Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence

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Abstract: Differentiated treatment is a key focus in current competition investigations of the European Commission and national competition authorities, ranging from more prominent placement of one’s own services in a ranking to preferential access to data and the favouring of businesses that pay higher levels of commission. Based on their exclusionary and/or exploitative character, the paper distinguishes three types of differentiated treatment on online platforms in order to provide an analytical framework for assessing the extent to which such practices are abusive under Article 102 TFEU, namely: pure self-preferencing, pure secondary line differentiation and hybrid differentiation. The paper points out that the main area where EU competition law currently does not offer effective protection is in the most far-reaching situation where a business is blocked from a platform without legitimate justification. To address harm in such cases, the paper suggests giving a stronger role to economic dependence both within and outside EU competition law and explores possible measures building upon the Platform-to-Business (P2B) Regulation as well as the notion of fairness of platform-to-business relations.

I. Introduction

The relationship between platforms and businesses is at the core of various ongoing competition investigations. Online platforms provide significant benefits to businesses by enabling them to target a wide audience that typically exceeds the territory of individual Member States and even beyond. In the absence of platforms which act as intermediaries between business users and consumers, small and medium-sized enterprises (SMEs) in particular would not have had equally effective opportunity to reach consumers. In this regard, platforms often

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constitute the main entry points for businesses to access certain markets. At the same time, platforms rely on the presence of businesses in order to create value for consumers. Even though platforms and businesses are thus dependent on each other in order to operate their respective services, platforms typically have a superior bargaining position in relation to their business users. This may result in an imbalance between the interests of platforms and businesses, potentially leading to unfair practices. The scope for such issues is particularly present when platforms both act as intermediaries by facilitating market access for businesses and compete with these businesses by offering their own products to consumers on their marketplaces.1

This dual role of platforms, with a focus on e-commerce platforms and app stores, is at the core of recent competition cases at the EU and national level. The European Commission fined Google in June 2017 for abusing its dominance in the market for online search by systematically giving prominent placement to its own comparison shopping service. To stop the infringement, the Commission required Google to treat ‘competing comparison shopping services no less favourably than its own comparison shopping service’, in particular by applying ‘the same processes and methods to position and display’ comparison shopping services in its general search results.2 The decision is now under appeal at the General Court.3 In July 2019, the European Commission opened a competition investigation into Amazon’s use of sensitive data from independent retailers who sell on its marketplace.4 On the same day, the German and Austrian competition authorities announced that Amazon would modify its terms and conditions for business users in response to competition concerns expressed by the two authorities during the investigations they started in, respectively November 20185 and February 2019.6 The closure of these proceedings into Amazon’s terms and conditions was reached in June 2021.7

2 Case AT.39740 Google Search (Shopping), 27 June 2017, paras 699–700.
conditions (the Austrian competition authority stated it would continue monitoring issues relating to communication and logistics) can be explained by the fact that the opening of proceedings by the Commission relieves national competition authorities of their competence to apply EU competition law to the practices at stake. In parallel, Amazon is subject to scrutiny by the Italian competition authority for another aspect of its conduct in relation to business users on its marketplace. The investigation of the Italian Competition Authority focuses on the allegation that Amazon discriminates on its platform in favour of third-party merchants who use Amazon’s logistics services. Apart from Amazon, Apple is a target of competition authorities. Based on a complaint from Spotify, the European Commission is investigating Apple’s conduct in relation to its App Store. In addition, the Netherlands Authority for Consumers and Markets is looking specifically at the position of Dutch apps for news media in Apple’s App Store.

At the basis of many of these probes lies the increasing belief that differentiated treatment by platforms, either in terms of self-preferencing or in terms of offering more favourable business terms to some than to others, raises competition issues. However, the legal standards to assess the anticompetitiveness of such conduct are far from clear. In fact, differentiated treatment is common across markets and is often an inherent feature of vertical integration. The decision of the European Commission to qualify the more favourable treatment of Google Shopping as abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU) is not without controversy, in particular because of the unclear theory of harm. There is wide consensus that the objective of EU competition law is to protect competition, and not to protect the interests of individual competitors. In particular, dominant firms are not subject to a general duty to keep their competitors in the market. Behaviour that is harmful to an entrepreneur to impose interim measures on Amazon. See DéCISION 2019-MC-01, 3 July 2019. Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1. Italian Competition Authority, ‘A528—Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services’ (Press release, 16 April 2019). See the website that Spotify created explaining its complaint to the European Commission: See for instance: Pinar Akman, ‘The theory of abuse in Google Search: A positive and normative assessment under EU competition law’ (2017) Journal of Law, Technology & Policy, 301. Help Without Borders: How the Google Android Case Threatens to Derail the Limited Scope of the Obligation to Assist Competitors’ (SSRN Working Paper, April 2016). See Konstantinos Stylianou, ‘Exclusionary discrimination under Article 102 TFEU’ (2014) 51 CML Review, 141. However, arguing that equal treatment is a
dominant undertaking’s competitors does not necessarily breach EU competition rules, unless its conduct harms competition as such through, for instance, tying, discriminating, or refusing to deal. At the same time, the power asymmetries between platforms and businesses are increasingly recognized. This has led to the adoption of a Regulation on fairness and transparency in platform-to-business (P2B) relations (the P2B Regulation) that targets potentially harmful trading practices beyond EU competition law. The P2B Regulation is a first step in better monitoring the online platform economy.

At the national level, a number of Member States (including Germany, France, Italy, Greece, and recently also Belgium) have put legislation in place to protect against abuses of economic dependence. Economic dependence is a different concept than dominance in competition law with a wider scope of application. For instance, in its press release announcing the investigation against Amazon’s terms and conditions, the German Bundeskartellamt referred not only to the possibility that Amazon holds a dominant position but also that ‘the sellers are dependent on Amazon’. As a result, businesses who are dependent on a platform to operate may rely on such national regimes if practices of differentiated treatment are not caught by the EU competition rules. While some of these regimes also require commercial conduct to distort competition for triggering protection, their objective complements competition law that mainly protects the welfare of consumers and not the ability of businesses to compete.

Against this background, the paper examines the notion of differentiated treatment by distinguishing between three categories based on the exclusionary or exploitative character of particular practices (Section II), provides an analytical framework for assessing the extent to which each category can be found to be abusive under Article 102 TFEU (Section III), and explores possible further regulatory interventions, drawing upon national regimes of economic dependence as well as the P2B Regulation and the notion of the fairness of platform-
business relations (Section IV). The paper submits that EU competition law, as decision-making practice and case law currently stands, does not offer effective protection for the most far-reaching instances of differentiated treatment where businesses are removed or blocked from a platform without legitimate justification. If such situations turn out to be persistent in the market, a stronger role for economic dependence would be needed to cover the relevant harm. The paper makes a number of suggestions in this regard, both within EU competition law and based on additional measures outside EU competition law.

II. The notion of differentiated treatment

Differentiated treatment can be defined in accordance with Article 102 (c) TFEU. This provision considers the application of ‘dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’¹⁷ to be one of the types of behaviour prohibited as an abuse of dominance under EU competition law. At the outset, it must be emphasized that differentiated treatment is not inherently problematic. In fact, it is common for undertakings to differentiate the offers they make to customers. In this regard, it is useful to distinguish the more neutral term ‘differentiation’ from the notion of ‘discrimination’, which has a negative connotation. According to the Cambridge dictionary, differentiation means ‘to show or find the difference between things that are compared’,¹⁸ while discrimination is regarded as ‘treating a person or particular group of people differently, especially in a worse way from the way in which you treat other people’.¹⁹ Because the notion of discrimination implies the existence of some form of less favourable treatment or even harm, the term ‘differentiation’ or ‘differentiated treatment’ is used here when referring to the application of dissimilar conditions to equivalent transactions. This is to emphasize that differentiated treatment is not problematic in and of itself.

Differentiation can take various shapes. For the purposes of this paper, a distinction is made between three categories of differentiation on online platforms:

- ‘pure’ self-preferencing whereby a vertically integrated platform treats its affiliated services more favourably than non-affiliated services—the more prominent display of Google’s comparison shopping service in its general search results as compared to rival comparison shopping services is an example;

¹⁷ Conversely, the application of equivalent conditions to dissimilar transactions can also constitute a form of differentiated treatment. The Court of Justice confirmed this in Case 13/63 Italy v Commission, ECLI:EU:C:1963:20, para. 4: ‘Discrimination in substance would consist in treating either similar situations differently or different situations identically’.

¹⁸ See <https://dictionary.cambridge.org/dictionary/english/differentiation>.

¹⁹ See <https://dictionary.cambridge.org/dictionary/english/discrimination>.
• ‘pure’ secondary line differentiation whereby a non-vertically integrated platform engages in differentiated treatment among non-affiliated services in a market in which it is not active itself—for instance, a hotel booking platform providing hotels that pay more commission fees with a higher ranking;

• and a third ‘hybrid’ category whereby a platform engages in differentiated treatment among non-affiliated services in an effort to favour its own business—a platform blocking an app that interferes with its ability to gain revenues through advertising would be an example.

The hybrid category differs from pure self-preferencing in that the differentiated treatment of the third type does not relate to the favouring of a platform’s affiliated services versus non-affiliated services. Instead, the differentiation takes place among non-affiliated businesses but indirectly benefits the platform in a different market than the one in which the non-affiliated customers compete. The latter indirect benefit for the platform distinguishes the hybrid category from cases of pure secondary line differentiation under the second category.

Whereas primary line injury concerns exclusionary behaviour by which a supplier forecloses competitors from the market in which it operates itself, secondary line injury is exercised by a supplier against some of its customers compared to one or more of its other customers. This way, the supplier can distort competition on the downstream market, where it is not active, by favouring and exploiting some customers over others.20 Pure self-preferencing qualifies as primary line injury, because the key objective is to exclude rivals from the market. Differentiation among non-affiliated customers in a market where the platform is not operating itself constitutes pure secondary line injury, as the harm is purely exploitative and falls upon the platform’s downstream customers that compete with each other. In the hybrid category, primary line injury prevails because the ultimate aim of the platform is to strengthen its own position to the detriment of rivals in the market. However, the hybrid category also contains exploitative elements because it entails the favouring of one or more customers over others.

The following sections discuss the three categories and provide concrete examples to illustrate the nature of each type of differentiation. The application of EU competition law to the three categories is analysed subsequently in Section III.

A. Pure self-preferencing

The first category of pure self-preferencing relates to vertically integrated platforms giving more favourable treatment to their own, affiliated services to the detriment of non-affiliated services. The Google Shopping decision and many of the ongoing national competition investigations mentioned in the introduction

involve some form of self-preferencing by dominant firms. For conduct to be regarded as pure self-preferencing, a platform has to be vertically integrated and favour its own, affiliated activities over rival, non-affiliated activities. Self-preferencing by a non-vertically integrated platform falls under the third, hybrid category. Although self-preferencing may lead to anticompetitive effects and harm rivals, it is to a certain extent natural for an undertaking to give priority to its own downstream activities as a way to recoup its investments in the upstream facility or infrastructure. While vertical integration has traditionally been seen as largely procompetitive because it improves efficiency and reduces transaction costs, this belief seems to be changing now particularly in relation to the digital economy where leveraging of market power from one market to another can give rise to conglomerates tying various related activities together under one umbrella. Claims are even made to reverse the burden of proof and let dominant firms provide evidence that self-preferencing has no adverse effects on competition. Pure self-preferencing can take place in a number of ways in the context of online platforms. More prominent placement of one’s own services in a ranking is one example.

In its Google Shopping decision, the European Commission established that Google had treated its own comparison shopping service more favourably than the services of rivals. While competing comparison shopping services could only appear as generic search results and were subject to the Panda algorithm that demotes websites with low original content (which is inherent to comparison shopping services), Google Shopping was prominently positioned, displayed in rich format and was never demoted by the Panda algorithm. The Commission tried to unravel an anticompetitive strategy on the part of Google by relying on internal documents illustrating that Google was aware that the market performance of Froogle (the predecessor of Google Shopping) was relatively poor. For instance, a Google executive wrote in 2007 before Google started the alleged self-preferencing: ‘Froogle simply doesn’t work’. According to the Commission, Google’s conduct had the effect of increasing traffic from Google’s general search

21 This is also visible in the approach towards vertical restraints in EU competition law. The Vertical Guidelines state that ‘vertical restraints are generally less harmful than horizontal restraints’, because the development of complementary activities is considered likely to increase economic efficiency. See Guidelines on Vertical Restraints [2010] OJ C 130/1, para. 98. Similarly, the Court of Justice argued in Allianz Hungaria that ‘vertical agreements are, by their nature, often less damaging to competition than horizontal agreements’. See Case C-32/11 Allianz Hungaria, ECLI:EU:C:2013:160, para. 43.
24 Case AT.39740 Google Search (Shopping), 27 June 2017, paras 344–359 and 379–386.
25 Case AT.39740 Google Search (Shopping), 27 June 2017, para. 490.
results pages to Google Shopping while rival comparison shopping services suffered from a decrease in traffic.26 User traffic is important for comparison shopping services to be able to compete in various ways. Among other effects, traffic enables comparison shopping services to generate more original user reviews that increase the value of the service to users; traffic facilitates machine learning effects that help improve the relevance of the results of a comparison shopping service and thereby its usefulness to users; and, most importantly, traffic generates revenue through commissions from merchants or online search advertising that can be used to further invest in the comparison shopping service.27 By displaying its own service more prominently in a ranking, a platform can thus provide its downstream activities with a competitive advantage over rivals.

