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Advertisers as Frenemies?
Or how *Google Shopping* (2021) demonstrates the limits of Article 102 TFEU's theory of harm for search engine market

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Abstract

This thesis is an in-depth study of *Google Shopping* (2021) *and* explores how the case tests the limits of EU Competition Law's ability to respond to novel business practices that arise in the fast-moving, multi-sided digital markets (in this case, the search engine markets).

In *Google Shopping* (2021), Google came under fire for according a more favorable treatment to its own Comparison Shopping Services (CSS) as compared to rival CSS in its online search services. A Comparison Shopping Service is a web-platform that gathers and compares product offers from online sellers, and displays them to users, along with directing such users to the online seller's website to conduct purchases. In its general search engine results, Google was flagged for displaying results from its own CSS on top ranking and prominent spots as compared to those of its rivals. Such *self-preferencing* behavior in *Google Shopping* (2021) was held by the court to amount to an abuse (of Google's dominant position) under EU Competition law.

While Google claims self-preferencing is a normal business practice that allows it to monetize its general search services, such justification, arguably, sits awkwardly against the issues of fair and free competition, and consumer choice—since allegedly users' online shopping behavior is nudged by Google. For the enforcement of EU Competition law, the central questions concern: *what parties* (consumers or competitors*)* are being harmed by such conduct, and *how* are they being harmed. Such questions inform the *theory of harm* that underlies the classification of business conduct as *abusive.*

The thesis investigates this very dialectic of whether *self-preferencing* is—and should be declared—abusive. The thesis conducts doctrinal legal research and engages in a close textual reading of the court's reasoning in *Google Shopping* (2021) along with an analysis of EU Competition case law to delineate the often-murky boundaries of the 'abuse' of dominant position. The thesis combines legal material from EU Competition law with the more recent literature from Platform Economics and Industrial Organization to cast a fresh, multi-disciplinary perspective on the issue of abuse of dominance.

The thesis argues that the EU Competition Law has taken a wrong turn in *Google Shopping* (2021) by declaring self-preferencing conduct to abusive in search-engine market. The court's failure is twofold: firstly, as a matter of legal reasoning, the court's decision is unprincipled and internally inconsistent (incoherent) with the EU Competition law jurisprudence. Secondly, such incoherence extends the theory of harm (and hence the regulatory boundaries of EU Competition Law) too wide, and as a result, it renders EU Competition Law counterproductive in digital markets.

Chapter 1: Introduction

Google Shopping (2021)[1] is a landmark judgement ("the judgement") that marks, ever more so than before the advent of EU Competition Law in digital markets[2][3]. The judgement has provoked an intense debate on whether Google's conduct is abusive under the existing legal framework and policy of EU Competition law. However, the controversial judgement goes beyond that and casts doubt on the adequacy of EU Competition law's regulatory framework when it comes to understanding and regulating the pricing-models of search engines that are characterized by features of digital markets (such as zero-pricing, multi-sidedness, network effects and economies of scope).

Th thesis argues that the General Court (GC) took a wrong turn in the judgement and the court's approach is incoherent with the existing body of EU Competition law. The thesis contends that not only is Google's conduct not abusive, but such incoherence exposes the weaknesses in EU Competition law's theory of harm as it is currently applied in regulating search engines.

In particular, the judgement held that Google's conduct constituted an independent abuse which comprises of two behaviors: a) discrimination and b) leveraging. This thesis asserts that the GC's approach in Google shopping is a creative misreading of EU Competition case law—in that the court is using a mix and match of various legal tests corresponding to separate abuses of dominance—as well as general principles of EU law to come up with an independent abuse. Such an approach reveals an incoherence. Such incoherence leads to two problems. Firstly, it extends the theory of harm too widely and brings the search engine's normal business pricing practices into the domain of abusive practices. This renders the theory of harm problematic as it blurs the distinction between procompetitive and anti-competitive conducts—regulation of only the latter of these being the aim of EU Competition law. Secondly, it reveals that there are no categories of abuse under EU Competition law that can apply to Google's conduct (and by default to search engines), and correspondingly, court's contrived attempts to stretch the categories (of abuse) too wide to fit Google's conduct distorts the purpose and direction of EU Competition law.

It is within this context that the thesis advances that the theory of harm under Article 102 TFEU ("article 102") needs to be reconsidered and broadened in line with the developments of business models in search engine markets. More specifically, this thesis argues that the theory of harm under article 102 should be aligned with the More Economic Approach (MEA)[4].

1.1 Main research questions:

This thesis is guided by two main research questions. Firstly, it asks whether the GC's approach in the Google shopping case in regulating the market for online search engines is coherent with EU case law under Article 102. Secondly, it asks how does Google Shopping decision impacts upon a theory of harm under article 102.

[1] T-612/17 Google and Alphabet v Commission (Google Shopping) [2021]
[2] All footnotes follow this citation style:(author's surname: year, page number)
[3] (Colomo,2022:61)
[4] MEA is defined below in Theoretical Framework section.

1.2 Theoretical framework:

1.2.1 *The European School*

The thesis situates the discussion of the EU Competition Law under the theory of European School. The European School is a paradigm in Competition Law [5]which views EU Competition law as an interdisciplinary field that incorporates an economic and social dimension to its legal framework[6]. The European School views EU Competition law as a unique mix of German Ordo-liberal economic philosophy combined with the integrationist objective of the EU (i.e., its focus on achieving a single economic market, and a common area of freedom, security and justice)[7]. Moreover, the EU Competition law has a marked social policy dimension, as manifested from its concern with creating a European Social market economy[8] as well as from the inclusion of fairness as a potential competition law concern.

As Hilderbrand notes that in more recent years, the EU Competition law has taken a turn towards MEA[9] over the last three decades. The MEA consciously adapts and expressly prefers a greater use of economic theories, and economic analysis in Competition law's enforcement[10]. EU Competition law relies heavily upon economic models, tests and evaluative criteria such as (definition of market structure, effective competition etc. to name a few)[11]. In short, economic reasoning determines the legal thresholds beyond which a conduct can become a Competition Law concern[12]. As Schweitzer and Patel note, the MEA can refer to three different approaches or versions of the role of economics in EU Competition Law[13]. The first MEA version can be seen as advocating a (radical) redefinition of the EU Competition law goals[14]. The second, less hardcore version of MEA can be viewed as advancing an increased use of economic theories and methodologies to ascertain the facts of the case and to establish evidence for legal purposes[15]. The third version can be understood as suggesting that the (existing) economic models of assessing anti-competitiveness (in EU Competition Law) must be reviewed in the light of the advances in economics, with an aim of applying Competition Law in a more precise and unerring manner[16]. In this thesis, the argument for adapting an MEA aligns largely with this third version. Unlike the first MEA version, this thesis does not propose EU Competition law adapting new goals; unlike the second MEA version it does not propose applying new economic tests and/or in areas (under the regulatory domain of article 102) where economic reasoning does not apply already. Instead, this thesis merely asserts that the already established economic reasoning under the As Efficient Competitor (AEC) test and Counterfactual Test should not be discarded. In the strain of the third

[5] (Hilderbrand,2016)
[6] Ibid.
[7] Ibid.
[8] (Jones and Suffrin,2019:37)
[9] The terms MEA and effects-based approach are largely synonymous and are used interchangeably throughout this thesis.
[10] See for instance:(Witt,2016:110-158) and (Mosso,2011:11-22)
[11] (Neven et.al,2006:746)
[12] For a detailed account of the impact of a more economic approach in shaping the trajectory of EU Competition law, see generally:(Witt,2019:172-212) and (Van der Bergh,2016:13-42).
[13] (Wardhaugh,2020:2)
[14] (Schweitzer and Patel,2013:220)
[15] Ibid.
[16] Ibid.

MEA version, this thesis proposes that article 102 jurisprudence must review its treatment of discrimination and leveraging in the light of the new economic evidence.

Thus, on the whole, as a theoretical framework, Hildebrand's European School is a particularly apt choice for this thesis. It is because the judgement involves elements that correspond well with the European School's concerns. Some such elements of the judgement include: I) a considerable focus on fairness as a goal of Competition law, II) an emphasis on preserving competitive structures in the market[17], and the debate on the relevance of economic reasoning in finding an abuse of dominant position on Google's part.

1.2.2 *Primary and Secondary legal sources*

The primary legal sources/provisions of EU Competition law are articles numbered 101 till 109 of the Treaty of Functioning of European Union (TFEU). Article 102 is the core focus of this thesis, since this is the provision that deals with abuse of dominant position and thus applies in the case of Google Shopping. Several key legal concepts under article 102 such as 'abuse' and 'dominant position' are open-ended, and their exact interpretation and scope differs upon the facts of the case as well as upon the economic tests applied to them and the specific interpretative choice of the court[18]. Nonetheless, the legal definitions of types of abuses falling under article 102 such as *tying*, *bundling*, *leveraging*, *exploitative abuse*, *exclusionary effects* as employed in the case law on Article 102 will be taken as given.

Moreover, in the chapter on discrimination, perspectives from the Platform Economics dealing with digital economy and network industries are introduced to highlight how discrimination as a general principle of EU law cannot be extended to article 102 TFEU. Adding insights from platform economics is fruitful in demonstrating flaws with the EU Competition law's questionable treatment of theory of harm in the search engine market.

Likewise, in the chapter on leveraging, economic material from Industrial Organization is introduced as a contrast to challenge the more orthodox ordo-liberal school that forms the economic basis for the enforcement of article 102's enforcement strategies. The inclusion of perspectives from Industrial organization is pertinent here since it sheds light on the failings of EU Competition law in miscategorizing the incentives of dominant firms and informs the argument of this thesis concerning the need for the EU Competition law to renew its MEA focus in search-engine market.

1.3 Research Methodology:

This thesis offers a critical commentary of the legal reasoning in the (2021) judgement. The judgement results from the appeal filed by Google against the Directorate-General for Competition ("EC")'s 2017 decision[19] ("infringement decision") that had found Google to have abused its dominant position in the general search market.

[17] which is one of central tenets of Ordo-liberalism. See:(Gerbrandy,2019:127-142)
[18] See for instance:(Franck,2017:87-114)
[19] AT.39740 Google Search (Shopping)

The critical commentary employed in this thesis engages in Doctrinal Legal Research. Doctrinal legal research refers to '*reasoning about the requirements and applications of law'*[20]. Unlike scientific research, which is largely driven by fact-finding and empirical research, doctrinal legal research is more normative in nature, and concerns itself with analyzing legal principles, and formulating a coherent body of legal rules or legal doctrines[21]. The mainstay of doctrinal legal reasoning concerns the ascertainment of correct interpretation of the law and its application to particular facts of a case. The normative focus of doctrinal legal reasoning goes beyond the issue of *what the law is* to *what the law should be*[22]. Doctrinal legal research is the most common paradigm of legal scholarship within the EU courts' decisions[23] yet it is rarely recognized expressly as a method of legal discourse in the EU law[24].

In addition to the law contained in article 102 (TFEU), the doctrinal research is based upon the interpretation of case law under article 102. The court's case law '*though in theory not formally binding—is often the most important source of law*'[25].

Moreover, this research also draws upon other secondary sources including soft law documents such as the Commission's 2009 Guidance Paper [26]("Guidance Paper"). Furthermore, this thesis also borrows heavily from secondary sources such as case notes, and academic commentary on Article 102, the judgement, and the infringement. Such academic scholarship consists mostly of textbooks, and scholarly articles dealing with the law and economics of article 102. The diverse perspectives from academic commentary will help highlight how the Google judgement is incoherent when situated within the approach/interpretation adapted by the EU Competition law jurisprudence.

