COMPETITION AND REGULATORY CHALLENGES IN DIGITAL MARKETS: HOW TO TACKLE THE ISSUE OF SELF-PREFERENCING?

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This contribution deals with the application of competition rules in the digital sector and, in particular, the distortions that can result from self-preferencing strategies. In the context of the European Commission’s Digital Markets Act project and the UK’s plans to regulate the major digital ecosystems, the aim is to examine the relative effectiveness of the current effects-based approach stemming from competition law enforcement, the use of per-se rules, the implementation of specific regulation or the imposition of structural remedies to address such risks. It is a question of insisting on the objectives pursued (maximisation of consumer welfare, dynamic efficiency, contestability of market positions and fairness) and on the conditions for the implementation of hybrid approaches combining the logic of sectoral regulation and procedures rooted in the enforcement of competition rules.

Keywords: digital ecosystems, self-preferencing, exclusionary abuses, exploitative abuses, remedies

JEL codes: L12, L41, L42, L86
Self-preferencing is one of the thorniest issues in the implementation of competition laws in digital markets. Following Ibanez-Colomo (2020), the OECD (2020) defines self-preferencing as a strategy by which a dominant undertaking leverages its dominant position in one market to favour its own products in a related market. Self-preferencing can take the form of a refusal to deal or the one of a distorted competition based on the dominant position on the upstream market. Tying and bundling strategies pertain to this strategy as discrimination. Self-preferencing issues are, for instance, more and more analysed in margin squeeze cases both to define the theory of harm and to discuss about proper remedies, as the Deutsche Telekom and Slovak Telekom judgements of the European Union (hereafter EU) Court of Justice shown.\footnote{See EU Court of Justice, Judgment of the Court of 25 February 2021, Slovak Telekom a.s. v Protimonopolný úrad Slovenskej Republiky, case C-857/19; Judgment of 25 March 2021, case C-152/19P, Deutsche Telekom / EU Commission, and Judgement of 25 March 2021, Slovak Telekom / Commission, case C-165/19P}

The risks associated to self-preferencing practices are carefully considered in the analysis performed by competition authorities on the competition process in digital markets. For instance, on December 15\textsuperscript{th} 2020, the EU Commission proposed a Digital Markets Act that would impose several obligations to firms designated as gatekeepers (European Commission, 2020a). Some market strategies could be prohibited per se for such market players. Among the dos and nots notably figure self-preferencing practices. The article 6(1)b of the DMA directly address this issue: the gatekeeper shall “refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or any third party belonging to the same undertaking compared to similar services or products of third party and apply fairly and non-discriminatory conditions to such rankings”.

One can question the prohibition of self-preferencing practices. It is one of the core characteristics of a firm – as opposed to the market – to discriminate in favour of its own activities against to ones provided by other market players. The only exception can be a case in which the firm is overwhelming dominant. In such a case, the company is submitted – in EU competition law – to a special duty regarding the preservation of competition in its relevant market.

As Vatiero (2015) states, the EU jurisprudence imposes to the dominant position a sort of negative responsibility. The dominant firm has to abstain from certain behaviours in order to avoid excluding its competitors from the market while depriving them from the capacity to compete on the merits.\footnote{According to EU case law: “a finding that an undertaking has a dominant position is not itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market” (NV Neverlandsche Banden-Industrie Michelin v. Commission, 1983).} However, it is very clear that these behaviours are not allowed only because the firm at stake is a dominant one. The same behaviours are allowed for a normal (e.g., non-dominant)
firm. Put differently, a dominant firm must refrain its own behaviour to avoid using market strategies that are lawful in themselves but that can exclude weaker competitors from the market just because these strategies are not replaceable by a non-dominant competitor.

Does the DMA proposal differ from this underlying logic? Three concerns must be raised. First, the firms that will be designated as gatekeepers can be not dominant ones. Second, self-preferencing is a common practice in several activities, especially in the retail industries with the development of private labels for instance. How to explain the extension of such a special duty to even not dominant players and the difference of treatment between brick and mortar retailers and marketplaces? Third, is self-preferencing always welfare decreasing? Should one prefer a per se prohibition to the implementation a rule of reason? The second one is more requiring but allows balancing potential gains for consumers and possible negative effects on the competition process. However, the DMA should not be conceived as an additional way to implement competition rules but as a complementary policy. Its purpose differs from the objectives assigned to competition law enforcement. The DMA aims at guaranteeing market contestability and to tackle fairness related issues. Even if one only considers competition laws, one could discuss the relevancy to limit their purpose to consumer welfare maximization. It makes sense considering legislative history and courts decisional practices to consider broader purposes as competition process protection or market liberties’ preservation.

Competition laws in general and in digital markets in particular aim at protecting the consumer welfare but also aim at addressing boarder concerns as Philip Marsden and Rupprecht Podszun stress in their report for the Konrad Adenauer Stiftung: Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement (Marsden and Podszun, 2020). They put into relief three constitutional principles at the heart of EU competition policy: 1) freedom of competition, 2) fairness of intermediation, and 3) the sovereignty of economic actors to take their decisions autonomously. The focus on intermediation shows that the problems are mainly related to the behaviour of platforms vis-à-vis their complementors. This raises issues of (economic) dependency, contractual imbalances that may raise distributional issues more directly than efficiency issues.

While point is essential when one considers the specific case of EU competition and its ordoliberal roots, things could be different in the US case. The purpose of the Sherman Act has generated a broad literature, as the legislative intent is difficult to grasp. Conflicting views about the objectives of the drafters have been developed. Some authors consider that the purpose of the Sherman Act is to prohibit undue wealth transfers (Lande, 2013), to avoid monopolies (Lande and Zerbe, 2020)
or… to promote allocative efficiency as soon as the Act is analysed as a consumer welfare prescription (Bork, 1978).

In the EU competition law case, it is impossible to limit the objectives defined for competition policy in 1957 by the Treaty of Rome only to the maximisation of the consumer welfare. EU Competition law is more oriented toward the protection of the competition process than focused on efficiency. The EU competition law aims at guaranteeing a free and undistorted competition. As we have highlighted above, EU competition law allows for differential treatment of the dominant operator in favour of firms lacking market power. This specificity has not disappeared in 2009 with the economic turn, which was originally advocated by the Commission. When a dominant (on the upstream market) and vertically integrated competitor does not apply similar conditions (in similar circumstances) to its own downstream activities and to the one of its downstream competitors, assessing the net effect of the practice is not required. Applying an unequal treatment among downstream complementors can be sufficient to engage its responsibility. In other words, a dominant operator’s practice that induces a discrimination at the expense of other market players may be sanctioned not only on the grounds of its actual net effect but because it deprives them from the market opportunities resulting from an undistorted competition.

For instance, in a recent case before the French Competition Authority related to an alleged abuse of dominant position of Apple to the detriment to downstream operators, the complainants pointed out that, the case law does not require proof of an anti-competitive effect in the case of unfair trading conditions. According to them, as soon as the practice implemented by Apple on the iOS application distribution market is likely to produce foreclosure effects on two adjacent markets on which Apple competes with application publishers, it is sufficient to demonstrate a difference of treatment to characterise a self-preferencing strategy. The vertically integrated dominant operator has to guarantee that its competitors can compete on the merits, on the downstream market.

