Discrimination and Self-favoring in the Digital Economy

By associated professor Christian Bergqvist, ph.d. University of Copenhagen[1]

Although there could be a danger of generalizing and simplifying complex economic questions through bold statements, the digital economy is prone to discrimination and self-favoring. Not only do such allegations arguably form the core of EU-antitrust cases as *Google Shopping* and *Amazon,* but the new *Platform Regulation* also mandates a menu of information obligations targeting these economic concerns. Presumably, the thinking is that transparency will curtail such abusive behavior, referring remaining conflicts to policing by other provisions, including Article 102 prohibiting anti-competitive conduct. Unfortunately, case law renders little support for such optimism. The concept of discriminatory abuse is subject to several ambiguities, and the *Google Shopping,* rich with example of search and ranking biases, was not pursued as such amplifying the ambiguities. The digital economy might be better served with more caution in the ability of competition law to resolve conflicts raised by these economic developments. This is also true because such cases are time consuming and hold potential for non-coordinated regional outcomes when enforced nationally without clear EU precedents and leadership set by EU institutions.

In June 2019 EU's *Platform Regulation*[2] came about, securing a balancing of the different positions when it came to online platforms, through a set of targeted mandatory rules. The Regulation attemptsto secure a fair, predictable, sustainable and trusted online business environment, with a high level of transparency, fairness and effective redress. In particular, it focuses on the ranking of corporate websites in the search results generated by online search engines and the risk of discriminatory self-favoring of hits. A prudent consideration of this Regulation is necessary because online search engines are essential sources of internet traffic for digital undertakings offering goods or services online. Often, these undertakings hold a significant level of market power. This is particularly seen when it comes to ranking search inquiries but also more generally in respect to promo-

[1] The article reflects development as of January 2020 and was presented at the conference *The Challenges of Regulating and Enforcing Competition Law,* Bucharest 14-15 of November 2019. The author can be reached on cbe@jur.ku.dk and welcomes comments.

[2] Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services. See recital 4-8 for outline of its object.

tion of products and services sold online. Furthermore, while of course disputed by the providers of online search engines, such undertakings do appear to be positioned to manipulate results and access results for customers in unfair and harmful ways. Unfortunately, the Regulation confines itself to a menu of information obligations, referring bias and self-favoring to policing under other, but unnamed, provisions.[3] An obvious question is whether Article 102 TFEU, prohibiting anti-competitive unilateral conduct, would raise the questions of the ability to check discrimination and self-favoring in the digital economy.

The purpose of this paper is to explore the ability to control and police discrimination and self-favoring under Article 102 TFEU, as envisioned by the Platform regulation. While many elements of the Regulation could warrant comments only the matter of self-favoring when ranking and presenting goods and services will be evaluated. Essentially, this analysis rests on the outcome of *Google Shopping*[4] and the ability to clear up the ambiguity surrounding discriminatory abuse.[5] Part I will deal with the operative part of the adopted Platform Regulation in terms of ranking while part II and III deal with the analysis of this question under Article 102 TFEU. Part IV summarizes the entire paper, including tabling some recommendations for consideration for future development of this area of the law.

I. Analysis of the EU's Platform Regulation

The EU's *Platform Regulation*[6] came about in the remarkable short span of two years. This indicates the urgency of the matter and the interest at EU level to address perceived shortcomings of the existing framework. The content of the Regulation can essentially be concentrated into **i**) a set of information obligations intended to secure fair and non-discriminatory access to online services, **ii**) different instruments to solve conflicts should such emerge and finally, **iii**) the ability to issue further guidelines on e.g. good practices in fairness and transparent treatment - presumably, in respect to the scope of the first two. However, the information obligations directed at ranking and access questions form the core of the Regulation, and while fatigue in actual obligations it does mandate disclosure of e.g. ranking principles and ability to influence these trough remuneration.

[3] See recital 8 and article 1 (4).

[4] COMP/39740 - *Google Search (Shopping).* Currently, on appeal as case T-612/17 - *Google and Alphabet.* O.J. 2017C 369.

[5] Potentially could the pending investigation into Amazon (COMP/40462 - *Amazon Marketplace)* also help. However, no information on its content is available.

