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The DMA's not-so-final view on self-preferencing

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INTRODUCTION

Now that the final Digital Markets Act text has been published, we thought that it would be a good time to look at the provisions relating to self-preferencing, following up on the article we wrote on the topic last year.

In relation to self-preferencing, the final text is broadly similar to the draft we saw last year. However, there are some notable additions. **In this article, we explain what's changed and what's remained and discuss some of the outstanding economic questions. In doing so, we consider what may be the EC's thinking behind these amendments, how the text could benefit from further specification and the potential challenges for so-called gatekeepers in complying with the DMA.** This is because, depending on how they are implemented, the new amendments could make compliance very burdensome (for example, on algorithm transparency and self-preferencing for crawling).

These are all elements that the EC will need to keep in mind as it firms up the legislation before Spring 2023 when the DMA will come into force. The draft proposal on self-preference is in Article 6 of the DMA, which contains those provisions that are subject to further specification.

SO, WHAT'S NEW AND WHAT'S REMAINED?

The fundamental themes and the overall spirit of the self-preferencing provision are broadly unchanged from the draft text. At the same time, the description of the types of conduct that are prohibited remains quite vague.

In the final text, the DMA states that gatekeepers "*should not engage in any form of differentiated or preferential treatment in ranking on the core platform service, 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. To ensure that this obligation is effective, it should also be ensured that the conditions that apply to such ranking are also generally fair and transparent. Ranking should in this context cover all forms of relative prominence, including display, rating, linking or voice results and should also include instances where a core platform service presents or communicates only one result to the end user. To ensure that this obligation is effective and cannot be circumvented it should also apply to any measure that may have an equivalent effect to the differentiated or preferential treatment in ranking."[1]

As summarised in Figure 1 below, there have been four main changes to the self-preferencing provisions in the final DMA text compared with the draft, all of which **extend the scope of the obligations for gatekeepers.**

Figure 1 – Main changes in relation to self-preferencing in the final DMA text

The final text, in particular the amendments, raises a number of interesting questions:

- Why has the EC specified that the conditions gatekeepers apply to their ranking have to be *transparent* as well as fair?
- Why do "crawling" and "indexing" matter to the EC?
- Why has the EC included the clarification around a "single result" for search rankings?
- What does the EC mean by "*any measure that may have an equivalent effect to the differentiated or preferential treatment in ranking*"?

We consider each of these questions below.

WHY "TRANSPARENT" AS WELL AS "FAIR"?

The final text of the DMA requires gatekeepers to ensure that their rankings are both fair and transparent. The draft had referred only to "fair" rankings, although its treatment of fairness was broad and unclear (as discussed in our article last year on FRAND issues in the DMA). **The obvious interpretation of the additional**

[1] Recital 49.

transparency condition is that gatekeepers will have to share their ranking algorithm with others – but this begs the question of who these others will be.

On the one hand, the EC may want access to gatekeepers' ranking algorithms to monitor compliance. However, the text would benefit from greater clarity on the type of information that would be requested and how the EC would use it in practice. For example, will the EC be accessing and manipulating the algorithms (e.g. A/B testing) or just observing outcomes? A full analysis of how such algorithms function would be a very complex task requiring enormous technical expertise.

On the other hand, transparency could extend to the **firms that are subject to ranking on the gatekeeper's core platform service (potentially including competitors)**, such that they could have access to or more in-depth knowledge of the gatekeeper's ranking algorithm. If this is the case, such an obligation could potentially be very disruptive and burdensome for gatekeepers. First, they are likely to be extremely reluctant to disclose the inner workings of their algorithms to non-gatekeeper competitors, given how much investment, time and resources go into developing them. Obliging gatekeepers to do so would severely dampen their incentives to innovate and further develop such algorithms. Second, there is also a risk that after all the "rules of the game" are fully disclosed, third parties may use this information to game the system, resulting in services that perform better in the rankings but are worse for consumer welfare. To take an extreme example, if an algorithm favoured websites that are more succinct and so contain fewer words, a company could decide to exclude important information on users' T&Cs.

Given the above, we encourage the EC to provide more clarity on who will have access to gatekeepers' algorithms and how this information will be used.