1.3.1 *The meaning of Coherence in the context of Doctrinal Legal research in EU Competition Law Jurisprudence*

Since this thesis argues that the judgement is incoherent with the EU Competition law jurisprudence, it is pertinent to provide a definition of coherence. In this thesis, definition of coherence is borrowed from the seminal work of Sauter, who, in the context of EU law, defines "coherence" as "consistency in the service of a particular objective" [27]. Coherence is not a legal term; however, it is a useful conceptual category that is wide enough to incorporate the evaluative/normative dimensions of its (EU Law's) integrity (as a corpus of laws), effectiveness, and legitimacy[28]. Thus, coherence can provide a useful vocabulary to understand how EU Competition law is organized[29].

For a broader appreciation of the significance of coherence as an analytical category, it must also be noted that EU Competition case law adopts various different interpretative techniques. The

[20] (Komarek,2015:28)
[21] (Chynoweth,2008: 672-675)
[22] Ibid.
[23] (Bengoetxea,1993:6)
[24] (Komarek,2015:29)
[25] (Schermers and Waelbroeck,200:133)
[26] 2009/C 45/02
[27] (Sauter,2016:2)
[28] Ibid.
[29] (Sauter,2016:9)

choice of interpretative techniques bears upon the range of arguments that can be made with the discourse of legal doctrinal analysis[30]. Although the EU courts are generally silent on their choice of interpretative methodologies[31], and there is no clear hierarchy of techniques the EU courts use[32], it is widely believed that EU courts largely favor a systematic and teleological approach[33].

The systematic approach interprets the legal text in consideration of the wider context of the legal system, in particular, the text's relation with other legal texts and in line with the sources and general normative framework and interpretative rules/techniques in that legal system[34]. The teleological approach refers to a style of hermeneutics that focuses on the overall goals and objectives of the legal system as a whole[35]. The teleological interpretation *reads* the legal text so as to align it with the goals the legal system is trying to achieve, in this case, the telos being the objectives set in the EU Treaties and the entire corpus of Union law[36].

Thus, this thesis' argument that Google judgement is incoherent means that it fails to fit in neatly with the existing body of EU Competition law jurisprudence, and the stated meta-level goals of EU law, defined broadly.

1.3.2 *A note on the objectives of Article 102 TFEU*

Since this thesis deals with the application of article 102 in the Google case, it is fruitful to provide a brief overview of the aims and operation of Article 102. Together with article 101, article 102 is integral in creating and strengthening internal markets by ensuring 'undistorted competition'[37]. Although what a competitive market structure is, and what undistorted competition is, is left undefined and the meaning owes to the facts of the case[38]. Likewise, the exclusive focus of Article 102 is to prevent the abuse of dominant position that has actual or potentially detrimental effects on the internal market[39]. As discussed previously, the key legal concepts under article 102 such as "abuse", and "dominance" remain open-ended and devoid of any substantive content[40].There is considerable debate among academics and scholars on the goals of EU Competition law. However, some of the most commonly recognized goals of EU Competition Law include ensuring an effective and workable competition in the internal market by removing distortions in the market; safeguarding consumer welfare; enhancing efficiency; achieving a European internal/common market; advancing fairness, and long-term social welfare maximization etc.[41]

However, among all these, this thesis focuses upon the following two: 1) consumer welfare (competitive prices for consumers, more choice for consumers)[42], and 2) maintaining competitive

[30] (Conway,2012:202-270)
[31] (Beck,2012:279-316)
[32] (Conway,2012:202-270)
[33] See for instance:(Conway,2012) and (Beck,2012)
[34] (Komarek,2015:45-47)
[35] Ibid.
[36] Ibid.
[37] (Jones and Suffrin,2019:302)
[38] (Nazzini,2011:156-185)
[39] Article 102 TFEU
[40] Ibid.
[41] For a discussion on the range, and often-contradictory goals of EU Competition law see: (Gerber,2016:85-94);(Stylianou and Iacovides,2022:2-29) and (Dabbah,2010:36-44).
[42] (Bailey and John,2018)

conditions in the market. The reason behind focusing on these two goals is because the judgement itself flags these two goals as relevant to Google's conduct, and how Google acted contrary to these two[43][44].

1.3.3 *Definition of Theory of Harm*

Since Article 102 deals with preventing 'abuse' of competition, it is pertinent to discuss what theory of harm informs the court's assessment of 'abuse' in Google judgement. Unfortunately, Article 102 does not specify what theory of harm informs its application[45]. There is no general substantive test of abuse adapted under article 102[46]. Article 102, while not being exhaustive in its definition of abuse, lists four different types of abuses that are illustrative of the type of conduct targeted under article 102[47]. There are various economic tests and legal requirements that the Commission needs to fulfill/satisfy to invoke each of the types of abuse. The only concrete guidance about 'abuse' is that it is an objective concept[48] and that the assessment of abuse considers the conduct of the dominant form, and its effects on the market[49].

Theory of harm remains a largely unsettled concept in EU Competition Law jurisprudence[50]. Theory of harm is an economic term and does not have a legal counterpart[51].It *'is an economic narrative that enables a competition authority or a court to apply sound economic principles to the facts of a case'*[52]. However, the closest legal concept that can be related to the theory of harm is the ultimate (negative) effect of the abusive conduct of the dominant firm. In Article 102 jurisprudence, abusive conduct can be either exclusionary (leading existing competitors to exit the market or foreclosing market access for future competitors) or exploitative (i.e., unfair pricing practices)[53] that harm competition and consumers[54]

Based on this theoretical understanding of theory of harm, for the purposes of this thesis, the theory of harm here is defined specifically to comprise of the following two issues: 1) the identification of elements of harm in Google's conduct (whether it is exclusionary or exploitative) and 2) how such conduct can be analyzed under the existing legal categories of abuse under article 102.

1.4 Significance of the research:

As Makris argues, EU Competition law is best viewed as 'Responsive Law'. By this phrase he means that EU Competition law is an open normative system (i.e., it is sufficiently flexible and adaptable to accommodate newer types of business conducts). However, such conceptual elasticity

[43] Unless specified otherwise, all para citations in the footnotes refer to T-612/17 Google and Alphabet v Commission (Google Shopping) [2021].
[44] para 553
[45] (Jones and Suffrin,2019:361)
[46] See for instance:(Nazzini,2012:52-103)
[47] Article 102 TFEU
[48] C-85/76 Hoffmann-La Roche (1979)
[49] (Zenger and Walker,2012:185-209)
[50] See for instance:(Parcu and Botta,2021:8-9)
[51] (Bailey and John,2018:177-178)
[52] Ibid.
[53] (Faull and Nikpay,2014:387-392)
[54] (Zenger and Walker,2012:185)

of EU Competition law's analytical categories can also pose a challenge to its integrity[55]. The reason why I chose to focus on the Google Shopping case is because it poses a significant question mark on the coherence (in particular, the *integrity* element) of the EU competition law—and hence on this very dialectic mentioned by Makris. The Google Shopping case tests the limits of EU competition law's ability to adapt and respond to the newer challenges posed by the technological advances in the search engine markets, and more broadly, digital markets.

The rapid technological advances and the emergence of digital markets have given rise to skepticism among antitrust enforcers such as about the monopolization of the market by the dominant firm[56]. Moreover, there have been concerns that in digital markets network effects can create insurmountable barriers to entry[57]. Such market dynamics and technological interfaces have raised calls for the EU Competition law to adopt new legal frameworks and conceptual categories which do justice to the market dynamics in the digital space[58]. For instance, it has been noted that the EU Competition law's tests of defining the relevant market, and its focus on SSNIP test must be modified for digital markets[59]. Likewise, it has been noted that EU Competition law's regulatory focus has been based around price-based abusive practices, and it is thus strained when it comes to search-engine markets that are zero-priced markets, and where firms which enjoy almost-zero marginal costs[60].

Against this backdrop, the judgement represents a landmark decision in that it very boldly terms Google's conduct as abuse what is apparently a common[61] business strategy of online search engines. Colomo argues that the Google Shopping case epitomizes the enforcement rigor of EU Competition law in holding the superdominant firms accountable[62]. Not only is the judgement significant because of the hefty fine imposed on Google, but also because it raises important questions about the continued relevance and direction of some of the most fundamental concepts under Article 102. For instance, one topical concern is whether, in search engine markets, a duty to share access to its services (with rivals) be imposed on a dominant firm in the absence of such services being essential facilities[63]. Although the Google case concerns the regulation of search engine markets only, it has wider ramifications for a fuller range of digital markets. Issues such as these raise questions concerning the appropriate responses of EU Competition law, especially given the wide-reaching effects of digital markets on our social, economic welfare and legal rights[64]. The unprecedented nature and impact of digital markets also pose questions concerning whether Competition law should step aside and let other fields of law such as consumer protection and IP law deal with these issues[65].

[55] (Makris,2021:228)
[56] (Jones and Suffrin,2019:412)
[57] (Maihaniemi,2020:77)
[58] See for instance:(Ezrachi and Stucke,2016)
[59] (Kramer,2020:35)
[60] See for instance:(Jarman, and Orsal,2020:315-337)
[61] (Portuese,2021)
[62] (Colomo,2022:61)
[63] As is conventionally required under article 102
[64] See for instance:(Ezrachi and Stucke,2016)
[65] See for instance:(Edelman and Geradin,2016)

The judgement's bold stance against Google also poses questions concerning the legitimacy of EU Competition law's enterprise as it raises issues concerning judicial activism[66]. This is even more relevant because EU Competition Law, in what could arguably be seen as a *desperate* move, sought inspiration from general principles of EU law (principle of equal treatment) to find Google's self-favoring as a new category of abuse. Such a bold move by the court could be characterized as exhibiting a tendency towards *common-carrier antitrust*[67] involving big-tech giants. Such a move, if seen as excessive, could actually go against consumer welfare and necessitate a new approach to understanding business models in digital economies.

Therefore, as EU Competition law is at cross-roads with other legal disciplines concerning the regulation of digital markets, this thesis aims to contribute towards answering this topical issue of Competition Law's relevance and efficacy in search engine markets. By arguing that an imposition of a general prohibition on self-preferencing (in search engine market) is unsatisfactory, this thesis highlights how the EU competition law has set a wrong precedent as it not only overregulates search engines, but more problematically, it distorts their market dynamics.

In this respect, numerous authoritative accounts on Google have analyzed whether Google's conduct be mapped under various categories of abuses under article 102. Some such categories being: essential facility doctrine and refusal to deal[68], tying[69], leveraging[70], and applying dissimilar conditions to equivalent transactions[71] and the imposition of a general duty against non-discrimination[72]. This thesis consolidates and builds upon such scholarship. While most research on Google has argued why Google's conduct does not satisfy the test of leveraging under EU Competition law, this thesis goes a step further and is more *vocal* in suggesting that is now the time for EU Competition law to reconsider the abuse test in leveraging as a business strategy in search-engine markets.

Likewise, while much of the recent scholarship has discussed whether Google's conduct fits in the test of discrimination under article 102, this thesis establishes how Google's conduct cannot be discriminatory unless EU Competition law radically revises its enforcement strategy and expressly focuses on exploitative conduct as a main category of abuse, or unless it incorporates fairness as a standalone evaluative criterion in digital markets—which, however, is undesirable and will go against the MEA direction in which EU Competition Law should move. Lastly this thesis aims to contribute to scholarship by reviewing the Google case in the light of recent regulatory developments such as DMA and evaluate its impact on search engine markets.