Another way in which a platform can favour its own business is through preferential access to data. By monitoring all purchases taking place via its sales channels, the platform can learn from the performance of downstream competitors and use this knowledge to improve its own offerings. The platform will, for instance, be better able to discern market trends and evolutions in consumer preferences because of its aggregate overview over how consumers behave and what purchases they make. One can even imagine ‘copycat’ behaviour whereby a platform decides to start selling a product itself in competition with its business users, upon noticing the product’s popularity among consumers based on information about sales made by business users. Because of its larger scale of operation, the platform will likely be able to offer the product at a lower price and can give its own offering a more prominent placement in the ranking (in connection with the first type of pure self-preferencing differentiation mentioned above). The affected business user is then left with a choice to either accept significant losses of sales or to reduce its price in order to remain competitive.28 According to the 2017 E-commerce sector inquiry of the European Commission, only about half of the marketplaces ‘share some data with their professional sellers whose products were visited or purchased’.29 The restricted access of business users to transactional data allegedly impedes their ability to measure and improve their performance, develop new business strategies, better respond to market trends and create new products.30 The use of transactional data from business users is at the heart of the competition investigation of the European Commission against Amazon announced in July 2019. According to its press release, the Commission

26 Case AT.39740 Google Search (Shopping), 27 June 2017, paras 452–501.
27 Case AT.39740 Google Search (Shopping), 27 June 2017, paras 444–451.
30 Ecorys (n 28), 28.
will look in particular into: (1) the standard agreements between Amazon and marketplace sellers to examine how the use of third party seller data by Amazon as a retailer affects competition and (2) whether Amazon’s potential use of competitively sensitive marketplace seller information affects the selection of the winners of the ‘Buy Box’. A large part of transactions are done through the ‘Buy Box’ that enables a buyer to add items from a specific retailer directly into his or her shopping cart.  

B. Pure secondary line differentiation

Beyond cases of pure self-preferencing by vertically integrated platforms, a non-vertically integrated platform can engage in differentiation among non-affiliated businesses. In the absence of vertical integration, it may be unclear why a platform treats particular customers more favourably than others. Since the platform is not active in the affected market itself, it benefits from competition between independent customers. This category of pure secondary line differentiation differs in two ways from the first category of pure self-preferencing: (1) pure secondary line differentiation involves more favourable treatment by a non-vertically integrated platform of one or more non-affiliated customers over others in a market in which the platform itself is not active (so that there is no dual role where the platform also competes with downstream business users); and (2) the motive for pure secondary line differentiation by a platform is exploitative and not exclusory—the key objective of the platform is not to foreclose rivals; after all, the platform is itself not even active in the affected market. As Advocate-General Wahl explained this in his Opinion in the MEO case, cases of pure secondary line injury are rather rare:

‘If . . . the undertaking in a dominant position is not in competition with its customers on the downstream market, it is not easy to determine the reasons which might lead that undertaking to apply discriminatory prices, other than the direct exploitation of its customers. It would therefore seem somewhat irrational for it to reduce the competitive pressure which exists among its trading partners on the downstream market’.  

As regards online platforms and in particular in the context of rankings, one reason to differentiate between non-affiliated businesses can be to ensure that consumers see high-quality offerings in response to their queries. A hotel booking
platform (which usually does not have a dual role because it does not offer accommodation itself), for instance, has an incentive to rank hotels relative to the user reviews they received to ensure that hotels with more positive reviews are displayed higher in the search results than hotels with less positive reviews. This type of differentiation reflects the two-sided nature of online platforms inherent in their role of facilitating transactions between the two customer groups, namely consumers and hotels or business users more generally. As a result, the motivation of a platform to engage in differentiation does not only stem from protecting its affiliated services (as in the case of pure self-preferencing) but also from keeping consumers satisfied.

The extent to which a platform should be free to differentiate among non-affiliated businesses is a difficult issue. It is hard to draw the boundaries of what constitute legitimate reasons or justifications for a platform to engage in differentiated treatment. This is a challenge that applies to all types of differentiated treatment. The nature of user reviews received by business users seems a reasonable indicator for one’s position in a ranking, but at what point do lower user ratings justify the downgrading of a business in the ranking? In addition, a platform’s behaviour may not even qualify as differentiation if the quality differences in offerings are such that business users can no longer be regarded as being in comparable situations. For differentiated treatment to exist, the customers or trading parties to which the dissimilar conditions are applied must be in equivalent situations. In some cases, differentiated treatment will simply reflect the distinct conditions in which customers find themselves. An example outside of the online platform economy context is differences in transport costs charged by a supplier to its customers. If the costs of transporting orders differ substantially depending on the location of the customer, it seems logical for a supplier to charge a lower shipping fee to customers located closer by. One can also argue that differentiated treatment is legitimate in such circumstances or that there is no differentiation at all because the transactions are not equivalent. As a result, there is overlap between the different stages of analysis.34

Because various interests are at stake, it is difficult to establish what a ‘neutral’, ‘impartial’, or ‘objective’ ranking should look like.35 The interests of the platform, business users and consumers point in different directions. While a business user, for instance, will wish to be ranked first in order to receive the most user traffic, a platform needs to make sure its service is profitable and reflects the needs of consumers. Therefore, it seems impossible to require a platform to act in one particular way that can be considered ‘fair’. Furthermore, rankings are designed to differentiate and serve the exact purpose of selecting the most

relevant results for users. As a consequence, differentiation is inherent in the functioning of rankings. Although the notion of search and platform neutrality has been advocated for, it is unclear what it would precisely entail and how it can be implemented. A requirement for entirely neutral rankings may lead to results being displayed in an order that does not match with the interests of users and would thus do away with the benefits that rankings provide in selecting the best results for users. Some level of differentiation is therefore to be expected in order to offer a good quality service to users. Generally speaking, pure secondary line differentiation is less suspicious from a competition law perspective, because the platform lacks the motive to foreclose competitors from the market. However, exploitation can also result in competitive harm on a downstream market and may require a competition intervention as will be discussed in Section III below.

C. Hybrid category

The hybrid category contains a mix of exclusionary and exploitative elements and therefore finds itself in between the categories of pure self-preferencing and pure secondary line differentiation. Hybrid forms of differentiated treatment concern situations whereby a platform differentiates among non-affiliated businesses but, unlike in cases of pure secondary line differentiation, does so in order to favour its own services. Since the differentiation is not exercised by favouring its own activities vis-à-vis non-affiliated businesses, the behaviour does not qualify as pure self-preferencing. Instead, the benefit for the platform is indirect and is gained in a different market than the one in which the non-affiliated businesses compete. Although the conduct has exploitative elements in that it involves the favouring of one or more customers


over others, an exclusionary motive prevails because the platform’s ultimate objective is to strengthen its own market position in relation to rivals. A platform engaging in differentiation of the hybrid category can be vertically integrated or not. What is key is that the differentiated treatment has an exclusionary effect in a market in which the non-affiliated businesses are not active themselves.

(i) ‘Wide’ price parity and rankings

An example of differentiation of the hybrid category by a non-vertically integrated undertaking is in the context of rankings on hotel booking platforms. Nustay, a Danish hotel booking platform, reportedly filed a complaint with the European Commission in June 2019 alleging that Expedia and Booking.com were restricting competition in the market for hotel booking platforms. Nustay claims that Expedia and Booking.com downgrade a hotel’s ranking if it offers lower accommodation prices on other hotel booking platforms such as Nustay.38 Because a lower ranking results in less visibility, a hotel is punished commercially if it decides to offer lower prices elsewhere. This conduct enables Expedia and Booking.com to reinstate the effect of so-called ‘wide’ price parity clauses that have been found to violate competition rules. A ‘wide’ price parity clause prevents a hotel from charging lower prices on other hotel booking platforms or via its own sales channels. Various national competition authorities, including the German, French, Italian, and Swedish, have taken action against these ‘wide’ price parity clauses and concluded that they breach the competition rules, because they restrict competition among hotel booking platforms and create a barrier to entry for new platforms. At the same time, France and Austria have banned price parity clauses altogether through a legislative intervention, thereby bypassing the need to conduct a competition assessment.39

By downgrading a hotel’s ranking if it offers lower prices on other hotel booking platforms, Expedia and Booking.com incentivize hotels to refrain from doing so—despite the fact that ‘wide’ price parity clauses are now commonly regarded as anticompetitive. The objective of a platform behind such forms of differentiation, exploiting hotels offering lower prices elsewhere versus those that do not, is to restrict competition in the market for hotel booking platforms. If hotels are punished by getting lower rankings on Expedia and Booking.com for offering lower prices on other platforms such as Nustay’s, the latter’s commercial success is at risk and its strategy to compete with the established platforms through lower commissions for hotels and thus lower prices for consumers will be in vain. However, at the outset, it is not clear that the behaviour of Expedia and

Booking.com infringes competition law. There is no obligation on hotels to adhere to price parity for being listed in the ranking (unlike the price parity clauses against which competition intervention took place) and platforms may have a legitimate reason to downgrade hotels that offer lower prices elsewhere. Because consumers expect offerings to be ranked in the order of the best and most relevant deals, it may be justified for the platform to give more prominent placement to hotels that do not advertise better prices elsewhere. The fact that the behaviour of Expedia and Booking.com harms Nustay’s commercial interest will not be sufficient to establish competition liability. However, if the conduct of the two platforms indeed reduces competition in the market for hotel booking platforms and higher prices for consumers, as claimed by Nustay, it will be more likely to breach the competition rules.

(ii) Additional services and rankings

A vertically integrated platform can also engage in differentiated treatment of the hybrid category. The investigation of the Italian Competition Authority against Amazon is a good example. According to the Italian competition authority, Amazon grants improved visibility, higher search rankings, and better access to consumers only to merchants who also use its logistics services. Some of these merchants may compete with Amazon in the context of its retail activities. However, Amazon’s benefit from engaging in this type of differentiation lies in a different market, namely in the market for logistics services. Amazon’s behaviour provides merchants with incentives to rely on Amazon’s logistics services, which could reduce competition in this market to the detriment of rival providers of logistics services. Amazon may argue that this type of differentiation is legitimate, because the fact that merchants also take its logistics services means it can better assure consumers a good quality deal from sale until delivery. Nevertheless, the scope for such justification seems much smaller here than in the example of the impact of price parity by hotels on rankings mentioned above. In the absence of Amazon’s differentiated treatment, merchants may have relied on the logistics services of other providers so that their choice of Amazon does not purely stem from the quality or commercial success of its logistics activities.

This type of behaviour is not an ‘outright’ form of self-preferencing, since the platform does not simply give its own offerings more prominent placement in the ranking vis-à-vis those of non-affiliated business. However, it is clear that the

downgrading in a ranking of business users who do not take additional services versus those who do, does benefit the platform in a related market where it aims to exclude competition. In the example of Amazon, the benefit lies in the market for logistics services. The exclusionary element is what qualifies the behaviour as a type of differentiation falling within the hybrid category. This example of differentiation also illustrates that vertically integrated platforms do not always have strong incentives to directly favour their own downstream services in a ranking. There may be situations where the platform benefits more from other, more indirect arrangements, for instance by conditioning a higher ranking for a business on the payment of a fee or commission to the platform or on the compliance with additional requirements through special partnership programmes.\(^{42}\) The Italian investigation against Amazon is one illustration of this issue and can shed more light on the competitive effects of such practices.

(iii) Blocking of access to the platform

The most far-reaching decision that a platform can take as regards its relationship with a business user is to block the latter’s access. How to qualify such cases of blocking of access in terms of the three categories of differentiated treatment distinguished in this paper depends on the nature of the platform’s behaviour, which can range from pure self-preferencing to hybrid forms of differentiation or even pure secondary line differentiation. This can be best illustrated by looking at a number of instances where businesses have indeed been removed from a platform.