[6] Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

Ranking search inquiries and the risk of self-favouring

The EU's Platform Regulation mandates information obligations in respect to ranking of websites following the making of an inquiry by a user.[7] Normally, an inquiry would yield an index of blue links, referred to *natural search result* or *organic search result*,[8] with a quality in terms of relevance for the inquiry, depending upon the complexity of the search algorithm. Undertakings active on digital markets have involved progressively more advanced algorithms that today also include an analysis of users' choices, referred to as "click-through rates," which feedback into the algorithm to generate better and more precise results. The mandatory information to be provided pursuant to the Regulation includes **i**) the main parameters determining ranking, **ii**) the reason for their relative importance, **iii**) possibilities of influencing these against direct or indirect remuneration, and **iv**) any decision to alter or delist websites following notification from third party. To the extent products and services are offered to consumers, differentiated treatment must also be disclosed,[9] including **v**) the main economic, commercial or legal considerations motivating this and **vi**) the ability to influence this by remuneration. Essentially, the Regulation initiates an extension of the ranking obligations to other forms of selective presentation, including discriminatory self-favoring, for the purpose of precluding ranking bias and securing what could be described as "ranking neutrality".

The information requirements applicable to *online search engines* has by the definitions utilized in the Platform Regulation[10] been limited to *general (horizontal) searches.* General searches involve searches across the entire internet, for whatever query is entered in the search engine, and involve three automated processes: *crawling*, *indexing* and *serving*[11] for the purpose of generating an index of possible results. Embedded in these processes are other precluded ways of accessing, and searching the internet. While unspecified this would involve other online services, such as[12] **i**) content sites, like newsgroups, newspaper and information repositories, such as Wikipedia, **ii**) social media sites, such as Facebook and LinkedIn, and, **iii**) specialized (vertical) search engines, such as the travel website www.kayak.com, which provides search results

[7] C.f. Article 5.

[8] See case AT.39.740 – *Google Search (Shopping)*, Recital 10, note 8.

[9] C.f. Article 7.

[10] C.f. Article 2 (5). The Regulation does not specify this directly. However, the rendered definition focuses on general horizontal search.

[11] C.f. Case AT.39.740 – *Google Search (Shopping)*, Recital 15. For a walkthrough of search engines, their functionality and economics, see Herz, M. (2014). *Google Search and the Law on Dominance in the EU: An Assessment of the Compatibility of Current Methodology with Multi-Sided Platforms in Online Search.* SSRN, pp. 1-20.

[12] See COMP/39740 - *Google Search (Shopping)*, Recital 161-190.

within a specific subject matter.[13] As explained above, the enforcement priority is whether general (horizontal) searches offer a search across the entire internet in contrast to e.g. specialized (vertical) search engines focusing on specific issues and subject matters.

Search engines are prone to manipulation

As explained in the recitals of the Regulation, the enforcement priority concern is whether online search engines are not only essential for undertakings offering online goods or services, but also prone to manipulation, where results are presented in a selective manner. For online retailers, this could easily be translated into a lower listing in the index of sites, resulting in a less favorable position on the list of results returned to end-users. As end-users are reluctant to consider more than the first three to five links returned,[14] appearing below these levels is tantamount to not being displayed at all. Bias in search and ranking could therefore have a strong anti-competitive effect, explaining why the matter is covered by the Regulation and should be an enforcement priority under Article 102 as indicated by EU's 2017 *Google Shopping* decision.

II. The EU Google Shopping decision

Manipulation of the search index can be highly anti-competitive, as illustrated by EU's investigation into Google and the rendered decision, *Google Shopping.*[15] Google operates as a two-sided platform that allows end-users to search the Internet at no charge, but while offering advertisers the privilege of appearing in or near the search results or "hits" or on web pages listed in those results. This ranking of hits provides remuneration for the company. In addition to the generic, unsponsored results, additional results are provided today in the form of **i**) sponsored ads and links normally displayed above the generic results, and **ii**) commercial products, services, and information, normally provided in separate boxes. Thus, rather than a single response to an inquiry, Google now provides three separate sets of search results,[16] two of which lead to Google-affiliated services,

[13] For completeness, it should be noted that the ranking requirements of the Regulation also covers some forms of social media and thus specialized vertical search engines. See e.g. recital 11 referring to social media and Article 2 (2) defining online intermediary services in a manor potentially covering some forms of vertical search engines.