WHY DO 'CRAWLING' AND 'INDEXING' MATTER TO THE EC?

The final DMA text also prohibits preferential treatment for indexing and crawling, whereas the draft referred only to ranking algorithms. This obligation can be expected to primarily affect search engines, whose activity relies on crawling and indexing to then deliver a ranking of results.

Crawling is the process by which a search engine discovers new and updated web pages, while **indexing** is the process by which web pages and their content are catalogued and added to the search engine's index.[2] Together with ranking (also called "serving"), these are the three stages involved in delivering general search results. In the context of *Google Search (Shopping)*, Google's internal documents suggested that in order for Google's own shopping comparison service to appear in its search results, Google would need to give it preferential treatment at all three stages: crawling, indexing and ranking. If not, Google's shopping comparison service may have been omitted at any one of these stages.[3]

Given this history, this issue may be at the heart of the EC's focus on crawling and indexing. The purpose of adding them may be to prohibit self-preferencing conduct in both these back-end processes and/or in the

[2] For example, see Case AT.39740 *Google Search (Shopping)*, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

[3] See Paragraph 7.2.3.3 clause (491): *Google's Engineering Director responsible for Froogle, which stated that "[…] Onebox result items often stink" and warned that "(1) [t]he [Froogle] pages may not get crawled without special treatment; without enough page rank or other quality signals, the content may not get crawled. (2) If it gets crawled, the same reasons are likely to keep it from being indexed; (3) If it gets indexed, the same reasons are likely to keep it from showing up (high) in search results. […] We'd probably have to provide a lot of special treatment to this content in order to have it be crawled, indexed, and rank well".*

final ranking of results. The EC appears to be pushing for **greater transparency** across all components of the ranking process, which seems to be consistent with its drive for more transparency overall in ranking algorithms/conditions, as noted in the section above.

However, it may be **considerably more difficult to detect self-preferencing in crawling and indexing** for several reasons. First, dissecting the entire search algorithm to examine crawling and indexing is a complex task that would require significant efforts by the EC and would impose an even greater data-sharing burden on gatekeepers. *Google Shopping* showed us that the implementation and operation of crawling and indexing is very costly,[4] so one would expect monitoring these processes to be onerous too. Second, there may be some inefficiency in extending the scope to crawling and indexing. As the Google Shopping case indicates, if self-preferencing - intended to give preferential treatment to one's own services - were to occur at the early crawling stage, then it seems likely that it would be detected at the ranking stage in any case. Instead, this provision may be required if the discriminatory conduct takes the form of demoting rivals (e.g. removing them from the list of results to a query) given that arguably the demotion could happen exclusively at the crawling, indexing or ranking stage.

In light of these considerations, the EC needs to carefully assess whether the potential benefits of looking at these processes outweigh the costs.

WHY THE CLARIFICATION AROUND A "SINGLE RESULT"?

The final DMA text also clarifies that preferential treatment is in addition prohibited for core platform services (CPSs) that present only one result in response to user queries. The obvious motivation here seems to be to capture virtual assistants, which usually offer users only one result.

More generally, **the EC has become increasingly focused on virtual assistants** and has added them to the list of CPSs covered by the DMA. Therefore, self-preferencing for these services appears to be another of the EC's concerns. With that in mind, we will share further thoughts on virtual assistants in a forthcoming article in this series.

This provision may go beyond virtual assistants. For example, it might end up covering other devices that provide users with only one result due to space constraints, e.g. **fitness wearables.** Moreover, depending on where the line is drawn, would single-result self-preferencing behaviour also include **mobile operating systems and device manufacturers** that offer their own browser by default on their devices (this being the "single result")?[5] Or is this simply equivalent to the tying behaviour that we observed in the EC's case against Microsoft in the 2000s?[6] This illustrates how challenging it is to define clearly what constitutes self-preferencing.

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[4] See Paragraph 6.2.2 clause (304): *As DuckDuckGo explains on its website: "While our indexes are getting bigger, we do not expect to be wholly independent from third parties. Bing and Google each spend hundreds of millions of dollars a year crawling and indexing the deep Web. It costs so much that even big companies like Yahoo and Ask are giving up general crawling and indexing. Therefore, it seems silly to compete on crawling and, besides, we do not have the money to do so".*

[5] We note that such conduct is likely to be addressed by requiring gatekeepers to offer "choice screens" for users to select their preferred browser.

