Proceedings of the 2nd International Conference on Interdisciplinary Humanities and Communication Studies
DOI: 10.54254/2753-7048/29/20231423

"Self-preferencing": An Analysis on the Way of Anti-Competitive Conduct

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Abstract: Since the emergence of the Google Shopping case, a whole new type of abuse of market dominance has entered the public eye. In an Internet oligopoly, it uses its own company's product advantages in terms of algorithms, data, etc., to limit the competitiveness of its competitors. It is similar to traditional abuses of market dominance, such as tying and refusal to supply. However, it only partially meets all the behavioural elements of traditional monopolistic behaviour. Its widespread use by start-ups to support and protect their growth is not prohibited by law. However, when Internet oligopolies use it to support their products, it creates a monopoly that restricts competition like other abuses of market dominance. There is no clear and uniform definition of this type of behaviour, and the forms of behaviour are often varied, which may lead to abuse of the offence if they are arbitrarily criminalised. Therefore, "self-referral" conduct that can be criminalised should be strictly limited. This type of behaviour is widespread in the Internet sector, which is why countries have introduced laws such as the Digital Marketplace Act and the American Innovation and Online Choices Act to regulate such behaviour. Ultimately, however, the impact of the behaviour on the competitive environment of a typical market and the interests of consumers must be examined from the perspectives of both competitors and consumers to determine whether "self-referral" behaviour is in breach of Article 102 of the TFEU.

Keywords: self-preferencing, Google shopping case, TFEU

1. Introduction

No single doctrine defines "self-preferencing", nor any act defines whether "self-preferencing" is an abuse of a dominant position. Even the most crucial case on "self-preferencing", the Google Shopping case, does not mention it, but the concept was crucial for the decision. Without a uniform definition, there are many opinions about what constitutes "self-preferencing". Some scholars have interpreted it as "a conduct of a large provider of core platform services which consists in favouring one's products and services over those offered by competitors on the same platform." [1] The author believes that is not accurate. Since "self-preferencing" is an act that defines not only the act but also the actor, this definition is a restricted interpretation of "self-preferencing". In other words, it is not so much a definition of "self-preferencing" as it is a definition of "self-preferencing" as a violation of competition law. Other scholars have defined it as "a theory of competitive harm". [2] However, the scope of the definition is too broad, as it covers not only "self-preferencing" as a

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DOI: 10.54254/2753-7048/29/20231423

subset of leveraging in the Google shopping case, [2] but also other conduct such as "refusal to supply", "predatory pricing", and "tying and more", which means that it is an expanded interpretation contrary to the previous definition. The current academic literature on "self-preferencing" mainly focuses on e-commerce. From these cases alone, "self-preferencing" is likely preferential measure companies take to enhance competitiveness for their products or services. Such measures, if implemented by small, uncompetitive enterprises, can protect the enterprises' survival and improve their competitiveness and can be used as a means of protecting emerging enterprises without harming the interests of consumers. The TFEU, [3] therefore, does not explicitly prohibit "self-preferencing". However, if a "dominance power" abuses its dominant position by engaging in such conduct to exclude its competitors from competitiveness, this could restrict competition, create a monopoly and ultimately harm the interests of consumers. [4] In other words, "self-preferencing" should be considered on a case-by-case basis. Even if the conducts are similar in that it involves giving preferential treatment to one's platform or products, the final determination of whether the conduct should be punished should be based on whether the conduct is an abuse of a dominant position, whether the conduct causes harm to the interests of consumers, and whether the conduct restricts competition in the market. This article focuses on the Google Shopping Case, [5] and Google Android Case [6] and the Amazon Case [7] as examples - and some other cases as references for terminological or statutory interpretation - for further analysis and critique of what has been clearly defined as "self-preferencing".

The rest of the paper is organised as follows. Section 2 will mention some cases in which "self-preferencing" are regarded as an infringement of Article 102. [3] The third part will include what kind of behaviour might be regarded as an abuse of dominance and analyse them from both the actors' and the actions' perspectives. Finally, the last section will conclude the different ideas towards "self-preferencing" and the possible future direction of the relevant provisions.