[14] See case AT.39.740 - *Google Search (Shopping),* Recitals 453-457 and 535.

[15] COMP/39740 - *Google Search (Shopping).* Currently, on appeal as case T-612/17 - *Google and Alphabet.* O.J. 2017C 369. For a substantial analysis of the decision see Christian Bergqvist and Jonathan Rubin, *Google and the trans-Atlantic antitrust abyss*, Concurrences N° 3-2019.

[16] In reality, Google might today provide more than three searches as new info-boxes appear to have been incorporated and blended with the generic results. For more about Google search engine see e.g. case AT.39.740 – *Google Search (Shopping),* Recitals 8-37.

in addition to the generic search results. On account of this blend of search results, Google prefers to term its service "*Universal*" as the traditional *general (horizontal) search* is blended with *specialized (vertical) searches*. This universal approach thus allows end-users to focus on specific subject matters, often displayed with pictures and prices and is thus a visually more appealing digital experience than that provided by competing offerings.

Google Universal Search comes with a flavor of self-favoring

While Google Universal Search indisputably provides for a superior user experience, it also involves self-favoring, when the premium display, with pictures and prices, are reserved to Google's own offerings. The anti-competitive harm is that this could, relegate the competitors to the organic blue links. Furthermore, an additional concern is that (but this is disputed by Google), the utilized algorithm could appear to maliciously downgrade competing offerings. Allegations of self-favoring emerged as early as 2007, including malicious downgrading of competitors, climaxing in June 2017, with the rendering of EU's *Google Shopping* decision. A decision not only identifying an abuse but also warranting a record fine of EUR 2.42 billion (USD 2.97 billion). While to some extent vague in defining the scope of the abuse, it does involve the (intentional) downgrading of competitors at the core. A downgrading accomplished by **i**) submitting competing offerings only to the generic search ranking algorithm, and **ii**) reserving the best positioning in the generic search results and the separate box for Google's own offerings.[17] Moreover, the search results downgrading alleged specifically related to competing shopping offerings and thus the core of the later Platform Regulation. The decision arguably stands for the proposition that these elements alone are sufficient to make out a claim for "abusive leveraging," thereby injecting a concept of abuse into Article 102 that encompasses self-favoritism as a violation.

The antitrust theory of harm advanced by the Commission

While clearly defining self-favoring as abusive**,** the decision in *Google Shopping* is with 216 pages relatively brief. To some extent, this follows from only addressing the search bias allegations, referring other charges for adjudication in separate proceedings. But its brevity is also a product of the vague theory of harm driving the case, which obviated the need for the Commission to explain how the evidence met the traditional legal standards for well-defined abuses. Google's claim that it was found liable in the EU under a novel and unprecedented "abusive leverage" standard devoid of clear precedential support is not entire-

[17] See Recital 379. Pursuant to Recital 2, "*The Decision establishes that the more favourable positioning and display by Google, in its general search results pages, of its own comparison shopping service compared to competing comparison shopping services (the "Conduct") infringes Article 102*." This indicates that reserving a better position rather than downgrading competing offerings constitutes the abuse, see, e.g., Recital 2. But then e.g., Recitals 342 and 344, points to the combination as abusive.

ly unfounded.[18] However, the weakness of the decision is legally irrelevant because abuse of dominance neither requires malicious intent[19] nor ability to accommodate the theory of harm under a traditional and well-defined theory.