1.5 Justification concerning the scope of the subject matter of thesis

Although cases against Google are a part of the EU's saga of discontentment with big tech firms in digital economies, this thesis only focuses on the Google Shopping decision in the context of online search engines. Due to its timeliness in the wake of EU's recent digital strategies, Google

[66] (Lindebloom,2022:71)
[67] (Colomo,2018)
[68] See for instance:(Mays,2015) (Lianos and Motchenkova,2013)
[69] See for instance:(Edelman,2015)
[70] See for instance:(Hoppner,2017)
[71] See for instance:(Akman,2017)
[72] See for instance:(Vesterdorf,2015) and response to Vesterdorf by (Petit,2015).

case is paradigmatic in that it culminates the case law from over 5 decades of Competition law, and thus provides a unique opportunity to revisit and reflect upon the future trajectories and relevance of EU Competition law in digital space.

Although the Google judgement raises a host of significant issues such as concerning the (narrowness of) definition of the relevant market; problems in establishing Google's dominant position on the given market; burden of proof and the issues of (excessiveness and appropriateness) of structural remedies, this thesis only focuses on the alleged 'abusiveness' of Google's conduct. Thus, this thesis will not engage in the fuller set of legal issues that must be proven under article 102.

The very specific focus of this research is justified by the fact that as compared to other legal questions that the Google judgement gives rise to, the most topical and far-reaching issue concerns the GC's declaration of self-preferencing as abusive. Thus, this thesis only focuses on this element of abuse in the Google decision. Secondly, a more practical issue concerns the limited scope of this thesis, due to which, regrettably, a wider range of important legal and policy issues in Competition Law have to be excluded. It is due to this the thesis only focuses on the ad-based price mechanism of Google search engines and does not consider Google's wider operational and functional issues.

Relatedly, the choice of doctrinal legal research and focus on the case law is an inevitable one since such theoretical-methodological foundation is the widely established paradigm of legal research on the EU Competition Law. Moreover, the selection of case law for discussion is essentially the one the GC itself cites and discusses in its judgement. Thus, this thesis' preferred choice of theory and method is necessary to explain how the judgement is incoherent within the traditional Competition Law framework of Article 102 (i.e., how the court is wrong on its own terms). However, the relevance of adapting a more interdisciplinary perspective is acknowledged and it is hoped that this thesis will inform future interdisciplinary research on the same issue.

1.6 Roadmap—Structure of thesis

The judgement found Google's self-conduct to be abusive and declared that it is a new type of abuse, which can be termed as *discriminatory leveraging*[73]. Discriminatory leverage consists of two distinct types of abusive conduct that have their basis in EU Competition Law under article 102, namely: 1) leveraging and 2) discrimination. This thesis is thus structured so as to singularly focus on the court's reasoning pertaining to each of these above-mentioned elements.

The second chapter assesses the court's reasoning concerning Google's conduct as leveraging. The third chapter evaluates the logic behind the court's treatment of Google's self-preference as a (new) form of discrimination. The fourth (concluding) chapter will situate the judgement in the broader context of the regulation of digital markets—in particular, commenting on the Google judgement's continued relevance after the EU's recent legislative proposal, Digital Markets Act ("DMA")[74].

The fourth (concluding) chapter also summarizes the critique of the Judgement with a view to elucidating how it renders the theory of harm problematic, and to advance that the (*corrective*) way forward for EU Competition Law is through a renewed emphasis on MEA. Lastly, in suggesting this way forward, the chapter reflects on how the ECJ's Intel 2017 decision[75] revives an MEA under article 102, and how such an approach can inspire the ECJ in its upcoming review[76] of GC's decision.

[73] The judgement does not use this term. However, this phrase has been used widely in the academic commentary to describe the court's approach, see for instance:(Ahlborn,Van Gerven, and Leslie,2022:88)

[74] Proposal Draft for Digital Markets Act COM/2020/842

[75] C-413/14 Intel v Commission [2017]

[76] Google appealed to ECJ in January 2022 against the GC's judgement.

Chapter 2: Does Google's conduct amount to Leveraging, and if yes, what's the harm in it?

This chapter discusses whether Google's conduct amounts to leveraging. Before moving further, it is helpful to lay out a general concept of leveraging. Although, there is no received definition of leveraging under article 102[77]—and it is described as a label that covers various kinds of conducts that involve a dominant firm that is active in more than one market[78]—Hoppner notes that the essence of leveraging is the firm (dominant in the first market) trying to extend its influence in the second (often-related) market[79].

This chapter critiques the judgement that held that since leveraging is a general category of abusive conduct, the EC did not have to fit leveraging under already established (specific) leveraging sub-types such as tying, and bundling. The court's approach, this thesis argues, is unprincipled and hence incoherent with the existing EU Competition case law. Due to its incoherent approach, the judgement fails to convincingly point to any anticompetitive harm in Google's leveraging conduct. The judgement's failure calls for a reflection on the Court's theory of harm concerning leveraging: i.e., whether leveraging is harmful in search engine markets or is such conduct economically rational for search engines.

The chapter identifies various clusters of arguments the judgement makes concerning leveraging, and deals with each of them under separate parts.

The first part of this chapter will briefly summarize the court's reasoning concerning leveraging. This will provide a context for the latter parts of the chapter which evaluates the (ab)normality of leveraging in the light of the research from Industrial Organization as applied to digital platforms.

The second part of the chapter will criticize the judgement and explain its incoherence by arguing how it failed to explain the anti-competitive element in Google's leveraging practices. More particularly, this part of the chapter scrutinizes how the judgement failed to explain whether it is the dominant firm's intention to leverage, its change in business strategy, or effects of leveraging—that constitute an abuse.

The third part of the chapter will critique the Court's assessment of effects of leveraging in Google case and demonstrate how the Court's foregoing of AEC test and counterfactual analysis is flawed.

The fourth part—after setting forth in the first three parts how leveraging in Google is not abusive—argues why the Court cannot use the open-textured, non-exhaustive nature of Article 102 to create a new type of self-preferencing based leveraging abuse.

Lastly, the fifth part explains why leveraging is generally seen as abusive under Article 102, and reviews this by introducing evidence from Industrial Organization and Platform Economics to suggest why EU Competition Law should reconsider its theory of harm concerning leveraging.

[77] (Faull and Nikpay,2014:69)
[78] (Padilla and Donoghue,2020:307)
[79] (Hoppner,2017:212-214)

2.1 Summarizing the Court's argument concerning leveraging

In connection to leveraging abuse, Google argued before the GC that EC [in its (2017) infringement decision] had alleged that Google's conduct constituted of 'leveraging' (its dominant market position in General Search market to Specialized search market) without identifying how its (Google's) self-preferencing conduct was anti-competitive[8081]. Google argued that leveraging under Article 102 has many established sub-types/categories, each with its own theory of harm [as contained within respective tests that identify the specific anti-competitive element that needs to be proved (by EC) to establish abuse on the part of the dominant firm][82]. Google asserted that EC did not specify which specific type of leveraging Google had committed and did not satisfy the specific legal test for such type[83]. Therefore, Google argued, EC could not identify how Google's conduct fitted into the anticompetitive conduct categories under leveraging, and thus, failed to establish any abuse on part of Google[84].

In response to Google's argument, the judgement held that leveraging is a generic term for (detrimental) impact (dominant firm's) conduct on one market (where the defendant is dominant) can have on the other (adjacent market, where it is trying to gain influence)[85]. The court noted that under Article 102, the label "leveraging" can apply to different practices that can be abusive in view of '*all the relevant circumstances*'[86]. The court noted that Article 102 is not an exhaustive list of abuses[87]. Here, the court's underlying logic is that since Leveraging is a *general* abuse category, EC did not have to fit leveraging under established leveraging sub-types such as tying, and bundling. Rather, the EC's pleading of leveraging is successful as long as it could show: 1) an anticompetitive conduct, which has 2) (adverse) effects on an adjacent (specialized search) market[88].

2.2 Intention, conduct or effect: What is the abusive element in Google's leveraging?

Moving ahead to an analysis of the GC's treatment of Google's conduct, the most fundamental element of incoherence in the judgement is that it fails to specify what element of leveraging is anticompetitive in EU case law: Is it the desire to expand in a second market (*intent*); is it the change in business strategy to achieve that aim (*conduct*), or is it the effect of such conduct (*effect*) that is abusive? Here, as discussed below, the EU competition case law under Article 102 also seems to present a muddled and incoherent narrative when it comes to finding the abuse element in connection to leveraging.

[80] Unless specified otherwise, all para citations in the footnotes are from the "judgement".
[81] paras 144-145
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] paras 162-164
[86] para 439
[87] para 154
[88] paras 174-175,195

2.2.1 *Inconsistencies in the EU Competition case laws[89] as to the abusive element in leveraging*

Some case law suggests that intent of leveraging is the abuse element. For instance, in *Tetra Pak,* EC seems to express concern over how Tetra's dominant position would be extended from the cartons market to the SBM machine market[90]. Whereas, in the second series of the case, *Tetra Pak II,* the GC upheld the EC's finding and expressed concern more with the 'future conduct' of the firm (after having vertically integrated) rather than with the extension of dominant position for its own sake[91]. Please note that although the court confusingly used the word 'future conduct', it seems to be concerned with the dominant firm's intention. Support of such reading comes the fact that the Court in reaching its decision did not even require any evidence of [current conduct (or strategy) on Tetra's part to exclude competitors, nor did the Court require any proof of anticompetitive effects[92].

Conversely, some case law suggests that the conduct of leveraging is the abusive element. For instance, in other cases, the court and/or competition enforcement agencies seem to worry that vertical integration in itself could allow firms to exclude competitors[93] or vertically integrated firm's increased buying power could cause consumer harm[94], or conduct such as rebates would allow the dominant firm to expand its market power[95]. In this regard, a more remarkable case is *Severn Trent Laboratories*[96], where the defendant was not formally convicted of abuse of dominant position. However, before that stage, the defendant undertaking was subjected to binding commitments to implement certain structural remedies that would remove the defendant's ability to permanently remove "*in an effective and clear manner, a potential avenue for leveraging market power*"[97]. This is even more remarkable because the remedy was imposed even in absence of "*evidence that Severn Trent intentionally sought to exclude competitors in the water analysis market*"[98].

Alternatively, some case law suggests that the effect of leveraging is the abusive element. One such case being *CK Telecoms* where GC held that a change in business strategy after having vertically integrated is not anticompetitive, even though it may lead to disadvantage to competitors[99].

[89] Some of the case law in this section pertains to Merger Control under EU Competition Law, which is not governed under article 102. That said, Merger Control is highly relevant to analysis of article 102 since mergers lead to the merged entities' dominant position and create a risk of abuse of dominance (which is the primary concern of Article 102). On this interconnection between merger control and Article 102 see:(Donoghue and Padilla,2020:309) and (Lorenz,2013:242).

[90] paras 74-78 of T-51/89 Tetra Pak [1990]

[91] para 159 of C-333/94 Tetra Pak II [1996)

[92] (Faull and Nikpay,2014:385-386)

[93] paras 71-81 of C-27/76 United Brands [1978]

[94] para 153 of COMP/M.784 Kesko/Tuko [1996]

[95] para 301-312 of T-203/01 Michelin II [2003]

[96] IB 02/13 [2013]

[97] [OFWAT,2009:7]

[98] [OFWAT,2009:8]

[99] Paras 340-349 and 362-369 of T-399/16 CK Telekom [2020]

Since none of these cases have overruled each other, and in absence of a binding precedent [100] it is difficult to distinguish which approach shall prevail in future cases. These cases reveal that competition authorities and EU courts are at cross-purposes when it comes to identifying what exactly is the anticompetitive element that *triggers* the application of Article 102.

Such confusion also manifests itself in (Google) judgement, which raises questions on the nature and the validity of the theory of harm under the leveraging category of abuse under article 102. The judgement seems to be taking issue not only with effects, but also with conduct and intent. On one hand, the judgement suggests that leveraging is not abusive in itself but abuse depends on effects[101]. Elsewhere, it suggests that the change in Google's is abnormal[102], and *infers* that Google must have anticompetitive intent[103]. Elsewhere, it suggests that due to specific circumstances, the conduct itself comprises of unjustified treatment, and is thus abusive[104].