Disconnect complained to the European Commission in 2015 about Google removing its app, protecting users against invisible tracking and malware distributed through advertisements, from the Play Store.\(^ {43}\) Google motivated the removal by stating that its terms and conditions have always prohibited developers from using Play Store to distribute apps that interfere with other apps.\(^ {44}\) Similarly, Google relied on an alleged violation of its terms and conditions to justify its plan to remove Unlockd’s apps from the Play Store. Unlockd provides a different approach to mobile advertising by showing advertising or other content when a user unlocks his or her phone. In May 2018, UK Judge Peter Roth granted Unlockd an interim injunction preventing Google from removing Unlockd’s apps made for the UK market.\(^ {45}\) However, due to a lack of funding to

pursue the proceedings, Unlockd withdrew its claim in February 2019 and in May 2019 was even ordered by the UK Competition Appeal Tribunal to pay Google’s costs.\footnote{Unlockd v Google [2019] CAT 17, 21 May 2019 <https://www.catribunal.org.uk/sites/default/files/2019-05/1283T_Unlockd_CMC_CAT_17_210519.pdf>.
}

Apple is facing similar issues, in particular as regards the removal or restriction of screen-time and parental-control apps. Two of the most popular parental-control apps, Kidslox and Qustodio, reportedly filed a complaint against Apple with the European Commission. Kaspersky Lab similarly complained to the Russian authorities that Apple forced it to remove certain key features from its parental-control app. Although Apple allegedly started to impose restrictions on these apps at the time that it introduced similar tools itself, it denies any such link and argues that it wants to prevent the apps from gaining too much information from users’ devices to protect privacy and security.\footnote{Jack Nicas, ‘Apple Cracks Down on Apps that Fight iPhone Addiction’ (New York Times, 27 April 2019) <https://www.nytimes.com/2019/04/27/technology/apple-screen-time-trackers.html?module=inline>.}

Outside of the realm of app stores, Google is under scrutiny by the Italian competition authority for refusing to integrate Enel’s X Recharge app into the Android Auto environment. Enel’s app aims to provide users with information and services for recharging electric car batteries. According to the Italian competition authority, Google has an interest in defending its Google Maps app that offers information on locations for charging electric cars and directions on how to reach them.\footnote{Italian competition authority, ‘A529—ICA: investigation launched against Google for alleged abuse of a dominant position’ (Press release, 17 May 2019) <https://en.agcm.it/en/media/press-releases/2019/5/ICA-investigation-launched-against-Google-for-alleged-abuse-of-a-dominant-position>.}

In all of these cases, the behaviour of the platforms at stake can be explained because they have an interest in protecting their own business either directly, in cases of pure self-preferencing, or indirectly, in cases falling within the hybrid category. Apple’s decision to block screen-time and parental-control apps from its app store and Google’s decision to ban Enel’s X Recharge app from the Android Auto environment are examples of pure self-preferencing. In these situations, Apple and Google are themselves active in the downstream market where they have blocked the activities of the respective businesses. In the cases of Disconnect and Unlockd, however, Google itself is not active in the markets in which the two businesses compete but does have an interest in protecting its position in mobile advertising as its main revenue stream. Disconnect and Unlockd may make it harder for Google to monetize its activities, so that there is an exclusionary motive for Google to block their apps.

Purely exploitative cases can also be imagined where a platform decides to block certain apps and allow others that provide a similar functionality to users to retain access without having any exclusionary motive. For instance, a platform

\footnote{Graef}
can decide to restrict access for services that do not meet a minimum level of quality for the sole purpose of protecting users of its app store. Such cases of pure secondary line differentiation may occur when the platform does not actually have any exclusionary motive behind its decision to restrict access for particular business users. Because of the absence of any exclusionary character and the lack of incentives of platforms to block business users providing good quality services, these instances are less problematic from a competition law perspective than cases of pure self-preferencing or differentiated treatment under the hybrid category. Where these cases of pure exploitation result in harm, other measures based on the notion of economic dependence, as analysed in Section IV, may be more suitable to provide redress.

III. Boundaries of EU competition law

The characterization of differentiated treatment in the three categories as outlined in the previous section does not only help in creating order in the various factual settings in which platforms engage in differentiation, but also in determining how to assess differentiation from a competition law perspective. A distinction is traditionally made between exclusionary and exploitative conduct in competition law. Exploitative practices lead to direct harm for customers and consumers in the form of, for instance, excessive pricing or unfair contract terms, whereas exclusionary behaviour indirectly harms consumers through the foreclosure of rivals from the market thereby diminishing competition on parameters such as price, quality, and innovation. The analysis of the three categories of differentiated treatment under competition law can therefore be based on whether their nature is exploitative or exclusionary. While pure self-preferencing is exclusionary conduct and pure secondary line differentiation qualifies as exploitation, the hybrid category contains a mix of exploitative and exclusionary elements. Each of the three categories of differentiated treatment are examined through the lens of competition law below.

A. Competition law assessment of pure secondary line differentiation

Article 102 (c) TFEU is argued to specifically deal with secondary line injury because of the reference the provision makes to ‘trading parties’, which is understood as non-affiliated businesses on a downstream market. There are cases in which this provision has been applied to address primary line injury resulting from a dominant firm offering dissimilar conditions to customers with the aim of excluding its competitors on the upstream market. However, these cases have been subject to criticism, in particular because of the lower standard of proof required for establishing a competitive disadvantage in cases of secondary line
injury as compared to the threshold applicable to exclusionary abuses.\textsuperscript{49} Even though Article 102 (c) TFEU thus seems to be particularly targeted at cases of pure secondary line injury, exploitative abuses in general have so far not been an enforcement priority for competition authorities.\textsuperscript{50}

The 2009 Guidance Paper outlining the enforcement priorities of the European Commission under Article 102 TFEU only covers exclusionary conduct. The Commission states in the Guidance Paper that it may decide to intervene in relation to exploitative behaviour ‘in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured’.\textsuperscript{51} Exploitative abuses are generally considered to be more adequately tackled under unfair trading or consumer protection law.\textsuperscript{52} This is connected to the confidence in the self-correcting nature of the market that may mitigate the harmful effects of exploitative behaviour by a dominant firm. The common belief is that by keeping the market competitive through taking action against exclusionary abuses, the room for a dominant firm to exploit consumers is limited. In the words of Competition Commissioner Vestager, ‘[t]he best defence against exploitation remains the ability to walk away’ and consumers can often be protected ‘just by stopping powerful companies from driving their rivals out of the market’.\textsuperscript{53}

\textit{(i) Notion of competitive disadvantage}

Not many competition cases have dealt with differentiated treatment by a dominant firm among non-affiliated businesses. Those that do typically relate to network industries or other markets where the dominant firm is an unavoidable trading party, so that customers do not have a real choice and cannot escape the effects of the differentiation by switching to a rival supplier.\textsuperscript{54} Beyond cases such


\textsuperscript{50} A recent exception outside the context of differentiated treatment is the German Facebook competition case where the Bundeskartellamt found that Facebook’s combination of user data from different sources, which breached EU data protection rules, constituted an exploitative abuse under competition law. Bundeskartellamt, ‘Bundeskartellamt prohibits Facebook from combining user data from different sources’ (Press release, 7 February 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html>.

\textsuperscript{51} European Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ (Guidance Paper) [2009] OJ C 45/7, para. 7.

\textsuperscript{52} See the discussion in O’Donoghue and Padilla (n 34), 846–9.


as United Brands, Corsica Ferries, and Portuguese Airports, where the abusive nature of the differentiated treatment between customers stemmed from grounds of nationality or residence, the key cases concerning secondary line differentiation outside of pure internal market considerations are British Airways, Clearstream, and Meo. These cases have clarified the scope for competition liability and in particular the interpretation of the requirement of ‘competitive disadvantage’ as mentioned in Article 102 (c) TFEU.

Even though the ripeners and distributors from various Member States in United Brands and the domestic and international shipping lines in Corsica Ferries did not compete with each other and thus were not put at a competitive disadvantage by the differences in, respectively, prices for the supply of bananas and tariffs for piloting services, the Court of Justice did apply Article 102 (c) TFEU to both scenarios. In his Opinion in Corsica Ferries, Advocate General Van Gerven even stated explicitly that ‘the Court does not interpret [Article 102 (c) TFEU] restrictively, with the result that it is not necessary, in order to apply it, that the trading partners of the undertaking responsible for the abuse should suffer a competitive disadvantage against each other or against the undertaking in the dominant position’. The Court of Justice later contrasted Advocate General Van Gerven’s statement in British Airways by making clear that for Article 102 (c) TFEU to apply ‘there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others’. British Airways operated bonus schemes that according to the Court involved the granting of different rewards to different agents for selling the same amount of tickets. Although the Court did require a competitive disadvantage to be present to hold such a form of differentiated treatment abusive, the burden of proof seems rather low. As to the applicable standard, the Court stated that what is required is that the differentiation ‘tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners’ and that ‘it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually’.

The General Court endorsed the need for a competitive disadvantage in Clearstream, which dealt with differentiation in pricing for clearing and settlement.
services, but again kept the threshold for finding such a disadvantage low. According to the General Court, ‘the application to a trading partner of different prices for equivalent services continuously over a period of five years and by an undertaking having a de facto monopoly on the upstream market could not fail to cause that partner a competitive disadvantage’ for the purposes of the case at hand. In response to claims that this wording gives rise to a presumption that price differentiation is likely to result in a competitive disadvantage, Advocate General Wahl argued in his Opinion in MEO that even if such a presumption can be derived from Clearstream, the case is ‘somewhat out of date’. In its MEO judgment, the Court of Justice indeed confirmed a more effects-based approach by stating that ‘the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not, however, mean that competition is distorted or is capable of being distorted’. With regard to the standard of proof, the Court stated that a finding of a competitive disadvantage ‘does not require proof of actual quantifiable deterioration in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation’. This is a considerably higher threshold than that which follows from the earlier cases. Commentators have even referred to the stricter approach in MEO as ‘the quiet death of secondary-line discrimination as an abuse of dominance’. The MEO case concerned a collective management society, the sole one in Portugal, which applied a higher tariff to MEO than to another customer providing paid television signal transmission services and television content. Although the Court of Justice left it to the national court to determine whether the tariff differences were capable of creating a competitive disadvantage (the case involved a preliminary ruling from a Portuguese court), it did make a number of statements pointing out the limited room for reaching such a conclusion. Because the case concerns the application of differentiated tariffs only in the downstream market, the collective management society, in principle, has no interest in excluding one of its trading partners from that market in which it is not active itself. Following Advocate General Wahl, the Court also argued that one may deduce, in some circumstances, that a tariff differentiation is not capable of affecting the

66 Case C-525/16 MEO, ECLI:EU:C:2017:1020, Opinion of Advocate General Wahl, para. 90.
68 Case C-525/16 MEO, ECLI:EU:C:2018:270, para. 37.
70 Case C-525/16 MEO, ECLI:EU:C:2018:270, para. 36.
71 Case C-525/16 MEO, ECLI:EU:C:2018:270, para. 35.
competitive position of an operator where the effect of that tariff differentiation on the costs or the profitability and profits of that operator is not significant. According to the Court, the amount MEO paid annually to the collective management society represented a relatively low percentage of the total costs borne by MEO so that the tariff differentiation had a limited effect on MEO’s profits.72

(ii) Lessons for future cases

The Court clarified in MEO that it is not necessary for the abusive conduct to affect ‘the competitive position of the dominant undertaking itself on the same market in which it operates, compared with its own potential competitors’.73 Secondary line injury can thus in principle be a competition concern. However, the Court also gave a strong signal that secondary line differentiation can be found abusive under Article 102 (c) TFEU only in limited circumstances. To qualify as abuse, the dominant firm’s behaviour must in particular have an effect on the costs, profits, or other interests of a downstream customer of such a nature that it influences the latter’s competitive situation. A question for consideration in future cases is how this requirement has to be interpreted in practice. For instance, can a dominant firm invoke claims that the differentiation occurs among a large group of trading parties so that the disadvantage imposed on one or a few does not impact overall competition in the downstream market?74 And does a dominant firm have more room to engage in differentiated treatment against trading parties capable of absorbing higher prices or other types of differentiation without materially affecting their competitive position due to their own profitability?75 These are also relevant issues to consider when assessing secondary line differentiation by platforms vis-à-vis business users under Article 102 (c) TFEU.

On the one hand, the Google Shopping decision of the Commission illustrates that a higher ranking can have a substantial impact on user traffic and thus one’s competitive success (assuming this insight also holds beyond instances of self-preferencing in which Google was engaging).76 On the other hand, the emphasis that the Court in MEO places on the lack of interest of a non-vertically integrated firm to distort downstream competition limits the scope for holding secondary line differentiation abusive by providing the dominant undertaking with room to claim that there is a procompetitive reason for applying different prices or

72 Case C-525/16 MEO, ECLI:EU:C:2018:270, para. 34, referring to the Opinion of Advocate General Wahl in Case C-525/16, MEO, ECLI:EU:C:2017:1020, para. 104.
73 Case C-525/16 MEO, ECLI:EU:C:2018:270, para. 24.
74 See O’Donoghue (n 69), 445.
76 See all the data the Commission gathered about how Google’s conduct decreased traffic to competing comparison shopping services and increased traffic to Google Shopping in Case AT.39740 Google Search (Shopping), 27 June 2017, paras 452–538.
conditions to non-affiliated customers. And even beyond the existence of a competitive disadvantage and the room for objective justifications for differentiation, the issue of the equivalence of the situations in which business users find themselves will likely be key, in particular in the context of assessing alleged differentiated treatment in rankings of non-affiliated customers on platforms. If the fact that business A has better customer service or provides better quality products than business B implies that they are not engaging in equivalent transactions within the meaning of Article 102 (c) TFEU, there is no obligation for a dominant platform to treat them alike in the first place for the purposes of competition law.

Finally, if differentiation indeed takes place between equivalent transactions on a platform, it will be rare to encounter instances of pure secondary line injury without any exclusionary elements. As earlier cases outside the platform context have shown, differentiation often consists of exploitative and exclusionary elements at the same time. For instance, in British Airways the different rewards provided to agents for selling the same amount of tickets were considered to have both an exclusionary effect on the competing airlines as well as being exploitative of the agents. The Dutch Funda case also illustrates this. The Amsterdam District Court delivered a judgment in March 2018 about an alleged form of differentiation by housing website Funda that was based on the Opinion of Advocate General Wahl in MEO—the Court of Justice had not yet delivered its judgment in the case at the time. Funda was accused by VBO of applying less favourable conditions to its estate agents on the platform as compared to NVM’s real estate agents. In particular, Funda allegedly provided NVM agents with a more prominent position in the ranking of properties on the website than VBO agents, charged VBO agents more for placing properties and did not give VBO agents full access to the database with information on properties. With reference to the Opinion of Advocate General Wahl in MEO, the Amsterdam District Court argued that a further investigation into the anticompetitive effects of Funda’s conduct was needed, taking into account all relevant circumstances. According to the interpretation of the case law of the EU Courts by the Amsterdam District Court, such a requirement applies to all types of differentiation. However, considering that the risks to competition differ in accordance with whether the differentiation concerns primary line or secondary line injury, such differences should also be reflected in the legal assessment. In fact, this is what Advocate General Wahl himself argued in his Opinion in MEO.