Although abuse does not require a showing of malicious intent, it does require **i**) an impairment of competition, and **ii**) a breach of the relevant legal standards. Herein lies the second weakness of *Google Shopping*. Of the 124 pages of text devoted to the question of abuse, most of it is devoted to explaining how Google's behavior is detrimental to competition—or, more accurately, detrimental to Google's competitors—while only 11 pages avert to some kind of explanation of how the challenged conduct contravenes the relevant legal standards.[20] As noted earlier, the challenged conduct consists of downgrading competing services by **i**) submitting rival services only to the generic search ranking algorithm, **ii**) reserving the best positions in the generic search results and the separate boxes for Google-affiliated offerings, and **iii**) coupling the later with pictures and graphics, while presenting competing offerings with only text. [21] Explaining why this amounts to abuse, the Commission states:[22]

> "*The Conduct is Abusive because it constitutes a practice falling outside the scope of competition on the merits as it: (i) diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service; and (ii) is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services."*

It appears that the Commission does not object to the application of a self-correcting search algorithm, nor directing traffic to Google properties, but only that Google's own offerings are not filtered through the same algorithm, so they are allotted more favorable display positions and presentations, amounting to discrimination by Google in a potentially exclusionary manner. This sits well with the Commission's theory of abusive leverage, but it does little to account for how consumers may be harmed. The offerings allotted premium display is clearly a profitable activity, so it is logical that Google would attempt to divert

[18] See case T-612/17 - *Google and Alphabet.* O.J. 2017C 369, p. 37, plea 5.

[19] C.f. case 6/72 - *Continental Can*, paragraphs 27 and 29; case T-128/98 - *Aéroports de* Paris, paras 170 and case C-549/10P - *Tomra*, paras. 19-22, cited in case AT.39.740 – *Google Search (Shopping)*, Recital 338.

[20] See Recitals 331-339, 591-607 and 641-652.

[21] See Recitals 379, 395-397 and 512. However, Recital 2 seems to single out more favorable display as abusive in itself without the other elements.

[22] Recital 341. The abusive conduct and its effect are outlined in Recital 341-396 and summarized in Recital 397-401. Further, notable comments on the review of the conduct are offered in Recital 336, 537 and 661-662.

traffic to its own sites, a fact that does not elude the Commission,[23] which recognizes that in a two-sided market losses on one side of the market can be recouped on the other. Google has denied directing traffic to particular websites, but, Google's behavior might be commercially rational and even necessary to develop and maintain the superiority of its general search algorithm.[24] Since only one service can be displayed in the box, Google's choice is logical. This digital technology places considerable stress on the legal concept of abuse, since the decision implies that competing offerings must be displayed no less prominently than those who pay to be displayed.

Naturally, it is unrealistic to accept that operating search engines is unprofitable and implausible that Google's corporate behavior is guided by altruism. Users pay for general search in the form of consumer-generated data that contribute to the development Google's search algorithm, its digital assets, and other Google services, some of which are profitable.[25] Further, the advertisement side subsidizes the search services and brings profits to Google. In this context, the essential question is not whether Google diverted traffic, but rather whether such diversion constitutes an abuse, which the Commission has clearly answered in the affirmative with its rendered decision.

The *Google Shopping* Decision set high standards

While establishing self-favoring as abusive if bias and thwarting competition, *Google Shopping* set very high standards for this. The rendered decision is supported by voluminous calculations and graphic evidence in support of the claim that Google's algorithm is biased in a way that moves traffic away from competing shopping offerings and toward Google's own properties.[26] While difficult to evaluate from the outside[27] the latter allegation does raise a very high burden of proof commanding substantial resources to be invested in any successful case. Further, as the theory of harm involved discriminatory self-favoring, it would have been logical to pursue the case in this way, but the Commission chose not to avail itself of the opportunity. From this must follow that self-favoring forms a different form of abuse infringing Article 102 only within a narrow set of circumstances - provided, of course, *Google Shopping* is not overturned on appeal. Also troublesome, from a community perspective, should be the risk that nation-

[23] See, e.g., Recitals 157-160. For completeness it should be noted that general searches might not entail an economic loss. Recital 642 indicates that it may be rather profitable.

[24] See Recitals 502-510 and case T-612/17 – *Google and Alphabet.* O.J. 2017C 369, p. 37, plea 1, 2 and 3.

[25] See Recitals 158-159. Admittedly, such "payments" are more or less voluntary, since end-users can still access most of Google's most popular services even if they opt-out of providing data to the company.

[26] See, e.g., Recitals 361-370, 454-501 and 539-567 for examples of the statistical and graphic analysis used to support DG COMP's claims.