2. "Self-preferencing" as an Infringement of Article 102 of the TFEU: Case and Analysis

In Google Shopping, the Commission's investigation confirmed that Google was the largest, most influential and most dominant search engine in the European Economic Area. In its "general search service" interface, Google used an algorithm that favoured its own service, offering its own platform's Comparison Shopping Service (CSS) a more favourable position than other comparable price comparison services (i.e. competitors) or more visible logos, among other benefits. [8] These advantages can lead to a higher click-through rate and traffic to their links in the Google search interface.

In the course of the case, Google argued that although the "general search service" provided by Google was under the control of Google, a company with a large market share, third-party merchants who refused the services of the Google platform would find it difficult to find such a widespread platform, and it would be detrimental to their development to abandon the services provided by the Google platform. It could be said that Google is "likely to eliminate all competition in the relevant market." [3][9] and that this platform is indeed "indispensable to carrying on that person's business." [3][9] However, the general search service provided by Google is free and open to third parties, and the algorithms used to rank the different links on this platform are free and unconditional, and no restrictions are placed on third parties or denied to any competitor of the CSS service. [8] Therefore, if we refer to the Bronner Criteria for determining whether an act constitutes "refusal to supply", [3][9] it is not appropriate to consider Google's act of modifying its algorithm to its advantage as a monopoly. [8] However, the General Court did not consider it appropriate to use the "refusal to supply" test of the Bronner case in the circumstances of this case. [8] In this case, Google was not refusing to provide a "general search service" to other service providers but was modifying the algorithm by which the service operated so that its own service would not be

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downgraded on the search page because it was not preferred by consumers, thereby gaining a more favourable competitive advantage. [10]

Since this case pioneered the monopolistic practice of “self-preferencing” on digital platforms to restrict competition, this type of unfair competition has been gaining attention. Since Google’s use of its own algorithms to gain a competitive advantage in comparison service offerings, there has been app-related “self-preferencing”. Google requires Chrome to be installed on mobile devices using Android as a pre-requisite for installing the App Store.

Users must first download Chrome to use the App Store to download referenced applications, giving Chrome a competitive advantage in the browser market. [6] It is somewhat similar to a “tying and bundling agreement”, but it is a mutually beneficial agreement between upstream and downstream markets, from monopolising the upstream market to dominating the downstream market. The two are only linked because they are part of the same internet company. In order for Chrome to gain a competitive advantage in the wandering market, Google has taken advantage of the dominant position of the Google Play Store in the application space so that whenever users of Android-based mobile devices need to download Google apps, they must first download Chrome, thus giving Chrome, a relatively unpopular browser among browsers, a higher competitive advantage. Again there is a leverage effect, with Google using its dominance in one market to gain an advantage in another associated market. In addition, there is the competitive advantage that Amazon gains by manipulating “Buybox” or using non-public sales data from third-party merchants to market its own products and make its own retailers and merchants using Amazon’s logistics more attractive. [7]

The combination of the features of several cases shows that the conduct of “self-preferencing”, when found to have the effect of restricting competition, often overlaps with traditional abuse conduct like “refusal to supply”, “tying or bundling agreement” and “discriminatory conduct”, but differs from them in some details. The case of “self-preferencing”, when found to have the effect of restricting competition, often overlaps with the traditional “refusal to supply”, “tying or bundling agreement”, and “discriminatory conduct”, but differs in some details from these acts. The differences will be explained in detail in section 3.2. For example, the Google Shopping Case is similar to “refusal to supply”. However, it does not entirely prohibit competitors from entering the market. It is also similar to “discriminatory conduct”, but the difference in treatment is that “self-preferencing” is a granting of preferential treatment to itself while “discriminatory conduct” is preferential treatment for different competitors. The effect of such “self-preferencing” varies from case to case, so whether such conduct constitutes an abuse of a dominant position is determined by the impact of the conduct on competitors and consumers. In the Google Shopping Case, for example, from the perspective of consumers, Google was able to use this monopolistic conduct to charge other businesses higher fees, and the businesses passed on the costs to consumers to ensure their own interests, which further resulted in consumers having to pay higher prices for the same services. At the same time, such monopolistic behaviour may reduce the range of choices available to consumers or deny them the opportunity to access choices closer to their needs. From the perspective of businesses, unequal competitive conditions can discourage innovation by other businesses that do not have a competitive advantage. It is characteristic of monopolistic behaviour and can ultimately harm consumer interests to the detriment of competitors and market competition.