77 See O’Donoghue (n 69), 445.
78 Case C-95/04 P British Airways, ECLI:EU:C:2007:166.
80 Amsterdam District Court 21 March 2018, ECLI:NL:RBAMS:2018:1654 (Funda), para. 2.11.
82 Case C-525/16, MEO, ECLI:EU:C:2017:1020, Opinion of Advocate General Wahl, paras 70–77.
Although the Amsterdam District Court did not pay attention to this in its judgment, the Funda case does not appear to be a situation of pure secondary line differentiation where a dominant firm has no interest in weakening the competitive position of its trading parties in the downstream market. The Funda case therefore differs from MEO in an important aspect. Funda does seem to have an interest in favouring trading party NVM on the downstream market for residential real estate, because NVM owns 70 per cent of Funda’s shares and has more than 90 per cent of the voting rights in Funda. The existence of such a possible exclusionary motive increases the likelihood of harm to competition, so that this is an element that should be considered in determining whether the differentiation qualifies as abuse of dominance. The Amsterdam District Court based its conclusion that no abuse of dominance took place partly on an expert report in which no consistent evidence was found that the differentiation had impacted the competitive position of NVM agents as compared to non-NVM agents.

These findings were made based on an effects analysis of the market, so that the outcome would probably have been no different if Funda’s possible exclusionary motive had been more explicitly considered. However, to establish the right analytical framework, cases of pure secondary line differentiation have to be distinguished from cases where an exclusionary element is also present, thereby potentially turning the case into one of self-preferencing. Because NVM owns Funda for a large part, the more favourable conditions Funda applied to NVM real estate agents arguably constitute a form of self-preferencing as they cannot be seen as non-affiliated businesses.

Due to the limited scope of competition enforcement relating to pure secondary line differentiation following the MEO judgment, the role of other regimes in protecting against economic dependence becomes more important. This is particularly the case for situations where business users are blocked from the platform. As will be discussed in Section III.B.(iii), such situations are difficult to capture under EU competition law as currently interpreted in decision-making practice and case law.

B. Competition law assessment of differentiation of the hybrid category

The assessment of hybrid forms of differentiated treatment under competition law depends on how this behaviour is manifested by the platform on the market.

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85 This analysis is based on Inge Graef, ‘Grenzen aan discriminatie als misbruik van machtspositie - Zaak C-525/16, MEO’ (2018) 12 SEW Tijdschrift voor Europese en economisch recht, 541, 544–5.
As illustrations, three practices are discussed here that have already been mentioned in Section II.B: conditioning a business’s ranking on whether it complies with ‘wide’ price parity (i.e. the absence of cross-platform pricing), conditioning a business’s ranking on whether it takes additional services from the platform, and the blocking of a business’s access to the platform.

(i) ‘Wide’ price parity and rankings

To assess the first practice, an analysis needs to be made of whether such behaviour leads to restrictions of competition that the ban on ‘wide’ price parity clauses, as enforced by national competition authorities throughout the European Union, aims to prevent. If so, one may argue that the conditioning of a customer’s ranking on its lack of differentiating prices across platforms, is to be considered as abuse based on the same reasoning underlying the illegality of ‘wide’ price parity clauses, namely the restriction of competition in the market for hotel booking platforms. In addition, the outcome of the competition analysis would depend on the extent to which the consumer interest in having hotels that offer no lower prices elsewhere displayed higher in the ranking outweigh anticompetitive effects on the market for hotel booking platforms. As a result, the key determining factor to establish the abuse is how pronounced the anticompetitive effects are.

(ii) Tying

In relation to the second practice, tying can form a relevant framework through which to assess the anticompetitive effects of conditioning a business’s ranking on whether it takes additional services from the platform, like Amazon’s logistics services in the ongoing investigation of the Italian competition authority. Tying deals with the leveraging of a dominant firm’s established position in the market for product A (market for the tying product), for instance the market for e-commerce platforms, to the market for product B where it wants to strengthen its presence (market for the tied product), for instance the market for logistics services, by making the sale of product A dependent on the purchase of product B. A difficulty in transposing this reasoning to the practice investigated by the Italian competition authority is that business users are not obliged to take Amazon’s logistics services in order to be able to sell goods through Amazon’s e-commerce platform. There is no contractual obligation or technical integration between the two services that forces businesses to rely on Amazon’s logistics services when using its marketplace services. In order to be abusive under Article 102 TFEU, tying requires a form of coercion so that customers do not have a choice of obtaining the tying product without the tied product. A question is how far

86 See in particular Case T-201/04 Microsoft, ECLI:EU:T:2007:289, paras 864–865 concerning the tying of Windows Media Player to Microsoft’s operating system Windows. This approach was confirmed by the European Commission in its 2009 commitment decision dealing with the tying
this requirement can be stretched when assessing differentiated treatment in rankings.

If businesses are downgraded in the ranking to such an extent that they cannot effectively compete anymore unless they do take additional services from the platform, this may be sufficient proof of coercion. At the same time, the tying has to be liable to foreclose competition in the market for the tied product—in the Italian investigation against Amazon, this is the market for logistics services. If businesses despite the tying can and do rely on logistics services of other providers, this can offset the foreclosure effect created by Amazon’s behaviour. As a result, in order to qualify such conduct as abuse of dominance, evidence of the existence of anticompetitive effects will again be key.

(iii) Blocking of access to the platform

The refusal to deal abuse is relevant to assess the third practice of blocking a business’s access to the platform. Two scenarios are discussed here where the platform itself is not active on the downstream market. Situations in which the platform does compete with downstream businesses qualify as pure self-preferencing and are examined in the next section. The scenarios that are relevant for the purposes of the present section concern either purely exploitative cases of secondary line differentiation or cases of hybrid differentiation. An exclusionary motive is absent in cases of pure secondary line differentiation, because the platform does not benefit, and may even suffer, from blocking the access of some business users. The interest of a non-vertically integrated firm is to have as many downstream services as possible accessible via its platform. Cases of pure secondary line differentiation will be less frequent because the platform has no incentive to deny access, unless a business harms the platform’s reputation, for instance due to low quality of service provided to consumers. In cases of hybrid differentiation the platform does have an exclusionary motive, but in a market different than the one in which the affected business users compete. The fate of Disconnect and Unlockd, as discussed in Section II.C.(iii), illustrates that a platform may decide to ban applications in order to protect its business in a related market, such as the way Google allegedly tried to protect its revenues in mobile advertising in the two cases.

What pure secondary line and hybrid differentiation have in common as regards the analysis of blocking of access as a refusal to deal abuse, is that the condition of exclusion of effective competition in the downstream market is not met. This means that the blocking of access under these two categories of

87 Similarly, attention was paid to whether consumers could and did obtain third party media players and web browsers in the Microsoft cases. See Case T-201/04Microsoft, ECLI:EU:T:2007:289, paras 1049–1077 and Case COMP/C-3/39.530 Microsoft (tying), 16 December 2009, paras 39–54.

differentiation cannot be found abusive under the current interpretation of Article 102 TFEU. The exclusion of effective competition is one of the conditions that have to be applied for qualifying a refusal to deal as abuse of dominance. The others conditions are: the indispensability of the input to which access is refused; the prevention of the introduction of a new product due to the refusal to deal (relevant for intellectual property protected assets); and the absence of an objective justification for the refusal to deal. The way in which the requirement of exclusion of effective competition has been applied in previous refusal to deal cases indicates that the relevant question is whether the dominant firm reserves the downstream market to itself by denying a competitor access to an input.

In the context of the application of the condition of exclusion of effective competition in *Magill*, the Court of Justice explicitly stated that the Irish broadcasting stations ‘reserved to themselves the secondary market of weekly television guides by excluding all competition on that market’. Similarly, in *IMS Health*, the Court of Justice argued that the refusal was ‘such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market’. It can be concluded from these statements that the requirement of exclusion of effective competition aims to target the situation in which a dominant firm is already active in the downstream market and tries to reserve that market to itself by refusing to deal. As such, the conduct that a refusal to deal abuse targets is the leveraging of market power from the upstream market, namely the input to which access is requested, to a downstream market in which the dominant firm competes with the access seeker. Under this interpretation, the condition of exclusion of effective competition does not capture the scenario in which a requesting undertaking needs access to an input in order to enter a market in which the dominant firm is not (yet) active, because the latter does not reserve the downstream market to itself by refusing to deal in that situation. In fact, this scenario is even more damaging to innovation and consumer welfare than leveraging, because it implies that the dominant firm is capable of preventing the development of a new market by refusing to deal.

Whether the European Commission and the EU Courts are willing to stretch the refusal to deal abuse to such situations remains to be seen once they are confronted with a refusal to deal that prevents the requesting undertaking from

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89 Joined cases C-241/91 and C-242/91 *Magill*, ECLI:EU:C:1995:98, para. 56.

90 Case C-418/01 *IMS Health GmbH*, ECLI:EU:C:2004:257, para. 52.


opening up a new market. In the more traditional setting in which refusal to deal abuse has been developed, the dominant firm does not have an incentive to refuse access in such a situation. Since the dominant firm is not active in the downstream market that the requesting undertaking wishes to enter, it does not have to protect its position in that market. In principle, it will only gain revenue from selling access to the requested input or from charging commissions from transactions facilitated through its platform. However, the online platform economy is much more complex due to the connections between the various activities dominant platforms operate. This may imply that a dominant platform decides to block a business user’s access in order to prevent it from eroding the platform’s commercial interests elsewhere in the ecosystem. The current interpretation of refusal to deal, as a framework targeting traditional leveraging from an upstream to a downstream market, does not adequately capture these market dynamics. The cases of Disconnect and Unlockd are good illustrations where the anticompetitive harm falls outside the reach of a refusal to deal abuse. Because of the control a dominant firm can exercise over the development of new markets by refusing to give access to an indispensable input, the fact that it is not active in the downstream market itself should not stand in the way of holding the refusal to deal abusive. In particular in the context of online platforms where markets are increasingly connected, it would be desirable for EU competition law to capture these instances under the refusal to deal abuse. Alternatively and in the absence of any competition law precedent, other measures based on the notion of economic dependence, as analysed in Section IV, can be devised to provide redress in these situations.

C. Competition law assessment of pure self-preferencing

Self-preferencing is at the heart of the Google Shopping decision of the European Commission. The Commission qualified Google’s behaviour as ‘leveraging’, namely ‘the use of a dominant position on one market to extend that dominant position to one or more adjacent markets’, which, according to the Commission, constitutes ‘a well-established, independent, form of abuse falling outside the scope of competition on the merits’. In particular, the Commission stated that Article 102 TFEU prohibits not only practices intending to strengthen a firm’s dominant position but also ‘conduct of an undertaking with a dominant position in a given market that tends to extend that position to a neighbouring but

93 This analysis is based on Inge Graef, ‘Rethinking the essential facilities doctrine for the EU digital economy’ (2019) 52(3) Revue juridique Thémis de l’Université de Montréal, 33, 67–9.
94 See Nicolas Petit, ‘Technology Giants, the Moligopoly Hypothesis and Holistic Competition: A Primer’ (SSRN Working Paper, October 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856502>, where he coined the term ‘moligopolists’ to capture the new market dynamics where firms may have a monopoly for a certain service but at the same time compete in oligopoly for other services.
95 Case AT.39740 Google Search (Shopping), 27 June 2017, para. 649.
separate market by distorting competition’.96 The use of Google’s dominance in the market for general search to strengthen its position in the market for comparison shopping services therefore amounted to abuse of dominance in the view of the Commission.

(i) Earlier precedent

To remedy the abuse, the Commission required Google to engage in equal treatment of its own as well as rival comparison shopping services.97 However, discrimination or differentiation did not feature as a ‘theory of harm’ in establishing the abuse—even though earlier cases have dealt with the application of more favourable conditions to a dominant firm’s own activities. For instance, *Deutsche Bahn* involved a German national rail operator who applied more favourable tariffs for railway traffic to some customers, including its own downstream subsidiary, as compared to others. In its decision, the Commission argued that Deutsche Bahn was abusing its dominant position by promoting its own services through the imposition of discriminatory conditions in respect of equivalent transactions on the downstream market.98 Another example is *GT-Link* where a Danish state port operator exempted its own downstream ferry services, as well as those of some of its trading partners, from the payment of port duties. In its preliminary ruling, the Court of Justice stated that this behaviour is capable of constituting an abuse ‘in so far as with regard to the public undertaking’s other trading partners it involves application of dissimilar conditions to equivalent transactions’.99 These cases thus illustrate100 that the favouring of one’s own downstream activities vis-à-vis those of rivals has been successfully qualified before as abuse of dominance under Article 102 (c) TFEU.