The difficulty lies in the perimeter of this guarantee. Should one guarantee to small market players the access to the market or the access to a given digital ecosystem? Should such a guarantee be limited to platforms enjoying a near monopoly position making them an unavoidable trading

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1 See for instance the case of the hypothetically equally efficient competitor criterion in margin squeeze cases (Marty, 2013).
2 See for instance: EU Court of Justice, case C-242/95 GT-Link A/S v De Danske Statsbaner (DSB)
3 French Competition Authority, decision n°21-D-07, 17 March 2021, related to request for interim measures in the online advertising sector.
partner? In such a case, the platform should be defined as an essential facility and all the conditions required to characterise an asset as such under competition laws must be met. Incidentally, the platform should have a dual role e.g. should propose competing goods and services in the downstream market in which the complementors are active. Two requirements could be deduced if such an analysis is made. First, is a vertically integrated firm bound to open its “platform” to its competitors? Second, is such a firm obliged to refuse any preferential treatment to its own subsidiaries? We can consider that it depends on the dominance of this ecosystem on a given relevant market. Imposing such obligations to a firm controlling an essential facility is rather common. However, in digital markets, a dominance can be also a relative one. The essentiality can be defined through the dependence of complementors to access to a specific segment of consumers. This point can be captured by the characterisation of a platform as enjoying a gatekeeper position and a structuring power on its ecosystem. It is exactly what the EU DMA tries to deal with.

The dominance in such situations echoes phenomena of economic dependence and of technological dependence (Bougette et al., 2019). Such phenomena can be induced for instance by single-homing strategies. Economic dependence related concerns raise similar concerns than the notion of abuse of economic dependence position does exist in several Member States internal competition laws. Legal provisions related to the sanction of economic dependent position abuses exist in the restrictive practices framework in Italy, Germany, or France for instance. Such provisions were more recently introduced in Belgium in 2019.

The interest of the concept of economic dependence in the case of digital markets is that it makes it possible to grasp cases of relative dominance, as illustrated by the case of the new amendment to the German competition law. Indeed, on 19 January 2021, a 10th amendment of the German Act against Restraints of Competition, the Digitisation Act entered into force. It allows tackling the situation of market players benefitting from a paramount significance for competition across markets. The new legislation allows the competition authority to prohibit certain types of blacklisted conducts without having to establish a dominant position on any particular market. This new amendment is all the more relevant in our perspective it can also be implemented to companies that exert a relative market power and not an absolute one. More particularly, the Section 19a allows

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6 The keystone players could also constraint its complementors to opt for single-homing (through exclusivity inducing contracts for instance). It is in the platform’s interest to put pressure on its partners to opt for single-homing. In the short term, it is in the partner’s interest to do so (limiting transaction costs, guaranteeing access to the market, limiting the risks associated with investments), but the essentiality of the platform which results from this makes it possible for it to implement abusive strategies. It is important to note that single-homing can be either voluntary for the complementor or constrained by the keystone through rewards and sanction mechanisms that can lead to exclusivity agreements.
the Bundeskartellamt to “prohibit certain types of conduct by companies, which, due to their strategic position and their resources, are of paramount significance for competition across markets. Such conducts include e.g. the self-preferencing of group’s own services or impeding third companies from entering the market by denying them access to specific data.” Even if an undertaking does not reach the level of market dominance, some specific requirements can be imposed as soon as other companies are dependent from it on the supply or purchase of goods or services. Meaningfully, the German amendment of the Act against Restraints of Competition recognises the existence of a “power of intermediation” that can raise dependence related competition concerns (Budzinski et al., 2020).

The issue of relative or absolute dominance stresses the difference between competition for the market and competition in the market. We can presume the first one is sufficient. A monopoly is not an issue in itself as long as the market remains contestable. The key question is the one of barriers to entry. Are the current “dominant” platforms durable monopolies? If we suppose that all their participants (both users and complementors) are locked-in (through switching costs, exclusivity-contract type clauses, etc.) and if we assume that dominant platforms have no chance to be disrupted, we could suppose their market positions could be considered as protected from market threats and counter forces of the other stakeholders. Under these hypotheses, it is also necessary to ensure a free and undistorted competition within these ecosystems. The three values presented by Marsden and Podszen (2020), freedom of competition, fairness of intermediation, and the sovereignty of economic actors to take their decisions autonomously, make particularly sense in this perspective.

Indeed, the problem of self-preferencing is a problem of competition within the market... since one defines an ecosystem as a relevant market. Considering such a case implies some specific conditions as the vertical integration of the keystone that makes this firm a competitor of its own complementors. It also implies that this keystone enjoys an absolute market power (as defined on a relevant market) or a relative one.

The concerns about the competition within the market echo the debates on the regulation of major online ecosystems from the EU Commission P2B regulation of June 2019 (European Commission, 2019) to the British Digital Market Unit, which creation was announced in November 2020. The issue of the competition within the platform can be analysed under different angles. Some practices can be related to unbalanced transaction conditions and can be related to “exploitative practices”.

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7 Bundeskartellamt, Press release, 19 January 2021. The Section 20-1a of the new legislation allows dependent companies to claim among other things access to their data. It echoes, as we will see, one of the EU Commission’s objection in its Amazon’s case.
Other practices can be seen under the prism of “exclusionary practices”. Self-preferencing pertains to these last ones. Nevertheless, a credible threat of an exclusionary abuse can lead to an exploitative one. A complementor can accept to pay for services as pay for prominence in ranking if it appears this payment is the only way to avoid ranking manipulations.

To sum up, two main concerns are raised by digital ecosystems: the possible distortions in the competition within the market (e.g., in the ecosystem, between the keystone’s direct activities and the ones of its complementors (and simultaneously its downstream competitors) and a lack of contestability of gatekeeper’s position. The EU Commission’s DMA aims at addressing these two concerns that are difficult to deal with only on the basis of antitrust laws. The article 102 TFEU enforcement is mainly based on an effects-based approach that leads to difficultly address issues as self-preferencing. Self-preferencing might raise two main competition risks. The first one is to allow the keystone to exploit (even relative) dominance within the ecosystem by abusing from its architecture (or private regulatory) power. The second one is to leverage its dominance in adjacent markets. The extension of market power to vertically related markets can be detrimental to consumer welfare. Two questions can be induced. A first one is related to the capacity of competition law to tackle self-preferencing related issues notably regarding their fairness related dimension. The second one is the proper treatment of self-preferencing strategies. Must we prohibit these ones per se or can we implement an effects-based approach on a case-by-case basis, considering all their specific circumstances?

The paper is structured as followed. The first section presents the difficulties raised by the implementation of competition laws to digital ecosystems. The second section analyses the specific issues related to self-preferencing related cases. The third section concludes.

I – How to ensure a free and an undistorted competition in digital ecosystems?

The supervision of digital ecosystems can take several forms from the strict application of competition laws (associated with their current standards) to more interventionist devices. We consider successively these ones. A first subsection presents the difficulties to enforce current competition law procedures. It interrogates the capacity of currently available remedies to tackle the concerns induced by gatekeepers’ practices. A second subsection is devoted to the option to replace the effects-based approach by the implementation of per se rules. A third subsection investigates to what extend the competition law enforcement should be complemented by regulatory-type devices. Eventually a fourth and last subsection considers the opportunity, tractability, and potential effects of structural remedies as for instance the separation of market places activities and the supplying of goods and services.
A – Enforcing currently available competition tools

A first option is to enforce competition as usual that is to say on the basis of an effects-based approach. This one could take different forms according to the criteria applied. It can be based on the consumer welfare as a unique criterion. It can also be grounded on multiple criteria (as the liberty of choice, etc).

