellers. Such an intervention is common practice in a*

Service) may quickly be outweighed by the additional transaction costs for such visibility. Conversely, a gatekeeper may earn more from increasing the fees charged to any third party (and possibly also their business users), in terms of required ad spendings, than from promoting its First-Party Service in ranking.

In fact, trying to create a "prisoner's dilemma" that economically forces providers of similar Third-Party Services to outbid each other for paid placements, in order to obtain an equal prominence in search ranking as conferred upon a First-Party Service, can be seen as a classic gatekeeper strategy to circumvent any prohibition of self-preferencing in rankings. These mechanisms can lead to a transfer of surplus from the third parties (and their business users) to the gatekeeper.[346] Even though it is collectively optimal for the third parties not to pay (to reach parity with the First-Party Service), such mechanism "*leads them all to pay, which means that the ranking remains unchanged*".[347] OSEs have a particularly strong incentive and technical capability to use auctions for paid results to extract the surplus from third parties[348], which they are supposed to treat equally. Such mechanism may render a gatekeeper even less contestable than any discrimination of services in search rankings. 303

It follows that a gatekeeper fails to comply with Article 6(5) DMA if the solution implemented to grant third parties a similar opportunity as conferred upon the First-Party Service in any way degrades the quality of the 304

number of network industries and may be worth considering in the case of gatekeeper platforms." (*Peitz,* "The prohibition of self-preferencing in the DMA", CERRE 2022, p. 22).

346 *Krämer/Schnurr*, "Is there a need for platform neutrality regulation in the EU?" (2018) Telecommunications Policy 42, p. 514, 525; *Höppner*, "Gatekeeper's Tollbooths for Market Access: How to Safeguard Unbiased Intermediation", CPI Antitrust Chronicles (2021), pp. 5–11.

347 *Bougette/Budzinski/Marty*, Self-Preferencing Theories Need To Account for Exploitative Abuse – ProMarket, March 27, 2023; and in "Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses" The Antitrust Bulletin, Vol. 67/2 (2022), pp. 190–207.

348 *Höppner*, "Gatekeeper's Tollbooths for Market Access: How to Safeguard Unbiased Intermediation", CPI Antitrust Chronicles (2021), p. 5–6. This is true even if (as is standard now) an auction is combined with a quality score, see *Bougette/ Budzinski/Marty,* ibid. "*The ability of the platform to extract an additional share of the business partner's surplus can also be observed on search engines through keyword auctions as soon as the auction result can be corrected through a quality score. The opacity of the methods used to set these scores can lead companies to outbid each other, leading them to the same Nash solution*".

service provided by the OSE to either those third parties, end users or other business users, compared to an OSE service without the advantage being conferred upon a First-Party Service. Such degradation is particularly evident in terms of increased advertising volume and costs as well as content duplication on the SERP, when compared to the situation prior to the advantaging of the First-Party Service.

305 In the instance that a gatekeeper seeks to confer an advantage upon a First-Party Service but cannot find an equivalent to accommodate all similar Third-Party Services without compromising the quality of its OSE for end users, business users, or both, Article 6(5) DMA prohibits the gatekeeper from conferring the advantage upon its First-Party Service.[349] As a result, to comply, the gatekeeper will have to cease granting such unilateral advantage, for instance, by removing First-Party OIS/Vertical features from its SERPs.

dd) No remaining imbalance of rights and obligations

(1) Article 6(5) sentence 2 DMA: "fairness" of "such ranking"

306 According to Article 6(5) sentence 2 DMA, the gatekeeper shall apply "*fair*" conditions to "*such ranking*"[350], that is to the ranking of its First-Party Service in relation to a similar Third-Party Service. Pursuant to Article 12(5) DMA, a practice shall be considered to be "unfair"

> "*where there is an* [i] *imbalance between the rights and obligations of business users and* [ii] *the gatekeeper obtains an advantage from business users that is disproportionate to the service provided by that gatekeeper to those business users.*"

It follows from recital (62) DMA[351] that the same definition applies for the "fairness" of an OSE's ranking conditions.

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349 See also below at V.

350 Note that in the German translation Article 6(5) sentence 2 DMA is imprecise: The English version uses the wording "*<u>such</u> ranking*", thereby referring back to the ranking addressed in sentence 1. In contrast, the German version uses "*das Ranking*", which can be understood as "*<u>the</u> ranking*", which misses the crucial link to sentence 1 and the difference to Article 6(12) DMA.

351 "*For [..] online search engines [..] gatekeepers should publish and apply general conditions of access that should be fair [..]" (sentence 1) „Pricing or other general access*

As also follows from Article 8(8) DMA, it therefore needs to be assessed "*whether the intended or implemented measures*" to achieve an equal ranking 307

> "*ensure that there is no remaining imbalance of rights and obligations on business users and that the measures do not themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users.*"[352]

Regarding the "*remaining imbalance of rights and obligations*", recital (33) DMA explains that 308

> "*[m]arket participants, including business users of core platform services and alternative providers of services provided together with, or in support*

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conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper." (sentence 6). While this directly relates to a gatekeeper's obligation under Article 6(12) DMA, no less may apply to the equivalent fairness obligation in Article 6(5) sentence 2 DMA as *lex specialis*.

352 Article 8(8) DMA. Note that this Article deals with the specification of obligations under Article 6(11) DMA and 6(12) DMA. However, the same must apply for specifying Article 6(5) DMA, as *lex specialis* to Article 6(12) DMA: Article 6(12) DMA deals with the "*general conditions of access for business users to [...] online search engines*". The provision deals with the "access" of business users to an OSE more generally, not just their ranking. Moreover, as regards non-discriminatory ranking, Art. 6(12) DMA concerns (i) the relation of all ranked business users to each other as well as (ii) their respective relation to the OSE itself, rather than their relation to a First-Party Service. The provision therefore resembles a general clause (*Schwab* in (2024) Podszun (editor), Digital Markets Act, Art. 6(12), para. 318). Article 6(5) DMA, in contrast, deals with the specific conditions to the ranking (see sentence 2) of services, exclusively in the relation between a gatekeeper's First-Party Service and any similar Third-Party Service, no other businesses.. Addressing the specific conflict of interest arising from such constellation of a vertically integrated OSE, Article 6(5) DMA aims to impose additional obligations on the gatekeeper as regards its OSE's ranking of its First-Party Services in relation to Third-Party Services (rather than as regards the ranking of third parties in relation to each other). Article 6(5) DMA thus constitutes a *lex specialis* to Article 6(12) DMA (*Heinz* in: (2024) Podszun (editor), Digital Markets Act, Art. 6(5), para. 111). As Article 6(5) intends to be stricter when it comes to the ranking of a gatekeeper's First-Party Services, the legal requirements for the special ranking conditions under Article 6(5) DMA may not fall below the general access criteria under 6(12) DMA where no conflict of interest exists. Thus, the principles laid down in Article 8(8) DMA must apply to Article 6(5) DMA all the more.

> *of, such core platform services, should have the ability to adequately capture the benefits resulting from their innovative or other efforts.*"

309 The gatekeeper needs to "*allow others to capture fully the benefits of their own contributions*".

(2) Inability to fully capture benefits of own innovation and efforts

310 As explained in recital (33) DMA, any opportunity granted to a Third-Party Service in order to achieve an equal ranking needs to allow such service to fully capture the benefits of its innovations and contributions. This in turn suggests that such Third-Party Service must be able to (i) present its service as a service independent from that of the gatekeeper, (ii) differentiate such service from the First-Party Service, (iii) deploy its own technology, and (iv) provide the full spectrum of its service, rather than being limited to any lower level of performance that the First-Party Service may only achieve.

(3) Inability to compete for the full service

311 According to recital (33) DMA, any solution implemented to ensure equal treatment with a gatekeeper's First-Party Service must allow each provider of a similar Third-Party Service to capture the benefits resulting from its business efforts. The objective of Article 6(5) DMA is to ensure equal opportunities for similar services presented on a CPS. This implies that third parties providing a similar service must obtain an equivalent opportunity to present the full spectrum of their offerings and to reach the same customers as the First-Party Service.

312 This criterium leans on principles established for dominant firms under general EU competition law. According to case law,

> "*customers should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it*".[353]

353 CJEU, judgment of 19/4/2012, Case C-549/10 P, EU:C:2012:221, *Tomra/Commission*, para. 42.

A company with market power may therefore not justify abusive conduct in a certain segment of a market by the fact that its competitors remain free to compete in other segments.[354] 313

These principles must apply all the more to designated gatekeepers. Accordingly, a gatekeeper's solution to outbalance any advantage granted to a First-Party Service needs to ensure that third parties providing a similar service may compete on the merits for the entire relevant service and not just for a part that the gatekeeper determines. A gatekeeper may not justify unequal treatment as regards a certain segment of the relevant First-Party Service by the fact that providers of a similar service remain free to compete in other segments of such service. 314

This is relevant, for example, where a gatekeeper decides to offer an OIS directly through the online interface of its OSE but is only capable or willing to provide a certain segment of such OIS, for instance, only to compare prices and product reviews. If third parties providing a similar OIS would be capable of providing the entire spectrum of the OIS, for instance, by comparing more factors such as delivery time or trustworthiness, the gatekeeper must enable them to do so. Otherwise, consumers would be deprived of the full choice of services and competitors would be unable to compete on the merits and capture the benefits of their efforts. 315

For the same reasons, a gatekeeper may not justify the display of its First-Party Service prominently to some end users by the fact that third parties are free to supply other customers, for instance in return to other search queries. Similarly, a gatekeeper may not justify providing its First-Party Service at the top of a SERP in response to any given query by the fact that a third party may provide its similar service through a similar grouping of results further below the SERP or in response to other queries. Neither may a gatekeeper justify the grant of a certain design feature to its First-Party Service subject to a certain end user interest (as expressed by the query) or engagement (such as a click or hover) by the fact that such end user 316

354 General Court, judgment of 12/6/2014, Case T-286/09, EU:T:2014:547, *Intel/Commission*, para. 132: "*competitors […] must be able to compete on the merits for the entire market and not just for a part of it. An undertaking in a dominant position may not therefore justify the grant of exclusivity rebates to certain customers by the fact that its competitors are free to supply other customers. Similarly, an undertaking in a dominant position may not justify the grant of a rebate subject to a quasi-exclusive purchase condition by a customer in a certain segment of a market by the fact that that customer remains free to obtain supplies from competitors in other segments.*".

remains free to access and use a similar Third-Party Service in case of another interest of engagement, i.e., for other queries.

(4) Inability of all similar third parties to compete

317 In line with the criteria of competition for the full spectrum of a service established above, an unfair imbalance of rights and obligations remains where the gatekeeper's solution to ensure equal treatment in ranking, by object or effect, limits the number of third parties that may provide their similar service in an equivalent way.

> "*[I]t is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand*".[355]

318 It is neither the role of a gatekeeper to dictate, through the setting of its OSE, how many viable providers of a certain service will be allowed or capable to compete via such platform for the entire user demand for such service.

(5) Improper conditions for third parties

319 Moreover, according to recital (62) sub-paragraph 2 DMA, ranking conditions should be considered unfair also if they "*lead to a disadvantage for business users in providing the same or similar services as the gatekeeper*". Read in conjunction with Articles 6(5), 8(8) and recital (33) DMA it follows that there is less favourable treatment if the gatekeeper conditions the obtaining of an equivalent prominence on improper obligations. An imbalance remains, in particular if in order to take advantage of any opportunity offered as a compensation for an advantage conferred upon a First-Party Service, the provider of a similar Third-Party Service must (i) change its business model, (ii) provide a new service, (iii) enter into direct competition with its business users, (iv) transfer or give up value (payments, data, content, IP rights), or (v) purchase further services from the gatekeeper or a third party.