3. Limitations on the Determination of “Self-preferencing” as an Abuse of a Dominant Market Position

3.1. Limitations of the Actors

As a new monopoly model that has emerged with the development of internet platforms, the study

of "self-preferencing" that can constitute a monopoly is not well developed. This is because, on the one hand, these cases are new and have not been around for long, with the earliest case, the Google Shopping case, occurring only five years ago in 2017. On the other hand, the investigations into such cases take a long time and are very intensive, with the Google Shopping investigation into its data and conduct going back to the CCS (then known as "Froogle") in 2004, [8] and the Google Android Case, which, according to the European Commission's decision, began in 2011, which means that the review of the case went back at least 12 years, [6] and the investigation into the Amazon case began in 2019, and the report was not published until 2020, which took one year and three months. [7] In addition to this, the "self-preferencing" companies that have been found to have abused their dominant market position are invariably large internet companies that dominate their associated markets or have internet-related businesses that are dominant in the relevant areas, and the number of such platforms or The number of such platforms or companies is itself limited. Therefore, although there are not many cases per se, this information in itself is sufficient to qualify the "self-preferencing" abuse of a dominant position, i.e. large internet companies, such as Facebook, Amazon, Google and more in the West, and Alibaba, Tencent, Baidu and others in China.

As different regions are located in different markets and have different market volumes, the conditions to be able to be found to have a dominant market position will evolve different criteria to determine this depending on the market in which they are located. As a result, the frequency of such cases has led to the introduction of different laws regulating the relevant criteria for dominant market position. For example, in Section 2 (5) of the American Innovation and Choice Online Act in the US [11] sets out detailed restrictions for "covered platforms", which are the actors of "self-preferencing", and Article 3. of the Digital Market Act [12] The EEA also sets out the criteria for "gatekeepers" identifying as actors dominating the market. In addition, as can be seen from the cases mentioned above, the subjects of these cases all have one thing in common: they wear several hats. For example, Google is an internet company, a provider of a "general search service", a provider of CSS, a provider of the Chrome browser and a provider of the Google Store platform. Furthermore, Amazon is an operator of a trading platform for major third-party retailers to connect with customers and a merchant with its own products. Some scholars say this is a 'hybrid platform'. [13] The convenience of multi-tasking and the desire to expand has led these companies to use "self-preferencing" as a means of leverage to shelter each other for mutual benefit: to use their dominant position in one market to expand their influence in other markets, to expand together and to monopolise the market. Thus, although not explicitly mentioned in these acts, some official reports do not only propose the prohibition of "self-preferencing" but also the structural separation of platforms in order to minimise leverage. [14] In short, a company can only be considered to have a dominant market position if it meets the legal requirements for its share of the relevant market, i.e. if it meets the criteria of a "covered platform" in the US market or can be recognised as a "gatekeeper" in the European market, or if it meets the legal requirements of the relevant market in other markets. In order to be considered as having a dominant market position, the company must meet the legal requirements of the relevant market. Only companies with a dominant position in the market, which simultaneously "abuse their dominant position" by "self-preferencing", should be guilty of monopolisation.

3.2. Limitations of the Actions

In addition to qualifying the subject of the act, it is also necessary to qualify the main acts performed by these subjects. In light of Section 3(a) of the American Innovation and Choice Online Act which identifies Unlawful Conduct in general [11] and Article 5 of the Digital Market Act about the obligation for gatekeepers, [12] as well as the author's summary of the cases mentioned in

this article, it is possible to classify these acts in practice from the following two perspectives. These acts can also be classified from the following two perspectives.