[6] The EC had to first deal with a similar concern back in the 2000s in the case against Microsoft (Microsoft tying Windows OS with Windows Media Player), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004TJ0201&from=EN.

WHAT DOES THE EC MEAN BY "ANY MEASURE THAT MAY HAVE AN EQUIVALENT EFFECT TO THE DIFFERENTIATED OR PREFERENTIAL TREATMENT IN RANKING"?

This sentence in the DMA has remained unchanged since the draft text, and it is still unclear precisely what the EC means by "any measure that may have an equivalent effect". In the extreme, the upshot could be a very broad definition of self-preferencing, which could significantly constrain gatekeepers' behaviour and reduce their incentives to innovate.

It seems reasonably clear what the EC means by "differentiated or preferential treatment in ranking". Its thinking is likely to be informed by the precedent from *Google Shopping*. In essence, any conduct undertaken by a gatekeeper to **artificially "boost" itself above its rivals** in a ranking process would be prohibited under the DMA. Traditional search engines and virtual assistants are obvious CPSs where this behaviour could occur. There may, of course, be debate over whether the "boost" that the gatekeeper gives itself is truly artificial/preferential or the result of an objective and neutral algorithm, but this form of self-preferencing appears to be more obvious.

However, **it is far from clear what the EC means by "any measure that may have an equivalent effect".** One could speculate justifiably that it may have included this wording to provide additional flexibility in the types of conduct captured by the DMA. On a very broad interpretation, this could prohibit gatekeepers from doing anything at all which gives their own products a boost over rivals, even possibly for channels used by gatekeepers but not by their rivals. Taking Google's search engine as an example, Google offers a number of other products on a ribbon at the top of the results page. For instance, Google Maps always appears at the top of the screen as an option for users to click on, irrespective of the subject of the search. Could Google's promotion of its owns maps service in this case be considered self-preferencing by the EC under this broader definition, given that it is not simultaneously promoting rival services (e.g. Apple Maps)?

This would seem more akin to the *Google Android* case (which is currently under appeal). Again, it is clear that there is a strong interaction with other provisions in the DMA – such as in relation to tying, leveraging and interoperability. For instance, if a gatekeeper pre-installs its own apps on its mobile devices, could the practice be considered self-preferencing, particularly if it does not also load rivals' apps? Could a lack of interoperability also be treated as a self-preferencing issue, in that a gatekeeper may effectively be preferencing its own service by making it more difficult to use rival services? These examples seem less likely to be the focus of the legislation, but the final DMA text on self-preferencing could be interpreted as applying in these instances too.

All of this indicates that the lines between prohibited practices are blurry, and it is therefore important that the EC clearly defines what is and is not considered to be self-preferencing within the different CPS markets, potentially following further consultation with the relevant parties. A general lack of clarity in such definitions is likely to generate confusion and uncertainty in compliance if gatekeepers do not understand which rules apply to them. It may also significantly reduce gatekeepers' incentives to innovate, which would go against the grain of the EC's ultimate objective to increase competition in EU digital markets.

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SO WHAT'S NEXT?

The final DMA text provides some clarifications on self-preferencing, but there is still significant uncertainty on a number of fundamental issues, such as how to distinguish self-preferencing from competition on the merits and how the obligations will be enforced in practice. Depending on how the provisions are interpreted, many of them **could potentially become fairly onerous and may ultimately be unwarranted**.

Looking ahead, it is worth noting that the provision on **self-preferencing is included in Article 6**, which will be subject to further specification. Therefore, the EC will have another opportunity to set clearer rules that gatekeepers can follow more easily and to correct for some of the unintended consequences of these rules. As the Commission receives extraordinary powers to intervene through the DMA, it will have to ensure that its intervention does not overly damage current and new product creation, innovation and investment, to the detriment of consumers. Given the risks related to such an outcome, there are high stakes with this article. Our hope is that in shaping the final version of the DMA text the EC will be motivated to deliver real benefits for consumers rather than to belligerently punish gatekeepers.

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