355 CJEU, judgment of 19/4/2012, Case C-549/10 P, EU:C:2012:221, *Tomra/Commission*, para. 42; judgment of 30 January 2020, Case C-307/18, EU:C:2020:52, *Generics (UK)*, para. 161.

Additionally, pursuant to Article 13(6) DMA, any measures taken to comply with Article 6(5) DMA *"shall not degrade the conditions*" for third parties using the OSE who offer similar services and avail themselves to the right of equal treatment, compared to the conditions they experienced before the gatekeeper granted an advantage to its First Party Service.[356] 320

(6) Improper pricing

According to recital (33) sentence 4 DMA, an unacceptable situation where there is still an imbalance in rights and obligations 321

> "*is not excluded by the fact that the gatekeeper offers a particular service free of charge to a specific group of users, and may also consist in excluding or discriminating against business users, in particular if the latter compete with the services provided by the gatekeeper*".

Thus, a gatekeeper cannot use the absence of payment from a third-party service to justify favouring its own service in rankings. Article 6(5) DMA is concerned with any form of preferential treatment in rankings. The need to pay for advertisements becomes relevant only once equivalence in prominence is ensured.[357] 322

While having to pay for a third-party service does not excuse favouring a First-Party Service in rankings, imposing improper payment obligations can have an equivalent effect to differentiated and preferential treatment in ranking, violating Article 6(5) DMA.[358] For instance, if similar Third-Party Services have to pay for equal prominence on SERPs, no equality of oppor- 323

356 See above at cc (3).
357 See above at bb) (2).
358 See recital (52) sentence 4 DMA in connection with Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 700 (d) "*any measure chosen by Google and Alphabet: [..] should not lead to competing comparison shopping services being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established by this Decision.*"

tunities is ensured.[359] In fact, as has been outlined above[360], since Article 13(6) DMA prohibits a gatekeeper from degrading the conditions or quality of the OSE service it provides to third parties who avail themselves of the right under Article 6(5) DMA to be treated equally in ranking, measures to outbalance a ranking advantage of a First-Party Service may not increase the costs for similar third parties to appear equally on the SERP.

ee) No conferral of a disproportionate advantage upon the gatekeeper

324 Pursuant to Articles 8(8) and 12(5)(b) in combination with Article 6(5) sentence 2 ("fair") DMA, no equal treatment is achieved, where the measures to outbalance any advantage of the First-Party Service "*themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper*"[361] to the affected third party.

(1) Conferral of advantage upon OSE or other CPS

325 Note that, in contrast to Article 6(5) sentence 1 DMA, the condition of the lack of any conferral of an advantage upon the gatekeeper, as set out in Article 6(5) sentence 2 DMA in combination with Articles 8(8) and 12(5)(b) DMA, does not relate only to an advantage for the First-Party Service. It relates to an advantage for the "gatekeeper" overall, including *any* of its services. This applies, in particular, to the conferral of an advantage upon the gatekeeper's OSE itself.

326 The requirement can be traced back, once more, to the *Google Search (Shopping)* decision. As mentioned previously[362], an OSE's envelopment (leveraging) by self-preferencing has a twofold anti-competitive effect: (i) extending the OSE's dominance into associated markets for ranked services

359 This is regardless of whether the First-Party Service needs to "pay". As it is part of the same undertaking (the gatekeeper), any internal "payments" merely involve shifting funds within the same group ("left pocket, right pocket") without any genuine exchange of value. Since there is no strict prohibition against internal cross-subsidies, the gatekeeper could easily refund any payments made by its First-Party Service to the OSE to spare the former of any additional costs.

360 At III.3.c.cc)(3) ("degradation of conditions or quality").

361 Article 8(8) DMA.

362 Above at recital 11.

and (ii) excluding or impeding providers of such ancillary services from competing with the OSE.[363] Such OSE dominance maintenance effect (by strengthening its position vis-à-vis ranked specialised search services) was described by the Commission as follows:

> *"By positioning and displaying more favourably, in its general search results pages, its own comparison shopping service compared to competing comparison shopping services, Google protects the part of the revenue that it generates on its general search results pages and which serves to finance its general search service. Indeed that revenue could be channelled directly to competing comparison shopping services (therefore bypassing Google's general search service). The Conduct* [of self-favouring] *may therefore make it more difficult for competing comparison shopping services to reach a critical mass of users that would allow them to compete against Google."*[364]

The cited Commission's concerns can be broken down in two sub-concerns: First, by integrating its First-Party OISs into its OSE, Alphabet channeled end users' commercial (comparison) interest and corresponding queries to its OSE, rather than having them turn directly to providers of similar OISs. If end users learn that particular services (such as an OIS) may be accessed and used directly through a particular OSE, they have no incentive to call up such services directly. Second, if less end users call up similar OISs directly, they may never reach the critical scale to allow them to broaden their offerings and develop an OSE. 327

Similarly, in its study on "online platforms and digital advertising", the CMA found that Google may also have the incentive to favour its specialised search services "*in order to protect its position in general search, by reducing the threat of entry into general search from related markets.*"[365] „*Google's incentive to foreclose competition may arise in part from a desire to limit the competition its general search engine faces over the longer term.*"[366] 328

With its fairness criteria in sentence 2, as defined in Articles 8(8) and 12(5)(b) DMA, Article 6(5) DMA picks up such concern about a further 329

363 See also *Colangelo*, "(Not so) Elementary, My Dear Watson": A Competition Law & Economics Analysis of Sherlocking", ICLE White Paper 2024-03-08, p. 14.

364 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 642.

365 CMA, "Online platforms and digital advertising", Market Study Final Report, 2020, at 3.130.

366 CMA, ibid., at 3.142.

strengthening of an OSE through self-preferencing in search results, aimed against specialised search services as potential OSE rivals.

330 It follows that there is no equal treatment in ranking within the meaning of Article 6(5) DMA, where measures intended or implemented to grant Third-Party Services an equal opportunity to that enjoyed by First-Party Service themselves confer an advantage upon the OSE or any other CPS of the gatekeeper which is disproportionate to the service provided by the OSE to the third party. Such conclusion can also be drawn from the very subject of the DMA to ensure the contestability of services, in particular of the designated CPSs, which by definition enjoy an entrenched market position. It would contradict such objective, if a gatekeeper, in order to seemingly comply with the obligation following from Article 6(5) DMA to not favour any First-Party Service, could implement measures which, while potentially creating equal opportunities between the First-Party Service and the Third-Party Services, actually overall confer an advantage upon the gatekeeper's OSE – which may be even less contestable than the First-Party Service.

331 The prohibition following from Article 6(5) sentence 2 DMA, to confer an unjustified advantage upon other gatekeeper services consequently complements the prohibition in sentence 1 to favour a First-Party Service in ranking. Within their complex ecosystems, gatekeepers may preference themselves in various ways. The preferential ranking of a First-Party Service is just one of such means. An equally problematic self-preferencing strategy is for a gatekeeper to treat business users differently in one of its platform services, depending on if and how actively they use another of its services.[367]

332 By ranking business users better that also use other gatekeeper services or more intensively than those to do not, the gatekeeper can create anti-com-

367 An insightful example is the case A528 of Italian competition authority against Amazon Logistics. The authority found that Amazon presented sellers more favourably on its marketplace if they also used Amazon's own logistics services (Fulfilment by Amazon (FBA)). Sellers that did not use FBA, lost crucial visibility and related marketing opportunities to boost sales on the Amazon marketplace. This created an incentive for sellers to use FBA. Thus, the ranking mechanism conferred an unjustified advantage upon FBA. 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. The case was also analysed in European Commission, "Digital Markets Act Impact Assessment support study, Annexes", 2020, p. 298 et. sub.

petitive incentives for potentially common business users to overall use its services more than others. It is apparent that any measures to implement Article 6(5) DMA may not comply with the DMA if they merely exchange one form of self-preferencing through another. In particular, a preferential treatment of a First-Party Service in OSE rankings may not be ceased through a scheme that advantages the OSE itself or preferences another gatekeeper service. This may occur, for example, if equal treatment in rankings is conditioned on similar services providing the OSE more data than any other OSE or on their more intensive use of another gatekeeper service.

Such a non-compliant outcome is likely, in particular, where a gatekeeper, instead of de-integrating, is effectively enveloping even more activities to its OSE by inviting or commercially obliging providers of Third-Party Services to transfer value to the gatekeeper ecosystem. This can occur where in order to be treated no favourably in ranking, third parties need to offer their services through the OSE, without being proportionately compensated for such contribution to the gatekeeper's integrated platform. For example, a gatekeeper intending to integrate any part of its own OIS/Vertical into its OSE, thereby conferring an advantage over third parties providing a similar OIS/Vertical, may, in theory, outweigh such advantage by inviting these third parties to equally integrate parts of their OIS into the OSE. However, such measure would not comply with Article 6(5) DMA, where the measures to integrate third parties "*in themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper*" to such third parties. 333

For that reason, during the legislative process, the European Parliament had proposed to add a further sentence after recital (51) sentence 4 DMA. Such amendment was supposed to clarify that any 334

> "*preferential or embedded display of a separate online intermediation service* [of the gatekeeper] *should constitute a favouring irrespective of whether the information or results within the favoured groups of specialised results may also be provided by competing services and are as such ranked in a non-discriminatory way.*"[368]

368 General Secretariat of the Council, Cover Note of 11/02/2022, "Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)", Case 2020/0374(COD), 6179/22, pp. 59, 271.

335 Such clarification reflected the fact that even if third parties are entitled to contribute to an OIS that is provided by the gatekeeper through the SERPs of its OSE, this does not constitute equal treatment. First, because the third party then still may not provide its own OIS through the OSE, using its own technology. Second, because by having to upload its content to the OIS of the gatekeeper, the third party would in fact confer an advantage upon its rival and, indirectly, also to the gatekeeper's OSE.

(2) Relevant advantages

336 Whether any third-party integrations confer a disproportionate advantage upon the gatekeeper, in particular an OSE, depends on the circumstances. Article 3(8) and recital (2) DMA list relevant advantages that strengthen a position of a CPS and make it less contestable.

337 In line with such list, a disproportionate advantage can be assumed wherever the integration (i) increases scale economies (e.g. by reducing own costs), (ii) generates positive network effects for the gatekeeper (e.g. by channelling more end users or pulling more business users to its OSE[369]), (iii) enables it to connect more end users with more business users (e.g. by gaining exclusive or non-reciprocal access to non-confidential business data such as non-crawlable commercial offers[370]), (iv) obligates third parties to use additional gatekeeper services[371], (v) increases the dependence on the gatekeeper (e.g. by creating a central infrastructure all need to share), (vi)

369 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 642.

370 A gatekeeper may implement measures that position its OSE as an unavoidable trading partner for any Third-Party-OIS and/or their business users to reach end users. The OSE may leverage such position to extract relevant non-public data from such OISs and/or their business users at no costs, as pre-condition for not being discriminated against. If in order to escape discrimination on the SERP, every Third-Party-OIS needs to upload relevant business data to the OSE for free, this grants the OSE a competitive advantage, thus further exacerbating an already uneven playing field. This is the case, in particular, if such is data is not shared with any third party, thereby providing the OSE with a unique data advantage. See European Commission, Digital Markets Act – Impact Assessment Support Study, p. 313-314; *Colongelo*, "(Not so) Elementary, My Dear Watson": A Competition Law & Economics Analysis of Sherlocking", ICLE White Paper 2024-03-08, p. 15.

371 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

creates lock-in effects (e.g. through substantial costs for onboarding), (vii) decreases multi-homing for the same purpose by end users (e.g. by diverting traffic to own CPS), (viii) increases a conglomerate corporate structure (e.g. by adding a further layer), or (ix) generally opens access to more data from different sources and thereby generates data driven-advantages.