I will now discuss these three possible options, one by one.

A) If the anticompetitive element is the change in business conduct, then this error in Court's reasoning is partially due to the circular definition of 'competition of merits'[105]. The judgement attributes change in conduct as deviation from competition on merits[106], which is surprising since competition on merits is a vaguely defined concept[107]. It does not comprise of a single legal test, but is a matter of factual assessment[108], and is therefore, criticized as being substantively vacuous, not providing an objective measure of harm,[109] and merely a 'policy slogan'[110]. Based on such deficiencies in competition on merits as a legal criterion, the judgement cannot utilize the term to label Google's conduct as abusive or abnormal without pinpointing what precisely is wrong about its (leveraging) strategy. This is troubling for any sound theory of harm because the same conduct that can have procompetitive rationale or actual effect of increasing efficiencies may also be flagged as anti-competitive.

B) If the anticompetitive element is the dominant firm's intention to extend itself in the second market this makes abuse under Article 102 a catch-all category. Despite the inconsistencies in the case law, it is questionable whether the mere intention to an extension of dominant position from one market can and should constitute an abuse in itself. The EC's infringement decision cites (*Telemarketing*[111]), (*Microsoft*[112]) and (*Irish Sugar*[113]) to suggest Google's intent to leverage as abusive. EC's approach was implicitly endorsed by the (2021) judgement. However, against EC's approach, it could be argued that above-mentioned cases could be read differently, and as involving

[100] see for instance:(Frese,2014:48) and (Jacobs,2014:12)
[101] Para 164
[102] paras 176 and 179
[103] Para 164
[104] para 197
[105] See for instance:(Geradin, Layne-Farrar, and Petit,2012:207-8)
[106] para 175
[107] (Lianos,Korah and Siciliani,2019:6)
[108] See for instance: para, 25 of Commercial Solvents (1974) and (Lianos,Korah and Siciliani,2019:918-920)
[109] (Maihaniemi,2020:106-107)
[110] (Vesterdorf,2015:15)
[111] C-311/84 [1985]
[112] T-201/04 [2007]
[113] T-228/97 [1999]

a substantial anticompetitive effect through an identified leveraging conduct such as: refusal to supply (in *Telemarketing*), tying (in *Microsoft*) and discriminatory pricing (in *Irish Sugar*)[114]. Thus, in absence of proof of abuse, these cases could not be used to support the idea that an intention to extend one's dominant position is a competitive concern in itself[115].

Moreover, even if the leveraging falls under a recognized sub-type, it must still be substantiated by some anticompetitive effect, else leveraging will become an empty category devoid of any meaningful need for identification of dominant firm's conduct. This would be inconsistent with the established theory of harm under Article 102 which takes an issue with abuse of conduct, rather than with the dominance of the firm[116]. Hence, if the judgement becomes a precedent for finding leveraging based on presumed intent, it risks distorting the theory of harm since abuse under Article 102 is an objective concept[117] and focusing on intent alone would make the finding of abuse purely subjective.

2.2.2 *The role of intent in the judgement:*

Although this thesis argues that the court should have adapted MEA, for which the reliance on intent is not strictly necessary, the discussion of the court's problematic treatment of intent that follows is fruitful in highlighting the court's inconsistency. Furthermore, since a sound theory of harm shall be consonant with the incentives a dominant firm faces[118] highlighting any reliance on the inherently vague nature of intent strengthens the case for an effects-based approach, which this thesis argues for.

Due to the evidential difficulties in ascertaining the highly subjective notion of intent, generally, courts have tried to steer clear of relying exclusively on the dominant undertaking's intent.[119] Instead, they have gravitated towards an effect-based standard (arguably, a more objective criterion of abuse)[120]. However, as discussed in the next paragraph, the judgement seems to be introducing an unjustifiable use of intent to find a conduct abusive.

On one hand, the judgement says anticompetitive effects are to be measured objectively[121]. On the other hand, the judgement seems to be sliding towards a more subjective notion of fault (for instance, where it emphasizes how Google's actions of self-preferencing were deliberately planned (i.e., intentional)[122]. Yet elsewhere, the court says the dominant firm's intent can be considered as one of the factors in establishing abuse[123], but then goes on to say that *"the existence of an intention to compete on the merits, even if it were established, could not prove the absence of abuse*"[124].

[114] (Koenig,2019:5)
[115] Ibid.
[116] See for instance: para 42 of AG Wahl's opinion in Intel v Commission [2017]
[117] para 91 of Hoffmann-La Roche v Commission [1979]
[118] (Zenger and Walker,2012:185)
[119] (Nazzini,2011:188)
[120] See for instance this position being supported in a number of leading academic commentaries on Article 102, in particular:(Faull and Nikpay,2014:463,493-494) (Padilla and Donoghue,2020:338-343) and (Ezrachi,2021:239)
[121] para 126
[122] para 287
[123] para 255
[124] Para 277

Confusion abounds when the court suggests that it can use either of the two (effects standard) or (intent alone) to establish an abuse, thus, in a way making the issue of intent-based abuse more unsettled. This can be observed from the following extract from **para 73** the judgement:

"The Commission found that Google could not have been unaware [emphasis added] *of its dominant position on the national markets for general search services or of the abusive nature of its conduct, even though some aspects of the situation had not been examined* [emphasis added] *in previous cases. Google had therefore acted intentionally or negligently "*[emphasis added][125].

Here, the court prevaricates that it can consider intention in establishing abuse, but it does not have to, and even if (lack of anticompetitive) intent is considered by the court, it may not necessarily lead to finding of no abuse. Thus, it appears that the court is having two bites at the apple.

2.2.3 *Pandora's box: Problems with para 73 of the judgement*

Such a broad and unqualified base for liability renders the theory of harm unstable because it means that courts can forget the effect part and focus on the conduct or intent itself. This way, courts can always *manufacture* an abuse. Not only does this allow regulatory shopping for EC, but it renders meaningless the *objective justification* defense allowed to dominant firms under Article 102 TFEU[126]. In support of this argument, consider **para 73** quoted above. In that para, the court seems to imply **all** of the following routes to inferring liability:

a) Google must have been aware of its dominant position and such awareness could constitute an abuse. This suggests that awareness of dominant position *increases the likelihood* of finding such dominant firm's conduct abusive.

b) Google must have been aware of the abusive nature of its conduct and such awareness could constitute an abuse. This suggests that if the firm suspects its conduct is 'abusive', that alone could be used to establish abuse regardless of actual or potential effects.

c) Google could be held liable even though *some aspects of the situation had not been examined.* This base of liability approximates closer to the (traditionally accepted) objective standard of the abuse. However, this seems to impose a strict liability on the firms in the fashion of criminal law. In other words, a firm could be held to have 'abused' its position by a completely benign conduct. Such a basis of liability evidences a tension between the notion of abuse (which may imply *fault*) and procompetitive conduct that inadvertently ends up doing harm. Most problematically, the court is equating awareness of the dominant position and/or the awareness of abusive nature of conduct with intention or negligence. Neither holds true. In typical Criminal law fashion, awareness of a harm occurring is not the same as having an intent to cause such harm[127]. Moreover, an objective standard does not take into account the defendant's subjective state of mind[128].

[125] Para 73

[126] For a summary of scope of objective justification see paras 40-42 of C-209/10 *Post Danmark* [2012]

[127] For a basic distinction between awareness (foresight) and intention, see for instance: (Allen,2019:61);(Simester et al.,2019:166-175)

[128] See for instance: (Loveless, Allen, and Derry,2020:129)

Thus, an analysis of para 73 reveals that the court's guidance on the role of intent in establishing abuse is not clear. Moreover, relying on intent has another problem of dealing with dual intent in the search engine market. Dual intent problem means that a dominant firm may simultaneously have multiple reasons behind its strategies (one can be procompetitive, the other one anti-competitive)[129]. For example, the very same conduct (for e.g., vertical integration leading to lower prices for consumers) can also be interpreted as an attempt to extend dominance by the dominant firm. This is particularly true for digital markets where the firms are not only competing in the market, but also competing for the market[130]. They may be trying to compete fiercely even risking the exit of consumers (potentially anti-competitive) but also trying to gain more network by excluding rivals which can actually benefit consumers, and also give more financial capacity to the dominant firm to keep innovating if it needs to retain its market lead (potentially procompetitive).

Moreover, establishing intention for the sake of establishing abuse is also problematic because as Mahaniemi notes digital markets are highly volatile, and ever evolving[131]. This suggests that a dominant firm may have various motivations and may be just responding to evolving market dynamics by expanding to ensure its own survival rather than intending to foreclose competition.

Secondly, as seen in the Google case, the presumptions about the undertaking's intention to leverage can lead to type 1 errors. Once the court already presumes an intention, it would become very difficult for the firm to successfully plead an objective justification. This is seen as widening the theory of harm. It is because, even otherwise, objective justifications under Article 102 are already very unlikely to be successful[132]. The problem of presumed intention is that it begins to effectively replace actual intention, and thus makes it improbable if not impossible to defend against. This is typified in Google case where we see that Court rigidly insists that Google has to show procompetitive justifications *separately* for the active demotion part of its self-preferencing strategy[133], and cannot plead overall efficiency justification for its overall strategy that includes both active self-preferencing of own material and active demotion of rival CSS.

Relatedly, the court held that efficiency justifications can only be considered at a second stage, only after abuse is established [134]. The Court also held that any efficiencies that Google pleads must not only be shown for Google's active promotion of its own CSS, but also for the demoting part of its strategy[135]. Again, this is problematic for a theory of harm because Google's demotion of rival CSS (by subjecting it to different algorithms) is not separate from its strategy to promote its own CSS. Thus, the court's artificial divide between these two parts of the same strategy is misleading, since it hinders Google from claiming efficiency justifications for its overall 'leveraging' strategy. It also raises problems from the angle of burden of proof and defenses available to Google. This two-stage model of enforcement (first part: establishing abuse, and second part: objective justifications) has been criticized as counterintuitive in the scholarship[136]. It

[129] (Donoghue and Padilla,2020:700)
[130] (Graef,2019:7)
[131] (Maihaniemi,2020:112-113)
[132] (Botta and Wiedemann,2020:392)
[133] para 567
[134] para 188
[135] para 376
[136] See for instance:(Friederiszick and Gratz,2015:691)

is argued that objective justifications/efficiency gains shall not be considered as a defense, but as part of assessment before any finding of abuse[137].

This brings us to the question of whether the anti-competitive element of leveraging is its effect in Google case.

C) If the anticompetitive element is the effect of dominant firm's conduct, then the judgement failed to highlight the two key anticompetitive elements, it alleges Google of, namely a) exclusion of competitors, and b) harm to consumers. In the context of EC's (2017) infringement decision, since the scholarship has already dealt with and in a largely exhaustive manner how Google's conduct does not lead to consumer harm and foreclosing effects[138], I will not discuss this issue further. However, to contribute to the scholarship, I am going to discuss an important issue here, which arises in the (2021) judgement. Such issues being the court's argument that concerning the anti-competitive effect of Google's leveraging there is no need to satisfy either AEC test[139] or a counterfactual analysis[140]. Before proceeding to analyzing the court's argument, it is helpful to lay out definitions of AEC test and counterfactual analysis.

AEC is one of the economic tests that help determine the anticompetitive effects of the dominant firm's conduct. Such conduct is anticompetitive only if it is likely to exclude from the market (on which the firm is dominant) a competitor which is at least as efficient as the dominant firm[141].