One reason why the Commission did not rely on these precedents in *Google Shopping* may be the fact that the provision is not the most suitable to address cases of self-preferencing. Article 102 (c) TFEU was designed to deal with pure secondary line differentiation, and transactions with a dominant undertaking’s downstream business are difficult to regard as equivalent to a transaction with a third party.101 Clarifying the extent to which price discrimination amounts to exclusionary abuse, the Court of Justice argued in *Post Danmark I* that ‘the fact that the price of a dominant undertaking may ... be described as “price discrimination”, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely,

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96 Case AT.39740 *Google Search (Shopping)*, 27 June 2017, para. 334.
97 Case AT.39740 *Google Search (Shopping)*, 27 June 2017, para. 700.
100 See for a discussion of other relevant cases Jones and Sufrin (n 49), 561 and O’Donoghue and Padilla (n 34), 805.
101 Jones and Sufrin (n 49), 561.
charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse. All of this may explain why the Commission in its *Google Shopping* decision put more emphasis on the numerous graphs and other evidence showing the evolution of search traffic as impacted by Google’s behaviour in order to prove anticompetitive effects, instead of on the legal test (which only covers 9 out of the 755 paragraphs in the entire decision!) Apart from whether the Commission has sufficiently met its burden of proof in showing the anticompetitive effects resulting from Google’s behaviour, the legal test that the Commission applied for establishing the abuse will also be one of the key elements of the General Court’s analysis on appeal.

**(ii) No indispensability**

In response to the Commission’s allegations, Google claimed that there is no precedent for characterizing its conduct as an abuse of dominance. In particular, Google argued that its behaviour could only be considered abusive if the criteria established by the Court of Justice in *Bronner* are fulfilled. By failing to apply those criteria, the Commission is in Google’s view imposing a duty to provide rival comparison shopping services access to ‘a significant proportion of its general search results pages’ even though access to those pages is not indispensable in order to compete. The inapplicability of the indispensability requirement is what distinguishes the self-preferencing abuse in *Google Shopping* from refusal to deal cases such as *Bronner*. The indispensability requirement seeks to examine whether actual or potential substitutes exist for the input of the dominant firm. In *Bronner*, the Court of Justice interpreted this requirement in a strict way, arguing that other methods of distributing daily newspapers existed as alternatives to Mediaprint’s home delivery scheme to which Bronner requested access ‘even though they may be less advantageous for the distribution of certain newspapers’. In addition, the Court of Justice concluded that there did not appear to be ‘any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult’ for Bronner to establish its own nationwide home delivery scheme. It was not enough, in the view of the Court, for Bronner to claim that such a second home delivery scheme would not be

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103 Case AT.39740 *Google Search (Shopping)*, 27 June 2017, paras 452–538 (analysing how Google’s conduct decreased traffic to competing comparison shopping services and increased traffic to Google Shopping) and 589–643 (analysing the anticompetitive effects of Google’s conduct).
104 Case AT.39740 *Google Search (Shopping)*, 27 June 2017, paras 644–652 deal with Google’s arguments in relation to the applicable legal test.
105 Case AT.39740 *Google Search (Shopping)*, 27 June 2017, para. 646.
106 Case C-7/97 *Bronner*, ECLI:EU:C:1998:569.
107 Case AT.39740 *Google Search (Shopping)*, 27 June 2017, para. 645.
108 Case C-7/97 *Bronner*, ECLI:EU:C:1998:569, para. 43.
109 Case C-7/97 *Bronner*, ECLI:EU:C:1998:569, para. 44.
economically viable due to the small circulation of daily newspapers.\textsuperscript{110} According to the Court, it would be necessary at the very least to establish that it is not economically viable to create a second home-delivery scheme with a circulation comparable to that of the daily newspapers distributed by the existing scheme.\textsuperscript{111}

While the Google search results constitute an important gateway for comparison shopping services to reach users, it would have been hard for the Commission to claim that there were no alternatives at all—considering that the existence of less advantageous alternatives do not render an input indispensable.\textsuperscript{112} However, even if the Commission had decided to analyse the Google Shopping case as a refusal to deal, it is unclear whether these high standards set out in \textit{Bronner} would have been applicable. The General Court in \textit{Microsoft} considerably lowered the standards by arguing that 'non-Microsoft work group operating systems must be capable of interoperating with the Windows domain architecture on an equal footing with Windows work group server operating systems' in order to be marketed viably.\textsuperscript{113} Interestingly, equal treatment is also the outcome of the Google Shopping decision even though the Commission did not apply the indispensability requirement. To stop the self-preferencing, Google had to subject its own comparison shopping service 'to the same underlying processes and methods for the positioning and display in Google's general search results pages as those used for competing comparison shopping services', including 'all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result'.\textsuperscript{114}

In response to Google's argument that the \textit{Bronner} criteria should have been applied, the Commission argued that they were irrelevant in the situation at hand. According to the Commission, Google's behaviour did not concern a passive refusal to give competing comparison shopping services access to a proportion of its general search results. Instead, the Commission qualified the conduct as 'active behaviour relating to the more favourable positioning and display by Google' of its own comparison shopping service.\textsuperscript{115} Furthermore, the Commission stated that the \textit{Bronner} criteria do not apply in a situation, like in Google Shopping, where ending the infringement does not involve imposing a duty on the dominant undertaking to 'transfer an asset or enter into agreements with persons with whom it has not chosen to contract'.\textsuperscript{116} Such arguments are not particularly convincing, considering that such distinctions from 'regular'

\textsuperscript{110} Case C-7/97 \textit{Bronner}, ECLI:EU:C:1998:569, para. 45.
\textsuperscript{111} Case C-7/97 \textit{Bronner}, ECLI:EU:C:1998:569, para. 46.
\textsuperscript{113} Case T-201/04 \textit{Microsoft}, ECLI:EU:T:2007:289, para. 421.
\textsuperscript{114} Case AT.39740 \textit{Google Search (Shopping)}, 27 June 2017, para. 700.
\textsuperscript{115} Case AT.39740 \textit{Google Search (Shopping)}, 27 June 2017, para. 650.
\textsuperscript{116} Case AT.39740 \textit{Google Search (Shopping)}, 27 June 2017, para. 651.
refusal to deal scenarios can also be explained based on the nature of the input at stake. A search engine typically lists websites without entering into a contract with or transferring an asset to their owners. And one could also construe the Google Shopping case as one about a refusal to give access to the prominent spots in the search results, so that the Commission’s argument about distinguishing active from passive behaviour becomes a matter of semantics.117

(iii) Constructive refusals to deal and margin squeezes

Although the Commission explicitly rejected the idea that the case involved a refusal to deal, Google Shopping could in fact be analysed as a so-called constructive refusal to deal. This would have saved the Commission the trouble of establishing self-preferencing as an independent form of abuse, because constructive refusals to deal also do not require indispensability. According to the Commission’s 2009 Guidance Paper on exclusionary abuses, constructive refusals to deal can take the form of delaying or degrading the supply of the product or imposing unreasonable conditions for supplying.118 Google’s behaviour to demote rival comparison shopping services in its general search results can be argued to constitute such a constructive refusal to deal, because the conditions under which rival comparison shopping services get access to the search results make Google’s conduct allegedly anticompetitive. In particular, the situation at stake in Google Shopping has some similarities with that of a margin squeeze. A margin or price squeeze concerns a situation whereby a vertically integrated dominant firm sets its upstream and downstream prices to such a level as to create a margin between them at which downstream competitors cannot make a profit. In markets for online services where price is less important as a parameter of competition, other conditions of access as applied by a dominant firm may form the object of a margin squeeze or a constructive refusal to deal more generally.

In the context of platform-to-business relations, the dominant firm’s platform, Google’s general search engine in Google Shopping, constitutes the upstream market, whereas the downstream market is formed by the product or service offered through the platform, comparison shopping in the Google Shopping case. By engaging in self-preferencing, a vertically integrated platform can squeeze out downstream rivals through the imposition of conditions that do not allow them to compete viably.119 Self-preferencing in the form of more prominent positions for a platform’s own downstream services in a ranking (as in Google Shopping)

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117 For a more detailed discussion of how the Commission is bypassing the refusal to deal framework in Google Shopping, see Graef (n 93), 58–60.
119 For a detailed discussion of how the margin squeeze concept can be applied to online platforms, see Friso Bostoen, ‘Online platforms and vertical integration: the return of margin squeeze?’ (2018) 6(3) Journal of Antitrust Enforcement, 355.
may harm businesses to such an extent that they cannot effectively compete any-
more due to the decrease in exposure to users. Where self-preferencing takes the
form of preferential access to data about transactions by downstream rivals (as in
the Commission’s Amazon investigation), the platform may have such detailed
information about trends in consumer preferences and successful products that it
can outcompete business users. While price squeezes specifically concern the
margin between the dominant firm’s upstream and downstream prices, self-
preferencing relates to how a dominant firm’s control over the conditions of
access to the upstream market can foreclose competitors from the downstream
market.

It is particularly promising to analyse self-preferencing as a form of margin
squeeze, because the Court of Justice has explicitly stated in its TeliaSonera judg-
ment that margin squeezes can be abusive irrespective of whether a duty to deal
exists under the Bronner criteria. According to the Court in TeliaSonera, the
Bronner criteria do not ‘necessarily also apply when assessing the abusive nature
of conduct which consists in supplying services or selling goods on conditions
which are disadvantageous or on which there might be no purchaser’. The
Court argued that a margin squeeze ‘may, in itself, constitute an independent
form of abuse distinct from that of refusal to supply’. Otherwise, in the
Court’s view: ‘before any conduct of a dominant undertaking in relation to its
terms of trade could be regarded as abusive, the conditions to be met to establish
that there was a refusal to supply would in every case have to be satisfied, and
that would unduly reduce the effectiveness of Article 102 TFEU’. A similar
reasoning arguably applies to situations of self-preferencing: if self-preferencing
can only be abusive when the dominant firm is under a duty to deal, the scope
for competition interventions is limited. In particular, the strict interpretation
of the indispensability requirement in Bronner (if still valid after Microsoft) would
have likely prevented the Commission from taking action in Google Shopping as
discussed above. The inapplicability of the indispensability requirement to mar-
gin squeezes has been criticized, in particular because it creates incentives for
dominant firms not to give access to non-indispensable inputs for which no duty
to deal exists. By not providing access at all, a dominant firm can prevent the
terms under which it would otherwise have supplied the non-indispensable
inputs qualifying as a margin squeeze.

The Google Shopping case therefore provides an opportunity for the General
Court to clarify whether the finding of the Court of Justice in TeliaSonera, that a
duty to deal does not have to be established in the context of margin squeezes,
also applies to similar types of exclusionary conduct that are not concerned with

120 Case C-52/09 Konkurrensverket v TeliaSoneraSverige AB, ECLI:EU:C:2011:83, para. 55.
121 Case C-52/09 Konkurrensverket v TeliaSoneraSverige AB, ECLI:EU:C:2011:83, para. 56.
122 Case C-52/09 Konkurrensverket v TeliaSoneraSverige AB, ECLI:EU:C:2011:83, para. 58.
123 See Inge Graef, EU Competition Law, Data Protection and Online Platforms: Data as Essential
price. The reference to ‘*terms of trade*’ in the *TeliaSonera* judgment can provide support for expanding this line of reasoning to other forms of discriminatory conduct as well. In its December 2018 *Slovak Telekom* judgment, the General Court did point to the fact that the Court of Justice in *TeliaSonera* did not particularly refer to margin squeeze as a form of abuse ‘but rather to the supply of “services or selling goods on conditions which are disadvantageous or on which there might be no purchaser” and to “terms of trade” fixed by the dominant undertaking’. According to the General Court in *Slovak Telekom*: ‘Such wording suggests that the exclusionary practices to which reference was therefore made concerned not solely a margin squeeze, but also other business practices capable of producing unlawful exclusionary effects for current or potential competitors, like those classified by the Commission as an implicit refusal to supply access to the applicant’s local loop’.124 This could arguably also include the self-preferencing at stake in *Google Shopping*, even though the Commission has not relied upon this theory of harm in the decision.125

(iv) Anticompetitive effects

The key in holding self-preferencing abusive as a margin squeeze or constructive refusal to deal is the existence or capability of the behaviour to produce anticompetitive effects.126 As argued by the Court of Justice, the relevant benchmark to be applied is ‘that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking’.127 For price squeezes, this implies that the costs of the dominant firm have to be used as a basis for the assessment. According to the Court in *TeliaSonera*, the relevant question is then whether competitors who have the same costs as the dominant firm would be compelled to sell at a loss (negative margin) or due to reduced profitability have more difficulties operating on the market (positive but limited margin).128 Self-preferencing does not deal with differences in costs between the upstream and downstream levels, but involves conditions of access to the upstream market, controlled by the platform, that are set at such a level that downstream rivals may no longer be able to viably compete. To assess whether such anticompetitive effects indeed exist, one could simulate whether the dominant firm’s own downstream affiliate would be able to effectively compete if it had to operate under the same conditions of access as those applicable to third party business users. Because the dominant firm’s own downstream operations are used as a basis for the analysis, the anticompetitive effects are established from the perspective of an as-efficient competitor who is, however, now subject to the conditions as they are applied to regular, non-affiliated business users.