An implementation of a technical approach of competition law enforcement provides some guarantees in terms of consistency (Ginsburg, 2010). It also avoids implicit trade-offs at the expense of consumers welfare (Melamed and Petit, 2018). However, it can be challenged on the grounds of the definition of efficiency in itself. An overly restrictive definition of its objectives leads to reduce competition policy enforcement only to a search of allocative efficiency (Steimbaum and Stucke, 2018). Some concerns can also be raised in terms of dynamic efficiency. Some market practices cannot induce a direct harm to consumers but an indirect one through damages inflicted to trading partners or to innovation. Both of them are detrimental to consumers on long run. It also possible to consider, following a neo-brandeisian approach or the Law and Political Economy one, that antitrust laws pursue other objectives than efficiency, as distributive purposes, or aim at guaranteeing a dispersal of economic power conceived as a necessary condition to preserve political liberties (Britton-Purdy et al., 2020).

The net effect on consumer welfare of many of the practices undertaken by digital ecosystems are difficult to assess. For instance, in the EU Commission Android decision, the pre-installation of Google apps or the prohibition of forks can be both seen as competitors hindering strategies and as consumer-friendly practices (Marty and Pillot, 2018).

B- Opting for per se rules?

A second way to ensure a free and undistorted competition could be to make evolve competition rules toward a form-based approach. It can rely on do and don’t type rules defined ex ante. These per se rules could be seen as efficient since they allow avoiding possible irreversible damages to competition, are not difficult to enforce, and provide a satisfactory level of legal certainty (see for instance Khan and Chopra, 2020). On the contrary, by prohibiting ex ante some market practices, such rules may impair the capacity of the competition process to fulfil all of its promises. It can hinder innovation and reduce the consumer-welfare by prohibiting practices which net effect can be positive. Several other difficulties possibly induced by such an approach could be underlined. For instance, the definition of the dos (positive duties towards competitors as interoperability or data portability) can be a target of lobbying actions of competitors (de Streel and Larouche, 2021).
In the same vein, the don’ts are all the more difficult to define as the digital markets are constantly evolving. If the regulation is specifically targeted toward specific firms, imposing them rigid rules can induce a competitive disadvantage, at their detriment, without any objective reasons, except an assault against bigness, defined as a market failure as such.

Such issues are particularly crucial for the EU Commission DMA proposal. Several concerns have been raised regarding the definition of the initial rules arguing they favour investments in lobbying strategies. Symmetrically the possibilities to empower the EU Commission to make these rules evolve are denounced as excessively unilateral and raise concerns in terms of administrative discretion.

**C – Should we regulate digital ecosystems?**

A third approach may consist in setting a regulatory framework in order to supervise some digital ecosystems. As Jacobides and Lianos (2021) states “the field of competition is not a single product market, but an ecosystem of complementary products”. Consequently, an implementation of competition laws that requires to define a dominance on a given relevant market can be at odds with current competitive issues. We should indeed consider the multiproduct webs that lock-in customers and the architecture power in ecosystems that puts complementors in a dependent position both at the economic and at the technical point of view. The gatekeeper position coupled with the private regulatory power of keystones allow exerting a potentially abusive power related to the lock-in of consumers and the (sometimes constrained) single homing of complementors. Self-preferencing can be a typical consequence of such a power allowing to refuse access to the market (e.g. to the ecosystem) and to distort competition within the market at its advantage. A kind of regulation is all the more relevant that, as Lianos (2019) states, “vertical intra-ecosystem integration falls in a blind spot of existing competition law”.

A critical dimension of the regulatory option lies in the definition of regulation while applied to big techs. Is it a matter of regulating industries affecting public interest? Shall we implement a public utilities’ type of regulation? If a specific regulation has to be implemented on specific ecosystems, as the British model proposes, several questions remain. First, will the code of conducts proposed pertain to a personalised law logic? In that case, we should interrogate the general character of the legislation. Second, will these codes be an experience of delegated supervision or an experience of procedural regulation (Kirat and Marty, 2015)? Third, will the enforcement of these codes differ in this procedure from the enforcement of antitrust laws?
A first conception of regulation echoes a public-utilities oriented logic. A regulation of a specific platform can make sense if it can be considered that this one enjoys a durable and rather non-contestable monopoly position. Such a situation of quasi natural monopoly leads to characterize digital ecosystems as an equivalent of a network industry. It can be discussed regarding the vertical integration of some ecosystems. However, it is not self-evident. An alternative basis to justify a sector-specific regulation could be the old US jurisprudential standard of “affectation with public interest”. Such a standard justifies implementing a specific regulation to market players outside the scope of “natural monopolies”. For instance, as soon as the activity of the firm has an impact on boarder social dimensions, as the distribution of welfare or pluralism of information. Justice Clarence Thomas advocates for applying a common carrier regulation to digital platforms: “And this Court long ago suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when “a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.”

One of the difficulties induced by this approach is to make constant trade-offs between conflicting and not commensurable values. The technological and competitive turbulences of the digital markets induce some additional difficulties compared to a public utilities regulation inspired model: the regulation must be a flexible (Jacobides and Lianos, 2021), participative (Tirole, 2019), if not an anticipatory one (Armstrong et al., 2019).

In this respect, the solution towards which the British are moving seems to be particularly interesting. The roadmap drawn up by Lord Tyrie for the CMA in February 2019 highlighted the challenges linked to the development of digital technology both for consumer protection and for the protection of competition. The Lord Tyrie’s diagnosis also highlighted the difficulties that the CMA would have to face. The time required for procedures, the irreversibility of potential damage to competition and the need for flexibility and agility in dealing with these procedures figured prominently in the concerns put forward by Lord Tyrie.

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8 ‘There is nevertheless one fundamental difference. Exclusivity rights formerly protected a public utility. The incumbent has developed its network without incurring the risk of being unable to recoup its own investments. Things could be seen as radically different in the case of large digital ecosystems for which the financing had been made without any guarantee of success both because the uncertainties regarding future demand and the ones related to competitors’ investment decisions and technical choices. The Big Tech market positions are mainly due to their own merits. A market dynamic characterised by a winner takes all model also implies that losers are not able to recoup their investments and face a sunk costs’ issue.


10 See German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 411 (1914).
The necessity to make the regulatory framework evolves is to guarantee “the ability of the CMA to act quickly to prevent harm to consumers in fast-moving markets”. The interest to put in place an ex-ante framework and to act quicker can also be explained by the limitations of current antitrust procedures. According to Lord Tyrie: “[in] these unduly long and costly proceedings […] the CMA’s counterparties comprise large teams of private-sector lawyers, deploying Byzantine procedural and technical complexity on behalf of their clients. The result is often years of protracted legal dispute, of intellectual interest and commercial benefit to firms and the competition establishment, but far removed from concerns of ordinary consumers.” The duration of current antitrust litigations raises the risk of an irreversible damage to competition. Thus “carrying on roughly as we are is not a prudent option” (Ryrie, 2019). A regulatory modelled approach should complement a competition based one. It should be noted that Lord Tyrie’s (2019) recommendations also emphasised two key dimensions. The first was consumer protection beyond that currently achieved by competition rules. The second was the strengthening of the CMA’s capabilities, particularly in terms of access to data on firms’ activities and in terms of analysis of their algorithms. The technical capacities of the regulatory agencies (or competition law enforcers) in terms of data access and algorithms analysis are ones of the crucial dimensions of our current challenges.