[27] Google has challenged DG COMP's calculations and methodology, see Recital 619-626.

al competition authorities are unable to reach a consensus position on the matter. For example, it appears that a German court[28] applying the same rules as the Commission has declined to define this self-favoritism as abusive, while a UK court,[29] in principle, was inclined to condemn the behavior, but found no abuse because the behavior had a legitimate business purpose and had little, if any, anticompetitive effect. Finally, as detailed below, the decision not to pursue the matter against Google as discrimination, has the potential to cast doubt upon the legal treatment of this issue under Article 102.

III. Discriminatory abuse

As already indicated, it is arguable that *Google Shopping* represents a missed opportunity to clear up the ambiguity surrounding discriminatory abuse and apply the well-established legal concept to ranking manipulation. Not only does the case echo discrimination, but the theory of harm as outlined by the Commission sits uneasily with the presumed core of Article 102(c). Non-objective differences in terms, placing trading partners in a competitive disadvantage position. The decision to apply a different, and most likely higher standard, therefore questions the availability of Article 102(c) against self-favoring as intended by the *Platform Regulation*.

Abusive discrimination – A concept subject to some ambiguities

Conceptually, discrimination involves non-objective differences placing trading partners in a competitive disadvantaged position. This provides a (clear) framework for an evaluation of the purported discrimination[30] and indicates that there may be some lacunas in the ability to monitor and police the fast-developing digital economy. However, in practice there has been limited interest at EU-level in pursuing discriminatory abuses, which is logical in light of the embedded dilemmas and ambiguities in the legal concept. It even remains open what sort of conduct can be considered abusive. In isolation, price discrimination is benign[31] and in practice has been underplayed with respect to the requirement of an anticompetitive effect, regardless of the reference in Article 102(c).[32] This is a position particularly difficult to align with the effects-based approach endorsed in the

[28] District Court of Hamburg ruling of 4/4-2013 in Verband against Google ref: 408 HKO 36/13.

[29] See and *Streetmap v Google* [2016] EWHC 253 at paras. 60, 139, 161,175 and 177.

[30] For further see e.g. Damien Gerardin and Nicolas Petit, *Price Discrimination under EC Competition Law: The Need for a case-by-case Approach*, GCLC Working Paper 07/05.

[31] See e.g. Opinion of Advocate General Wahl in Case C-525/16 - *Meo*, para 4.

[32] C.f. Gunnar Niels & Helen Jenkins, *Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down*, ECLR 2005, p. 608.

Enforcement Paper[33] and now by precedent in the *Intel* case[34] when it comes to exclusionary abuse. Hence, strong arguments can be raised against enforcing Article 102(c) without a prudent regard to wider market context and outside a narrow set of circumstances, perhaps explaining the path utilized by the Commission in *Google Shopping*.

Meo, at first glance a missed opportunity

In light of the doctrinal ambiguities, much hope was attached to the case of *Meo*,[35] when referred to the Court of Justice, as the national court specifically requested clarification on the concept of discriminatory abuse and the required testing for identifying this. In *Meo*, a Portuguese TV provider considered itself to have been unfairly victimized by the national copyright collecting society, when this had offered a competitor more favorable tariffs, leading to a dispute. In contrast to other cases involving discrimination, including *Post Danmark I*,[36] *Hoffmann-La Roche*[37] and *Michelin I*,[38] the victim was a direct customer and not a competitor, offering an ideal opportunity to clear up the ambiguities. The Advocate General even invited the Court to do this, offering suggestions for possible approaches as detailed below. However, the Court confined itself to two observations: first, that the non-vertically integrated company normally lacked interest in thwarting competition downstream (or upstream; and second, that differential treatment would only be abusive if able to distort competition taking all the relevant circumstances into consideration. In light of the many ambiguities, this looked like another missed opportunity for setting clear precedents. However, if viewed more broadly, including with respect to the issue that the Court did not distance itself from the Advocate General's Opinion, more advanced guidances become available on the concept of discriminatory abuse.

The Advocate General Opinion offers prudent guidance

In contrast to the Court of Justice, the Advocate General offered a number of observations on the concept of discriminatory abuse.[39] This included welcoming the opportunity to clarify the matter of discrimination in general and specifically where the alleged victim was a customer, rather than a competitor, and the evi-

[33] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*.