All of these advantages appear to materialise where the gatekeeper, in order to integrate a new first-party OIS into its OSE, invites providers of a similar OIS to "join" by contributing their intermediated business offers to the gatekeeper so that it can set up a meta-OIS that combines the offerings of all OIS to present them side-by-side on its OSE interface. 338

(3) Disproportionality of the advantage conferred

A measure to treat a First-Party Service and similar Third-Party Services equally does not comply with the DMA if it confers an advantage upon the OSE (or another CPS of the gatekeeper) which is "*disproportionate to the service provided by the gatekeeper to the business user*".[372] The proportionality criterion necessitates to weigh up the advantage and disadvantages that a Third-Party Service obtains from a gatekeeper measure to implement Article 6(5) DMA. 339

Regarding the relevant advantages, it follows from the objective of Article 6(5) DMA, namely out prevent self-preferencing, that the "advantage" to be treated equally in ranking with the First-Party Service may not be taken into account for the purpose of weighing up advantages and disadvantages. It would be a circular reasoning if the "interest" in compliance with a particular law could form a relevant criterion for the scope of such very law. 340

Rather, the concept of a "*conferral of an advantage on the gatekeeper*" suggests that the corresponding "disproportionality" criterion requires an assessment of whether (i) the conferred advantage upon the gatekeeper in turn also confers an advantage upon the business user (other than being treated equally), and whether (ii) such advantage outweighs any disadvantages resulting from the system the gatekeeper put in place, in particular as regards any costs or conditions imposed on the business user to take part in the system. 341

rankings); European Commission, "Digital Markets Act Impact Assessment support study, Annexes", 2020, p. 298 et. sub.

372 Articles 8(8), 12(5) in connection with 6(5) sentence 2 ("fair") DMA.

342 Conceptionally, the DMA's definition of a "*fair*" ranking appears to lean on[373] Section 19a of the German Competition Act ("**GWB**"), which deals with "*abusive conduct of undertakings of paramount significance for competition across markets undertakings*" – the German "gatekeeper" law. According to **Section 19a, para. 2, sentence 1, no. 7 GWB**, such undertakings, including Alphabet[374], shall be prohibited from

> *"demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand, in particular*
>
> *a) demanding the transfer of data or rights that are not absolutely necessary for the purpose of presenting these offers,*
> *b) making the quality in which these offers are presented conditional on the transfer of data or rights which are not reasonably required for this purpose."*[375]

343 As follows from the reference to the "presentation" of offers, the provision specifically targets OSEs with intermediary power.[376] It is seen as an abuse of dominance if such an OSE makes the "if" or the "how" of a ranking of a business user dependent on such user transferring "data or rights" to the gatekeeper which "*are not absolutely necessary for the purpose of presenting these offers*". This applies, in particular, to the situation that a gatekeeper makes an equal treatment in ranking (as key quality factor of an OSE) dependent on the third-party business user transferring data or rights that are not required for the operation of an OSE.[377] The official reasoning of the law explains this as follows:

> *"Non-explicit demands are also covered, for example if a search engine is technically designed in such a way that the display of certain hits is made dependent on the granting of rights or data. [...] The less the respective demand is required for the intermediation service, the more likely it is that*

373 According to recital (8), the DMA is „*approximating diverging national laws*", „*harmonis[ing] legal obligations [...] to ensure contestable and fair digital markets featuring [...] gatekeepers.*".

374 German Bundeskartellamt decision of 30/12/21, Case B7–61/21, *Alphabet*.

375 English translation published here https://www.gesetze-im-internet.de/englisch_gwb/.

376 Resolution recommendation and report by the Committee on Economic Affairs and Energy of 13/1/2021, German parliament BT-Drucksache 19/25868, p. 117; *Nothdurft*, (2022), in: Bunte (editor), Kartellrecht, 14th ed., § 19a GWB paras. 113 et sub.

377 Resolution recommendation, ibid.; *Nothdurft*, (2022), in: Bunte (editor), Kartellrecht, 14th ed., § 19a GWB, para. 119 et sub.

a disproportionate advantage compared to the reason for the demand can be assumed. An indication of disproportionality may also lie in particular in the fact that no serious negotiations are offered with the other side of the market regarding the advantage demanded by the company with overriding cross-market significance – for example, regarding appropriate remuneration for the demanded advantages. [...] This may include constellations in which the intermediation service as such is made dependent on the granting of licenses for copyrighted content without this being mandatory for the intermediation service. [Or] situations in which a search engine displays websites worse if the provider operating the website does not grant the search engine a license to display its copyrighted content."[378]

Section 19a GWB specifies what "fair" ranking means in the context of dominant OSEs. Considering the objective of the DMA to approximate national laws on gatekeepers[379], such principles may not be ignored in the assessment of a "fair" ranking pursuant to Article 6(5) sentence 2 DMA in combination with Articles 8(8) and 12(5) DMA. In particular, Section 19a GWB specifies "*whether the intended or implemented measures*" to achieve an equal ranking in compliance with Article 6(5) DMA "*ensure that there is no remaining imbalance of rights and obligations on business users and that the measures do not themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users*". 344

d. No discrimination of dissimilar services with similar websites, including of direct suppliers

aa) Ranking concerns of dissimilar third parties

Article 6(5) DMA does not allow any solution which, in order to outbalance an advantage to a First-Party Service in ranking, in effect confers an unjustified advantage upon another gatekeeper service, in particular for the CPS itself (above at IV.3.d). A different yet related question is whether a gatekeeper may outbalance an advantage for a First-Party Service by granting an equivalent advantage to providers of similar Third-Party Services if this in turn harms other parties that provide *dis*similar services. For example, 345

378 Resolution recommendation, ibid. (translation from German original).
379 Recital (8) DMA.

may a gatekeeper compensate a prominent placement of a First-Party OIS on its SERP by displaying similar Third-Party-OISs equally prominent, if this in turn demotes dissimilar OISs or their customers on the SERP?

346 The issue was raised in a written question by a Member of the European Parliament (MEP) to the European Commission on 19 March 2024.[380] The MEP noted that the modifications Alphabet had applied since January 2024 to comply with Article 6(5) DMA *"have resulted in a considerable decrease in web traffic and clicks for websites of direct suppliers such as hotels, restaurants, and retailers. Instead, a select few aggregators, some of which are also gatekeepers, are set to disproportionately benefit from these changes."* The MEP asked the Commission to *"confirm whether product changes that adversely affect multiple non-digital economic sectors should not be prohibited as a result of the application of the DMA"*. The question appears to be based on a misunderstanding of Article 6(5) DMA.[381] Nonetheless, the priority given to the issue signals a genuine concern that merits a closer analysis.

380 Parliamentary question P-000835/2024 by Ivan Stefanec (PPE), „The Digital Markets Act should enhance the contestability and fairness of digital markets", 19/3/2024.

381 The question implies that equal treatment on the SERP, as demanded by the DMA, could adversely affect multiple non-digital economic sectors; and that therefore the enforcement of the obligation should be re-considered. This misrepresents Article 6(5) DMA. The provision does not demand or necessitate any of the adversarial effects described by the MEP. Article 6(5) DMA leaves the gatekeeper the discretion as to how it prevents a more favourable treatment of First-Party Services. In full knowledge of its algorithms and the outcome of tests, it was Alphabet's decision, not the Commission's, to implement the modifications that resulted in a decrease in traffic for websites of direct suppliers and led to an increase of traffic to intermediaries instead. Alphabet had decided against any of the alternative solutions to comply that would not have had such impact but only benefit direct suppliers. Alphabet consciously decided to implement product changes that adversely affect direct suppliers under the disguise of ending the previous product changes that had led to an unequal treatment of indirect suppliers. Contrary to what the MEP's question implies, such decision must not lead to the false conclusion that original unequal treatment of indirect suppliers should not be prohibited or somehow benefited direct supplies. Rather, if the measures taken to end such self-preferencing consciously harm direct suppliers, then this is one more reason to question their compliance with the DMA. In fact, the adverse impact described by the MEP, may have added to the concerns that led the Commission to launch a non-compliance proceeding against Alphabet as early as 25 March 2024.

bb) Technical framework: OSE's function to rank diverse websites, not business models

(1) OSEs' side-by-side display of complementary services

By definition, OSEs rank websites of businesses of any kind. As the General Court pointed out, 347

> *"the rationale and value of a general search engine lie in its capacity to be open to results from external (third-party) sources and to display these multiple and diverse sources on its general results pages, sources which enrich and enhance the credibility of the search engine as far as the general public is concerned."*[382]

In line with its function as an open platform to navigate users to relevant information, an OSE is typically not concerned about the business model of the crawled, indexed and displayed website operators. It is concerned about the relevance and reliability of the information found online, for answering a certain query, regardless of how the source is monetized.[383] 348

It is therefore not the exception but the rule that an OSE displays websites of companies with different business models side by side on a SERP. An OSE may only estimate, on the basis of the query entered, but does not know for certain what an end user is ultimately looking for. In many cases, end users may not even know themselves what is available online. If they knew, they could navigate to a relevant website directly, rather than calling up an OSE first. Many turn to OSEs to find out what kind of information is available on any particular topic. They are looking for a broad choice of information that corresponds to their individual pre-knowledge and current interest. Where such pre-knowledge and interest are unknown to the OSE, it needs to give a broad selection of websites with information that may be relevant to the user. 349

For example, in lack of any further information about the searcher, a generic search query for "smartphones" may lead to a SERP with websites of very different businesses, including (i) non-commercial forums, blogs or advertising-funded news publishers that report on smartphones or their producers, (ii) phone manufacturers like Apple or Samsung, (iii) merchants 350

382 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 178.

383 Above at B.II.2.

selling phones, and/or (iv) OISs comparing smartphones and prices of merchants to facilitate transactions.

351 Depending on the end user's likely current interest, as expressed by its query, its geographic location and, where available, its search history, websites for different businesses will appear in different quantities and different orders on any given SERP. For example, in the search for "smartphone" mentioned above, already a slightly more specific query such as "cheap smartphones" will (rightly) lead to more results for e-commerce firms and less to non-commercial websites such as blogs. Furthermore, while the generic term "smartphone" indicates that the user has not yet decided on a specific smartphone, the OSE will (have to) show more websites with a broad selection of phones to compare and choose from. In contrast, a more specific query such as "buy a cheap black iPhone 256 GB in Brussels" suggests that the user is less interested in a product comparison but rather in websites of price comparison services or local shops.

352 Similarly, general travel queries (e.g. "holiday in Greece") will trigger more websites for indirect suppliers (OISs) rather than direct suppliers. The OSE's algorithms appreciate that the user has not yet decided on a specific location, time, airline, hotel or other services for a trip. Therefore, websites of an OISs are likely to provide a more helpful overview, more comprehensive information, than the websites of any individual supplier ever could. The ranking reflects this. In contrast, more specific travel queries will lead to a SERP with less indirect suppliers and more websites of direct suppliers because the end user is further down the "booking funnel".[384]

353 The OSEs core business is to interpret an end user's likely intention and to compile a SERP that provides a broad choice of websites (and business models) in a non-discriminatory manner, which corresponds to the likely user intent. If an end user entering a query never intended to engage with a business model A, the display of more or only results from business models B or C, does not harm a provider of business model A. Due to the OSE's algorithms reacting to the likely intent, the search results found an appropriate balance between non-commercial and commercial sites, and within the latter between direct and indirect suppliers.

384 On the concept and relevance of the customer journey / marketing funnel for the antitrust analysis of search services see *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.), Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, p. 63 et sub.