Counterfactual test involves a hypothetical assessment of what the market situation would have been in absence of the dominant firm's conduct (that exists as a matter of fact)[142]. Thus, the test tries to see the extent of damage if any caused by the dominant firm's conduct by comparing the effects/situation with and without the conduct[143]

2.3 Foregoing AEC test and counterfactual analysis: How the court's assessment of effects of leveraging is flawed

By exempting EC from proving the harm to an AEC standard, the court seems to go against the general grain of the established case law on leveraging. Such case law requires that regardless of the types of leveraging abuse—and regardless of all the theoretical and practical limitations of AEC test—finding of abuse requires the demonstration of exclusionary effects on competitors at least as efficient[144]. As its rationale, the judgement noted the EC does not need to use an as efficient competitor test because such a test only applies when the conduct is price-based. This is

[137] (Lianos, Korah, and Siciliani,2019:928)
[138] For a very convincing case for how the 2017 EC infringement decision fails to prove how Google's conduct leads to consumer harm and foreclosing effects, see:(Renda,2015); (Akman,2017);(Lang, 2016);(Papp, 2015) and (Bergqvist, 2018)
[139] para 539
[140] paras 373-381
[141] (Mantzari and Gaudin,2022:127)
[142] (Veljanovski,2010:437-438)
[143] Ibid.
[144] (Hoppner,2017:208-221)

questionable because if the court can abstract general principles from price-based abuse case law (e.g., *Deutsche Telekom*)[145] in one part of the judgement[146],why could it not do so in the other part?

Such incoherence on the court's part has practical disadvantages for litigants. In the absence of AEC analysis, the EC can, instead of demonstrating empirically an objective proof of the anticompetitive effects, may simply substitute its own findings of abuse by drawing heavily on the dominant undertaking's *presumed* intention. Likewise, foregoing counterfactual tilts the burden of proof[147]. The court noted that EC had introduced evidence, but that Google failed to rebut the evidence produced [148]. This implies that EC can present whatever questionable findings it makes by studying the evolution of the market and shifts the onus to Google. This makes the pleading of objective justification [149]. If a counterfactual analysis would have been conducted in the Google case, it would have demonstrated that Google's conduct is not anticompetitive since consumers are not significantly better, and that advertisers are not significantly worse off in absence of Google's lack of self-preferencing[150].

Therefore, given such problems, it is suggested that courts when applying Article 102 shall adopt an MEA. The judgement as a case in point demonstrates how without a solid economics-backed effects-based reasoning, the theory of harm risks becomes formalistic, and reveals how enforcing Article 102 without first offering a clear and substantive test of when the dominant firm's conduct becomes abuse is tantamount to putting the cart before the horse.

2.4 Why can the Court not use the open-textured, non-exhaustive nature of Article 102 to create self-preferencing as a new subtype?

Since the court failed to identify the anti-competitive element and to explain the case as one of the existing categories of leveraging, it tried to circumvent the problem by creating a new type of leveraging where abuse lies in self-preferencing itself. To do so, the court (relying on *Continental Can*[151]) invoked the open-textured nature of Article 102 and held that art.102 should not be seen as an exhaustive list of abuses[152]. The court underscored that the form or category of abuse does not matter; instead, what matters is the substance of the conduct, and whether it is abusive[153].

However, the court ignores the proper context of the Continental Can case. In *Continental Can* itself, the ECJ argued so – because at that time (in 1973) there were no special laws to regulate Mergers/Acquisitions[154]. Thus, such teleological interpretation of Article 102, at the time, was intended to provide a basis for regulating a field for which no specialized branch of law existed[155]. However, the court's application of such case law in Google Shopping to extend Article 102 to

[145] C-280/08 Deutsche Telekom [2010]
[146] para 180
[147] (Mouton and Reed,2022:154)
[148] para 443
[149] see for instance:(Friederiszick, and Gratz, 2012:6-45)
[150] See footnote 138 on the EC's impossibility to prove consumer harm and exclusionary effect.
[151] C-6/72 [1973]
[152] para 154
[153] para 335
[154] (Padilla and Donoghue,2020:315)
[155] Ibid.

create a new type of leveraging abuse is unwarranted because a year before the Google judgement, the EU had proposed a draft a European Digital strategy in the shape of Digital Markets Act (DMA)[156] and Digital Services Act[157] . Moreover, without first establishing a theory of harm and delineating the boundaries of abuse, a retrospective finding of a duty violates legal certainty[158].

Secondly, caution should be exercised in creating a new sub-type of leveraging abuse without satisfying any substantive legal tests because the status and nature of leveraging as an abuse is unsettled. There is no universally established definition of what leveraging exactly comprises [159]. Leveraging is not an independent abuse in itself[160], but a common denominator of various kinds of anticompetitive conducts that involve more than one market[161]. Consequently, it generates confusion in the theory of harm if the court creates a new abuse without applying and justifying an adequate legal standard.

2.5: The need to revisit Leveraging in EU Competition law in the light of the evidence from Industrial Organization and Platform Economics

When it comes to assessing the 'abusiveness' of leveraging practices, EU Competition law recognizes a type of leveraging that is defensive in nature (i.e., to retain one's own position in the market)[162]. If leveraging is seen as defensive, Google's self-preferring may be viewed as a natural consequence given the market structure of search engines. In support of leveraging, Donoghue and Padilla note that in EU Competition law, leveraging has acquired a negative connotation, and that this needs to change in the light of more recent economic literature. One possible reason for such a negative view of leveraging is because Article 102's jurisprudence does not incorporate the more recent economic studies that reveal procompetitive rationale of vertical leveraging[163]. Yet another explanation is that the court's fear concerning the negative potential of leveraging in EU merger control has spilled over to the case law under article 102[164].

In the literature on Industrial Organization, leveraging has been defined as an envelopment mechanism through which '*the enveloper might enter the target market and, at the same time, bend the origin platform's rules to provide a better outcome* [emphasis added] *for its own products or services*[165]. Thus, leveraging can be economically rational in consideration of the industry's specific market structure, and the incentives for firms to evolve their business strategies[166]. This is especially so when a digital platform moves from a zero-priced model to a hybrid one, where revenue is generated from multiple sides. For example, instead of just receiving advertising money, Google can now market its own services etc. by introducing complementary services such as

[156] [COM/2020/842]
[157] COM/2020/825
[158] (Bouzoraa,2022:144)
[159] (Colomo,2018:212)
[160] (Donoghue and Padilla,2020:310)
[161] (Eben,2018:147-148)
[162] See for instance:(Schmidt,2009:31) and (Coombs and Subiotto,2009:343)
[163] (Donoghue and Padilla,2020:309)
[164] (Donoghue and Padilla,2020:309)
[165] (Condorelli and Padilla,2020:10)
[166] Ibid.

Comparison Shopping. There may be a justifiable incentive for it to change its strategy since Google can now arbitrate between the various sources of revenues[167]. For EU Competition law purposes this means that leveraging may not necessarily be anticompetitive since it may not always (and unequivocally) lead to a decline in consumer welfare[168]. For example, leveraging through tying can be an economically sensible way to increase participation of users and advertisers on both sides, and to improve coordination in two-sided markets in cases of a monopoly[169].

Thus, evidence from Industrial Organization also supports the argument that leveraging and change in business strategy in itself should not be described as (categorically) abusive, because entry into complementary markets can also have positive welfare effects[170].Likewise, studies in Platform Economics suggest that leveraging can be a perfectly rational business conduct in digital markets since network effects can create efficiency gains for the supplier. For example, while maintaining a general search engine, Google's marginal cost of offering further specialized services such as Comparison Shopping are less. As mentioned earlier, since internet platforms thrive on user's attention and data, the digital tech-giants may find it perfectly rational to keep their users in the same circle (I.e., by offering specialized services such as Gmail so that the Google search engine user does not leave Google's network)[171].This argument is known as Minimum Spanning Tree[172].Minimum Spanning Tree may not necessarily lead to loss in consumer welfare[173] since demand-side economies of scale also result from network effects. Such demand-side economies manifest themselves, for instance, in the low cognitive cost for users[174]. Users may find it easy to stay on Google network and have their email and entertainment products because they can have a more integrative experience rather than using a different email server such as Yahoo[175]. Therefore, while assessing the abusiveness of search engine's activities, Parker and Van Alstyne caution against reading too much into the status of the platform as a social planner charged with optimizing the welfare of all stakeholders[176].

In sum, the realization that leveraging may increase consumer welfare and create efficiencies in the digital ecosystems lend support for the EU Competition law to adopt a case-specific effects-based approach[177] in digital markets.

[167] For an account of online platforms' incentives to start introducing their own products, see generally:(Belleflamme and Peitz,2021:133-139)
[168] (Choi,2010:607-620)
[169] (Amelio and Jullien,2012:437)
[170] For a discussion of procompetitive effects of leveraging see generally:(Donoghue and Padilla,2020: 1062-1064); (Evans and Salinger,2005:37);(Choi and Stefanadis,2001:52-70).
[171] (Maihaniemi,2020:139)
[172] Ibid.
[173] (Shoham and Leyton-Brown,2012:397)
[174] (Maihaniemi,2020:139)
[175] (Maihaniemi,2020:169)
[176] (Parker, Van Alstyne and Choudary,2016:201)
[177] (Alimonti, Neurohr and Ralston, 2021:144)

Chapter 3: A critique of the Court's reasoning concerning discrimination

As mentioned previously, the Court held that Google's self-preferencing conduct was abusive under Article 102, and such abuse amounts to *discriminatory leveraging*. In order to come up with this new kind of abuse, the court relied on two already existing categories of abusive conduct, namely: 1) leveraging, and 2) discrimination.

While the first chapter reviewed the court's treatment of the issue concerning leveraging. this chapter will proceed to critique the court's reasoning concerning discrimination. This chapter argues that the court's finding of a duty against self-preferencing not only unsettles the EU jurisprudence, but also unsettles the theory of harm for firms in digital markets, where self-preferencing is often taken as a normal business practice.

In essence, this chapter explains how the court essentially skipped the discrimination-based test under Article 102(c) and tried to create self-preferencing as an independent abuse. The chapter argues that since 102(c) does not apply here, there is no other way to import discrimination-based duty into Competition law unless the existing (exclusionary-abused based) framework of Article 102 is reconfigured.

Moreover, the chapter contends that hypothetically, even if it assumed that EU Competition law jurisprudence or general norms of EU Constitutional law lend to such an argument which supports a duty not to self-prefer, it can be argued that such a duty would disincentivize digital markets, and thus, go against one of the fundamentals of EU Competition law, which is to promote competition[178].

The chapter is structured in two parts.

Part I lists the court's line of argument concerning discrimination and analyzes various aspects of the court's reasoning. This part demonstrates how the court's reasoning misaligns with the normative-interpretative context of EU Constitutional Law and is incoherent with the assumptions of EU Competition Law. Part 2 elucidates on how such incoherence in the court's reasoning renders the theory of harm under Article 102 problematic.

[178] For goals of EU competition law, see generally:(Parrett,2012:61-84)

3.1 Summary of the court's reasoning and the critical evaluation of the court's reasoning

3.1.1 *Summary of the Court's reasoning concerning discrimination*

For an ease of analyzing the incoherence in the court's approach, the court's reasoning is broken down into 4 distinct steps.

1) Discrimination as an independent abuse: Firstly, in order to create a new general duty not-to-self-prefer, GC emphasized the non-exhaustive nature of Article 102 (relying upon *Continental Can*[179]) and on its judicial capacity to flesh out a new, independent type of abuse within the Art.102 framework[180].

2) The court's invoking of non-discrimination as general principle of EU law*:* Secondly, the court noted that such an abuse may consist of 'an unjustified difference in treatment' (citing *GT-Link*[181], *Aeroports de Paris*[182], *Irish Sugar*[183])[184]. The court (citing *Arcelor*[185]) noted that "*principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently*"[186].