[34] Case C-413/14 - *Intel* overturning case T-286/09 - *Intel*.

[35] Case C-525/16 - *Meo*, para 5-20 (background) and recital 30-37 (principles).

[36] Case C-209/10 - *Post Danmark v. Konkurrenceråde*t, para 8.

[37] Case C-85/76 - *Hoffmann-La Roche*, para 80.

[38] Case C-322/81 - *Michelin I*, para 87.

[39] Opinion of Advocate General Wahl in Case C-525/16 - *Meo*, para 4 (unique opportunity), 39 (development in market shares), 60-64 (no presumption of abuse), 67 (uniform tariffs), 71-93 (concept and principles), 97 (sufficiently significant) and 109 (costs).

dence of an appreciably disadvantage weak. The latter derived from the shift in market shares between the purported victim (from 25 to 40%) and alleged beneficiary (from 60 to less than 45%) in the course of the three years affected by the potential abuse. The Advocate General then moved on, stating that an abuse should only arise if the non-objective differences truly placed trading partners in a competitive disadvantage position, which should never be assumed, as price discrimination in itself was unproblematic. Thus, contrary to the wording of Article 102(c), the dominant undertaking was not obligated to offer uniform tariffs. However, where the Advocate General truly adds value to the debate is by differentiating between:

a) Price discrimination practices designed to attract customers of competing operators, such as predatory pricing, differential rates of discount and margin squeezing. This covers every pricing practice designed to foreclose or weaken operators present on the same market and at the same level (vertically speaking) as the dominant undertaking. This represents the price discrimination practices that enforcers normally are called to examine.

b) Price discrimination practices that affects 'trading partners' on the market downstream or upstream from the dominant undertaking and thus not in (direct) competition with it. Allowing Article 102(c) to cover this conduct should serve to prevent the commercial behavior of undertakings in a dominant position from distorting competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking.

Further, in the case of vertically integrated undertakings, the application of discriminatory prices on the downstream or upstream markets would be covered by the first situation (a) above, as it indirectly affects the undertaking's competitors. Sadly, the Advocate General does not move on providing principles for when discrimination distorts competition. However, the opinion does suggest that the disadvantages must be significant, also taking into consideration if the levied prices represent a significant proportion of the disfavored customers total costs.

Three forms of discrimination are embedded in Article 102(c)

While both the Court and Advocate General left questions open, some can be closed by consulting other cases. In the 2004 case of *BdKEP/Deutsche Post AG*[40], the Commission was called to evaluate national laws inducing the incumbent mail operator to discriminate mail intermediates in a non-objective manner. Replying to a submission that Article 102(c) did not cover this, it was noted how:

[40] COMP/38.745 - *BdKEP/Deutsche Post AG*, recital 64-66 (abuse) and 93 (the concept of discrimination).

> "*The wording* [of Article 102] *covers three types of discrimination, the first two of them exclusionary and the last one exploitative: (i) the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) the customer suffers commercially in such a way that its ability to compete in whatever market is impaired. It is obvious that type (i) and (iii) do not require a competitive relationship between the two comparator groups."*

Combined with the Advocate General's Opinion in *Meo*, it becomes apparent that the concept of discrimination in Article 102 not only covers three forms of abuse, of which two are exclusionary and one exploitive, but also that more advanced observations can be provided. This includes how Article 102(c) can be applied to:

a) *Horizontal (exclusionary) discrimination*, normally referred to as *primary-line-discrimination*,[41] initiated for the purpose of *foreclosing* competitors by targeting actual or potential customers with selective price reductions or other favors. Moreover, this includes foreclosure of upstream and downstream markets secured by preferential treatment of subsidiaries and internal departments of the vertically integrated company. The foreclosure could thus have a vertical element to it, but as the victim is a direct competitor (upstream or downstream) the foreclosure remains horizontal. Additionally, also pre-emptive foreclosure would be covered.[42]

b) *Vertical (exclusionary) discrimination*, normally referred to as *secondary - line-discrimination*,[43] initiated for the purpose of *twisting* competition in other markets e.g. for the benefit of a preferred trading partner (but not a subsidiary or internal department). While also directed upstream or downstream, the potential abuser has no direct interest in the foreclosure as it remains inactive in any of the affected markets. Hence, the foreclosure is (truly) vertical.

c) *Exploitative discrimination* that in practice involves national based discrimination[44] and henceforth potentially individualized pricing as detailed later. However, the abuse is essentially exploitive and should not be confused with

[41] See Robert O´Domoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 2nd Edition Hart 2013, p. 247-249.