125 See also the discussion in Graef (n 93), 58–60.
127 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 64.
Such an approach would also be helpful as a way to establish limiting principles for self-preferencing to constitute an abuse under Article 102 TFEU. An interpretation of self-preferencing that would give rise to a general principle of non-discrimination under EU competition law goes against the objectives of the regime, which protects the ability for market players to effectively compete but does not aim to ensure a full level playing field for all.\textsuperscript{129} Finally, the need to examine anticompetitive effects would bring the assessment of self-preferencing in line with the approach put forward by the Court of Justice in \textit{MEO} to prove the existence of a competitive disadvantage for pure secondary line differentiation. Even though the latter is exploitative instead of exclusionary in nature and is therefore generally less harmful, consistency in how to conduct a competition analysis of the various types of differentiated treatment is desirable—although the balance may tilt in different directions depending on the behaviour at hand. As regards the outcome of \textit{Google Shopping}, it is submitted here that the indispensability requirement would not have been applicable had the Commission analysed the case as one of margin squeeze or constructive refusal to deal on the basis of the \textit{TeliaSonera} judgment. Even though the decision finds itself on sketchy legal ground especially with regard to the Commission’s statement that leveraging constitutes an independent abuse,\textsuperscript{130} the Commission has paid a lot of attention to how Google’s behaviour gives rise to anticompetitive effects that harm rivals’ comparison shopping services. As such, the General Court’s analysis may focus on this part of the case to examine whether the Commission has met its burden of proof in terms of the existence or likelihood of anticompetitive effects. For the purposes of the qualification of self-preferencing as a category of abuse of dominance, the General Court’s judgment will hopefully provide more clarity than the Commission decision, in particular with regard to the relationship of self-preferencing with constructive refusals to deal such as margin squeezes.

\textit{(v) Blocking of access to the platform}

Attention also needs to be paid here to the most drastic form of self-preferencing whereby a platform blocks a business user’s access to the platform in order to favour its own downstream services. The motive to foreclose rivals in the downstream market is what qualifies blocking of access as a form of pure self-preferencing instead of pure secondary line or hybrid differentiation, which may also be relevant categories for cases of blocking of access not motivated by the desire to exclude downstream competitors. As discussed in Section III.B.(iii), the


\textsuperscript{130} As argued by Giorgio Monti, \textit{EC Competition Law} (Cambridge: Cambridge University Press, 2007), 186: leveraging is instead a general term for various specific strategies, like tying, refusing to deal, or predatory pricing, a dominant firm may apply to extend its market power from one market to another.
latter cases cannot be adequately addressed under the refusal to deal framework because the current interpretation of the requirement of exclusion of effective competition implies that a dominant firm has to reserve a downstream market to itself by refusing to deal. In cases of pure self-preferencing, the requirement of exclusion of effective competition is met since the dominant firm is active on the downstream market and blocks the access of a downstream rival in order to favour its own affiliated services. However, the application of the refusal to deal abuse to these cases is not without problems either. Situations of blocking of access may take the form of disruptions of supply, discontinuing an existing course of dealing, or of absolute refusals to supply, where no prior course of dealing with the business exists. Currently, it is unclear whether the same standards apply to these two distinct types of refusal to deal.

The Microsoft case involved a termination of supply of previous levels of interoperability information to Microsoft’s competitors in the market for work group server operating systems, but was nevertheless assessed by the General Court under the strict conditions developed in cases involving absolute refusals to deal. Such an approach may lead to undesirable outcomes, which can be best illustrated by reference to the new product condition. This condition is mentioned in cases where the requested input is protected by intellectual property rights and requires the refusal to deal to prevent the appearance of a new product being introduced by the access seeker. The application of the new product requirement to disruptions of supply implies that downstream competitors who are already active on the market and likely to have made commercial decisions on the basis of the supply, have to identify a new product that they would like to introduce in the market in order to continue to have access to the dominant firm’s input. If downstream competitors cannot identify such a new product that they would like to develop on the basis of the requested input, they have no cause of action under Article 102 TFEU towards a dominant undertaking that decides to enter the downstream market itself and withdraws previous levels of supply in order to become the sole supplier of the downstream product.

While the General Court in Microsoft did apply the new product condition and assessed the disruption of supply as a regular absolute refusal to deal, the Court of Justice conducted a different analysis for a disruption of supply in a 2008 preliminary ruling. The Sot. Lelos case dealt with a refusal of a dominant pharmaceutical company to meet orders of existing customers in full with the aim of restricting parallel trade. With regard to the applicable legal test, the

131 For instance, the Court of Justice stated in Magill that ‘the refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand’. See Joined cases C-241/91 and C-242/91 Magill, ECLI:EU:C:1995:98, para. 54.

132 Damien Geradin, ‘Limiting the scope of Article 82 EC: What can the EU learn from the U.S. Supreme Court’s judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’ (2004) 41 CML Rev, 1519, 1538 where this is referred to as ‘the absurdity of the “new product” test’.
Court of Justice argued that ‘established case-law of the Court shows that the refusal by an undertaking occupying a dominant position on the market of a given product to meet the orders of an existing customer constitutes abuse of that dominant position under Article [102 TFEU] where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor’. Interestingly, the Court referred to the Commercial Solvents and United Brands judgments and not to the Magill and IMS Health judgments in which it established the stricter test for absolute refusals to deal. This may indicate that the Court of Justice still regards the Commercial Solvents reasoning as the applicable law for disruptions of supply. The requirements of indispensability, as discussed above in the context of Bronner, and new product are absent in Commercial Solvents, so that these would not need to be met in order to hold a disruption of supply abusive under Article 102 TFEU.

Since the Microsoft judgment of the General Court was not appealed, the Court of Justice has not had the opportunity to rule on the fact that the lower court applied the stricter refusal to deal test to Microsoft’s termination of the previous level of disclosures of interoperability information. The blocking of access to a platform may often take the shape of a disruption of supply, as evidenced by Apple’s decision to block screen-time and parental-control apps from its app store once it started to offer these apps itself. Analysing this behaviour under the strict standard of absolute refusals to deal will not address the anti-competitive harm. Businesses would have no cause of action against a dominant platform who wants to reserve the downstream market to itself at a certain point in time, unless they can identify a new product for which access to the platform is indispensable. As a result, it would be desirable for disruptions of supply not to be assessed under the same strict standards as absolute refusals to deal.

IV. Economic dependence and fairness of platform-to-business relations

From the analysis of the boundaries of EU competition law in addressing differentiated treatment, it can be concluded that the main difficulty is to capture the anti-competitive harm resulting from the blocking of a business’s access to a platform. Other, less far-reaching instances of self-preferencing, hybrid and purely exploitative secondary line differentiation may also raise competition concerns (as discussed in the previous section), but existing interpretations of the relevant competition law concepts seem more capable here of addressing the anticompetitive effects. The MEO judgment has clarified the notion of competitive

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133 Joined Cases C-468/06 to C-478/06 Soc. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proionton, ECLI:EU:C:2008:504, para. 34.

134 This analysis is based on Graef (n 123), , 235–7 and 242.
disadvantage in the context of secondary line differentiation, hybrid differentiation may be targeted as a form of ‘wide’ price parity or tying, and constructive refusals to deal or margin squeezes can form the basis for pure self-preferencing taking the shape of preferential positions in rankings and preferential access to data.

The problem relating to cases of blocking of access to a platform is that the strict conditions of the refusal to deal abuse do not sufficiently and consistently address the anticompetitive effects of the three types of differentiated treatment distinguished here. In situations of pure secondary line and hybrid differentiation, the dominant firm is not active in the downstream market while the refusal to deal framework requires the dominant firm to exclude effective competition by reserving the downstream market to itself through refusing to deal. In situations of pure self-preferencing, it is not clear whether disruptions of supply have to be assessed under the same strict conditions as absolute refusals to deal. These problems are not specific to platform-to-business relations and are relevant for other sectors of the economy as well. However, with the increasing dependence of businesses on platforms to reach consumers, these issues are becoming more pronounced and urgent in the online platform economy. Against this background, this section discusses several ways to address anticompetitive effects of differentiated treatment, with a focus on the blocking of a business’s access to a platform, ranging from changes within EU competition law, to national regimes on abuse of economic dependence and possible new regulatory interventions.

A. New approaches within EU competition law

As discussed in Sections III.B.(iii) and III.C.(v) above, there is room to interpret the refusal to deal abuse in a way that better addresses the anticompetitive effects. Disruptions of supply should not be assessed under the same strict standards as absolute refusals to deal and the fact that a dominant firm is not active in the downstream market should not stand in the way of holding a refusal to deal abusive. The *Sot. Lélos* judgment of the Court of Justice provides support to solve the issue of disruptions of supply. However, dropping the condition of exclusion of effective competition in the downstream market (requiring the dominant firm to have downstream activities in competition with those of the access seeker) will be more controversial, because it takes the refusal to deal framework away from traditional cases of leveraging.

In addition, the interpretation of the requirement of indispensability reflects on the wider question of what type of competition EU competition law aims to protect. According to the *Bronner* judgment, the indispensability of the dominant firm’s input has to be assessed not with reference to the scope of the access seeker’s own downstream activities but with reference to a scale of business comparable to that of the dominant firm.135 This refers to the notion of the ‘as-

efficient competitor’ that also features in the MEO judgment in relation to differ-
entiation of a trading party that is ‘at least as efficient as its competitors’ as well as in the TeliaSonera judgment as a benchmark to test the anticompetitive effects resulting from a margin squeeze. The latter approach may be relevant to assess pure self-preferencing as constructive refusals to deal as well, as submitted in Section III.V.(iv).

(i) Is there a need to protect less efficient competitors?

The current focus on protecting as-efficient competitors in EU competition law may no longer reflect market reality, in particular in the online platform economy where a few firms dominate various market segments. This raises the question of whether it is still appropriate to require competitors to be as-efficient as these ‘digital champions’ in order to benefit from protection under the competition rules. The Court of Justice has already acknowledged the limits of the as-efficient-competitor test in Post Danmark II in the context of rebates by stating that ‘applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible’. The Court referred to Post Danmark’s ‘very large market share’ and the ‘structural advantages conferred, inter alia, by that undertaking’s statutory monopoly’ in the distribution of letters including direct advertising mail. In addition, the Court argued that access to the relevant market is protected by high barriers, so that ‘the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking’. On these grounds, the Court concluded that the as-efficient-competitor test must be regarded as one tool among others to assess whether a rebate scheme amounts to an abuse of dominance.

Although the strong market positions in the platform economy do not stem from government-granted rights and legal barriers, network externalities and returns to scale facilitated by data may have a similar impact on the market structure. As such, the arguments on the basis of which the Court in Post Danmark II accepted that less efficient competitors need protection may also hold in the context of platform-to-business relations. In fact, Director-General for Competition Laitenberger argued in a speech in the precise context of competition enforcement in digital markets that ‘there may be circumstances where one must consider intervening in order to protect “not as yet efficient” competitors in order to prevent damage to competition and ultimately consumers’. In his opinion, a dynamic view of competition is required so as ‘to acknowledge that smaller firms

136 Case C-525/16 MEO, ECLI:EU:C:2018:270, para. 31.
139 Case C23/14 Post Danmark II, ECLI:EU:C:2015:651, para. 60.
may have the potential to grow and therefore threaten dominant companies.\textsuperscript{140} In a similar vein, Competition Commissioner Vestager claimed that a ‘diverse collection of businesses ... can help to keep our economy strong and resilient’, that diversity is ‘the secret to innovation’, and that ‘building a portfolio’ instead of ‘picking a single winner’ is ‘the route to success’.\textsuperscript{141}

While these statements illustrate that more weight is given to protecting smaller businesses and market diversity in competition policy discussions, it remains to be seen whether and to what extent such developments will be reflected in actual enforcement actions, decisions, and case law. The recognition of the need for keeping businesses on the market also provides support for a more expansive interpretation of the refusal to deal framework in order to address the blocking of a business’s access to a platform—even if the business is not as efficient as the dominant firm—but does not provide clarity on how exactly this can be done. The remedies imposed by the European Commission in Google Shopping already protect the ability of comparison shopping services to compete with Google. However, the outcome of the case does not go beyond protecting as-efficient competitors—even though the decision does not mention this notion as a limit either. For instance, the Commission referred to evidence showing that Google was aware that its own comparison shopping service was not performing well.\textsuperscript{142} And it stated that ‘[t]he prospects of commercial success of Google’s comparison shopping service are enhanced not because of the merits of that service, but because Google applies different underlying mechanisms on the basis of the advantages provided to it by its dominant position in the national markets for general search services’.\textsuperscript{143} As such, one can argue that Google’s comparison shopping service was in fact less efficient than rival ones, so that the decision’s outcome does not extend beyond the regular scope of protection under EU competition law.

An issue for consideration in future competition cases is whether less efficient competitors should be more proactively protected, giving them the room to grow into a stronger competitor. For instance, the Amazon investigation of the Commission could engage with the question whether third party sellers should be given access to aggregate data about transactions on the marketplace in order to provide them with better opportunities to compete with Amazon. While


\textsuperscript{142} Case AT.39740 Google Search (Shopping), 27 June 2017, para. 490: referring to a Google executive who wrote in 2007, before Google started the alleged self-preferencing, that ‘Froogle simply doesn’t work’.