Website operates know that ranking criteria of an OSE correspond to the likely current interest of an end user. Therefore, prior to the implementation of Article 6(5) DMA, the "competition" of websites for organic ranking positions on an OSE has not let to any reported conflict amongst the respective business groups, such as between direct and indirect suppliers. All businesses knew, appreciated and ultimately welcomed that any website is subject to the same general ranking criteria of an OSE and that such criteria provide equal opportunities for every business model, depending on the end user's respective intent. 354

(2) Neutrality as competitive factor for OSEs

OSEs focus on the relevance of information found on a website, rather than the website operator's business model, has proven to be very successful. The attractiveness of an OSE directly depends on its ability to process the end user's query and to then match such identified information demand with the most relevant sources supplying corresponding information, irrespective of the monetization of such information. 355

Such matching of information demand and supply takes place in several steps. It constitutes the core of an OSE's information retrieval process.[385] 356

In a first step, the OSE's algorithms identify the search intent, i.e., they interpret the query as regards the end user's most likely information demand. This step may include an automatic process of paraphrasing the search query, e.g. a correction of misspellings and an analysis of semantic annotations and synonyms. It may also involve an analysis of the end user's search history to identify user-specific interests. 357

In a second step, other algorithms match the identified search intent with the most relevant webpages containing corresponding information, as archived in the OSE's web index. The OSE's algorithm then determine, which combination of search results would best cater for the likely search intent. As described above, a search query implying a commercial (rather purely information-oriented) intent will lead to more search results for websites with commercial offerings. Within this category, commercial queries implying an interest in a comparison of products, will lead to SERPs with more comparison websites; while queries implying a stronger interest 358

385 For a detailed technical description see *U.S. and Plaintiff States v. Google LLC* [2020], ibid., p. 16 et sub.

only for direct suppliers or a specific supplier, will lead to more websites of those.

359 Ultimately, the OSE with the best mix of websites to address the most likely search intent will attract most queries and in turn most advertising spendings.

360 Google Search became the world's leading OSE in year 2004. Its initial success was based upon an "open" infrastructure that provided the most relevant mix of websites of any kind, nearly exclusively through organic search results.[386] In particular, instead of providing any OIS itself, Google displayed results that directed users to such OISs.[387]

> "*Furthermore, Google displayed all results of [such] specialised search services in the same way and according to the same criteria. The very purpose of a general search service is to browse and index the greatest possible number of web pages in order to display all results corresponding to a search.*"[388]

361 The selection of such results is based upon a general algorithm that is applied in a non-discriminatory manner to a comprehensive web index of all websites that are crawled and indexed in an equally non-discriminatory manner. Thus, Google Search's initial success rested upon search neutrality[389], not in the sense of treating every website equally[390], but by applying

386 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 177 et sub.

387 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 182 "*Google initially provided general search services and acquired a 'superdominant' position on that market [..] On that market, Google displayed results that directed users to comparison shopping services.*"

388 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 182.

389 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras 178-183.

390 Google's paid lobbyists have consistently argued that there can be no „neutral" search because search engines would be inherently bias, having to prioritise certain content and websites over others (see, for instance, *Manne/Wright*, "If Search Neutrality is the Answer, What's the Question?", ICLE White Paper No 2011-14; *Lao*, "'Neutral' Search As A Basis for Antitrust Action?", Harv J. of Law & Technology, 2013, *Manne/Wright*, "Google and the Limits of Antitrust: The Case Against the Case Against Google", 34 Harv. JL & Pub. Pol'y (2011), 171). However, this argument misses the actual competition concern: Neutrality means that any such priorisation decisions (to weigh particular types of content as more or less relevant) must be applied in a non-discriminatory manner across the board of

the same processes and methods, algorithms and principles to all websites, including its own.[391]

362 It was only in 2007, after Google had already gained market shares above 90% in European countries, that it decided to deviate from an approach of neutrality and commenced embedding and thereby favouring First-Party-Services.[392] Google started with favouring specialised search services (verticals) and continued with the direct provision of content, such as through "knowledge panels". In both cases, the displayed content was not sourced from an open general web index (of all crawled URLs) but from a closed proprietary index (specialised product index or knowledge graph) that does not mirror the full breadth of the internet.[393]

363 As the General Court pointed out, Google's embedding of First-Party Services "*seems to be the converse of the economic model underpinning the initial success of its search engine*" and "*cannot but involve a certain form of abnormality*"[394] for an OSE. Favouring certain sources over others, or ignoring certain sources entirely, degrades the quality of an OSE both for end users and business users. In principle, such "abnormality" is not limited to the exclusion of particular sources of websites, such as rival OISs/Verticals, but applies to any unjustified demotion or bias against certain types of businesses.

364 However, by 2007, the barriers to entry and Google's overall quality advantage vis-à-vis other OSEs were already too strong for such quality degradation to cause significant end-user switching. As a result, despite Google's increasing self-preferencing, its OSE market shares remained steady at a very high level. Yet the deviation from search neutrality to favour First-Party Services allowed Google to gain dominance in many new markets, such as

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all websites, including those of the gatekeeper itself. Thus, while OSEs are free in weighing the relevance of certain type of content for certain queries, they must adhere to their own ranking criteria and apply them to all business users in an equal manner.

391 See the equal treatment remedy imposed in Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 700(c).

392 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras 181-182.

393 See above at recitals 116 et sub.

394 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 179 „*that Google favours its own specialised results over third-party results, which seems to be the converse of the economic model underpinning the initial success of its search engine, cannot but involve a certain form of abnormality.*" See also paras 176 and 616 on this point.

for comparison shopping (Google Shopping) or mapping services (Google Maps).

cc) Economic framework: advantages for direct suppliers of a ban on self-preferencing

365 To prohibit an OSE from preferencing a First-Party-OIS benefits not just third parties providing a similar OIS, but also their respective customers as well as third parties that are not similar to the First-Party OIS. In particular, for direct suppliers, a system of neutral OSE search results, treating all websites according to the same principles and algorithms, including the OSE's own, is commercially far more beneficiary than a system of gatekeeper self-preferencing.

(1) Harms of self-preferencing for direct suppliers

366 OSE self-preferencing harms direct suppliers in various ways.[395]

367 Suppliers rely on online discoverability. Larger suppliers typically rely on a dual distribution system. They operate their own website to sell products or services and engage with platforms to expand their reach.[396] However, there are many smaller and medium-sized suppliers that do not operate their own website or only have a weak own online presence to reach end users directly. Accordingly, supplier's dependency on platforms to ensure discoverability of their offerings depends on the strength of their own online presence. The less end users find a supplier directly, the more such supplier depends on other distribution channels to be discoverable.[397]

368 Acting as intermediaries between end users and business users, both OSEs and OISs facilitate the discoverability of direct suppliers, albeit with differ-

395 See in detail *Höppner*, "Google's (Non-) Compliance with the EU Google Decision", p. 166-168.

396 See Commission, Guidelines on vertical restraints, (2022/C 248//01), para. 60.

397 On the relevance of discoverability for smaller firms see European Commission, "Digital Markets Act – Impact Assessment support study, Annexes", p. 286, 326, and the resulting risks at 498 ("*Platforms have an editorial role, controlling the content customers see. Sometimes this is helpful but there is also a risk discoverability is buried and/or paying competitors are promoted*".

ent purposes (traffic vs sales[398]). Both OSEs and OISs charge suppliers for their intermediation services, with OSEs offering paid search results at the top of the page and OISs taking a commission for facilitating transactions.

369 The pricing of paid results within OSEs and the commissions charged by OISs depend on the level of competition they face. Prices increase with the market share of the OSE or OIS. This follows the basic principles of supply and demand for multi-sided platform services. As OSEs or OISs attract more users and suppliers, they command higher bids per user (individual query/transaction), resulting in increased costs for paid results or commissions per search query.

370 Consequently, more concentrated markets for OSEs and OISs lead to higher costs for business users. From an economic standpoint, direct suppliers therefore evidently benefit from (direct) competition (i) between OSEs, and (ii) between OISs, as well as (reciprocal) competitive constraints between OSEs and OISs.[399]

371 The cost-savings of such competition will be particularly significant for direct suppliers that have small profit margins due to low prices. The closer the prices of a direct supplier to actual costs, the more difficult it will find it to appear in the top paid search results of an OSE. That is because such results are based on an auction, in which suppliers with larger profit margins may outbid those with smaller margins (due to lower prices). In contrast, low-price suppliers tend to rank higher in OISs, such as comparison shopping services, that – in the interest of their end users - rank the best (cheapest) offers at the top (rather than those bidding the highest price for an ad).

372 Low-price suppliers have no margin to bid for paid ads to appear at the top of OSE results pages. Neither may they have the margin to invest into a strong own online presence to rank (directly) in organic OSE results. Such suppliers, however, may benefit greatly from OISs, which rank them highly for their low prices; also with a view to their discoverability in OSEs: The higher an OIS ranks a supplier (due to its low prices), and the higher OSEs

398 See on the differences between OSEs and OISs above at recitals 87 et sub.

399 OSE's and OISs operate on separate markets. However, the independence of a dominant company may not just be restrained by "*internal competitive constraints specific to that market, but also [from] external competitive constraints from products, services or territories other than those which form part of the relevant market under consideration*". General Court, judgment of 14/9/2022, Case T-604/18, ECLI:EU:T:2022:541, *Google and Alphabet/Commission (Google Android)*, para. 109.

in turn rank such OIS in organic results (due to the OISs high relevance for end users), the higher, indirectly, also the supplier appears on the OSE results pages. The supplier benefits from the high ranking of OISs in OSE results, because, unlike OSEs themselves, such OISs value the supplier's low prices.

373 Accordingly, suppliers focusing on low prices, will have a particular interest in maintaining visibility for OISs and in maintaining competitive constraints between them and OSEs.

374 Conversely, if a single gatekeeper dominates both an OSE and a relevant OIS, direct suppliers face the worst-case scenario. An OSE monopoly leads to the highest prices for paid results on an OSE. An OIS monopoly equally leads to the highest prices for commissions. If both come together, direct suppliers face a hard time. And if both are even under the control of the same gatekeeper, suppliers are left with no alternatives and may be exploited effectively; coupled with an ever-increasing dependence on the gatekeeper's infrastructure overall to reach end users.

375 The stronger a gatekeeper's position vis-à-vis suppliers, in lack of alternative channels to reach end users, the higher margin the gatekeeper can extract from suppliers through its auction mechanism. Where due to end users' single-homing with a gatekeeper suppliers may only reach their customers via such gatekeeper, they have no other option but to bid away their entire margins for paid results, if they wish to conclude a transaction at all.[400]

376 Such worst-case scenario is at stake when a gatekeeper OSE favours a First-Party-OIS to also dominate the OIS market. The rise of Google Shopping, Google Maps or Meta Marketplace to become designated CPCs as a result of gatekeeper self-preferencing demonstrated the effectiveness of such conduct.

377 Against this background, and as will be outlined further below, the removal of a First-Party-OIS from the top of an OSE's SERP does not disadvantage suppliers, not even those using such OIS. Instead, such removal may allow them to reach the same end users directly through organic search results

400 For this reason, any preferencing of a gatekeeper OIS will ultimately lead to higher auction prices for the gatekeeper's OIS, coupled with an ever-increasing dependence of suppliers on its infrastructure overall to reach end users. Yet, the stronger a gatekeeper's position vis-à-vis suppliers, in lack of alternative channels to reach end users, the more margin the gatekeeper can extract from suppliers through its auction mechanism.

leading to their website or through Third-Party-OISs, which are displayed instead of the First-Party-OIS. Both such alternatives reduce costs for suppliers, in particular due to the increased competition among OISs that lowers commissions.