[42] C.f. case T-228/97 - *Irish Sugar*. Here, discounts had been reserved for customers in border areas and hence those most likely to switch to a potential new supplier.

[43] See Robert O'Domoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 2nd Edition Hart 2013, pp. 247-249.

[44] COMP/38.745 - *BdKEP/Deutsche Post AG*, recital 95 refers to how nationality based discrimination has been condemned in case C-18/93 - *Corsica Ferries*; case C-7/82 - *GVL;* case C-27/76 - *United Brands* and case T-83/91 - *Tetra Pak.*

discrimination. Instead it should be reviewed under the legal standards for exploitation, including excessive pricing.

Despite the textual framing of Article 102(c) referring to "… *trading parties* [placed] *… at a competitive disadvantage"*, the provisions are not limited to vertical discrimination. Neither could the forms be considered mutually exclusionary,[45] and it even appears to cover indirect business relationship.[46] More significant have all three forms of discrimination been reviewed, establishing legal standards for Article 102(c) and the provision's ability to police against self-favoring in the digital economy as questioned initially.

Horizontal (exclusionary) discrimination

The dominant undertaking's ability to target customers with attractive (and selective) offers for the purpose of retaining or gaining their loyalty, hence *horizontal discrimination,* falls within the core of abusive discrimination. The framework for analyzing horizontal discrimination was established by *Michelin I,*[47] referring to the ability to thwart competition in light of all the circumstances. Abusive discrimination was also identified in *Compagnie Maritime Belge Transports,*[48] where selective price cuts fell short of the concept of predatory pricing, but nevertheless had targeted a named competitor and therefore merited condemnation. Horizontal discrimination is not even limited to a direct competitor or pre-emptive foreclosure, as it also covers preferential treatment of affiliated undertakings and interests upstream or downstream. In *Deutsche Bahn*[49] the conduct in question was held abusive when the offered terms intentionally favoured the group's own downstream activities. Furthermore, investments in infrastructure had been directed at lowering costs on the routes used by these, making it artificial to invoke lower costs as a defense. The concept of horizontal discrimination is not even confined to markets upstream or downstream and with a vertical link.

[45] See e.g. case T-65/89 - *BPB Industries Plc & British Gypsum Ltd* and case T-219/99 - *British Airways plc* covering both horizontal and vertical discrimination.

[46] Pinar Akman, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law*, J. L. Tech. & Policy 2017, pp. 330-331 appears sceptic against accepting a trading relationship, within the meaning of Article 102(c), when using Google to browse the internet.

[47] Case C-322/81 - *Michelin I*, para 73.

[48] See case IV/32.448 & IV/32.450: *Cewal, Cowac, Ukwal*, O.J. 1993L 34/20, recital 83. Ultimately upheld with united cases C-395/96P & C-396/96P - *CMB.* In *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 128 the behavior is rebranded as predatory pricing.

[49] T-229/94 - *Deutsche Bahn AG*, para 85-94.

In *Clearstream*[50] an attempt to offer special treatment to group-affiliated undertakings were found discriminatory, as this, in light of Clearstream monopoly position and the timespan (five years) could not "… *fail to cause that partner a competitive disadvantage".* Further, in *Post Danmark I*,[51] the Court of Justice expressed some hostility towards the concept of *primary-line-discrimination* and pricing below Average Total Cost as abusive per se, solely based upon selective, and thus discriminatory, elements. Embedded in this might be that horizontal discrimination is not a separate abuse, but merely exclusionary abuse. Presuming this to be correct, horizontal discrimination should then be reviewed under *all the circumstance-standard* established with *Michelin I* and galvanized by *Intel*,[52] including how the non-objective difference is able to place an As-Efficient Competitor in a disadvantageous position. Furthermore, in light of the theory of harm described in *Google Shopping*, horizontal (exclusionary) discrimination would have been the natural choice for legal standard to review the relevant conduct complained of. However, as detailed later, the Commission did waive this option, casting some doubt on the matter.