3) The court's drawing parallels of internet search engine with mobile Telekom sector: Thirdly, the court noted that in mobile telecom network operators, Regulation (EU) 2015/2120 and Directive 2002/22/EC **and** Regulation (EU) No 531/2012 impose on mobile phone network operators '*a general obligation of equal treatment* [emphasis added], *without discrimination, restriction, or interference with traffic, from which derogation is not possible in any circumstances by means of commercial practices*'[187].

4) The court invoking *Deutsche Telekom* to support equality of opportunity as a condition for competition on the merits: Fourthly, the court (citing *Deutsche Telekom*[188]) noted that competition on the merits can only take place '*if equality of opportunity is secured as between the various economic operators*'[189].

Article 102 already contains discrimination-based abuse, which is contained in 102(c)[190]. However, since the court did not use 102(c), but tried to establish discrimination as an independent abuse, I will not analyze the test under 102(c) further[191]. The rest of the elements in the court's reasoning are discussed one by one.

[179] C-6/72 [1973]
[180] para 154
[181] C-242/95 [1997]
[182] C-82/01 [2002]
[183] T-228/97 [1999]
[184] Para 155
[185] C-127/07 [2008]
[186] para 155
[187] para 180
[188] C-280/08 [2010]
[189] para 180
[190] For an overview of the objective, scope and legal framework of art.102(c) see generally:(Donoghue and Padilla,2020:957-1022)
[191]For an exhaustive account of why article 102(c) does not apply to Google, see

3.1.2 *A doctrinal critique of the Court's Reasoning*

3.1.2 (a) *Why discrimination cannot be an independent abuse—mainly because discrimination boils down to either exploitative conduct or exclusionary one*

Since the issue concerning the non-exhaustive nature of Article 102 was dealt with in the previous chapter, it will not be repeated here. Instead, the chapter proceeds to discuss why discrimination cannot be an independent abuse.

A survey of pre-Google case law reveals that discrimination cannot be an abuse in itself unless coupled by exploitative conduct[192]or exclusion[193]. This suggests that discrimination in and of itself cannot be a substantive legal test to find a firm's conduct abusive because discrimination itself boils down to either exploitation (which harms consumers) or exclusion (of competitors)[194]. This is abundantly manifest in Article 102 scholarship that dovetails discrimination into either exclusionary or exploitative abuses. For instance, Hornkohl notes that while secondary-line discrimination can be both exploitative and exclusionary, the general tenor of her argument seems to suggest that Google's secondary-line discrimination is a sub-category of exploitation[195]. Conversely, Geradin and Petit observe that in many exclusionary abuses under Article 102, there is an element of discrimination involved. Some such abuses include rebates, bonuses, and selective price cuts where dominant firms offer heterogenous incentives to its downstream trading partners[196].

Thus, it's hard to find an instance of benign discrimination in EU case law where there is no exploitation (due to discrimination hinging upon unfairness issues)[197] or exclusion. In fact, in cases that involve discrimination by dominant firm against downstream trades even the courts themselves are not always careful in distinguishing between exploitative effects and exclusionary effects[198]. Moreover, discrimination cannot be an independent abuse because it's not even clear whether secondary line discrimination (i.e., where the firm discriminates in favor of its own downstream services as compared to rivals on downstream market[199]) is problematic per se. For instance, AG Wahl remarks that: "*In so far as this latter type of price discrimination is concerned, the exclusionary effect and the effect of restricting the competitive process are not always immediately obvious*"[200]. Given such ambiguity concerning the problem in identifying why or how discrimination is abusive in itself, it makes perfect sense why discrimination (as an independent

generally:(Akman,2017:327-336). For an overview of the legal test to be satisfied under Article 102(c), see:(Layne-Farrar and Stuart,2013:555-614)

[192] para 36 and 79 of C- 525/16 MEO [2018]. Also see:(Ritter,2019:273-274) on a commentary on price discrimination as abuse under article 102 in the context of C-525/16 MEO.

[193] See for instance:[para 8 of C-209/210 (2012)] and [para 45 of C-165/19 (2021)]

[194] See generally:(Akman,2009:165-188)

[195](Hornkohl,2002:101-106)

[196] (Geradin and Petit,2005:20)

[197] (Jones and Sufrin,2019:32-33) and (Gerard,2005:3)

[198] (Donoghue,2018:443-444)

[199] (Hornkohl, 2022:100)

[200] para 74-75 of AG Wahl's Opinion in C- 525/16 MEO [2018]

abuse) hasn't had its day in Competition law (other than under the category of price-based abuses)[201]

Counterintuitively, while the judgement is trying to cast its net wider, its test for discrimination as an independent abuse is very clumsily formulated, and inadvertently ends up being very difficult to satisfy. This new test requires two elements: 1) unjustified treatment, and 2) exclusionary effects[202]. The judgement implies that for discrimination (as an independent abuse to be established) the plaintiff does not have to demonstrate evidence of either exploitation or exclusion, but of both[203]**.** Thus, Google's raising of discrimination as an independent abuse fails to offer anything new or easier for the EC to work with. Moreover, as discussed in the next paragraph, the court's invocation of Discrimination being a general principle of EU law is uncalled for to achieve a what is essentially a *repackaging*[204] of the already existing case law.

3.1.2 (b) Why the court's attempt to import the constitutional principle of Non-discrimination into Competition law is flawed

Firstly, the cases cited by the court[205] in support of its proposition (that unjustified treatment can qualify as grounds for a new abuse), namely Irish sugar[206], GT-Link[207], and Aeroports de Paris[208] cannot be invoked here. All these cases concerned incumbents, and Google's factual situation differs from those. For example, *Irish Sugar* concerns a former state-owned monopoly[209], *GT-link* concerns a state-run transport company[210], while *Aeroports de Paris* also concerns a public aviation authority[211].

Secondly, and more generally, the court's reliance on non-discrimination as a general principle of EU law to import such a duty into EU Competition law is misplaced. The court's treatment of the equal treatment principle is quite simplistic and ignores how the concept appears in the paradigm of EU Anti-Discrimination framework, where principle of equal treatment operates at many different normative levels and performs various functions[212].

In the hierarchy of norms, the reference to Principle of Equal Treatment in Treaties and in the Charter is to be understood as the norm operating at the first tier. At this tier, the principle serves as a fundamental human right as well as a constitutional benchmark for judicial review[213]. This must be contrasted with the principle operating at a second tier: i.e., the sector-specific incorporation of the principle of equal treatment where it appears to have a dual function: as a

[201] (Colomo,2014:149)
[202] para 152
[203] para 518
[204] See for instance, the caselaw under article 102, discussed in (Hornkohl,2022:104-110).
[205] Para 155
[206] T-228/97 [1999]
[207] C-242/95 [1997]
[208] C-82/01 [2002]
[209] para 103 of T-228/97 [1999]
[210] para 3 of C-242/95 [1997]
[211] para 77 of C-242/95 [1997]
[212] (Zaccaroni,2021:4)
[213] (Muir,2019:818)

regulatory tool and as both an exercise of and limit-setter of EU competence[214]. When the principle of equal treatment operates at the second tier, such dual functionality of the EU norms constrains the scope and exercise of EU law in the specific field[215]. Put simply, the sector-specific regulatory goals will prevent wholesale importation of general principles of EU law.

EU Competition law rules are to be understood in the overarching Constitutional law of the EU, of which it forms a part[216]. Thus, if there is a specific incorporation of anti-discrimination provision in the field-specific legal framework (second tier), that will take precedence over the more general principle of Equality operating at first tier. As Muir notes "*constitutional benchmarks may only apply within the scope of application of EU law so that it is natural to first look for rules of EU law regulating the field*"[217]. Even in the cases where both specific legislation and the constitutional benchmarks jointly apply, the content of specific legislation will take precedence in applying to the substance of the matter, and equal treatment principle under CFR (which GC invokes[218]) would not apply[219].

Applying this to the court's reasoning in Google, one can argue that for the want of a compelling justification, the Court *cannot* invoke the first-tier principle of equal treatment and bypass the already sector-specific discrimination-based abuse that already exists under Article 102(c).

Moreover, even within the EU Anti-Discrimination framework, nondiscrimination is not the same as equal treatment[220]. Equality is seen as a broader ideal, whereas discrimination is a specific instance which violates the principle of equality[221]. Thus, even if self-preferencing is seen as a violation of discrimination it does not automatically follow that Google has breached the obligation of equality under EU law so as to impose upon it an obligation to maintain equality of opportunity.

Likewise, the judgement mentions *Arcelor*[222] in support of extending the duty of non-discrimination to Article 102 jurisprudence[223]. However, the court fails to notice how *Arcelor* concerns the imposition of duty on EU member states when implementing EU law in their own domestic legal order and does not concern the extension of such duty to private undertakings (dominant firms) under Article 102[224].Secondly, in *Arecelor*, there was no sector-specific legislation that incorporated the non-discrimination principle, due to which the court had to seek recourse to the general principle of equal treatment under EU law[225]. However, in Google we see that sector-specific discrimination law is found under Article 102(c) which the court conveniently sidelined without an adequate explanation.

[214] (Muir,2019:819)
[215] Ibid.
[216] See for instance:(Lianos,2019:45-87) and (Claassen and Gerbrandy,2016:8)
[217] (Muir,2019:824)
[218] para 622
[219] (Muir,2019:830)
[220] See for instance:(Mccolgan,2012:14–37)
[221] (Somek,1999:243)
[222] C-127/07 [2008]
[223] para 155
[224] (Ahlborn, Leslie and Van Gerven,2022:97)
[225] paras 23 and 39 of C-127/07 [2008]

3.1.2 (c) Inaccurate Parallels with mobile telecom sector

It is argued that EU regulations quoted by the Court in mobile telecom industries are governed by different goals and considerations than in EU competition law, and hence, the duty in that context should not be extended to search engines as easily and without more. Firstly, services offered by mobile network operators differ from internet search engines. Search engines, by their very nature, capitalize on their ability to offer a personalized, highly specific search result[226]. Each search engine has its own network of users, and data collected from such users, and algorithms that categorize and rank information on the internet in a unique configuration[227]. Even if the same words are used in a search query by two different users, the results may vary based on their cookies, and prior search history[228]. All this suggests that search engines always offer a highly personalized result. Their situation is not analogous to mobile network operators, where the products offered usually converge on the same technical standards such as speed of data, volume and bandwidth etc. for all mobile operators[229]. Thus, the product from one company is largely homogenous and mutually substitutable to the products of other mobile telecom companies[230]. It is probably due to these reasons that the EU regulations in mobile telecom do not allow for legitimate "commercial reasons"[231]. However, EU Competition law has traditionally recognized objective justifications for discrimination[232].

3.1.2 (d) Why equality of opportunity is not the same as undistorted competition, and how the Court ignored the wider context of Deutsche Telekom

Firstly, the court seems to equate competition on the merits with equality of opportunity and fails to see that they may not be the same. In fact, they may require completely opposite responses. For instance, consider a situation where a firm has acquired an IP right based on their innovation and R & D. Denying access to such IP right may be in line with competition on the merits (since competition is not hurt by not sharing, but the duty to share may harm competition and disincentive firms)[233]. However, on the same facts, equality of opportunity may require sharing such access. Google's Algorithm could be seen as a quasi-IP law issue[234] since the court can be seen as forcing Google to provide access to rival CSS of its Panda algorithm (which constitutes a trade secret) on the same terms as Google does for its own CSS.