(2) (No) disadvantages for direct suppliers from competition amongst indirect suppliers

A prohibition to treat similar OISs equally does not typically create a disadvantage for any dissimilar third party, such as direct suppliers. On the contrary, in general, preventing self-preferencing improves the situation for all business users of an OSE, including direct suppliers. 378

As outlined, to cease the favourable embedding of a First-Party-OIS, a gatekeeper may either disintegrate its OIS by removing any groups of specialised results powered by such OIS from the SERP, or it may grant any provider of a similar OIS an equivalent opportunity to present itself.[401] 379

The first option, removing the First-Party-OIS's offerings from the SERP, does not disadvantage direct suppliers. Such removal opens up space on the SERP for relevance-based organic or general paid results. This benefits direct and indirect suppliers equally as it provides more visibility to both. 380

More organic visibility of their own websites is beneficial even for those direct suppliers (e.g. merchants) that used the favoured First-Party-OIS (e.g. Google Shopping) to appear within any favourably positioned group of specialised results powered by such OIS (e.g. Shopping Units). This is because any click by an end user on any such specialised result leading to a direct supplier triggers a payment obligation. In contrast, where a gatekeeper OSE may no longer nudge end users to click on a specialised (paid) result offered by its First-Party-OIS, more users click on the organic result for the supplier's website, at no costs. 381

To be sure, it may be that following the removal of a First-Party-OIS's specialised results, a direct supplier feels the need to buy general (Google) text ads to remain equally visible at the top of a SERP. However, on average the prices for such general ads are still below those for specialised ads in favoured First-Party-OISs. In any event, the option to buy general ads from the OSE instead of specialised ads from a First-Party-OIS means that suppliers do not miss out on opportunities to buy their way to the top of 382

401 Above at recital 23.

a SERP once the First-Party-OIS's specialised search results are removed from a SERP.

383 More importantly still, direct suppliers benefit immensely from an increase in competition between the indirect suppliers (OIS) they use to reach their end users following the removal of a First-Party-OIS. As outlined above, depending on the strength of their own online presence, including the amount of their investments in SEO and SEM, suppliers are more or less dependent on OISs to reach end users. However, as OISs charge commissions, the net benefit of using them decreases with the price of such commission.

384 As pointed out above, an effective end of a gatekeeper's favouring of a First-Party-OIS increases competition amongst OIS and thereby brings down costs for their business users, i.e., the direct suppliers. Small and medium sized suppliers who are most dependent on OIS benefit of such savings the most. Keeping the markets for OISs as competitive and contestable as possible, does not only reduce costs and, indirectly, increases suppliers' visibility; it also protects them from a unilateral dependency which may quickly lead to unfair terms and conditions.

385 In principle, the same advantages may be achieved, and disadvantages for direct suppliers prevented, if instead of removing its First-Party-OIS, the gatekeeper complies with Article 6(5) DMA by granting similar third parties an equal opportunity to the one granted to the First-Party-OIS. If equal opportunities are afforded, any advantage that a direct supplier previously enjoyed from using the First-Party-OIS (in terms of obtaining more prominence on the gatekeeper's OSE's results pages), can now equally be obtained from using similar Third-Party-OISs.

386 In particular, if direct suppliers valued the specialised results of the First-Party-OIS at the top of the SERP, because they provided an additional marketing channel to them, any equal embedding of Third-Party-OISs provides the same additional opportunity to appear at the top of the SERP because such OISs may now display equivalent specialised results at the same place.

387 To be sure, where an OSE integrates and thereby preferences its OIS on the SERP, a direct supplier enjoys the advantage that it only needs to upload its inventory to one OIS, namely the integrated First-Party-OIS. In contrast, if each OIS may present a prominent box with specialised results, direct suppliers need to multi-home by setting-up and steering their campaigns across several OISs that may win a box.

However, at least from a competition policy perspective, such need to multi-home does not constitute a relevant disadvantage of ending the gatekeeper's self-preferencing. The advantage of lower administrative costs for direct suppliers, if there is just one OIS that always appears at the top of the SERP, is an indirect anti-competitive effect of gatekeeper self-preferencing. Direct suppliers adapted to the lack of competition on the SERPs. In lack of equally favoured alternatives, suppliers turned to the First-Party-Service and invested in this distribution channel accordingly. However, such "pulling effect" is part of the overall anti-competitive impact of gatekeeper self-preferencing. It would run counter the objective of the DMA to consider such effects in isolation as an advantage of self-preferencing. 388

Competition between OISs pre-supposes a multi-homing of direct suppliers. To use several relevant OISs is in a direct supplier's own interest. It diversifies distribution channels, reduces dependencies and increases reach and marketing opportunities. Thus, multi-homing should be seen as a normal part of business, not a nuisance. 389

In any event, the additional costs for such multi-homing will be small in comparison to the resulting cost savings. The costs for enrolling with several OISs will likely be outweighed quickly by the cost savings from the lower commission prices that such enrolling allows by increasing competition between OISs. In other words, a supplier's administrative costs of multi-homing, as a pre-requisite for competition amongst OISs, will be lower than its costs of an OIS monopoly. 390

For similar reasons, it does not constitute a relevant disadvantage for direct suppliers using a First-Party-OIS, if following a gatekeeper's removal of such OIS from the SERP, these suppliers no longer appear at the top of the SERP either. 391

Business users of a gatekeeper's favourably treated First-Party-OIS have an inherent advantage vis-à-vis their direct competitors that do not use the favoured First-Party-OIS but a disadvantaged similar OIS. Due to the extent that a gatekeeper favours its OIS in search rankings, by displaying it at the top of the SERP, it indirectly also favours that OIS's business users (direct suppliers) vis-à-vis those direct suppliers that rely on a different OIS. Customers of the favoured First-Party-Service benefit of the self-preferencing 392

as it indirectly also boosts their prominence relative to non-customers of the OIS.[402]

393 However, in the context of applying Article 6(5) DMA, the interests of the customers of a favourably treated First-Party-Service in maintaining the preferencing of such service cannot be taken into account. Article 6(5) DMA shall bring any unjustified advantages for the First-Party-Service to an end. This includes the advantage of such OIS to appear more attractive to customers (direct suppliers), which realise that they have to subscribe to the First-Party-OIS to appear at the top of the OSE's results page.

394 A direct supplier should not obtain a preferential position on an OSE results page just because, and only if, it uses a distinct First-Party Service. Where equal treatment of OISs is ensured, direct suppliers may appear at the top of an OSE results page regardless of which OISs they are using. In other words, while removing the First-Party Service from the SERP may deprive business users of such OIS of an exclusive marketing opportunity, it creates new marketing opportunities for them elsewhere. As such opportunities enable competition amongst OIS that lowers prices for commissions, this choice leaves direct suppliers better off than with the exclusive opportunity granted by favoured First-Party-OIS.

395 It follows from the above that to the same extent that the preferencing of a First-Party-OIS harms similar Third-Party-OISs, it indirectly also harms direct suppliers that depend on OISs to reach end users other than through the (monopoly) OSE. This is particularly apparent for small and medium-sized suppliers without a strong own web presence[403] or suppliers with small profit margins due to prices close to costs.[404]

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402 See General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 170-171.

403 Suppliers with a weak own web presence will not rank (high) in organic OSE results and need to bid more for paid results (because such auctions also consider the quality of the landing page). In contrast, the quality of a supplier's website does not affect the ranking of its offers by an OIS. Thus, even suppliers with a weak online presence may rank high in OISs' results. If such OISs are then ranked high in OSEs organic results (because they objective provide the most relevant offers for end users), the direct suppliers will benefit indirectly too: Through the OISs' rankings of their offerings, they will gain a prominence in OSE results that they could never achieve independently.

404 As outlined above, as OSEs rank paid results based on auctions, suppliers with the largest profit margin may outbid those with a smaller margin due to lower prices. However, not even the winning supplier may benefit. Due to the economics of auctions, the cost for the paid result may well reduce the profit margin of any click

(3) Gatekeeper's incentives to turn direct suppliers against rival indirect suppliers

Considering the above, in principle, the economic interests of direct and indirect suppliers in an effective end of self-preferencing by a vertically integrated gatekeeper should be fully aligned. However, tensions between both user groups may arise when gatekeepers consciously pit them against each other to evade or erode self-preferencing prohibitions. 396

A gatekeeper has an incentive to circumvent the obligations resulting from Article 6(5) DMA. The incentive to circumvent DMA obligations is particularly strong since, being the first of its kind, it may serve as a blueprint for countries around the globe wishing to regulate digital platforms. 397

One strategy to circumvent or torpedo the law is for a gatekeeper to actively turn different types of business users against each other under the pretext of applying the law.[405] In particular, a gatekeeper granting prominence to a First-Party-OIS may try to implement measures that allegedly outbalance such advantage for similar Third-Party-OISs but in effect disadvantage other parties, in particular the business users of such OISs. A gatekeeper has many opportunities to do so. That is because every business user of a gatekeeper's favoured First-Party-OIS operating a website will automatically also be a business user of the gatekeeper's OSE (but not the other way around[406]). Gatekeepers can weaponize such overlap. 398

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to nearly zero. On these economics see *Höppner*, "Google's (Non-) Compliance with EU Shopping Decision", 2020, recital 29, 189, 297, 671.

405 This is apparent, in particular, for Alphabet's strategy in the context of implementing Article 6(5) DMA. As evidenced in their blog post of 5/4/2024, "New competition rules come with trade-offs", (https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/), Alphabet tried to make legislators in other countries believe that a prohibition of self-preferencing would harm direct suppliers, even though any of the alleged disadvantages were only the consequence of Alphabet's conscious decisions as to how to comply. "*We encourage other countries contemplating such rules to consider the potential adverse consequences — including those for the small businesses that don't have a voice in the regulatory process.*"

406 This is evidenced, for instance, by the ad revenues that Alphabet generates with Google Search: "*most of Google's Search Ads revenue comes from advertisers who only buy Text Ads and not shopping ads: 52.8% of Google's Search Ad revenue comes from advertisers who purchase Text Ads but do not purchase shopping ads, whereas 46.9% of revenue is from advertisers that purchase both Text Ads and shopping ads, and 0.1% of revenue is from advertisers that purchase shopping ads but not Text Ads.*" *U.S. and Plaintiff States v. Google LLC* [2020], Case No. 1:20-cv-03010 (D.D.C.),

399 The relationship between OSEs, ranked OISs and their respective business users, is complex. Any measure that a gatekeeper takes to treat similar OISs equally may also impact their respective business users. A gatekeeper can take advantage of such interdependency by designing a compliance mechanism that sets up direct supplies (as business users of OISs) against indirect suppliers (Third-Party-OISs) or against (an enforcement of) the prohibition of self-preferencing in search as such.

400 An obvious tool for the gatekeeper to this end would be to suppress the visibility of direct suppliers in the course of measures to allegedly treat all OISs similarly. In order to outbalance an advantage granted to a First-Party-OIS, the gatekeeper may embed similar Third-Party-OISs into its OSE's results page to provide more prominence to them, at the expense of their respective business users' visibility.

401 It is apparent that if a gatekeeper seeks to outbalance a top position granted to a First-Party-OIS by filling up the remaining results page only with links leading to similar Third-Party-OISs, while simultaneously excluding links to their business users' websites, it will leave the latter dissatisfied. As their organic results are demoted further down the results page, such business users may argue that the measures taken to ensure equal treatment between OISs in effect discriminate against them.

402 The gatekeepers in turn may not actually mind such criticism from suppliers against its compliance measures, but actually use it for its broader lobbying against rivals, namely, to suggest that everyone would be better off if the gatekeeper continued its self-preferencing.

403 For example, in April 2024, Alphabet proudly wrote in a (lobbying) blog post that the measures it had chosen to comply with Article 6(5) DMA

> "*benefit a small number of online travel aggregators, but harm a wider range of airlines, hotel operators and small firms who now find it harder to reach customers directly*".[407] Alphabet went so far as to argue that

Plaintiffs' Proposed Findings of Fact, Document 906, Filed 04/30/24, para 480. The fact that nearly no one purchases Shopping Ads (from Google's OIS) without text ads (from Google's OSE) suggests that there are no business users of Google's OIS that are not also users of Google's OSE. See also ibid., para. 491 explaining that "*to advertise a product, retailers typically buy Text Ads and shopping ads on the same SERP*" of Google Search.

407 *Cohen*, Google Director Economic Policy, 5/4/2024, "New competition rules come with trade-offs", (https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/.

> "*these businesses now have to connect with customers via a handful of intermediaries that typically charge large commissions, while traffic from Google was free*".