\textsuperscript{143} Case AT.39740 Google Search (Shopping), 27 June 2017, para. 600.
outside the realm of competition law, the Commission’s European Data Economy initiative is based on this exact premise that sharing and reuse of data among market players will increase competition and innovation to the benefit of overall economic growth and societal progress.144

(ii) Objective justification and protection of the platform’s own commercial interests

By determining what offerings we see in our search results and under which conditions businesses are included in the ranking, platforms can act as semi-regulators.145 This is especially the case for platforms that have a strong position in the market, so that there are no real alternative options for consumers and businesses. By regulating access to its services, such a platform that constitutes a key gateway for businesses to reach consumers146 simultaneously regulates access to (part of) the market. For instance, by laying down in its terms and conditions that businesses have to offer a certain level of data protection to users, a platform can preclude businesses that do not meet this threshold from offering their services via the platform’s sales channels—even if they do comply with the minimum level of data protection required by law. A platform that serves large parts of the market then takes the place of a legislator or regulator, because it decides what level of data protection is required for businesses to get the opportunity to reach consumers via its sales channels. The extent to which platforms should have control over what offers reach the market and are displayed to consumers is at the heart of current debates. In a 2019 speech, Competition Commissioner Vestager referred to this control as the power ‘to set the rules of the game’ and ‘to set the rules that govern how our markets work’, which in her view comes with a new example of the special responsibility incumbent on dominant firms not to use their power in a way that undermines competition.147 This issue does not only involve economic considerations in terms of possible limitations of competition and innovation but also creates concerns relating to fundamental notions such as consumer autonomy and democracy. As regards the more economic perspective of the control

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145 See the 2019 report by the special advisers of EU Competition Commissioner Vestager: Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, ‘Competition policy for the digital era’, 61–3 <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; the authors make an analogy with sporting leagues in arguing that because of their function as regulators, dominant platforms have a responsibility to ensure that their rules ‘do not impede free, undistorted, and vigorous competition without objective justification’.

146 Such platforms are typically referred to as ‘gatekeepers’, although it remains rather unclear what exactly turns a platform into a ‘gatekeeper’.

over markets by platforms, which forms the focus of this paper, an analogy can be made with the extent to which dominant firms may rely on objective necessities to justify abusive behaviour under Article 102 TFEU.

An undertaking can defend itself against claims of abuse of dominance by demonstrating either that its conduct is objectively necessary or that it produces substantial efficiencies that outweigh any anticompetitive effects on consumers.\textsuperscript{148} Two leading tying cases from the 1990s dealt with the extent to which dominant undertakings can invoke safety and health considerations as objective necessities to justify anticompetitive behaviour. Hilti engaged in a number of anticompetitive practices to ensure that customers who purchased its cartridges also bought its nails (in order to refill nail guns for use in the construction industry), including tying the sale of nails to the cartridges. These practices foreclosed independent sellers of nails from the market. As a justification for its behaviour, Hilti argued that safety required its nail guns to be used only with its own nails. According to Hilti, nails produced by other suppliers suffered from significant deficiencies rendering them incompatible with its nail guns.\textsuperscript{149} The General Court did not accept Hilti’s claims. It referred to laws penalizing the sale of dangerous products and to the presence of authorities competent to enforce those laws. According to the Court: ‘In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products’.\textsuperscript{150} The appeal by Hilti before the Court of Justice was dismissed.\textsuperscript{151}

Similarly, Tetra Pak invoked grounds of public health to objectively justify the tying of cartons, intended for the packaging of liquid foods, to filling machines. With reference to its earlier judgment in Hilti, the General Court argued that in the absence of binding rules ‘any independent producer is quite free, as far as Community competition law is concerned, to manufacture consumables intended for use in equipment manufactured by others, unless in doing so it infringes a competitor’s intellectual property right’.\textsuperscript{152} According to the General Court, compliance with public health standards could be ensured through different and less far-reaching means, in particular by disclosing to users of Tetra Pak machines all the technical specifications concerning the cartons to be used on those systems, without the applicant’s intellectual property rights being thereby prejudiced . . . and in any event, even if using another brand of cartons on Tetra Pak machines involved a risk it was for the applicant to use the possibilities


\textsuperscript{149} Case T-30/89 Hilti, ECLI:EU:T:1991:70, para. 103.

\textsuperscript{150} Case T-30/89 Hilti, ECLI:EU:T:1991:70, para. 118.

\textsuperscript{151} Case C-53/92 P Hilti, ECLI:EU:C:1994:77, paras 11–16.

\textsuperscript{152} Case T-83/91 Tetra Pak II, ECLI:EU:T:1994:246, para. 83.
afforded it by the relevant national legislation in the various Member States’. The General Court concluded that Tetra Pak’s practices ‘went beyond their ostensible purpose and were intended to strengthen Tetra Pak’s dominant position by reinforcing its customers’ economic dependence on it. Those clauses were therefore wholly unreasonable in the context of protecting public health, and also went beyond the recognized right of an undertaking in a dominant position to protect its commercial interests’. The Court of Justice dismissed Tetra Pak’s appeal.

In its 2009 Guidance Paper on exclusionary abuses, the Commission incorporated the outcomes of these cases by stating that ‘proof of whether [exclusionary] conduct . . . is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards’ and that ‘[i]t is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product’. Applying this reasoning from the Hilti and Tetra Pak cases to the online platform context would imply that a dominant platform has very little room to justify the blocking of a business’s access based on lack of compliance with interests that are protected by legislation. This would include the reference Apple made to data protection and security as the reason behind its decision to remove screen-time and parental-control apps from its app store. In Hilti, the General Court even stated that since the dominant undertaking could ‘institute the procedures laid down in the various national laws concerning product liability and misleading advertising, it may not argue that the allegedly dangerous nature or inferior quality of its competitors’ products intended to be used with a tool manufactured and sold by it justify abusive practices’. This reasoning would apply in particular to instances of exclusionary differentiation (either pure self-preferencing or the hybrid category) where the platform relies on such justifications as a pretext to protect its own commercial interests. Businesses may successfully argue that it is not for the platform to decide on the level of data protection or security but that it is for the competent authorities to enforce this. The Hilti and Tetra Pak precedents thus constitute a helpful framing through which to determine the extent to which dominant platforms may act as regulators by removing businesses that do comply with the applicable legislation.

157 See Nicas (n 47).
B. Lessons from national regimes on abuse of economic dependence

Even if EU competition law were to expand its reach beyond protecting as efficient competitors, it is not likely to capture all cases where the interests of businesses are harmed because of their dependence on a platform.\(^{159}\) For instance, economic dependence may also occur in relation to undertakings that are not dominant from the perspective of EU competition law and the categories of abuse recognized under Article 102 TFEU may be too limited to cover the harms specific to instances of economic dependence. National regimes on abuse of economic dependence may provide redress in such situations.

Although Regulation 1/2003 obliges national competition authorities and national courts to apply Articles 101 and 102 TFEU in parallel to national competition law for conduct falling within the scope of EU competition law,\(^{160}\) it also explicitly provides for the possibility for Member States to adopt and apply stricter national laws prohibiting unilateral conduct.\(^{161}\) Recital 8 refers specifically to national provisions ‘which prohibit or impose sanctions on abusive behaviour towards economically dependent undertakings’. This reflects the compromise that was found during the adoption of Regulation 1/2003 to accommodate concerns from a number of Member States whose national competition laws went beyond the types of abuse of dominance covered by Article 102 TFEU.\(^{162}\)

Although such national laws have been controversial ever since the introduction of Regulation 1/2003, their application may now in fact provide inspiration for a possible sector-specific regime at EU level considering the increasing dependence of businesses on online platforms. While various EU Member States have such a regime on abuse of economic dependence in place,\(^{163}\) the focus here is on the French and German systems. Their models are among the most well developed ones and differ from each other in scope, so that it is worthwhile comparing their approaches.

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\(^{163}\) For an overview, see College of Europe, ‘Study on the impact of national rules on unilateral conduct that diverge from Article 102 of the Treaty on the Functioning of the European Union’, November 2012 <http://ec.europa.eu/competition/calls/tenders_closed.html>.
(i) France

The legal basis of the French regime on economic dependence is Article L. 420-2 of the ‘Code de Commerce’ that does not only prohibit the abuse of a dominant position, but also ‘the abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings . . . if it is likely to affect the functioning or structure of competition’. The provision continues by stating that this abuse of economic dependence ‘may include a refusal to sell, tie-in sales or discriminatory practices’.164 To determine a position of economic dependence, the French competition authority has put forward four conditions that have to be fulfilled: (1) the notoriety of the trading partner; (2) the significance of its market share; (3) the importance of the part of turnover achieved with this trading partner in the total turnover of the business affected; and (4) the difficulty for the business affected to find alternative commercial partners offering similar commercial solutions.165 It is reported that only very few cases of abuse of economic dependence have been rendered because of these strict conditions and the restrictive interpretation by the French courts.166

And even if a position of economic dependence can be established, another significant hurdle is that its abuse has to be ‘likely to affect the functioning or structure of competition’. For a small business that is dependent on a non-dominant undertaking, this could mean that even the most far-reaching scenario where it is foreclosed from the market, for instance through a refusal to deal, is not covered. Because of its limited scale of operation, a small business may not be considered worthy of protection because its potential exclusion from the market will not affect the functioning or structure of overall competition.167 Despite the fact that this condition seriously restricts the scope of application of the regime, the Belgian rules on abuse of economic dependence, introduced in April 2019, also require ‘competition to be affected in the Belgian market concerned or in a substantial part thereof’.168 Such limits can be explained by the need to find a

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168 Author’s translation of ‘waardoor de mededinging kan worden aangetast op de betrokken Belgische markt of op een wezenlijk deel daarvan’ or ‘dès lors que la concurrence est susceptible d’en être affectée sur le marché belge concerné ou une partie substantielle de celui-ci’ in Article 4 of ‘Wet van 4 April 2019 houdende wijziging van het Wetboek van Economisch Recht met
balance between the private interests of dependent businesses and the public interest in market efficiency.

The objective of national regimes on abuse of economic dependence is mainly to protect businesses in a weaker bargaining position, whereas the EU competition rules focus on protecting the welfare of consumers. As recognized by the Court of Justice in its *Post Danmark I* judgment, ‘not every exclusionary effect is necessarily detrimental to competition’ from the perspective of EU competition law.\(^{169}\) In fact, the protection of smaller competitors can harm consumers, for instance when market inefficiencies result in higher prices.\(^{170}\) As a result, an adequate balance needs to be found where national rules that are stricter than Article 102 TFEU can effectively complement EU competition law without, however, eroding the latter’s purpose of protecting consumer welfare. The way the French regime on abuse of economic dependence has been interpreted seems to be too restrictive to provide effective protection to businesses that are dependent on non-dominant undertakings. To make sure that the new Belgian rules on abuse of economic dependence will have practical impact, it is submitted that they should not be implemented and enforced as restrictively as their French counterparts.

(ii) Germany

Germany seems to have a more effective regime on abuse of economic dependence that stems from § 20 of the ‘Gesetz gegen Wettbewerbsbeschränkungen (GWB)’. Unlike the French and Belgian systems, the German rules on abuse of economic dependence do not stipulate that the practices covered have to affect overall competition. § 20(1) GWB makes part of the prohibition on abuse of dominance also applicable to situations where ‘small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power)’.\(^{171}\)

The practices

\(^{169}\) Case C-209/10, *Post Danmark I*, ECLI:EU:C:2012:172, para. 22.

\(^{170}\) A 2012 study concluded that national rules on abuse of economic dependence provide little benefit to small suppliers and have unintended consequences because of legal uncertainty (shifting business away from small to larger undertakings to prevent liability) and the high costs of the system of rules. Some national rules, in particular those prohibiting sales below cost, were shown to increase consumer prices by up to 3 per cent. See College of Europe, ‘Study on the impact of national rules on unilateral conduct that diverge from Article 102 of the Treaty on the Functioning of the European Union’, November 2012, 13–15 <http://ec.europa.eu/competition/calls/tenders_closed.html>.

\(^{171}\) Official translation available at <http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0066>. In a report for the German Federal Ministry for Economic Affairs and Energy, Heike Schweitzer, Justus Haucap, Wolfgang Kerber, and Robert Welker recommended no longer restricting the scope of protection of § 20 para. 1 GWB (‘relative market power’) to small and medium-sized enterprises, as dependencies may also arise for large companies. See ‘Modernising
for which the prohibition of abuse of dominance is extended to situations of
dependence or relative market power concern behaviour that ‘directly or indirectly
impedes another undertaking in an unfair manner or directly or indirectly treats
another undertaking differently from other undertakings without any objective
justification’. In addition, § 20(2) GWB makes the so-called ‘Anzapfverbot’ of
§ 19(2) no. 5 GWB applicable to undertakings in relation to the undertakings
which depend on them. The ‘Anzapfverbot’ prohibits an undertaking from
demanding unjustified benefits from suppliers. It was applied by the German
Bundesgerichtshof in a 2018 judgment as a legal basis to prohibit the ‘wedding
rebates’ supermarket chain Edeka imposed on suppliers of sparkling wine. After
it acquired Plus discount stores from Tengelmann, Edeka required suppliers to
offer the same preferential conditions they had granted to Plus before so as to fi-
nance the take-over of the stores. The Bundesgerichtshof confirmed the conclu-
sion of the Bundeskartellamt that Edeka’s request for such rebates constitutes an
abuse of its relative market power in relation to the suppliers.