The roadmap proposed in the United Kingdom is particularly interesting to consider both in terms of its objectives (simplification, clarity, transparency, and effectiveness) and in terms of the concerns that an overhaul of the current competition rules would result in delays that are incompatible with the competition challenges. It is therefore a question of designing adaptations to the rules that will provide the competition authorities with “new functions and powers, including powers to investigate and to intervene quickly, to stop market-wise consumer detriment.” Lord Tyrie’s (2019) recommendations also emphasised two key dimensions. The first was consumer protection that should be extended beyond what has been currently achieved by competition rules. The second was the necessary strengthening of the CMA’s capabilities, particularly in terms of access to data on firms’ activities and in terms of analysis of their algorithms. Indeed, the technical capacities of the regulatory agencies (or competition law enforcers) in terms of data access and algorithms analysis are ones of the crucial dimensions of our current challenges.

The recommendations of Lord Tyrie (2019) are all the more interesting to consider that they were based on the development and extension of two pre-existing tools: the first is that of interim measures - to put an end to a practice before irreversible damage to competition is occurred - and

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the second is that of market investigations aimed at obtaining commitments from firms to ensure undistorted competition.

This concern for a framework that could be described as agile is reflected in current developments in the implementation of UK policy towards firms with strategic market status (SMS). As we saw above, the first foundations for adapting the UK framework were laid in November 2020 with the establishment of a Digital Market Unit (DMU). One of the interests of the proposed approach is that it is not focused on relevant markets, which are increasingly difficult to define in the context of multi-sided markets. The British project defines the digital ecosystems themselves as the proper scope of regulation.

This obviously reduces the general scope of the competition law framework, but it does make it possible to adjust this framework to the different business models that cannot be considered identical between the different companies grouped under the acronym GAFAM (and potentially other ones). As soon as a company is granted SMS status, it will be subject to supervision that is promised to be tailored-made, pro-active and above all preventive. As such, this framework does not replace the application of existing competition rules but is complementary to them. The aim of the DMU is to have the appropriate technical capacities to establish codes of conduct adapted to each SMS, to supervise them, and thus to prevent damages to competition.

It is not without interest to draw a parallel between the objectives assigned to the DMU and those which, according to Louis Brandeis, should have been those of the FTC as it was conceived when it was created in 1914 (Bougette and Marty, 2020). In contrast to the judicial courts responsible for enforcing the Sherman Act, the purpose of the FTC was to acquire technical expertise to ensure a better understanding of market practices. It should also have a preventive, not punitive, role. In Brandeis’ view, the FTC should rely on the regular organisation of trade practice conferences to discuss the effects of firms’ market behaviour and possibly make adjustments to prevent competitive harm.

Although more than a century separates the two initiatives, the logic seems relatively similar. The building of expertise and the implementation of preventive actions even outside of competitive litigation are two common features of the FTC and DMU projects. Another essential common feature is that these projects - like the European DMA - should be seen as complementary to, and not a substitute for, the application of competition rules. The FTC Act did not aim at replacing the

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12 In the EU case, relevant markets are defined in terms of products substitutability or in geographical terms (see Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997)). The EU Commission is contemplating changes to its Market Definition Notice.
Sherman Act even if its Section 5 can tackle – to some extent – similar practices than the one targeted by the Section 2 of the Sherman Act.

It is relevant to mention that in the UK case, in addition to this ex ante regulation, the tools of consumer and competition law will be strengthened (CMA, 2021). These reinforcements concern points that are particularly important in terms of preventing potentially irreversible damage to competition. This is the case with the rules related to merger control, the development of precautionary measures and, finally, the greater use of market investigations, which, in the UK case, make it possible to negotiate competitive remedies outside a competition law formal procedure.

As such, the model proposed in the United Kingdom has some strong characteristics (in terms of clarity, enforceability and flexibility) which may appear attractive in comparison with the EU one. The rules designed on the model of dos and donts may appear to be excessively backward looking. They are, above all, rather undifferentiated, whatever the business model of the firms concerned. In addition, we have to bear in mind, that the perimeter of firms designated as gatekeepers is much wider in the EU case than in the UK one.

However, despite these differences both proposals seem share a common feature. Even if they aim at escaping the constraints induced by competition laws procedures, their architecture is framed by these last ones. It is very characteristic for the EU DMA (even if its objectives – contestability and fairness – differ from the one of competition law) but also for the British procedure. Indeed, “The code seeks to set clear ‘rules of the game’ up-front, preventing the firm taking advantage of its powerful position” (CMA, 2020, p.27). The procedure echoes more a compliance-based model than a competition law based one. For instance: “SMS firms should have a legal obligation to ensure their conduct is compliant with the requirements of the code at all times and put in place measures to foster compliance” (CMA, 2020, p.35).

However as soon as we consider the case of remedies, a procedure inspired by competition law implicitly appears: “The DMU should be able to develop a PCI which is evidence-based and targeted to the particular harm to be addressed, as well as being proportionate” (CMA, 2020, p.45). The effects-based approach seems to prevail “In implementing a PCI the DMU should demonstrate that it is an effective and proportionate remedy to an adverse effect on competition or consumers”. The difference between regulation and competition law is pretty blurred.

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13 As we have previously seen, in the current DMA proposal the Commission enjoys a large discretion to add new ones.
14 Even if the DMA objectives – contestability and fairness- differ from the one of competition law, which is focused on efficiency. It could be relevant to add that fairness is not limited to a notion of justice or reasonability in the sharing of gains resulting from a transaction. It also echoes notions as equality between firms or loyalty (see for instance Malaurie-Vignal, 2021).
15 PCI as pro-competitive intervention.
**D - Could structural remedies be considered?**

The fourth approach consists in implementing structural remedies to dominant platforms. It could make sense in case of structural failures of competition. Such failures could be characterised by a durable dominance protected by barriers to entry that are impossible to overcome. These remedies could take an ex post form. This one corresponds to mandatory divestitures, as for instance the Lina Khan’s proposal to separate platforms and commerce (Khan, 2019). For our topic- the self-preferencing- such structural remedies could be seen as a radical way to prevent any conflict of interests.

These remedies could also be implemented “ex ante” through mergers control. It is not a matter of prohibiting market practices in advance. It can be a matter of prohibiting acquisitions implying the risk of extending the monopoly position. Strengthening the mergers control may limit the risk of consolidating or enveloping acquisitions.\(^{16}\) It could also be a way to prevent vertical integration to avoid seeing an upstream gatekeeper in position to distort downstream competition. It echoes with the old French administrative law principle of speciality that ban any diversification strategy of a public monopoly.\(^{17}\) The difference here is that these platforms owe their market positions to their past merits and not to their former legal exclusive rights.