It is telling, but equally disturbing, that Alphabet uses the shortcomings of its own implementation of Article 6(5) DMA, as pointed out by direct suppliers, as an argument for other countries not to impose a legislative ban on self-preferencing in the first place. An any event, obscuring all relevant facts, Alphabet's narrative is highly misleading.[408] This begs the crucial question: would measures having the alleged effect be compliant with the DMA in the first place? 404

dd) Legal framework

As a starting point, Article 6(5) DMA prohibits (only) a gatekeeper's preferential treatment of a First-Party Service vis-à-vis a *similar* Third-Party Service. This is to address the specific competition concerns caused by a gatekeeper's vertical integration, i.e. its dual role as referee and player.[409] It constitutes one of the DMA's core objectives to address any conflicts of interests resulting from such market position. The DMA is less concerned about the criteria for the ranking of businesses, where the gatekeeper has no conflict of interest resulting from vertical integration. 405

(1) Article 6(5) sentence 1 and sentence 2 DMA: relation for "non-discrimination"

Article 6(5) sentence *1* DMA sets out the overarching and central obligation: A gatekeeper may not treat a First-Party Service more favourably in ranking. According to Article 6(5) sentence *2* DMA, the gatekeeper "*shall* 406

408 (i) Alphabet sets and applies all ranking criteria, (ii) it was Alphabet's choice to display a "handful intermediaries" on its SERP rather than direct suppliers, (iii) Alphabet did so to compensate the advantage it had decided to grant a First-Party-OIS on the SERP, (iv) such First-Party-OIS itself charges higher commissions than most of the "handful" OISs displayed now, (v) the previous favouring of the First-Party-OIS demoted the organic (free) results for the respective suppliers, (vi) due to the previous self-preferencing, traffic from Google was no more "free" for direct suppliers wishing to appear at the top of the SERP as it is now.

409 See above at recitals 14 et sub.

apply transparent, fair, and non-discriminatory conditions to such ranking". It follows from the reference to "*such ranking*" and the systematic position of sentence 2 that the obligations imposed by sentence 2 are inseparably linked to those in sentence 1.[410]

407 Recital (52) sentence 2 DMA explains the link between Article 6(5) sentences 1 and 2 as follows:

> "*the gatekeeper should not engage in any form of differentiated or preferential treatment in ranking on the core platform service [..] in favour of products or services it offers itself [..]. To ensure that this obligation is effective, the conditions that apply to such ranking should also be generally fair and transparent.*"

408 It follows from this explanation that the ranking criteria in sentence 2 shall ensure that the ban on self-preferencing in sentence 1 "*is effective*". Article 6(5) sentence 2 DMA thus aims to strengthen and expand the ban on self-preferencing, not to weaken or limit it.

409 This objective is self-explanatory as far as it concerns the obligations to apply "fair" and "transparent" rankings. The criteria of fairness and transparency of rankings are not directly related to the prohibition to treat a First-Party Service no more favourably.[411] Therefore, these obligations are indeed complementary, justifying an individual citing in Article 6(5) DMA.

410 However, there is a stronger overlap between the prohibition to favour a First-Party Service in rankings (sentence 1) and the obligation to apply "non-discriminatory" conditions to such rankings (sentence 2). It did not require the "non-discrimination" obligation to outlaw any favouring of a First-Party Service because such ban is already the essence of sentence 1. This suggests that the "non-discrimination" obligation in sentence 2 is

410 Any other interpretation would render Article 6(5) sentence 2 DMA of any relevance. That is because, according to Article 6(12) DMA, a gatekeeper "*shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its [..] online search engines*" anyway. This includes ranking conditions. If Article 6(5) sentence 2 DMA was meant as a general provision to ensure FRAND-rankings of an OSE, it would not have been necessary beside the broader Article 6(12) DMA.

411 A gatekeeper may treat similar services equally but still "unfair". This is the case, for instance, where a relevance requirement that a gatekeeper sets for all services may inherently be easier fulfilled by its First-Party Service (e.g. "all companies with a G in their name shall rank higher").

meant to address situations of a differentiated treatment other than those addressed in sentence 1. Two such possible scenarios come to mind:

Article 6(5) sentence 1 DMA only addresses a preferential treatment of a First-Party Service vis-à-vis a *similar* Third-Party Service. This leaves two differentiations unaddressed: First, sentence 1 does not address any discriminatory ranking of *dis*similar services. Second, sentence 1 neither addresses any discrimination *amongst* similar Third-Party Services. 411

Intuitively, one may assume that, by definition, a third party providing a service that is *not* similar to the favored First-Party Service may be treated differently. That is because, the essence of discrimination, as prohibited by Article 6(5) sentence 2 DMA, is that comparable situations are treated differently or different situations are treated in the same way.[412] Thus, it would appear that it does not constitute discrimination if an OSE ranks dissimilar services differently. 412

However, when it comes to OSE rankings, the matter is more complex. That is because, as outlined above, OSEs do not rank business models, but websites. For such ranking the business model of a website operator may be relevant, but it is not decisive as it says nothing about the relevance of information on its website for any given query. From the relevant perspective of end users, operators of different business models, offering different services, may still provide equally relevant information on their respective websites. 413

Article 6(5) sentence 1 DMA is concerned (only) about an equal treatment of similar "service or product"; not of similar websites or information more generally. As explained above, services are defined by their functions and purposes.[413] The character of a service provided by a company is not necessarily defined by or inseparably linked to its web presence, let alone the quality of relevance of such company's website and its content. 414

In contrast to Article 6(5) sentence 1 DMA, Article 6(5) sentence 2 DMA is concerned about the application of non-discriminatory conditions for the ranking of (all) business users of a CPS in general. In case of an OSE, while sentence 1 ensures an equal treatment of similar services, sentence 2 ensures an equal ranking of comparable websites. Accordingly, while sentence 1 415

412 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 155 quoting CJEU, judgment of 16/12/2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, para. 23.

413 See at B.II.1.

prevents a favourable treatment of a gatekeeper service, sentence 2 ensures that this is implemented in a manner consistent with the function of an OSE to serve as infrastructure open to any website and not just business models which the gatekeeper seeks to offer via its OSE.

416 Both objectives often go hand in hand but may not always lead to the same outcome.

417 The "non-discrimination" obligation in sentence 2 can therefore be understood to ensure that measures to cease a preferential ranking of a First-Party Service vis-à-vis similar Third-Party Services do not discriminate against other business users of an OSE or *between* the similar Third-Party Services. In particular, an equal treatment of a First-Party Service and a Third-Party Service shall not come at the expense of (dissimilar) third parties operating equally relevant websites for corresponding queries. Because after all, the function of an OSE is not to treat equal businesses (services) equally, but to rank webpages (irrespective of their business model) according to their relevance to a particular search query.

418 In other words, the "non-discrimination" obligation in Article 6(5) sentence 2 DMA addresses the fact that, depending on the CPS in question, an obligation to treat similar services and products equally may not sufficiently ensure that the CPS treats all comparable business users equally. In the case of OSEs, this relates to the non-discriminatory treatment of website operators.

419 This interpretation is consistent with the DMA's overall understanding and approach to OSEs. As outlined above, OSEs are defined as services that crawl, index and rank webpages of any kind, in accordance with their respective relevance to a particular query. Unlike in the case of OISs, such ranking is regardless of the website operator's business model: OSEs navigate to relevant websites, not offers by suppliers. In contrast, the ban on self-preferencing in Article 6(5) sentence 1 DMA is concerned about business models. It compares a First-PartyService with providers of similar services. Such comparison is not linked to websites and their respective relevance but to the business model of a certain gatekeeper service, regardless of any website.

420 Based on such analysis, Article 6(5) sentence 1 DMA imposes the primary prohibition to not treat any First-Party-Service more favourably in ranking than similar Third-Party Services. Sentence 2 imposes a secondary obligation to ensure that the gatekeeper does not implement this prohibition in a way that is unfair or discriminatory vis-à-vis other business users (website

operators) of the OSE (which are not similar to the First-Party Service). Such website operators may be equally dependent on being findable via an OSE. They therefore shall not suffer from a gatekeeper's decision to have advantaged a First-Party Service in the first place or from its decision, following the entry into force of Article 6(5) DMA, to outbalance such prohibited favouring by granting equivalent benefits, in terms of relative prominence, to similar Third-Party Services, at the expense of other website operators that are equally relevant for a search query. To achieve an equal treatment of its First-Party Service and similar Third-Party-Services, the gatekeeper shall not opt for measures that harm *dis*similar other business users of an OSE.

(2) Article 6(12) DMA and its relationship to Article 6(5) DMA

The above reading of Article 6(5) sentence 2 DMA is also consistent with Article 6(12) DMA. According to Article 6(12) DMA, a gatekeeper shall publish and apply general conditions of access that should be fair, reasonable and non-discriminatory (see the explanation in recital (62) sentence 1 DMA). Amongst others, those general "FRAND" conditions shall provide for an alternative dispute settlement mechanism that is easily accessible for the business users. 421

Article 6(5) DMA deals with the general conditions of all business users to access an OSE. It does not deal with the specific conflict of interest arising from the incentive of a vertically integrated gatekeeper to preference own services in OSE rankings. To resolve this specific conflict, Article 6(5) DMA is *lex specialis* to the FRAND obligations in Article 6(12) DMA.[414] 422

It follows from such relationship, that whenever a case involves self-preferencing in the meaning of Article 6(5) sentence 1 DMA, the "F(R)AND" obligations in sentence 2 are more specific than their equivalents in Article 6(12) DMA. Thus, compliance with sentence 2 needs to be assessed first, before turning to Article 6(12) DMA. 423

By including the obligation of "fair", "transparent" and "non-discriminatory" rankings directly into Article 6(5) DMA, the DMA clarifies that a gatekeeper needs to consider these requirements when designing measures to implement the ban on self-preferencing in Article 6(5) sentence 1 DMA, because these obligations are closely interrelated. In fact, one may argue 424

414 See above footnote 337.

that Article 6(5) sentence 2 DMA supersedes the application of Article 6(12) DMA insofar as it concerns any discrimination of specific services as a result of a benefit granted to a First-Party Service.

425 In any event, it follows from the purpose of Article 6(5) sentence 2 DMA, i.e., to ensure the effectiveness of the ban on self-preferencing in sentence 1 (recital (52) sentence 2), that sentence 2 does not broaden the freedom of a gatekeeper to favour a First-Party Service but narrows it. The obligations mean that a gatekeeper with several options to comply with sentence 1 may not choose one that is unfair, discriminatory or non-transparent.

(3) Subjective rights of dissimilar third parties

426 As outlined above, in essence Article 6(5) sentence 2 DMA bans the gatekeeper from seeking to achieve equal opportunities for Third-Party Services that are similar to a favoured First-Party Service by applying ranking criteria that discriminate against other, dissimilar, business users.

427 It is clear from this objective that the interests of such dissimilar third parties limit the options of a gatekeeper to comply with Article 6(5) sentence 1 DMA. Another question is whether those third parties have any subjective right under Article 6(5) DMA to demand non-discriminatory ranking conditions. Amongst others, such right would allow them to bring private litigation against any measures a gatekeeper implements to comply with Article 6(5) DMA.

428 There are stronger arguments against the assumption of such subjective right. Rather, business users other than providers of similar services, will have to rely on Article 6(12) DMA.

429 While Article 6(5) sentence 2 DMA imposes a material obligation upon the gatekeeper to take the interests of other OSE business users into account, it is meant to strengthen and specify the primary prohibition to treat a First-Party Service more favourably. Any benefit of such specification for dissimilar businesses is a reflex of the ban on self-preferencing but not its primary purpose. Unlike Article 6(12) DMA, Article 6(5) DMA does not mention any "business users" as protected subjects. Article 6(5) DMA only refers to "a third party" providing a "similar service or product" to that offered and advantaged by the gatekeeper. The provision thus does not protect anyone other than the provider of a Third-Party Service that is *similar* to the First-Party Service the OSE favours. The obligation does not establish any right for any *dis*similar third party. Thus, nothing suggests

that Article 6(5) sentence 2 DMA entitles any company that does not (even) provide a service similar to the favoured First-Party Service to litigate against ranking criteria. Such right may lead to "popular" civil actions that the DMA does not support.