If the behaviour is classified as positive or negative, it can be divided into positive “self-preferencing” and negative “self-preferencing”. The behaviours mentioned in this paper are all positive in the sense of “self-preferencing”, which means that the platform offers products or services to both itself and its competitors but at the same time gives itself more favourable conditions. For example, the first type is similar to the Google Shopping Case, where more than one large internet company took unequal measures that were not mutually beneficial. Specifically, only the company’s own products or services, or those of its affiliates, have favourable conditions under the same conditions. For example, Google gives an algorithmic advantage to its own CSS, [10] so that even if the same CSS product is more efficient and convenient for other service providers and more popular with Internet users, it is still the less popular Google-provided CSS that appears at the top of Google’s general search interface, thus balancing the loss of user traffic due to the disadvantage of its own product. The negative term “self-preferencing” refers to measures of exclusion or restriction against another person, as described in 3.1. Exclusionary measures such as refusal to provide a particular service or facility are to be distinguished from “refusal to supply” as defined in Article 102. [3] Under the Bronner Criteria, “refusal to supply” requires that the service or facility or licence of intellectual property that is refused must be an essential service or facility or licence of intellectual property that is required by a competitor and must be unique, necessary and irreplaceable. [4] In the case of “self-preferencing”, even if it is not the only necessary and irreplaceable key service or facility or licence of intellectual property rights, it qualifies as “self-preferencing” as long as it constitutes an exclusion for competitors. On the other hand, restrictive measures will provide competitors with the services they require but will disrupt their behaviour and ability to conduct their business normally. For example, by providing the same general search services but for links to their own platform, they can jump in place in one go. In contrast, the pages of the competitor’s platform need to jump multiple times, thus affecting the user’s experience and thus increasing the negative evaluation of the competitor, maliciously downgrading the competitor’s proper ranking in search, or other similar measures. This “mischievous” restrictive approach is less severe than the exploitative initiatives such as “excessive pricing” and exclusionary initiatives such as “refuse to supply” and “predatory pricing” under Article 102. [3] The reason why “self-preferencing” is not explicitly prohibited by the TFEU is that, if we look at the act itself, “self-preferencing” is not as bad and severe as “refuse to supply”, “denial of access to an essential facility”, “excessive pricing” “price squeeze”, and other behaviour which have been clearly identified as abuses. In the US Supreme Court’s anti-monopoly cases, the prevailing view is that “competition is protected but not the competitor.” [15], and that “self-preferencing” by companies with less dominance in the market is not necessarily harmful to competition. “self-preferencing” is not necessarily detrimental to competition but can help micro and small firms to protect themselves so that they can remain in the market longer and increase the diversity of the market. The need to penalise the situation in section 2 of this paper is since such conduct, abused by the leading internet companies, which have unparalleled dominance in their respective fields, constitutes a monopoly which, even if not inherently pernicious, can severely restrict competition and harm the interests of consumers.

If “self-preference” behaviour is divided according to the preference elements involved. They can be divided into data preferences and traffic preferences. Data plays a central role in the operation of digital platforms, and its importance is self-evident. Every time a user browses the web, he or she leaves browsing data behind. By analysing the data, the platform is able to understand the user’s preferences and make a precise push based on them, which is the way to attract users to increase their usage. In the case of shopping websites, the precise pushing of products preferred by

DOI: 10.54254/2753-7048/29/20231423

users can attract customers to buy them. Data preference, as the name implies, is the platform's access to non-public data that is not available to competitors to gain a competitive advantage for its products or services, as in the case of Amazon, briefly mentioned in section 2. The data on "BuyBox", which is not available to competitors, provides an understanding of user preferences and is used for marketing advantage, making the competition between merchants more favourable to Amazon's merchants or those who use Amazon's logistics services. [7] Giving only its platform data constitutes positive self-preference and gains a competitive advantage. Conversely, suppose the platform sets restrictions on crawling others' data by setting up robots, for example, while keeping it open to itself in terms of data sharing. In that case, this constitutes exclusionary "self-preferencing". Traffic preference, traffic in the case of the Internet, is often thought of as the amount of attention gained by the user, which can be reflected in the number of users, the length of use, specifically reflected in the page, is the number of plays, and click-through rate. The Google Android case falls into this category, where the traffic is reflected in the number of downloads. [6] In the Google Shopping case, for example, the Commission's investigation confirmed the fact that links displayed at the top of the "general search service" were more likely to be clicked by users and more likely to receive higher traffic, proving that Google's use of a favourable algorithm to place its CCS at the top to gain a competitive advantage disproportionate to the quality of its own service constituted a monopoly. [5] Of course, the opposite can also be achieved by placing the competitor's service in a less visible location and limiting its traffic to the "self-preferencing" requirement. All these genres are, of course, only a brief and imperfect classification of the conduct. As more cases come to light, more categories and criteria for classification may emerge, and more facilitating will the law in this area develop.