There is only a very small likelihood that such remedies will actually be imposed in European law despite the provisions of the DMA. Structural remedies are almost never pronounced in European competition law. They have only been imposed in the context of negotiated procedures in cases involving the behaviour of incumbents in sectoral liberalisation processes. It is indeed necessary to prove that there is no equivalent behavioural remedy that would achieve the same results. In the context of judicial review of Commission decisions, this standard is far too demanding. It is therefore very unlikely that a firm’s property rights will be challenged in a competition law-based procedure (Marty and Mezaguer, 2018).

Things are different in the case of the DMA. The Commission has the power to impose structural remedies to a repeated non-compliant gatekeeper. According to the DMA proposal: “The Commission should investigate and assess whether additional behavioural, or, where appropriate, structural remedies are justified, in order to ensure that the gatekeeper cannot frustrate the objectives of this Regulation by systematic non-compliance with one or several of the obligations laid down in this Regulation, which has further strengthened its...”

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\(^{16}\) See for instance the contribution to the debate on competition policy in the digital sector of the French Competition Authority published in February 2020 (Autorité de la Concurrence, 2020).

\(^{17}\) See French Competition Council decision n°94-A-15, 10 May 1994, related to the competition concerns induced by the diversification of the gas and electricity sectors incumbents.

[https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/94a15.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/94a15.pdf)
gatekeeper position” (EU Commission, 2020a, §64). However, even if in that case an effects-based approach is not required – but a market investigation – the legal guarantees remain with a control of proportionality. Indeed, the Commission also states in the same point: “The Commission should therefore in such cases have the power to impose any remedy, whether behavioural or structural, having due regard to the principle of proportionality. Structural remedies, such as legal, functional or structural separation, including the divestiture of a business, or parts of it, should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy”.

If the probability to observe structural remedies is very low in the case of EU competition law, things are different in the US even though it has been a long time since the last implementation of such remedies.18 Considering these structural remedies under the light of the history of US Antitrust can be relevant. Louis Brandeis considered for instance that antitrust laws should address the concentration of economic power in itself. According to him, the law should limit the size of the firms. Not only according to him, no dominant position can be acquired on the merits, but also its maintenance is seen as anticompetitive as such (Bougette and Marty, 2020). The concentration is also described as efficiency-losses inducing and as threat for democracy. In this perspective, imposing divestiture remedies or even mandating a dismantling of a dominant player does not imply to renounce to efficiency gains.

The position of Henry Simons at the University of Chicago was convergent regarding the appropriate remedies to the question of bigness but significantly different in terms of assessment of the underlying economic trade-offs (Simons, 1934, 1936). Indeed, contrary to Brandeis, Simons considered that the concentration can be the result of a competition on the merits and can be welfare-enhancing. His distrust toward concentration was mainly grounded on the risks induced for democracy. Preserving the dispersion of political power supposes to tackle the issue of the risks induced by the concentration of the political one. As Brandeis did, Simons tended to preconize some structural remedies. Contrary to Brandeis’ views, Simons did consider that such remedies would be unavoidably welfare destructive. However, the only alternatives were the nationalisation of the firms at stake or their regulation. Surprisingly, in Simons’ views, the worst scenario was the last one. According to him, it combines the worst of the two worlds: the inefficiencies of public management and an incentive for the private sector to invest in lobbying strategies (Zingales, 2017).

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However, Simons recognised that structural remedies (e.g., divestments) may have a cost in terms of efficiency. Protecting an effective rivalry on the market has a price; a price that the consumer will pay. Therefore, there is no neutrality for the consumer. It is a trade-off to be accepted. We will illustrate this trade-off in our second part on the specific case of self-preferencing. Self-preferencing is not mandatory welfare decreasing. Putting such a practice in the don’t list may be analysed differently if we only consider the efficiency purpose or if we take into consideration contestability and fairness related ones.

II – Self-preferencing: damage theory and reflection on competitive remedies

How to deal with self-preferencing risks? We should first analyse their manifestations and second discuss about their economic effects before considering the need of a specific action and assessing the pros and cons of the different solutions available.

A- Characterising self-preferencing strategies

We present self-preferencing successively from the economic analysis perspective before considering it in the context of European and French case laws.

a) Some economics of self-preferencing

The draft European DMA, as presented on 15 December 2020, takes a very clear-cut approach to the competitive treatment of self-preferencing. Indeed, according to the DMA, the gatekeeper must: “refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking.”

Self-preferencing, as bundling strategies, pertains to dominant operators’ strategies that a competitor on a related market cannot replicate. If the competitor is not vertically integrated, if it does not control a competitive bottleneck, it cannot exert a countervailing power on the dominant player strategies. Through this type of unilateral practices, a dominant player can maintain its dominant position and extend it to adjacent markets (Eisenmann et al., 2011). It both compromise market contestability and fairness in the competition in the market e.g. the two objectives of the European DMA.

The report of the panel of economic experts convened by the Commission (Cabral et al., 2021) recommends a ban on these practices. As such, they would be treated more harshly than tying and bundling practices: “The panel proposes that self-preferencing be considered as illegal (e.g. black listed), whereas tying and bundling be included in the set of presumed anti-competitive practices for which gatekeepers can present an
efficiency defence (e.g. grey practices)” (Cabral et al., 2021, p.3). The vertical integration of an operator, which can make it a competitor downstream of users of its services on the upstream market, is a well-known case, particularly in telecommunications, as the Slovak Telekom case testifies. As noted in the report submitted to the Commission (Cabral et al., 2021, p.13), the solution is to combine ex ante rules and ex post procedures in the context of litigation. The logic behind Article 6 of the DMA is that of a general prohibition against discrimination affecting third parties. The panel therefore proposes to place self-preferencing on the list of blacklisted practices and thus to prohibit it per se.

Self-preferencing can take two forms. The first corresponds to competitive distortions on a downstream market induced by a vertical integration of the upstream market dominant player (if not monopolist). The second corresponds to a preferential treatment benefiting, not to a downstream subsidiary but to an independent player. In that case, we could observe a second order discrimination. The platform may provide an artificial advantage to a complementor vis-à-vis its horizontal competitors. What could be the platform motives? Indeed, we can consider that an upstream monopolist has no incentive to favour a monopolization of its downstream market. First, it has no interest to leverage its dominant position because of the single profit monopoly law. Second, it has interest to preserve a competition downstream in order to benefit from a differentiation that could enhance its profitability and not to favour something like two successive monopolies on a value chain (e.g. a double marginalisation). However, such a strategy can be profitable as soon as it protects the upstream position or it allows leveraging it to adjacent markets. It echoes consolidating strategies or envelopment one (see Condorelli and Padilla, 2020).

