

# Kluwer Competition Law Blog

## Book Review – Self-Preferencing in Online Search under Article 6(5) DMA, by Thomas Höppner

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The rise of digital platforms has revolutionised the global economy, yet it has also introduced a range of regulatory challenges and competitive concerns. This situation has resulted in the creation of vast digital ecosystems. The platforms managing these ecosystems have the motivation and capability to exclude suppliers, allowing them to dominate these markets. While simply having dominance in a market is not a concern for competition law, it is the abuse of this dominance that triggers legal intervention. One significant issue is the practice of self-preferencing, where platform operators prioritise their own services over those of competitors, with uncertainty persisting as to what constitutes the abuse of self-preferencing.

Abuse via self-preferencing occurs when a dominant platform favours its own products or services over those of competitors on its platform. Article 102 TFEU targets this kind of “*intra-platform exclusion*” through the concept of leveraging. However, the complex and dynamic nature of digital platforms complicates conventional legal examination under Article 102 TFEU. Article 6(5) of the Digital Markets Act (DMA) now specifically condemns platform envelopment strategies, where a core platform service encroaches on the territory of vertically competing platforms or services by promoting its own service to offer similar value propositions to end users. These practices are condemned because they hinder market entry, create barriers to entry, increase market concentration, and, thus, restrict competition.

Thomas Höppner’s book, “Self-Preferencing in Online Search under Article 6(5) DMA”, is a meticulous and timely exploration of a pivotal aspect of digital market regulation. Höppner’s research explores the concept of self-preferencing within online search engines, particularly focusing on the legal and economic implications under the Digital Markets Act (DMA).

Höppner begins his research by outlining the principles for identifying distinct first-party and third-party services and the guidelines for ensuring that these services do not confer advantages to the gatekeeper’s services. It outlines the legal framework and definitions necessary for identifying distinct first-party services, which are any offerings by gatekeepers that differ from their core platform services. The summary emphasises the importance of analysing the economic activity and purpose of these services to determine their distinctiveness based on functionality and objectives. Additionally, it underscores the equal treatment mandate, ensuring that third-party services receive the same opportunities and visibility as the gatekeeper’s services. The DMA aims to create a level playing field by mandating transparency, equal updates on ranking criteria, and non-discriminatory access to technological capabilities and data, thereby fostering competition and innovation in the

digital market.

In the next part of the book, Höppner lays the foundational understanding of the DMA's prohibition of self-preferencing, offering detailed guidelines and criteria for compliance to ensure a fair and competitive digital market landscape. This section of Höppner's book is divided into several key areas. Firstly, the author provides an overview of Article 6(5) DMA, by outlining the central obligation of equal treatment under the DMA, aiming to ensure that gatekeepers do not unfairly advantage their own services over third-party services. Höppner highlights the goals of contestability and fairness as the fundamental objectives of the regulation. Furthermore, the research provides an overview of the gatekeeper's conflicts of interest. In this respect, Höppner discusses how the DMA addresses conflicts of interest inherent in platform envelopment strategies, which can harm consumers and businesses by embedding the gatekeeper's own services in search results. Höppner's research also considers criteria for compliance with Article 6(5) DMA, such as disintegrating their own services or integrating third-party services without conferring an undue advantage. The research is also supplemented with a discussion on economic concepts, explaining how integrating additional services can extend a gatekeeper's market dominance and potentially limit competition. Lastly, Höppner provides practical insights into how these regulations can be implemented, including examples of compliant and non-compliant behaviours. The discussion includes the design of online search engines and the potential consequences for gatekeepers who fail to adhere to these standards.

The final part of the book focuses on principles resulting from complying with Article 6(5) DMA. This part outlines key aspects such as the obligations of gatekeepers to prevent self-preferencing, the importance of providing equal opportunities for third-party services, and the criteria for identifying distinct services that must not receive favourable treatment. In this section of the book, Höppner addresses several key aspects of regulatory compliance for digital gatekeepers. He asserts that these gatekeepers must bear the costs of ensuring that their services do not receive preferential treatment over those of third parties, thereby fostering equal opportunities and curbing self-preferencing practices that undermine competition. Höppner highlights the European Commission and the General Court's rejection of Google's technical constraints as objective justifications for self-preferencing in the Google Search (Shopping) case, emphasising the necessity of distinct service identification to prevent favouritism towards gatekeepers' own services. Additionally, he underscores the importance of establishing safe harbour provisions and conducting individual assessments to comply with Article 6(5) of the Digital Markets Act (DMA), ensuring a fair and competitive digital market environment.

Höppner underscores the legal, technical, and economic background necessary for the effective implementation of the DMA, aiming to foster a fair and competitive digital market landscape. The book meticulously explains the nuances of Article 6(5), starting with the condemnation of self-preferencing practices by gatekeepers. It outlines how these practices hinder market entry, create barriers, and increase market concentration, thereby restricting competition. The author provides a clear rationale behind the provision, emphasising the need to prevent dominant platforms from leveraging their position to the detriment of competitors and consumers alike. This book is an essential read for policymakers, legal professionals, and anyone interested in the intersection of technology and regulation.

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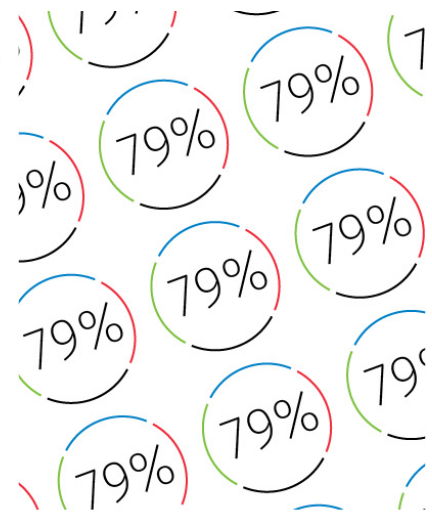
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