The current research on "self-preferencing" is not sufficiently developed, and current legislation has incorporated the practice into laws and regulations everywhere. However, the most critical anti-monopoly rules do not regulate "self-preferencing". There is also a lack of regulation of "self-preferencing", which can lead to monopolies, as it is a sort of catch-all clause, a "pocket crime". "self-preferencing" generally cannot be punished arbitrarily and can only be criminalised if they meet certain restrictions. Otherwise, the penalty for monopolistic behaviour may quickly become an abuse of the pocket clause. In practice, the "Bronner Criteria" is the main criterion for judging whether the conduct is an abuse of the dominant position. However, it only sets out the most basic directions and principles for judging the abuse of the dominant position. It lacks detailed provisions on what kind of situation is a dominant position and what kind of pricing is predatory. The "Bronner Criteria", a criterion for "refusal to supply", is very restrictive, and not all cases of abuse of a dominant position may meet its requirements. Using the "self-preferencing" criterion is very restrictive, and not all cases of abuse of the dominant position may meet its requirements, especially in the case of "self-preferencing". In the author's view, "self-preferencing", as a form of underwriting monopolistic conduct, will gradually increase in incidence. Due to the increasing importance of Internet companies, including it in anti-monopoly law is necessary. However, strict restrictions should impose on its usage. Otherwise, it will end up as a "pocket crime". Firstly, anti-competitive behaviour that fits the profile of other monopolistic behaviour cannot be defined as "self-preferencing", since they are, according to the analysis in 3.2, less serious than other abuses. Secondly, the penalties for "self-preferencing" must comply both with the conditions of abuse of market position and harm to competition and with the provisions of market-specific laws against unfair competition (e.g. the American Innovation and Choice Online Act, DMA...). Most importantly, the monitoring of conduct, as prevention is far more effective than punishment, should be set up expressly to monitor several core services of large Internet companies and to nip monopolies in the bud before they occur.

DOI: 10.54254/2753-7048/29/20231423

4. Conclusion

Given the above analysis, whether “self-preferencing” constitutes an abuse of a dominant position depends on the circumstances. Although it meets several conditions of “unfair” and “dissimilar” as described under Article 102 of TFEU [3], the critical question is whether “self-preferencing” constitutes an “abuse of dominant position”. However, the purpose of competition law is not to protect competitors but to protect competition so that actors in the market are free to choose whether or not to trade under conditions that are not entirely fair. As with other monopolistic practices, “self-preferencing” is regulated only in the case of “abuse of a dominant position”. The point of this article is that the nature of “self-preferencing” is somewhat different from other classical behaviours that have been found to be abusive. When determining what “self-preferencing” is an abuse of a dominant market position should not be set in stone. In the three cases designed in this paper, the viciousness of “self-preferencing” is not as severe as other monopolistic acts and is easily overlooked. However, “self-preferencing”, as a new type of monopoly that has gradually emerged with the development of the Internet, is bound to become a significant monopoly behaviour in the future when the Internet occupies an increasingly large part of people’s lives. Therefore, it is necessary to define further and analyse the “self-preferencing” that needs to be punished. Already the US, EU and other regions worldwide have either introduced relevant legislation or are preparing to do so. Each of them has proposed different criminalisation criteria depending on the scope and volume of the market. Without a clear and uniform definition of “self-preferencing”, there is a great potential for abuse of the offence, and this is why strict limits exist to what can be criminalised as “self-preferencing”. In summary, whether “self-preference” is punishable should be based strictly on the criteria in Article 102 of the TFEU, [3] the specific laws and regulations of each locality and the extent to which the conduct is harmful to competition in the market and to consumers.

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