The issue at the economic point of view lies on the fact that the practices targeted by the EU Commission in its DMA would be prohibited automatically. As de Streel and Larouche (2021) state “[…] there is no possibility for the gatekeeper to rely on an efficiency defence to escape the imposition of an obligation, as it is the case under competition law”. Such a situation is all the more critical that the DMA does not impose a vertical separation of integrated gatekeepers. The constraints imposed on their market behaviour may hinder their capacity to compete with their own complementors. Self-preferencing as other vertical leveraging practices can be under conditions welfare enhancing and can be defended on an effects-based approach. A competition law-based perspective would require considering all the specific circumstances of the case to balance consumer welfare enhancing consequences with the damages potentially inflicted to competitors (Ibanez-Colomo, 2021). Two questions are raised in matters of self-preferencing defined as a monopoly leveraging strategy based

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19 Tying can be defended on efficiency grounds, see for instance Carlton and Waldman (2014).
on an artificially built “unlevel playing field”. A first question echoes the notion of freedom to contract: self-preferencing cases “entail an implicit claim that platforms implicitly promise unbiased treatment to all users” (Salinger, 2020, p.352). A second question is related to its consequences in terms of efficiency particularly since we consider the impact on innovation incentives.\(^{20}\)

An effects-based approach may performed even if consumer welfare is not the only dimension to deal with. However, it might require reversing the burden of proof (Crémer et al., 2019) to avoid false negatives. Such a reversal is sharply criticised by various stakeholders. For instance, according to the French think-tank Renaissance Numérique: “the proposed DMA introduces a sort of presumption of competitive guilt”.

Indeed, tackling the issue of self-preferencing with competition law enforcement or with the DMA (conceived as a complementary tool) implies a trade-off between false negative and false positive.\(^{21}\) The social cost induced by the first-one cannot be minimised as Budzinski et al. (2021) demonstrate. The detrimental effect increases with several market characteristics as the concentration level in the downstream market (de Cornière and Taylor, 2019), the insensitivity of consumers to biased recommendations (Bourreau and Gaudin, 2018), the existence of must-have contents, or a small quality difference between the goods and services offered by the integrated players and its downstream competitor (Padilla et al., 2020). The economic debate lies in the proper way to tackle this issue: a per se prohibition, to avoid an irreversible damage to competition, or a case-by-case approach based on the effects, to preserve judicial guarantees for the incriminated firm and to prevent welfare decreasing decisions. As the OECD (2020, p.53) states: “Like vertical integration, leveraging can generate efficiencies for consumers and provide legitimate rewards for innovation or competitive differentiation”.

Whatever the effects, self-preferencing raises concerns in terms of guarantees of a free and undistorted competition. It is for instance particularly important in terms of innovations adoption, knowing that a significant innovative path can both induce disruption risks and consolidate the dominant platform’s market position.

We could illustrate this point through an example provided by Ariel Ezrachi and Maurice Stucke in a 2020 working paper for the EU Commission (Ezrachi and Stucke, 2020). It does not deal with distortions on market places or on search engines but relates to the diffusion of innovations. To what extent a keystone player can favour the diffusion of an innovation proposed by a given complementor (or its own innovation) to the detriment of the one proposed by a competing

\(^{20}\) See Slovak Telekom Judgement, EU Court of Justice, February 25\(^{th}\), op. cit.

\(^{21}\) On the cost of errors in antitrust, see for instance Manne and Wright (2010).
innovator. The strategy of the platform can take different forms. The simplest strategy consists in a refusal to deal e.g. in a denial of access to the platform and by doing so to the users. A second strategy can use dark patterns to manipulate users’ decisions. These ones can combine bad nudges (pushing the consumer to decide in a way opposite to his interests) and bad sludge (creating frictions in order to hinder his capacity to make the choice that is optimal for me).

This example, developed by Ezrachi and Stucke (2020), presents a dark pattern based strategy hindering the capacity of consumers to make “optimal” choice. It is based on the possibility of controlling the dissemination of innovations in ecosystems by their keystone players in order to control their market dynamics and by doing so to limit the risk of being disrupted.

To illustrate their thinking, Ezrachi and Stucke (2020, p. 42) present the dynamics of an innovation adoption. The adoption of an innovation by a given individual is described as a five-phase process. The first is the knowledge phase. The individual must be informed of the availability of an innovative solution and its functions. The second is that of persuasion. It is through it that the individual forms favourable or unfavourable anticipations towards it. The third is that of the decision of adoption or non-adoption. The fourth is that of implementation. The fifth, finally, is that of the confirmation of the adoption. It can be confirmed by observing the choice of third parties or, on the contrary, be negatively affected by negative messages.

Keystones can play in favour of the adoption of an innovation developed internally (or by a “preferred” complementor). They also can act unfavourably for an innovation developed by a maverick. It may explain why digital ecosystems promote early and massive adoption of innovations. It may also explain why innovations proposed by complementors may fail. The following table extracted from de Marcellis et al. (2020) sums up.

<table>
<thead>
<tr>
<th>Steps in the Dissemination process</th>
<th>Favourable pivot Strategy</th>
<th>Unfavourable Pivot Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Knowledge</td>
<td>Ability to propose, to put forward</td>
<td>Reduce the possibilities of information about a potentially available innovation or access to information about how it works (by algorithmic manipulation of the search engine, for example, by de-referencing sites ...)</td>
</tr>
</tbody>
</table>

Lord Tyrie’s report (2019, p.7) emphasises this point: there is a need to ensure both that firms act in the market in accordance with competition rules but also that they do not take advantage of consumers’ vulnerabilities. There is a dual aspect of efficiency and fairness. However, fairness can also be invoked in relation to competitors when one considers the distortions of competition with the services offered by the gatekeeper and the unfair behaviour that the gatekeeper may engage in.

This point comes from de Marcellis-Warin et al., (2020).
The innovation that can access the market is only that proposed by the pivot and not that of third parties. It is undoubtedly a form of self-preferencing. The notion is not limited to the access of products and services to the market but also concerns the access of technologies. It reflects the ability of dominant firms to control their competitive environment and minimise the risk of disruption. In this respect, self-preferencing can be a tool for maintaining a dominant position.

b) Self-preferencing cases in recent EU case-law

Recent case law can illustrate the questions raised by self-preferencing in the EU context. The first case is provided by the EU Commission Google Shopping decision, a second one by the EU Commission statement of objections against Amazon. What could be the economic theory behind these two alleged self-preferencing strategies according to the EU Commission?

The Shopping case\textsuperscript{24} can be read as a leveraging strategy à la Microsoft\textsuperscript{25}. The extension of the dominant position can be analysed as an envelopment strategy consisting in defending its upstream dominant position against potential competitors and extending it to complementary markets. The self-preferencing strategy was grounded on a search engine manipulation (more precisely through demoting practices). We can underline the fact that Google challenges this view arguing that the correction of rival results was the produce of countermeasures against algorithmic manipulations.

\textsuperscript{24} EU Commission, case 39740 Google Search (Shopping), 27 June 2017.
\textsuperscript{25} EU Commission, case COMP/C-3/37.792 Microsoft, 24 March 2004.
(click-farms, etc.) and that the damage to consumers is not demonstrated in the Commission’s decision (Marty, 2019). This case interrogates the possibility to develop an efficiency-based defence as soon as the effects-based approach fades away in favour of a simple demonstration of an unequal treatment.