The lack of a subjective right of dissimilar parties does not reduce the effectiveness of the provision. A dual role of a gatekeeper as operator of an OSE and provider of a ranked First-Party Service only poses a particular threat to businesses competing with such First-Party Service. In principle, an OSE has no interest in treating businesses less favourably with which it does not compete. Accordingly, such business users require less protection. 430

While dissimilar third parties lack subjective rights under the specific obligation of Article 6(5) DMA, they may still rely on the Article 6(12) DMA which does mention "business users" and hence confers a subjective right. Accordingly, website operators may challenge the application of unfair or discriminatory general ranking conditions under this provision. This includes ranking conditions applied to implement Article 6(5) DMA. 431

Conceptually, the requirements under Article 6(5) sentence 2 DMA can and arguably should be stricter than under Article 6(12) DMA because it specifically addresses a (self-inflicted) conflict of interest, which may be missing in an Article 6(12) DMA scenario.[415] Nonetheless, ranking conditions that plainly infringe Article 6(5) sentence 2 DMA are likely to equally infringe Article 6(12) DMA. As outlined above, this is the case, for example, when gatekeepers grant advantages to First-Party Services, while suppressing any other business users on SERPs or unfairly raising their transaction costs to reach end-users. 432

ee) Consequences for compliance

Article 6(5) DMA sentence 2 DMA imposes additional requirements as to how the primary obligation under sentence 1 shall be implemented. Sentence 2 expands the obligation of the gatekeeper as regards an equal 433

415 Under Article 6(5) DMA, the need to balance the interests of different businesses only results from the gatekeeper decision to favour a First-Party Service. Such favouring typically deviates from the open character of CPSs. This abnormality justifies stricter requirements as compared to tensions that do not result from any self-inflicted conflict of interest but from deviating interests of unassociated business users, i.e. conflicts that do not relate to the vertical integration of the gatekeeper.

treatment of the business users of its OSE. Sentence 2 does not provide any justification for granting third parties that provide a similar service any less opportunities than a First-Party Service. In other words, any purported disadvantages for third parties providing a *dis*similar service cannot justify concessions regarding the right of a third party providing a similar service to be treated not less favourably than the First-Party Service.

434 There can be no compliance with Article 6(5) DMA if any measures to implement sentence 1, infringe sentence 2. This is the case, where the gatekeeper opts for measures that, while achieving equal treatment of a First- and Third-Party Service, are either "unfair", "non-transparent" or "discriminatory" vis-à-vis operators of other websites with dissimilar services. The obligations in sentence 2 thus limit the flexibility that a gatekeeper enjoys as regards how it prevents a more favourable treatment of a First-Party Service.

435 Gatekeepers have various options to implement Article 6(5) sentence 1 DMA without applying any discriminatory ranking conditions that harm third parties, including direct suppliers.[416]

436 Some of those options may only ever benefit rather than harm any business users that are dissimilar to the First-Party Service at stake, such as its customers. Notably, a gatekeeper always has the option to provide more space for (all) its business users, including direct suppliers, by removing its corresponding First-Party Services from its OSE interface.[417]

437 Other options to comply with Article 6(5) sentence 1 DMA may require further fine-tuning to avoid a discrimination of other business users, violating Article 6(5) sentence 2 DMA. In particular, where rather than by removing its First-Party-OIS from the SERP, a gatekeeper decides to implement Article 6(5) DMA by granting similar Third-Party-OISs an equivalent opportunity to offer their services directly on the OSE interface, the gatekeeper needs to ensure that such solution does not in turn discriminate against third parties (including direct suppliers).

438 This may be achieved, for example, by ensuring that direct suppliers may obtain the same advantages as regards their visibility and presentation on the SERP, regardless of whether they use the First-Party-OIS or any similar OIS. As outlined above, integrating Third-Party-OISs does not *per se* imply any disadvantage of discrimination of direct suppliers. It all depends on

416 See above recitals 364 et sub.
417 See above recitals 366 et sub.

the way such integration is implemented. By using all relevant OISs, a business user can secure an opportunity to always appear at the top of the SERP, whenever an OSE embeds an OIS there. Thus, an integration of Third-Party-OISs does not discriminate against third parties.

439 To assess whether a measure implemented to comply with Article 6(5) sentence 1 DMA involves the application of any discriminatory conditions for the ranking of websites, in the meaning of sentence 2, it is necessary to assess first, whether there is any unjustified difference in treatment as between the various business users of an OSE. In this regard, the ban on discrimination, as a general principle of the DMA and EU law more generally, requires that "*comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.*"[418]

440 It follows from such definition, that, in principle, the gatekeeper must not rank websites that are equally relevant to a search query differently or websites that are not equally relevant in the same way. As outlined above, given the very purpose of OSEs to process queries to identify a search intent and to weigh the relevance of potentially matching websites, this obligation amounts, first and foremost, to a procedural requirement: The OSE must subject all comparable websites to the same underlying processes and methods for the positioning and display in its SERPs. Such processes and methods include all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result in Google's SERPs.[419]

441 For an OSE, such requirement is not difficult to fulfil. After all, as outlined above, such application of general processes and methods to the ranking of all websites forms the core of an OSE and determines its commercial success as it directly impacts the quality of the matching of end users and websites operators, as the (only) business users of an OSE. By definition, OSEs operate general algorithms that they apply to a general web index (of all crawled and indexed websites) to determine which website is most relevant to an identified search intent.[420] This constitutes their standard business model; any self-preferencing the exception. Accordingly, to comply

418 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 155 quoting CJEU, judgment of 16/12/2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, para. 23.

419 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, para. 700(c).

420 See above at bb).

with Article 6(5) sentence 1 DMA, an OSE may always easily and swiftly fall back to its standard processes and methods for crawling, indexing and display websites in its SERPs. Any deviation from such standards in order to implement sentence 1 may raise suspicion under sentence 2, as it may amount to the application of discriminatory conditions for the ranking of businesses.

442 In any event, when taking into account the evolution of search engines, it is apparent that there are various long-established options available to a gatekeeper to comply with Article 6(5) sentence 1 DMA, without having to apply discriminatory ranking conditions, as prohibited by Article 6(5) sentence 2 DMA. Accordingly, any failure to do so, any harm caused to business users other than those similar to its favoured First-Party Service, is a result of a conscious decision by the gatekeeper.

443 As options exist to prevent harm to any business user, any such harm observed is not the result of the DMA's prohibition of self-preferencing. Such obligation inherently benefits direct and indirect business users. Rather, any such harm is the result of a gatekeeper's decision to not take the interests of the affected business users into account, i.e. to deviate from a principle of equal treatment and thus the result of non-compliance with Article 6(5) DMA.

444 Consequently, any claim by a gatekeeper that its measures to comply with Article 6(5) DMA harm certain business users, such as direct suppliers, or any corresponding observation by such business users, ultimately implies a failure of the gatekeeper to comply with Article 6(5) DMA, because its sentence 2 prohibits to cease self-preferencing by harming third parties.

445 In lack of a subjective right, direct suppliers affected by such gatekeeper decisions may not directly rely upon Article 6(5) DMA. However, they can refer to Article 6(12) DMA to ensure that their interests are taken into account. Any measures seen as circumventing Articles 6(5) and/or 6(12) DMA may be prohibited under Article 13(6) DMA.

4. Technical constraints, efficiency justifications and burden of compliance

446 As outlined above, in order to comply with Article 6(5) DMA, a gatekeeper granting a First-Party Service any advantage needs to implement an equivalent solution for any similar Third-Party Services that (i) does neither create imbalances in rights and obligations, (ii) nor confers a dispropor-

tionate advantage upon the gatekeeper as a whole or (iii) discriminates against any other business users of the OSE.

This section explores which effort a gatekeeper needs to make in order to implement such equivalent solution. This relates to two interrelated questions: First, who has to take on the effort and bear the costs in order to achieve equal treatment of similar services? Second, where is the limit to the effort that needs to be made to achieve such equal opportunities? 447

a. Framework: DMA compliance by design

According to Article 8(1) DMA, the gatekeeper has to ensure and demonstrate compliance and the measures implemented "*shall be effective in achieving the objectives of [the DMA] and of the relevant obligation*" laid down in Article 6(5) DMA. 448

Recital (65) DMA explains that 449

> "*gatekeepers should ensure the compliance with [the DMA] by design. Therefore, the necessary measures should be integrated as much as possible into the technological design used by the gatekeepers.*"

The concept of "compliance by design" implies an obligation of a gatekeeper to adapt the technologies it employs to ensure they align as automatically as possible with the prohibition of self-preferencing. It is worth noting in this regard that unlike an equivalent obligation of "compliance by design" in the GDPR[421], there is no mention in recital (65) DMA of any restrictions set by the current "state of the art" or any other technology, nor of the costs associated with the necessary technological measures to meet the DMA obligations. Rather, the wording "*as much as possible*" suggests a more ambitious stance. In line with the overall objective of the DMA and the particular market position that gatekeepers enjoy, in essence, they are being 450

421 Article 25(1) GDPR: "*Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing [...] the controller shall [...] implement appropriate technical and organisational measures [...] in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation*".

urged to push the boundaries and explore every available avenue to achieve an equal treatment of similar services.[422]

451 It follows from such explanation that even if meeting the obligation in Article 6(5) DMA necessitates significant alterations to the technological design of a gatekeeper's OSE, such efforts would still be mandated by the regulation.[423] Where the gatekeeper intends to confer an advantage upon a First-Party Service, compliance might even require that the gatekeeper invests in specific technological developments that go beyond the state of the art.[424]

b. Gatekeeper needs to bear the costs of compliance with Article 6(5) DMA

452 The framework outlined above is also pertinent to the question of which measures a gatekeeper intending to favour a First-Party Service in ranking must take to ensure that a third party offering a similar service receives an equivalent advantage, and who should shoulder the effort and costs of implementing such an equivalent.

453 It is important to recall in this context that the necessity to implement any equivalent for Third-Party Services arises only from a voluntary decision by the gatekeeper to confer an advantage upon its First-Party Service. If the gatekeeper does not grant such an advantage, no action is required.

454 However, if the gatekeeper does intend to confer an advantage upon a First-Party Service, it follows from Article 8(1) in conjunction with recital (65) DMA (as outlined above) that the gatekeeper must employ all feasible technical measures to implement an equivalent solution for similar Third-Party Services. The gatekeeper cannot shift the burden of implementing such a solution to the third parties protected by Article 6(5) DMA, nor can it impose any additional costs on them to be treated equally.

455 In essence, compliance necessitates that the gatekeeper itself undertakes all efforts and bears all costs to develop and implement any measure required to offset any advantage the gatekeeper wishes to confer upon its First-Party Service. Compliance cannot be achieved by establishing a

422 *Vezzoso*, "'Compliance by design' with the messenger interoperability obligation under the Digital Markets Act", (2023), SSRN, at 4.
423 *Vezzoso*, ibid., at 2.3.
424 Cf. *Vezzoso*, ibid.

mechanism wherein Third-Party Services can only achieve equal treatment if they themselves invest or bear costs that the First-Party Service is not required to bear or costs they would not have incurred in the absence of the unequal treatment at hand. Raising rivals' costs is a known tactic to stifle competition[425], and the DMA does not accept such an approach.