In the context of the Amazon investigation that the Bundeskartellamt closed in
July 2019, it also referred to the ‘Anzapfverbot’—however, not in the context of
abuse of economic dependence but of abuse of dominance that formed the main
basis for the case. The Bundeskartellamt did mention that the question of
Amazon’s relative market power and sellers’ dependence on its marketplace was
relevant but could be left open for the purposes of the case. This at least illus-
trates that such rules also have relevance beyond the physical retail sector, which
has so far been the focus of cases on abuse of economic dependence. In addition
to the ‘Anzapfverbot’, the abuse of economic dependence in Germany also covers
situations of differentiated treatment as § 19(2) no. 1 GWB (in conjunction with
§ 20(1) GWB) refers to an undertaking treating ‘another undertaking differently
from other undertakings without any objective justification’. Reliance on this
clause would complement competition interventions against differentiation, in
particular if the provision also covered situations where a business’s access to a
platform is blocked, which is where EU competition law now leaves a gap due to
the strict interpretation of the refusal to deal abuse.


172 As mentioned in § 19(2) no. 1 GWB.
174 According to the Bundeskartellamt, Amazon plays a significant role in providing access to cus-
tomers, but the fact that there are smaller sellers who only entered the online business in the first
place because of the presence of Amazon’s marketplace also has to be taken into account in such an
assessment. See Case summary ‘Amazon amends its terms of business worldwide for sellers on its
marketplaces—Bundeskartellamt closes abuse proceedings’, 17 July 2019, 11 <https://www.bunde
pdf?__blob=publicationFile&v=4>.
175 For an analysis of exploitative practices by platforms under the notion of economic de-
pendence, see Sangyun Lee and Jan Schüller, ‘Platform Dependence and Exploitation’ (SSRN Working
of economic dependence would indeed be particularly promising as comple-
ments to EU competition law from the perspective of the additional types of be-
haviour covered, as the difficulty with the boundaries of current EU competition
rules does not lie so much in establishing dominance but rather in fitting differ-
entiated treatment within the existing categories of abuse.

Because the national regimes on abuse of economic dependence apply across
the economy, the effect of an extension of the notion of refusal to deal for online
platforms beyond the situations now covered by EU competition law may have
undesirable consequences in other sectors. The protection of businesses that are
dependent on non-dominant undertakings should not be to the detriment of
consumers, who do not benefit from keeping businesses on the market ‘that are
less attractive to consumers from the point of view of, among other things, price,
choice, quality or innovation’ as stated by the Court of Justice in Post Danmark
I \(^{176}\) and that cannot be considered as ‘not as yet efficient’ competitors as
discussed in Section IV.A.(i) above. In the context of refusals to deal, Advocate
General Jacobs stated in his Opinion in Bronner: ‘if access to a production, pur-
chasing or distribution facility were allowed too easily there would be no incen-
tive for a competitor to develop competing facilities’.\(^{177}\) It is submitted here that
the platform-to-business context may be a sector in the economy where the bal-
ance of interests now tilts too much to the benefit of platforms, so that a focused
intervention is justified to protect businesses as well as consumers, who are
affected too if there is a lack of choice in the market. However, this may not be
true for other sectors where businesses still have more room to compete—even in
situations of economic dependence. For these reasons, the next section explores
possibilities for a platform-specific regulatory intervention.

C. Exploring regulatory interventions targeted at platforms

Three such other directions for additional regulatory interventions are explored
here: one building upon the P2B Regulation, another one based on the notion of
fairness of platform-to-business relations, and a final one targeting Article 101
TFEU.

(i) The Platform-to-Business Regulation

In its 2016 Communication on ‘Online Platforms and the Digital Single
Market’, the European Commission announced its intention to examine possible
unfair practices in relations between online platforms and business users. A pub-
lic consultation had revealed various concerns, including platforms imposing

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\(^{176}\) Case C-209/10, Post Danmark I, ECLI:EU:C:2012:172, para. 22.

\(^{177}\) Case C-7/97, Bronner, ECLI:EU:C:1998:264, Opinion of Advocate General Jacobs, para. 57.
unfair terms, in particular for access to user bases or databases, and platforms refusing market access.178 Further fact-finding, studies, and stakeholder consultations resulted in the adoption of a Regulation on fairness and transparency in platform-to-business relations (‘P2B Regulation’) in June 2019.179

While its name refers to ‘fairness’, most of the provisions of the P2B Regulation relate to creating transparency—even though the European Parliament did propose amendments proposing a stronger focus on fairness. Transparency for business users is required in particular as regards the main parameters determining ranking as well as the reasons for their relative importance (Article 5), whether platforms engage in any differentiated treatment (Article 7), and the extent of access to data (Article 9). However, the P2B Regulation does not ban any practices or prescribe any conduct of platforms in relation to these issues.

A few situations are worth mentioning where the P2B Regulation does provide stronger protection to business users. Article 3(2) imposes a notice period of at least 15 days before the platform can implement changes to its terms and conditions. And Article 4 requires a platform to provide a business user with a statement of reasons when restricting, suspending, and terminating its service and to give the business user the opportunity to clarify the facts and circumstances in the framework of the internal complaint-handling procedure, which Article 11 makes obligatory—except for small enterprises.180

This light-touch regulatory approach seems to aim at gathering more information on the sector and monitoring whether the alleged unfair practices are anecdotal or will persist—even once they become more visible through the enhanced transparency now imposed. Recital 49 explicitly keeps open the option of ‘further measures, including of a legislative nature . . . if and where the provisions established in this Regulation prove to be insufficient to adequately address imbalances and unfair commercial practices persisting in the sector’. Recital 2 engages with the issue of the increasing dependence of business users on platforms and refers to the latter’s ‘superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union’. As discussed above, taking the protection of businesses too far may in fact be detrimental for consumer welfare. As such, the recital illustrates that there is a need for a balanced outcome to protect business users when the harm caused to them also affects consumers.

180 In the case of termination, Article 4(2) requires the platform to provide the business user with a statement of reasons at least 30 days before the termination takes effect.
For the agricultural and food supply chain, the EU legislator adopted a Directive on unfair trading practices in business-to-business relationships in April 2019. The Directive contains a list of specific unfair practices that Member States have to prohibit through national law. One can imagine a similar approach for unfair practices in platform-to-business relations—should further monitoring indicate such a need. Instead of prohibiting specific unfair practices for all market players, a threshold can be established in line with the notion of economic dependence or relative market power as used in national regimes for instance. The Directive on unfair trading practices in the agricultural and food supply limits its application based on the turnover of suppliers and buyers. More empirical and economic evidence needs to be gathered about how widespread alleged unfair practices in platform-to-business relations are and what effects they have on overall welfare. If the blocking of a business’s access to a platform indeed turns out to be a persistent practice that also causes harm to consumers because of a reduction of choice in services, this could be one specific practice to be prohibited unless objectively justified by the platform. To appropriately confine such a prohibition, the existence of potential consumer demand for the service that would be blocked could act as a limiting principle in this regard. Similarly, specific practices of pure self-preferencing can be banned, for instance a platform’s more favourable position in a ranking or more favourable access to data, if they have been shown to cause substantial harm to businesses.

(ii) Fairness of platform-to-business relations

Instead of or in addition to listing specific unfair practices, a general ‘unfairness’ clause can be devised as a catch-all provision targeting novel types of commercial behaviour as they develop. The Unfair Commercial Practices Directive takes this approach for business-to-consumer relations and contains three levels of ‘unfairness’: (1) a black list of practices that are considered unfair in all circumstances; (2) practices that are considered as unfair if they qualify as misleading or...
aggressive;\textsuperscript{186} and (3) a general clause rendering a practice unfair if it is ‘contrary to the requirements of professional diligence’ and ‘materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer’\textsuperscript{187} Some Member States do have national rules in place to protect businesses against unfair practices.\textsuperscript{188} For instance, Article L. 444-6, I, 2 of the French ‘Code de Commerce’ holds traders liable for and obliges them to make good damage caused by ‘subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties’. A number of Member States also have national provisions in place to protect businesses in situations where contract terms are not individually negotiated. Reference can be made here to Articles 6: 231 et. seq. of the Dutch Civil Code (Burgerlijk Wetboek) and Sections 305 et seq. of the German Civil Code (Bürgerliches Gesetzbuch) that include fairness tests applicable to business-to-consumer as well as business-to-business contracts.\textsuperscript{189} In addition, a number of Member States have extended the scope of application of national legislation implementing the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive from business-to-consumer to business-to-business situations.\textsuperscript{190}

Attempts have also been made at the EU level to create a fairness standard to protect SMEs in the context of the Draft Common Frame of Reference\textsuperscript{191} and the Proposal for a Common European Sales Law.\textsuperscript{192} Both initiatives, however, failed to be adopted as legislation. Interestingly, the P2B Regulation contains a reference to the fairness standard that was previously suggested in these two instruments for business-to-business protection. Recital 2 refers to ‘practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing’. This phrasing was used in the provisions of the Draft Common Frame of Reference and the Proposal for a Common European Sales

\textsuperscript{186} Article 5(4) of the Unfair Commercial Practices Directive.
\textsuperscript{187} Article 5(2) of the Unfair Commercial Practices Directive.
Law to assess the unfairness of terms in contracts between businesses. It may therefore provide a starting point to develop a possible future ‘fairness’ test for platform-to-business relations. Establishing the boundaries of what constitutes ‘fair’ behaviour would be particularly useful as a way to remedy harm from pure secondary line differentiation, which EU competition law is less capable of addressing as discussed in Section III.A above.

(iii) Article 101 TFEU

Coming to the end of this paper that has mainly considered differentiated treatment as a form of unilateral conduct, it is worth mentioning the potential role of Article 101 TFEU. Since the relationship of a business user with a platform is typically based on a contractual agreement between the two parties, Article 101 TFEU may also become of relevance in targeting anticompetitive effects of restrictive practices between these undertakings. The Amazon investigation of the European Commission seems to partly focus on such concerns, as the press release refers to the ‘standard agreements between Amazon and marketplace sellers’ and ‘Amazon’s potential use of competitively sensitive marketplace seller information’. The exchange of commercially sensitive information between market players—even if imposed by a platform on a business user—may breach Article 101 TFEU. In the context of its 2017 E-commerce sector inquiry, the Commission raised two types of competition concerns in this regard. On the one hand, the Commission argued that ‘the exchange of competitively sensitive data such as on prices or sold quantities between marketplaces and third party sellers or manufacturers and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services’. On the other hand, the Commission stated that ‘manufacturers that directly sell online may request their authorised distributors to provide them with competitively sensitive data which could be used for anti-competitive purposes’. Depending on the competitive impact of such practices on the market, the outcome of such an assessment could be that platforms are prohibited from using information about sales from third party sellers in their own activities as retailer—leading to a ‘firewall’ between datasets or other equivalent safeguards.

Based on similar reasoning, the expiry of the current Vertical Block exemption Regulation in May 2022 could be used as an opportunity to ban contractual clauses relating to the sharing of commercially sensitive data of business users.

with platforms (or exchange of information between suppliers and retailers more generally) as a hardcore or excluded restriction. This would subject these clauses to liability under Article 101 TFEU. Instead of providing stronger protection to businesses, such an approach would directly—and maybe more effectively—impose limits on the behaviour of platforms to engage in differentiated treatment that causes anticompetitive effects.

V. Conclusion

The increased activity by competition authorities in the area of differentiated treatment illustrates that such practices are becoming less accepted, even though differentiation is to some extent inherent in vertical integration and is common across markets. The paper distinguished three types of differentiated treatment in order to provide an analytical framework for assessing the extent to which EU competition law holds such practices abusive under Article 102 TFEU. Pure self-preferencing is exclusionary behaviour and pure secondary line differentiation qualifies as exploitation, while the hybrid category consists of a mix of exclusionary and exploitative elements. Because a platform normally will not have incentives to differentiate between non-affiliated businesses with which it does not compete, the category of pure secondary line differentiation is least suspicious from a competition law perspective. Where this type of differentiation substantially harms businesses, national regimes on abuse of economic dependence or possible new regulatory frameworks based on the notion of ‘fairness’ of platform-to-business relations can provide redress. For the category of pure self-preferencing, the Google Shopping decision provides the key precedent in which the Commission regarded self-preferencing as leveraging behaviour, allegedly constituting an independent form of abuse. It remains to be seen whether the Commission decision will stand on appeal. The leveraging theory of the Commission may not be convincing but, as submitted above, its approach to assess anticompetitive effects without applying the indispensability requirement does find support in the assessment of constructive refusals to deal, such as the margin squeeze at stake in TeliaSonera.

The key area where EU competition law may not go far enough to protect against differentiated treatment is in the most drastic instance where a business is removed or blocked from the platform. Such a scenario would need to be assessed under the strict conditions of the refusal to deal abuse, which under current case law only protects against a dominant firm who refuses to deal in order to protect its own downstream activities. Unless the scope of refusal to deal abuses is

stretched to go beyond scenarios of leveraging, this means that no redress is available under EU competition law to businesses that are blocked from a platform in situations of pure secondary line differentiation or differentiation of the hybrid category.

A stronger role for economic dependence would create more effective protection for businesses, both within EU competition law—for instance through protecting less efficient competitors in some circumstances—and beyond. National regimes on abuse of economic dependence are not all equally effective and their general nature may, on the one hand, be under-inclusive—covering abuses not specific enough for the platform-to-business context—and, on the other hand, be over-inclusive—when the protection of the ability of businesses to compete causes harm to consumers through market inefficiencies. The P2B Regulation provides a starting point for a platform-specific intervention to target unfair practices resulting from the dependence of businesses on platforms. To what extent more far-reaching regulatory measures for differentiated treatment in platform-to-business relations would be desirable does not only depend on further monitoring of the sector in order to identify persistent unfair practices, but also on ongoing competition investigations and the degree to which their outcomes protect against economic dependence.