The procedure initiated against Amazon is more complex. On one hand, it can be seen as rather similar in the sense that Amazon is accused of favouring its own products to the detriment of its competitors’ by exploiting strategically an asymmetric access to information. On the other hand, it also corresponds to the second type of self-preferencing, e.g., a second line discrimination, in that the Commission has risen the concern that the conditions made to independent merchants to access the buy box can be asymmetric and therefore may distort competition among them. The conditions to “win the buy box” are rather opaque and the Commission has launched an additional investigation to determine if these ones could distort competition among independent merchants. In an anticompetitive scenario (for which we have no conclusive evidence), Amazon may favour merchants that use its delivery services, pay for additional services (data analytics for instance) or accept to enter in “quasi-exclusivity” contractual provisions. In such a case, self-preferencing can lead either to an exclusionary abuse or to an exploitative one.

Such a privileged treatment can make sense at the economic point of view. The platform has a direct interest to give preference to trading partners who generate more revenues. It can also be rational to provide incentives to complementors to opt for single homing. It increases the attractiveness of the platform on the second side (the consumers) before the tipping and after this step, it guarantees its essentiality. The platform has to sanction complementors that opt for multi-homing and to reward the ones that have opted for single homing. Given an advantage to these last one (through a privileged access to the buy box) is a good option to align the interests. The mechanism of Amazon Prime plays an equivalent role on the consumers’ side and reinforce the necessity to access the platform and to benefit from the buy box for independent merchants.

One should keep in mind that such practices are far from unknown in the field of competition law and economics. Similar concerns exist in the retail industry, particularly regarding the conditions of competition between private labels and national brands in relation with the commercial negotiations between national brands’ producers and retailers. One can question the opportunity to apply a specific framework only to digital gatekeepers and not to any “unavoidable” trading partners.

26 European Commission, case 40462 Amazon Marketplace, statement of objections, 10 November 2020.
27 European Commission, case 40703 Amazon - Buy Box, opening of proceedings, 10 November 2020.
It worth noting that even a discrimination against a trading-partner does not mandatory reduce consumer-welfare. The privileged contractual partner can be the more efficient one and the vertical integration can be beneficial in terms of price, service quality and performance, and to some extend in terms of innovation. A case-by-case assessment is necessary.\textsuperscript{28}

B – Remedies

If we consider the tools currently proposed by competition laws are insufficient to address issues as self-preferencing, what could be the additional tools to add to our arsenal? First, we could discuss on the deterring effect of fines and on the limitations and pitfalls of the behavioural remedies as the ones imposed in the case of Google Shopping or the one of Google Android?\textsuperscript{29} Second, if a regulation is necessary, how implemented a participative, flexible, and light touch one?

The self-preferencing case \textit{par excellence} in the EU case law is undoubtedly the Amazon’s one, presented above. If we need to wait for being able to see how the EU Commission will deal with this case, it can be relevant to investigate the current practices of EU Commission and Member States competition agencies. We previously mentioned that the French Competition Authorities refused to pronounce interim measures requested by online advertising sector firms against Apple (because the lack of demonstration of an immediate risk). Indeed these firms asked for interim measures to delay the implementation of a new procedure for iOS users reinforcing the App Tracking Transparency (ATT) and allowing them to explicitly consent to the commercialisation of their personal data to third parties. If the Competition Authority had refused to impose interim measures, it had decided to analyse the case on the merits. Indeed, even if the procedure proposed by Apple can be seen as necessary to protect consumers and proportionate to this purpose, it remains that the solicitation procedure imposed to third parties differs from the one applied for Apple’s own services. Even, if the commercialization of users’ data differs in the case of Apple from the practices implemented by some of its complementors\textsuperscript{30}, it remains that the procedure imposed to them is an opt-in one while the one applied for its own services is an opt-out one.\textsuperscript{31}

\textsuperscript{28} For instance, see Jacobides et al. (2020) on the economic consequences of a prohibition of self-preferencing on the different digital ecosystems.

\textsuperscript{29} EU Commission, case 40099 Google Android, decision, 18 July 2018.

\textsuperscript{30} The differences of practices in terms of users data commercialization, justifies according to Apple, the differences in terms of consent solicitation between its own services and the ones of its complementors. The French Competition Authority stresses in its decision: “In this respect, Apple considers that ATT solicitation need not apply to its own advertising service, as it does not use individual user tracking techniques, as Apple Search Ads only uses a limited amount of proprietary data generated by the use of Apple's services, in order to aggregate users into cohorts of at least 5,000 people” (French Competition Authority, Decision 21-D-17, §161).

\textsuperscript{31} “For its own advertising services, Apple requires users to go to the iPhone settings and uncheck certain pre-ticked boxes if they do not wish to be subjected to these targeted ads” (French Competition Authority, Ibid, §79).
According to the French Competition Authority press release, in depth investigations have to be performed. The purpose is “to verify that the implementation by Apple of the ATT framework cannot be regarded as a form of discrimination or ‘self-preferencing’, which could in particular be the case if Apple applied without justification, more binding rules on third-party operators than those it applies to itself for similar operations”.

Per-se rules as black listing of self-preferencing can be particularly difficult to craft considering issues related to contractual liberties and ex ante incentives for the dominant operator. This case can be illustrated by three (but related) rulings of the EU Court of Justice in the Slovak Telekom and Deutsche Telekom case. The incumbent in the Slovak telecommunications market (and its German parent company) had been sanctioned for a margin squeeze in the high-speed Internet market. The Slovak operator argued that the EU Commission was obliged to assess if the access to the telecommunication local loop was effectively indispensable to alternative internet services providers to access the market, according to the criteria set by the Bronner ruling\(^\text{32}\) (e.g. to characterise the infrastructure as an essential one). In that case, the EU Court of Justice rejected the claim according to which such a qualification must be performed as the access had been made mandatory by a sector-specific regulation. Nevertheless, it insisted on the fact that an access to an infrastructure developed by an upstream competitor has to be mandate only if this last one controls the market. The purpose is to preserve its investment incentives. The EU Court may also stress the incentives of the new entrants to develop their own infrastructures.

We do not consider here radical remedies as the separation of platforms and commerce as they raise both legal and economic concerns. Both the EU DMA and the British project rely on a regulatory approach. It remains that three paths have to be considered.

The first path can be limited to define ex ante rules imposing positive duties at the benefit to platforms user and prohibiting some practices from the keystone. As we have seen above the difficulty is to define properly these rules of the game (dos and don’ts). The definition of the “dos” are exposed to strategies capture undertaken by complementors. We can go back to the literature developed on the use of antitrust to subvert competition. The “don’ts” may alter the competitive process in itself and not only limit the capacity of the dominant firm to extract the rents produced by its previous efforts. It can deprive consumers to innovate offers or welfare-enhancing bundles.

It raises two types of questions. The first one relates to the costs of errors in antitrust. What are the respective costs of ex-ante (and per-se) rules and the social costs of possible errors arising in an ex-post case-by-case analysis? The second one relates to the risks induced by excessively broad

\(^{32}\) EU Court of Justice, Bronner, 26 November 1998, aff. C-7/97.
prohibitions leading to prevent any risk to distort competition. It could lead to a precautionary antitrust as defined by Portuese (2019). This precautionary antitrust may be destructive in terms of consumer welfare by reducing price competition and – mainly – by impairing innovation capacities and incentives. The CJEU rulings in Deutsche Telekom and Slovak Telekom quoted above illustrate this point.