Therefore, any measure cannot be deemed compliant if, in effect, it results in higher costs for rivals compared to those borne by the First-Party Service itself.[426] This is the case, in particular, where the gatekeeper seeks to compensate a diminished visibility of Third-Party Services in organic results (due to the preferential placement of a First-Party Service above them) by inviting those affected third parties to purchase paid search results at the top of the results page, be it in the form of general text ads or ads specialised in the respective sector. Outlining the lower profitability of visibility through paid ads as compared to organic listings, in Google Search Shopping) the European Commission explained in detail, why paid traffic is no substitute for unpaid traffic.[427] The same economic principles apply under Article 6(5) DMA. 456

c. Constraints to achieve equal opportunities justify no self-preferencing

Article 6(5) DMA does not specify the level of effort a gatekeeper must exert to ensure that third parties receive an equivalent advantage to that given to a First-Party Service. Specifically, considering the absence of any criterion for objective justification and the principle of "compliance by design" outlined in recital (65) DMA (see above), any technical challenges, including perceived impossibilities or financial obstacles faced by the gate- 457

425 Coined by *Salop/Scheffman*, "Raising Rivals' Costs", (1983), The American Economic Review Vol. 73 No. 2, pp. 267–271 the theory found its way into several competition decisions.

426 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 [..] to foreclose iRobot's rivals [..] on Amazon's online marketplace [..]. This may include: [..] (iv) directly or indirectly raising the costs of iRobot's rivals to advertise and sell their [robot vacuum cleaners] on Amazon's marketplace*".

427 Commission decision of 27/6/2017, Case AT.39740, *Google Search (Shopping)*, paras 543 to 567; see also *Motta*, "Self-preferencing and foreclosure in digital markets: theories of harm for abuse cases", International Journal of Industrial Organization, September 2023, Vol. 90, footnote 24.

keeper in providing equal opportunities for third parties, cannot justify preferential treatment of a First-Party Service. Thus, Article 6(5) DMA reacted to arguments that Google had made during the *Google Search (Shopping)* competition case with a view to defending its favouring of own services in SERPs.

d. Objective justification arguments raised in Google Search (Shopping)

aa) Google's arguments regarding technical constraints

458 In *Google Search (Shopping),* Google argued[428] that it could not integrate third-party specialised search services into the SERPs of its OSE in an equivalent way to how it integrates its own verticals. Google would know how its own verticals work. But it would not know anything about how third-party verticals organise their indexes and rank their results. Google would therefore have no way of telling what results the third party's specialised algorithms and product indexes would serve up in response to a given query. Because Google does not know what specialised results third parties would return, Google would have to send the search query of the user to every similar vertical and wait for their response (i.e. their specialised results) before comparing the different results from different sources to each other and Google's results. To ensure that the response time for search results (so called "latency") stays roughly unchanged, Google would have had to add substantial additional processing capacity, which was burdensome. Moreover, Google could not be able to compare the relevance of its own results and results generated by third parties' algorithms in the same way as its 'Universal Search' technology allowed it to do for different result categories generated by Google's own specialised and generic search algorithms.

459 It would therefore be "impossible" for Google to incorporate results generated third parties providing a similar vertical into its OSE framework. All Google could do was to 'allow' rival verticals to submit their suppliers' inventory (in the form of product feeds) to Google's own specialised search catalogues so that Google could show those as product ads on Google Search; in response to product queries entered on Google Search. Those

428 See General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 544, 557, 571 et. sub.

data feeds, submitted by rival verticals, would then (have to) be selected and ranked by Google's own indexing systems, cataloguing technologies, and algorithms – rather than those of the vertical itself. Hence, the results shown on the OSE results page would need to remain Google ads, served up by Google's own technology rather than being based on third-party technology.

bb) Rejection of objective justification by Commission and General Court

Both the Commission and the General Court rejected Google's arguments as regards the alleged technical difficulties to equally integrate Third-Party Services. 460

To begin, Google had failed to explain why its alleged lack of knowledge of the systems of rivals, and the resulting technical impossibility to incorporate their specialised results along its own general results, should allow Google itself to incorporate results from its own vertical, thereby giving it a competitive advantage. 461

The Court found that, in general, 462

> *"contrary to Google's contention, the fact that it chooses to position and display its product results more favourably than those of its competitors is not better for competition than a situation in which there is equal treatment in that respect. The Commission is rightly doubtful that internet users would expect to find only results from a single specialised search engine on the general results pages."*[429]

Moreover, the Court clarified that the fact that granting equal treatment meant financial losses for Google, would not constitute a valid justification either.[430] Plus, considering the various detrimental effects of self-preferencing, the Court concluded that 463

429 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 562.

430 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 563: "*assuming that Google is penalised financially as a result of making its service accessible to [CSSs] under the same conditions as its own, that would not constitute a valid justification for its anticompetitive conduct*".

> *"even if the practices at issue may have improved some internet users' experience through the appearance and ranking of results of product searches, that is not in any event likely to counteract the harmful effects of those practices on competition and consumer welfare as a whole."*[431]

464 Specifically regarding the alleged technical constraints, the Court found first that Google had failed to demonstrate that it could not use the same underlying processes and methods in deciding the positioning and display of the results of its own first-party OIS and those of competing OIS.[432]

465 Second, the Court found that

> *"Google's conduct could not generate efficiency gains by improving the user experience, and that those efficiency gains, assuming they exist, do not appear in any way to be likely to counteract the significant actual or potential anticompetitive effects generated by those practices on competition and consumer welfare as a whole"*.[433]

466 Third, the Court highlighted that the Commission's concern had not been that Google failed to find an equivalent solution for rival OISs, but that Google failed to treat all OISs equally on the SERPs; which are two different things.[434]

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431 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 568. This is in line with Regional Court of Munich I, judgment of 10/2/2021, Case 37 O 15720/20, *NetDoktor/Google (Health Infobox)*, para. 102.

432 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 570.

433 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 572.

434 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 575: "*Thus, in the contested decision, the Commission did not deplore the fact that Google failed to introduce a new type of result in its [SERPs], namely results from competing [CSSs] that would actually be returned if the internet user's specific query were made directly on the competing [CSSs]' specialised search engine, nor did it seek anything other than equal treatment, in terms of positioning and display, of two types of Google results, nor yet did it complain that Google failed to make the comparisons which it was claiming to be unable to make between the product results Google itself provided and the product results that would have been produced by competing [CSSs] for the same specific query. That is in fact why Google can neither accuse the Commission of having failed to refute its technical explanations, nor, as it argued in the administrative procedure, complain that the Commission was obliging it to turn results from competing [CSSs]*

In other words, the relevant question is not whether it is technically feasible for Google to develop and implement any technical solution that would outbalance any advantage it grants its First-Party Service. The relevant question is whether there are technical constraints to treat them equally in ranking: 467

> *"[E]ven if Google was not in a position to apply identical underlying processes and methods in order to compare results from its own [CSS] and those from competing [CSSs] in the same way, in particular because of a lack of access to the product databases of competing [CSSs] and to their own product selection algorithms, it has not demonstrated that it was prevented from applying processes and methods to those results that would lead to results from its own [CSS] service and from competing [CSSs] being treated in the same way in terms of positioning and display."*[435]

To demonstrate that no equal treatment in ranking was feasible, Google would have to show that there is no alternative to conferring an advantage upon its First-Party Service in ranking. If equal treatment can be ensured by ceasing to confer such advantage, no question of feasibility arises. 468

e. No objective justification criterion in Article 6(5) DMA

Within the framework of Article 6(5) DMA the scope for any reference to technical constraints is even more limited. Unlike Article 102 TFEU, the *per se* obligations in the DMA in general, and Article 6(5) DMA specifically, do not foresee the option for gatekeepers to provide any objective justification arguments, such as alleged efficiency gains or product improvements as a result of the prohibited behaviour in question.[436] Proposals to include such option[437] were not adopted. 469

into Google product results by applying the same selection processes and methods to them as it applied to its own results".

435 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, para. 576.

436 Recital (10) DMA, see also recital (23) sub-paragraph 2, sentence 1 DMA; *Duquesne* et. all, "What Constitutes Self-Preferencing and its Proliferation in Digital Markets", GCR Digital Markets Guide, 3rd Edn. (2023)

437 *Dolmans/Mostyn/Kuivalainen*, "Rigid Justice is Injustice: The EU's Digital Markets Act should include an express proportionality safeguard", (2021), Ondernemingsrecht issue 2–2022; Monopolkommission (German Monopoly Commission), "Sondergutachten 82: Empfehlungen für einen effektiven und effizienten Digital

470 Instead, pursuant to Article 9(1) DMA, only where a gatekeeper demonstrates that compliance with a specific obligation laid down in Articles 5, 6 or 7 DMA

> *"would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union, the Commission may adopt an implementing act setting out its decision to exceptionally suspend, in whole or in part, the specific obligation referred to in that reasoned request ('the suspension decision')".*

471 Thus, as long as the gatekeeper cannot demonstrate that treating its First-Party Service equally to Third-Party Services endangers the "*economic viability of its operation in the Union*", no arguments relating to hurdles to grant equal opportunities may be heard.

472 The burden of compliance is on the gatekeeper. No one forces a gatekeeper to use its OSE to grant advantages to a First-Party Service. If the gatekeeper finds it impossible or too burdensome to develop a feasible solution outbalancing such advantage for its own service to ensure a level playing field between all providers of similar services, it may always stop granting the advantage to its own service in the first place.

V. Consequences where no fair equivalent can be found

473 Article 6(5) DMA constitutes an ex-ante prohibition of self-preferencing. It prohibits a more favourable treatment of own services, even if compliance requires discontinuing the treatment that causes concerns.

474 Where a gatekeeper intends to confer an advantage upon a distinct First-Party Service in ranking on its OSE but (i) cannot develop on its own costs a solution that provides an equivalent opportunity for similar Third-Party Services, or where such solution (ii) degrades the quality of the OSE for end users, business users or both, (iii) is not fair as imbalances in rights and obligations remain, (iv) confers a disproportionate advantage upon the OSE itself, or (v) discriminates against other business users of the OSE, the

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Markets Act", 2021, Chapter 6; *Zimmer/Göhsl*, "Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper", ZWeR 2021, 29, 56; *Schweitzer*, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal", ZEuP 2021, 503, 536.

gatekeeper may not proceed with its plan to confer an advantage upon its own service.

475 Where the gatekeeper had already conferred such advantage in the past, it has six months from the day of designation to comply by developing a fair equivalent for Third-Party Services. If the gatekeeper fails to implement such equivalent in time, it needs to take the advantage conferred upon its First-Party Service back by ceasing the respective self-favouring conduct. If, for example, the advantage lay in the inclusion of specialised results generated by a gatekeeper OIS/Vertical into the results page of its OSE, such results need to be removed from the SERP. If the advantage lay in entirely embedding a service, e.g. by providing an OIS directly through the SERPs of the OSE, such offering needs to cease by the day compliance is due, i.e. six months from the date of designation.

476 Where no fair equivalent is found, the gatekeeper may thus have to reverse a platform envelopment it has already carried out, for instance, by stopping to offer a First-Party Service through its SERPs, while similar Third-Party Services may not. This may impact the end user experience using the gatekeeper service. End users may have to make a click to the most relevant Third-Party Service rather than to obtain the respective service directly from the gatekeeper (without being asked). However, this inconvenience is a 'price' the DMA legislator was willing to accept. Because the corresponding advantages in terms of increased contestability, fairness, choice, innovation, and lower prices for end users outweigh the price of one click by far.[438] Moreover, once end users are granted the opportunity to learn about the Third-Party Services, they may decide to turn to them directly when they have a similar need in the future, rather than going through an OSE first. In this way, no additional click is required. The fact that by now a large proportion of shoppers start their shopping journey directly on Amazon shows that this concept works and that OSEs are not required to directly satisfy any type of user demand.

438 General Court, judgment of 10/11/2021, Case T-612/17, EU:T:2021:763, *Google and Alphabet/Commission (Google Shopping)*, paras. 567–568.