Secondly, the underlying assumption in the Court's reasoning appears to be that 'equality of opportunity' is the theory of harm in **all abuses** under Article 102. If it were not, the Court would not be equating equality of opportunity with *undistorted competition,* which is a general, all-encompassing goal of EU Competition Law. It is only due to this undercurrent that it makes sense for the court to attempt to extend this principle of equality to the Google case. However, the court's

[226] (Maihaniemi,2020:103)
[227] (Grimmelmann,2010:443)
[228] (Vijaya and Chander,2018:229)
[229] (BEREC Report on the convergence of fixed and mobile networks, 2017)
[230] Final Report Expert Group for the Observatory on the Online Platform Economy: Work stream on Differentiated treatment ("Progress Report",2020:11)
[231] para 180
[232] See for e.g.: (para 115 of C-525/16 *MEO,* [2017]) and (para 28 of C-106/83 *Sermide,* [1984])
[233] (Donoghue and Padilla,2020:87)
[234] See for instance:(Nazzini,2017:299-300)

assumption is controversial because before the Google case, the case law does not contain strong unequivocal evidence of a general duty not to discriminate against rivals[235].

Thirdly, and most importantly, the court misunderstands the context of *Deutsche Telekom*. Deutsche Telekom concerned margin squeeze where such abuse is already a recognized category of harm. *So, the equality of opportunity dimension is extra*, and even without this aspect, the conduct could be found abusive due to exclusionary effects. For example, another such margin squeeze case where equality of opportunity dimension did not feature is *Kingdom of Spain*[236]. Thus, the court's incoherence in using margin squeeze cases to support creating a new duty of self-preferencing risks regulatory arbitrage on the EC's part (i.e. EC may now frame margin squeeze abuses as self-preferencing ones to take advantage of the latter being prima facie abusive, after Google Shopping).

Moving back to the court's treatment of *Deutsche Telekom*[237], the court seems to be reading too much into the equality of opportunity. The statement quoted from Deutsche Telekom must be seen in its proper context where the defendant was a former state monopoly[238] and was now regulated by state legislation. In that context, all other economic operators were private parties. This special consideration is reflected in the following part of the court's judgement in Deutsche Telekom that immediately follows the part quoted by the Google judgement[239]:

"*until the entry of a first competitor on the market for retail access services, in 1998, the applicant had a monopoly on that retail market, the anticompetitive effect which the Commission is required to demonstrate relates to the possible barriers which the applicant's pricing practices could have created for the growth of competition in that market*"[240].

Thus, what the court in *Deutsche Telekom* is worried about is that a former state-run monopoly may not harm private parties due to their years of state-backed advantages. All these special considerations are absent in Google Shopping where Google and its rivals are all private parties, and the reason why Google rose to top was due to its first mover advantage[241].

[235] See for instance:(Hornkohl,2022:100);(Ahlborn, Leslie and Van Gerven,2022:98); (Colomo 2014:154) and (Bostoen,2022:78)
[236] T-398/07 [2012]
[237] C-280/08 [2010]
[238] para 146, C-280/08 [2010]
[239] para 155
[240] para 235 of C-280/08 Deutsche Telekom [2010]
[241] See for instance:(Van Loon,2012)

3.2 How does a duty against self-preferencing unsettle the theory of harm under Article 102?

EU Competition law scholarship is replete with compelling reasons why imposing a duty against self-preferencing is economically not justified[242]. Stating the obvious, self-favoring is a highly common practice among multisided platforms/information intermediaries[243]. Given its ubiquity, it has become almost cliché to point out that it cannot be considered economically rational for a firm to not favor its own subsidiaries or affiliates on upstream/downstream markets[244] in digital space[245]. Such a duty goes against the grain of economic wisdom and procompetitive gains that are linked to vertical integration[246]. In fact, self-preferencing can be seen as a natural result of a firm exploiting its competitive edge to their maximum[247].

Therefore, such a duty is particularly troubling in the search engine market because it suggests that whenever a rival CSS appears at a lower rank or under a different algorithm, this could be a competition law concern[248]. This would not only violate the principle of commercial freedom, discourage innovation and promote free riding by rivals[249], but also increase additional burdens and regulatory complications[250]. It is especially true because any procompetitive conduct (that results in efficiencies) could be flagged as anti-competitive[251] when it leads to some harm to competitors. Moreover, the same conduct of a firm could be pursued with multiple objectives based upon the specific market dynamics at the time of such conduct. Thus, what a general duty against self-preferencing would do is to set the threshold of abuse of dominance very minimally. This way the theory of harm becomes *a theory of everything*. Likewise, this duty also violates the fundamental norms of competition law, which aim to foster competition and active rivalry among firms. Thus, a general duty against self-preferencing would be detrimental to that objective[252].

Particularly, in the context of digital marketing, the findings of the EU Commission's 2020 Progress Report of Expert Group for the Observatory on the Online Platform Economy (" Progress Report") are illustrative of the trend towards recognizing that internet search engines can have legitimate grounds for self-preferencing. The report notes that in the context of digital markets, differentiated treatment is a common behavior, and unless anticompetitive effects are demonstrated, it is not problematic. In the context of multi-sided markets, regarding the normalcy of differentiated treatment, the report notes that various businesses are placed differently in relation to each other and as against the platform owner[253]. Therefore, the businesses are in nonequivalent situations, and hence, '*there is no differentiated treatment in the first place. And there may be objective reasons or justifications for a platform to apply different conditions to businesses in*

[242] See for instance:(Zingales, 2018); (Manne and Wright, 2011)
[243] See for instance:(Wiethaus,2015:507)
[244] (Vesterdorf,2015:6)
[245] For an overview of business model in zero-priced platforms, see generally:(Bougette, Gautier, and Marty, 2022:136-143)
[246] See for instance:(De Sousa,2020:4)
[247] See for instance:(Valdivia,2018:46)
[248] (Nazzini,2015:301-307)
[249] (Lang,2016:22)
[250] (Zingales,2018:23)
[251] (Colomo,2022:14)
[252] (Hovenkamp,2019:584-586) and (Valdivia,2022:3)
[253] (Progress Report,2020:5)

similar situations '[254].The most important objective reason is listed as technical standards[255]. These, for instance, could include relevance of data in response to search term, quality of data, format (in which search is requested e.g., image, video, text), time data was added to the internet. The report concludes that" *platforms should be granted a certain degree of discretion in deciding how to design their platform, so that some level of differentiation is to be regarded as inherent in their functioning*"[256].

This report also draws our attention to the question of whether it is actually possible and desirable for search engines to deliver neutral results and for equality of opportunity to be realized in practice. In the existing scholarship on self-preferencing in search engine markets, it has been widely noted that search neutrality is problematic both as an ideal aim, as well as a practical remedy[257]. For instance, it has been remarked that search engine neutrality approximates to the ideal type associated with perfect competition, which does not exist in real world markets, and that emphasizing on neutrality would be inefficient since search engines have to tailor their results to the users' specific needs and preferences[258] and hence it is customary for search engines to adapt a criterion to filter and classify results [259](in the Google case it is the use of Panda algorithm).

However, the Court and its supporters could argue that the Court is not really taking issue with using algorithms, but with the discrimination element[260]. However, such an argument misses its mark for the following reasons:

Firstly, if the court has no problem with search engines providing personalized results, and correspondingly if such search engines enjoy a discretion in designing their own algorithms, and platforms, it is not clear why should a search be expected to not self-prefer. Here, there is a tension between the duty against non-discrimination and the idea that search engines can have discretion in the first place to design their own platforms[261]. What is the extent of such discretion? And what exactly does the scope of equal treatment include? Asking Google to list all CSS (its own and rival CSS) would make the specialized search meaningless, because it would heap all CSS together without suggesting to users which one is more desirable, and thus Google would fail in its function of addressing the specific shopping-related need of the user[262]. Thus, instead of a dynamic search engine that responds to users' queries (by processing it through a number of technical factors), Google would become a simple catalogue.

Secondly, placing the ad on Google search page is part of the complex dynamics of Google algorithms-based revenue model[263] and that court cannot artificially isolate and separate this issue and make it subject of a specific obligation. By imposing a duty of equal treatment, the Court is arguably drifting towards a common carrier antitrust *which arguably* converges to imposing '*open*

[254] (Progress Report,2020:5)
[255] (Progress Report,2020:10)
[256] (Progress Report,2020:12)
[257] (Ammori,2016:52-58)
[258] (Lao,2013:2-12)
[259] (Renda,2015:14) and (Akman,2017:326)
[260] See for instance:(Hornkohl,2022:110)
[261] See for instance:(Belleflamme and Peitz,2021:207-218)
[262] (Renda,2015:17)
[263] See for instance:(Leyden and Dolmans,2014:253-254)

access' on platforms[264]. Such Open access assumes that information is a homogenous, non-excludable, non-exhaustive public good that everybody should have access to[265]. In employing such a view, the Court fails to see that search queries are heterogenous commodities, and that their very existence depends on Google's commercial models and its ability to provide them by cross-subsidizing it through the promotion of its own CSS[266].

Thirdly, while the court's remedy requires equality of opportunity[267], its extent is not clear. It could be argued that the court is only insisting on a certain level of equality, i.e., to only include (some but not all) rival CSS in top search results, and it could be said that this duty, thus, does not require a full equality of opportunity for all CSS. In this regard, Gugliotta notes that competition law is concerned with ensuring a theoretical equality of opportunity and not with mandating a practical equality of outcome[268]. However, it's difficult to argue how such theoretical equality of opportunity could be achieved. It is because the EC's remedy-driven quest for the category of abuse ends up ensuring more than an equal outcome for rival CSS. It is because (some of) the rival CSS that may appear in top spots on Google page, do not pay Google anything, while the other top results that appear in Google results pay Google to appear on top.

Fourthly, the very remedy of equality of opportunity mischaracterizes how search engines work[269]. Even if all search engines start listing rivals' results, ultimately, SEO practices and syndication of content would turn such search engines into providing unique and personalized experiences to users, and thus search bias would ultimately result[270]. Likewise, search neutrality is problematic because search engine service providers compete on the basis of quality and experience and distinguish themselves in their ability to offer results different from other search engines.[271] Although, strictly speaking remedies and enforcement do not concern my thesis, if the remedies are outrageous, they raise suspicions about the theory of harm (the Court is relying upon) being either too ambitious, or simply unworkable[272].

Therefore, when search engines cannot be neutral without becoming *dysfunctional*, there is no convincing reason why Google cannot prefer its own CSS—in the absence of any other compelling justification.

Fifthly, the court's artificial separation of equal treatment consideration from the inherently non-neutral nature of search engines fails to do justice to the needs of advertisers who would pay Google to be featured prominently. If Google search results are seen as slots where ads can be placed, any new firms may use the ad slots to gain quick visibility[273]. A rigid insistence on search neutrality would also hinder the market dynamic by making it difficult for promoters of niche content to reach new audiences or expand their consumer base[274]. The Court's insistence on equality of treatment essentially ignores how such advertisers may also benefit from their

[264] See for instance:(Farrell and Weiser,2003)
[265] (Maihaniemi,2020:41-44)
[266] (Maihaniemie,2020:83)
[267] Para 180
[268] (Gugliotta,2019:19-20)
[269] See for instance:(Portuese,2018:26-29)
[270] (Renda,2015:17)
[271] (Grimmelmann,2010:442-444)
[272] See for instance:(Marsden,2020:554-558) and (Graf and Mostyn,2022:564-574)
[273] Progress Report,2020:6)
[274] (Renda,2015:18)

arrangement with Google. It is ironic since such paid advertisers are Google's contractual parties, and hence its real trading partners, and the Court has failed to prioritize them over rival CSS who basically receive free promotion from Google.

In short, a duty to equal treatment ignores the perspective of other parties in this multi-sided market who actually monetize Google to keep running in the first place. Thus, this renders the theory of harm problematic; a rigid insistence on search neutrality and equality means other sides of the market are ignored in the accounting of harm and efficiencies in the Court's reasoning.