If we look back at the recommendations made in the DMA (Cabral et al., 2021, p.13), the per se prohibition of self-preferencing also implies the implementation of tools to characterise it ex post. The difficulty underlined by the authors of the report submitted to the European Commission is that self-preferencing does not always take the form of a refusal of access to the platform or a dereferencing. It more often takes the form of manipulation of the rankings. Not only can it not be inferred from a better ranking of the platform’s offer that there is discrimination, but any manipulation of the ranking can be particularly difficult to characterise.

Moreover, a rule of non-discrimination can simply lead to the neutralisation of the factor of belonging to the same group as the keystone in the ranking criteria. A simple control method could be to run the algorithm on historical data twice, eliminating the data relating to the origin of the goods sold in the second time, in order to check that this parameter has been neutralised and that the classification is therefore based solely on the other parameters.

Although this solution is easy to implement, it assumes that two conditions are met.

First, the Commission must have ex post access to data and algorithms (which is provided for in Article 24(2) of the DMA). It must also have the capacity to analyse the behaviour of the algorithm, which implies recourse to external bodies or experts capable of carrying out these assessments. In this respect, the requirements that could be imposed by the DMA could complement the European Commission’s initiatives on the supervision of platform-to-business relations (P2B Regulation of June 2019). These put forward requirements in terms of transparency and fairness in the relationship between digital platforms and the companies that use their services. Transparency and fairness cannot, however, be considered as equivalent characteristics. A high level of seniority on a platform or a high market share can alone explain a better ranking of the internal offer. Transparency – even when reinforced by specific guidelines (European Commission, 2020b) – may therefore be insufficient to prevent biases that can be questioned from a fairness perspective. Requiring the explicability of algorithms is much more important than demanding their transparency (Pasquale, 2017).
Even if some practices related to self-preferencing figure as a black-listed practice in the project of DMA, various stakeholders do consider that its definition is too restrictive. It is for instance the case the BEREC (Body of European Regulators for Electronic Communications) that issued in March 2021 a draft report on the DMA project. According to the BEREC, the don’ts are mainly backward-looking in the sense they are based on past or current EU Commission’s antitrust cases.

We have seen that the two main variants of self-preferencing are covered by the DMA. The first corresponds to an undue advantage for its own downstream services and the second to an advantage given to a downstream operator to the detriment of its competitors, in counterpart, for example, of its commitment to a loyalty mechanism or its payment for ancillary services. The first type of practices can be realised through unfair rankings or steering practices (in the case of a market place). The second type of self-preferencing echoes the notion of second line (price) discrimination (Breard et al., 2008). The same methods as described above can be used here (as unfair rankings, etc.) to favour one complementor against its competitors.

However, according to the BEREC, several other self-preferencing practices not explicitly targeted in the DMA proposal can be implemented. While the article 6(d) effectively forbids unfair ranking in market places, it does not mention explicitly the possibility to implement comparable practices in the case of mobile operating systems. Such a strategy can be followed here through a pre-installation of apps or a default setting. We may also consider the possible bias resulting from discriminations in enforcing contracts’ terms and conditions without reasonable causes.

The practices targeted by the Commission can be expanded to other ones through the flexibility clause integrated within the DMA, even if this last one also raises concerns in terms of Commission’s discretion. Following de Streel and Larouche (2021), it could be relevant to target practices favouring such practices as “conducts having the object or the effect of limiting users switching or multi-homing.”

III – Conclusion

As we have seen in this paper, there are many issues at stake in looking at the efforts of the European and British authorities from the perspective of regulation rather than simply competition enforcement.

First, how to reconcile the speed of market changes with the necessary stability of regulation? The ex-post enforcement of competition law has the advantage to deal with past facts and not to future strategies and potential intentions. Second, if this regulation is dedicated to some given ecosystems (as it will be the case in UK) the regulation is no longer a general framework applied to all the
market players of a given industry but a purely asymmetric one. It can make sense in the case of the opening to competition of previously monopolised sectors by government owned enterprises but it is more difficult to envisage in digital markets. However, two arguments for a sector specific regulation remain. A first one relates to some objectives beyond the scope of antitrust strictly defined, as pluralism, fairness… A second one relates to the capacity of a constant supervision combined with a significant expertise at the technical point of view.

At this stage, we should discuss two points. First, why could not the digital units of the different competition authorities perform as good as a sector-specific regulator in this respect? Second, a large part of these concerns (as self-preferencing) pertains to the conditions of the competition on a platform, e.g. the competition within the market. The opacity of algorithms (and the obfuscation strategies) and the trade secrecy related to P2B contracts make such regulation difficult and intrusive… Legislative interventions may aim at re-equilibrating P2B contracts on fairness and reasonability grounds. If such a purpose is legitimate, is a regulation really the most efficient solution to address these issues? Perhaps, as Nicolas Petit (2020) argues, it is better to promote a competition for the market. The existence of market alternatives in transactions – even potential ones - is the best way to help to achieve a satisfactory balance in transactions and to prevent undue transfers of wealth. The best solution, in this perspective, is not to disperse economic power (or to counteract the capacity of big players to grow) but to act to decrease barriers to entry and to favour innovation.

Unlocking the competition among digital ecosystems can both avoid unfair sharing of surplus and gatekeepers’ control of the trajectories of innovation and competition. Self-preferencing is undoubtedly one of the strategy by which a dominant operator can limit the risk of disruption from inside its own ecosystem and contribute to limit progressively the competition between ecosystems. However, EU experience shows that competition laws enforcement can be insufficient to tackle such practices. The prohibitions of exclusionary abuses and exploitative abuses under article 102 TFEU cannot allow sanctioning self-preferencing practices as the criterion of absolute dominance on a defined relevant market is sometimes unfitted to the situation and as the damage can not only be limited to a consumer welfare one but may be related to market contestability and fairness related dimensions. As Graef (2019) states “EU competition law currently does not offer effective protection […] in the most far-reaching situation where a business is blocked from a platform without legitimate justification.”

Assessing such situations supposes to analyse the harm in terms of economic dependence and can justify to rely on ex ante rules (as P2B Regulation) or to complement competition law with
additional tools whose purposes are not limited to allocative efficiency, as DMA aims at doing. However, if the current situation exposes to a risk of under-enforcement (and false negatives), relying on per se rules (or even reversing the burden of proof) might lead to an over-enforcement (false positive cases). Undoubtedly, it has a potential cost in terms of efficiency. Nevertheless, we have to take into consideration two factors. First, how to arbitrate between short-term efficiency gains and long term risks on the competitive process? A tipping point might involve an irreversible damage to competition according to the different hypothesis that we make on the existence of a possible structural market failure if barriers to entry are too high to ensure the contestability of the market. Second, shall we limit our objective to allocative efficiency e.g. to consider the competition laws only as a consumer welfare prescription? Our assessment can be different as soon as we consider that their purposes encompass the protection of the competitive process, a fair distribution of the transaction surplus, or the economic sovereignty of market players.

33 The use in the internal legislation of the EU Member States of sanctions for abuse of economic dependence based on restrictive practices law and not on the basis of competition one may be particularly interesting in P2B relationships in digital markets in that the standards are considerably less demanding. This could be particularly the case with regard to the issue of the origin of the dependency situation. See for instance the views of Arcelin and Fourgoux (2020, p.140) on the French Competition Authority decision n°20-D-04, 16 March 2020, related to on practices implemented in the sector of distribution of apple branded products.
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