3.2.1 *Is Google's judgement coherent with the EU's teleological approach?*

Lastly, in highlighting the inconsistence of the court's reasoning and the difficulties it creates for a theory of harm under article 102, it must be considered the court's reasoning fares with the EU law's teleological approach. In this regard, Hornkohl notes that the GC' creation of new anti-discrimination abuse is commensurate with the EU's teleological agenda and fulfills an important gap-filling function[275]. However, such an argument misses how the teleological approach under EU Treaties has an explicit *integrationist* agenda[276]—a dimension which is clearly not an issue in the Google case. It is because Google's discrimination is not based on the rival CSS' nationality, geographic location[277].For instance, case law cited by the court such as *Aeroports de Paris* concerned discrimination on the basis of nationality, and did not import a wider, and more general duty against non-discrimination.

Moreover, in terms of coherence with the other abuses under Article 102, it's unclear how independent or distinguishable this new abuse of self-preferencing is from other already-existing categories of abuse under Article 102. For instance, an element of discrimination appears in *already recognized abuses* under art.102 such as rebates or exclusive dealing scenarios[278]. Likewise, it could be argued that self-preferencing cases could also be analyzed as margin squeeze cases or constructive refusal to supply. For instance, Gugliotta suggests that Google's conduct can be likened to margin squeeze scenario in TeliaSonera[279]. However, the variable which distorts competition is not price, but rather a 'disfavourable technical standard'[280] (Google's Panda algorithm).

All this unsettles the theory of harm under Article 102 because the court's new creation of abuse blurs the boundaries between already existing abuse categories. For instance, since discrimination is now an independent abuse, the court fails to provide guidance on whether Article 102(c) is redundant. Because now, it seems that the tedious requirements of 102(c) need not be fulfilled, and rather the ground of discrimination as an independent abuse could be pleaded, instead. This provides a perfect recipe for regulatory arbitrage for EC.

[275] (Hornkohl,2022:100-106)
[276] For an account of how EU's integrationist goal is infused with EU Competition policy's framework see for instance:(Bailey and John,2018:8-12)
[277] For an account of such classic parameters of discrimination recognized under EU law,see for instance:(Prechal,2009:2-3)
[278] See for instance, section titled: "Horizontal discrimination—Foreclosing competitors" in (Bergqvist,2019)
[279] C-52/09 [2011]
[280] (Gugliotta,2019:48)

Chapter 4: Where do we go from here? Directions of Theory of Harm under Article 102 after the Google Shopping case

As this thesis established that judgement is not only incoherent but also exposes the fault lines within the theory of harm under Article 102—when it comes to regulating search engines—this concluding chapter discusses the wider impact of the judgement. and notes how it serves as a timely and apt reminder for EU Competition law to reconsider its theory of harm under Article 102 so that it can maintain its relevance and legitimacy in regulating search engines and the digital market, more broadly.

In particular, the chapter comments on the following issues:

Part 1 discusses the significance of the judgement in the wake of the EU's recent Digital Markets Act (DMA). Part 2 discusses how the judgement presents a case for EU Competition Law to re-focus towards an MEA. Relatedly, in the wake of Google's appeal lodged against the (2021) judgement, Part 3 suggests how ECJ (in Google's appeal) might adopt an MEA by seeking inspiration from its recent Intel judgement[281].

4.1 Does the DMA render Google judgement redundant in regulating digital markets?

DMA targets very large tech-companies that are seen as gatekeepers of the digital markets, which include providers of "core platform services" (including search engines)[282]. DMA shares similar regulatory concerns with Article 102 in its aim to ensure that gatekeepers (with significant user population) are not allowed to abuse their position to the detriment of other rival companies from accessing such gatekeeper's users[283].DMA imposes liability on gatekeepers[284] for self-preferencing[285] without requiring DMA enforcers to prove anticompetitive effects[286], or to consider any positive externalities (efficiencies) arising from such self-preferencing[287].

Given this regulatory overlap of DMA with Article 102, and the blanket ban on self-preferencing without having to prove anticompetitive effects, it may be questioned whether the DMA renders Google judgement redundant?

As a response, it is plausible to suggest that after DMA enters into force, Article 102 may not be invoked, at least in the cases of tech-giants operating in EU-wide digital markets. However, it could be argued that DMA will not render Google decision completely redundant, but rather will complement it[288]. It is because DMA is only triggered once its tightly defined thresholds are met. For example, to fall under the category of gatekeepers, platform service provides must have a

[281] C-413/14 [2017]
[282] (Ahlborn, Leslie and Van Gerven,2022:98)
[283] (Sikken,2022)
[284] Article:1(2) DMA
[285] Article:6(1)(d) DMA
[286] Article:6(1)(d) DMA
[287] (Ahlborn, Leslie and Van Gerven,2022:89)
[288] (Hornkohl,2022:100)

turnover of at least 6.5 billion euros (in EEA) or a market value of at least 65 billion euros in the previous financial year, and that such platform service provider must provide core platform services in at least three EU Member states[289]. In addition, such platform service providers must also have an active monthly user base of at least 45 million located/established in the Union and more than 10000 annual active base of business users)[290]. Moreover, to qualify as gatekeeper, the provider of core platform services must hold an entrenched and durable position in its operations[291] consecutively for the last three financial years[292].

Arguably, such cumulative conditions, and high thresholds means that only the biggest tech-giants would be subject to DMA regulations. Thus, a vast majority of digital firms, which are dominant on national digital markets in EU member-states, that satisfy the intra-community trade dimension, but do not meet DMA thresholds, would fall under Article 102. Moreover, DMA specifies that it applies '*without prejudice to the application of articles 101 and 102 TFEU*'[293]. This confirms that Article 102, and by default Google judgement will continue to be relevant even after DMA, albeit in a complementary manner.

4.2 How the judgement warrants the need for a theory of harm that involves a more careful effects-based approach

As discussed previously, the Court's approach is problematic since it takes issues with the form of Google's conduct, and largely disregards their effects. For instance, in the context of leveraging, the Court seems to take issue with Google's intention to consolidate its market power, rather than with the effects of Google's practices. The Court refers to Google as a '*quasi-monopoly*'[294] and (in its discussion of network effects and economies of scale)[295] seems to be receptive to the idea that due to the structure of the market, the market is tipping in Google 's favor. However, the court fails to explain how exactly Google 's *ultra-dominance* harms competition or consumers. Such failure clearly calls for the court to liberalize its thinking and normalize highly concentrated market structures as not anti-competitive per se[296]. This, as will be discussed below, is only possible by adopting a more effects-based approach, which will prevent overregulation that has a chilling effect on competition.

Likewise, in the context of discrimination, the court takes issue with Google's active promotion of its own content and goes on to create self-preferencing as an independent abuse. Here too, the court's emphasis is on the form of Google's strategy, rather than on its effects. This causes the court to misconstrue the dynamics of how digital markets operate. For instance, by seeing self-preferencing as a threat to incentives to innovate[297], and to lock-in its position as the dominant firm, the court fails to see how Google has even greater incentives to innovate since Google wants

[289] Article:3(2)(a) DMA
[290] Article: 2(b) DMA
[291] Article 3(1)(c) DMA
[292] Article 3(2)(c) DMA
[293] Article 1(6) DMA
[294] para 226
[295] para 178
[296] See for instance:(Hovenkamp,2019); (Lianos and Motchenkova,2013)
[297] para 451

to consolidate and expand its motivations[298]. The theory of harm the court employs is thus faulty; on one hand, the court believes Google wants to expand, but at the same time, the court fails to appreciate how expansion and retaining market position in search engines requires a consistent drive to invest and innovate. This is true especially in global markets where it appears implausible that an inefficient monopolist can dominate for a long time[299].

Such a formalistic approach also means that the court fails to notice how the firm's continued *ultra-dominant* position[300] may be due to consumer preferences (due to demand-side economics)[301] rather than due to any anti-competitive expansion (which might cause them supply side economies of scale). In the search engine market where information is a qualitative variable, an undue emphasis on the form of Google's conduct at the expense of a wider consideration of the consumer's experience means that Competition Law cannot understand the dynamics of digital markets which are characterized by multivariate factors, such as the focus on *information* rather than *price*[302]. Here, an effects-based approach would be better able to consider these wider variables in determining how a firm's conduct is anti-competitive. In deviating from an effects-based approach, Article 102 arguably risks becoming a sandboxing field for the EC to experiment various strategies in digital markets, for instance, guided by an ambition to achieve fairness or social justice. Such experiments may be counterproductive for the goals of Competition Law, and lead to issues such as internal inconsistency for the Competition law practitioners and legal uncertainty for the litigating parties.

Moreover, without embracing MEA, the courts risk failing to consider how innovation does not only accrue from the dominant firm, but also from the consumers' side in digital markets (for e.g., consumers discover new ways of utilizing digital products)[303]. The courts are thus envisioning a static model of what producers' and consumers' incentives look like in search engine markets, which may not accord with reality.

4.3 Recommendations for the ECJ, and the way forward for Article 102

In order to reorient EU Competition Law towards an internally coherent and doctrinally sound theory of harm under Article 102, it is recommended that ECJ should follow its approach in *Intel*[304]. In *Intel*, ECJ confirmed that the EC had erred by presuming that rebates were per se illegal and likely to cause actual or potential anticompetitive effects, without having demonstrated such effects. Remarkably, ECJ emphasized that a high standard of proof needs to be met by the EC to establish an abuse under Article 102.

Intel can be seen as a landmark decision in that it marks a shift towards an MEA direction. It is also recommended that such a rigorous effect-based approach shall be applied in search-engine markets, and even if self-preferencing is to be found abusive, the legal test for such must be

[298] (Maihaniemi,2020:7)
[299] See for instance:(McKenzie and Lee,2008:193)
[300] para 180
[301] (Maihaniemi,2020:6)
[302] See for instance:(Maihaniemi,2020:276-283)
[303] (Maihaniemi,2020:7)
[304] C-413/14 Intel v Commission [2017]

established in a stricter effects-based manner, where AEC and counterfactual are required to be proven by the EC. Arguably, this would prevent judicial activism by the court and prevent it from *misapplying* general principles of EU law from other disciplinary fields.

As discussed previously, since the main purpose of a theory of harm under Article 102 is to set forth the mischief to be avoided (by the dominant firms), and to provide a legal basis for defining the behavioral parameters of what an abuse consists of, an MEA would fare better here. Since MEA is generally seen as a more objective and scientific approach that aids to legal certainty, it goes a long way towards a clearer regulatory roadmap for the search engines and the digital economy, more broadly.

The need for such an approach cannot be overstated given that EC's 2017 decision has already influenced the development of DMA which imposes a blanket ban on self-preferencing. Although DMA applies to extremely large tech-giants (with tightly defined thresholds), Article 102 remains troubled by the legacy of Google Shopping, which paves way for regulatory arbitrage and regulatory shopping by the EC.

Unfortunately, due to the practical constraints, this thesis could not delve into deeper legal-economic underpinnings that inform the theory of harm and could not fully explore the broader issues concerned with establishing abuse, such as the definition of the relevant market, establishing dominance etc. Nonetheless, this thesis serves as a timely reminder of the need (for Article 102 jurisprudence) to have clarity concerning a robust and internally consistent theory of harm, and ideally—for the interests of the dominant firms and the EU competition authorities—to bring the theory of harm on a legal footing.

Thus, it is hoped that the future scholarship on the subject will benefit from this thesis in setting the record straight in regulating EU Competition law and in helping it steer towards its goals. Given the digital economy's impact on our socio-economic lives and legal rights, the need for a timely and correct intervention of EU Competition law in setting out clear benchmarks of a theory of harm in this regard cannot be overemphasized.

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