Vertical (exclusionary) discrimination

Vertical discrimination covers, as explained in *BdKEP/Deutsche Post AG*, discrimination of downstream trading parties (or upstream suppliers). However, essentially this involved "real discrimination", as the dominant undertaking does not benefit from this in an exclusionary manner. Consequently should the concept be avoided for discrimination in favor of vertically – integrated or group – affiliated downstream interests as detailed above. It should not even be a priority as the dominant undertaking often lacks an incentive to pursue foreclosure of vertical markets. Even the ability might be lacking unless in a monopolistic position, as any attempt to pursue a foreclosure could undermine the dominant position[53] and thus be unprofitable in a longer perspective. Nevertheless, a few cases have emerged giving some indication of the frame for assessing vertical discrimination. In *Portugal v. Commission*[54], the conduct was held abusive under Article 102(c) when a linear and quantum discount had *de facto* benefitted domestic air

[50] Case T-301/04 - *Clearstream*. In the underlying case, COMP/38.096 – *PO/Clearstream (Clearing and settlement)*, recital 224-227, the abuser was viewed as "... *an unavoidable trading partner"*, indicating that foreclosure was plausible.

[51] Case C-209/10 - *Post Danmark vs. Konkurrencerådet*, para 30 and 37.

[52] Case C-413/14 - *Intel*, para 139-146.

[53] Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge, 2004, p. 341.

[54] Case C-163/99 - *Portugal v. Commission*, para 11 (the discounts) and 51-54 (assessment). The 30 % is not stated directly but derived from the difference between the 22-30 % discount offered to domestic operators v. the 1-8 % for non-domestic operators. See also case 95/364/EC - *Brussels National Airport* O.J. 1995L 216/8, recital 13 and case IV/35.613 - *Alpha Flight Services/Aéroports de Paris*, EFT 1998L 230/10, recital 109-110..

operators. Not because some got better terms, as this was an inherent feature in quantum discounts, but due to high thresholds only attainable by a few particularly large partners and the up to 30% differences in the offered terms. Embedded in this is that differential treatment, even if non-objective, in itself is insufficient for identifying an abuse, as selective discounts always will benefit some at the expense of others. Only special treatment or favours creating manifest disadvantages would be relevant to raising the questions of how much differences should be accepted and how to evaluate these for the purpose of identifying an abuse.

As vertical discrimination remains exclusionary, it would not be unfair to seek guidance in the evaluation of traditional forms of exclusionary (vertical) abuse and tests applicable to these. Different approaches then become available. In *Clearstream*,[55] the Court concluded that in light of the facts, including the presence of a legal monopoly and a practice spanning four years, the discriminatory behavior "*... could not fail to cause… a competitive disadvantage."* Moreover, the abuser had been viewed as "*... an unavoidable trading partner*", indicating that foreclosure was plausible in a longer perspective. The case involved horizontal discrimination, but the consideration could reasonably be transferred to vertical discrimination, allowing for identifying vertical discrimination where it is obvious that a competitive disadvantage is imposed. Moreover, this would be unlikely, unless: **a**) the involved products or services were essential for the downstream activities, or **b**) the levied prices represented a significant proportion of the total costs by the disfavored customer. Devoid of these factors, a twisting of competition downstream (or upstream) would appear somewhat implausible, explaining why the Advocate General in *Meo* suggested considering the relationship between the levied prices and total costs. Moreover, option b) was applied in *Alpha Flight Services/Aéroports de Paris*[56] against (another) example of vertical discrimination favoring domestic air operators. Regrettably, the levied fees are undisclosed in the text of the decision. However, the Commission does clearly conclude *"... that a supplier paying the highest rate cannot offer competitive prices whilst maintaining the same profit margin."* The supplier would then start losing customers or reduce its profit and gradually be foreclosed.

Exploitive discrimination

Exploitive discrimination covers exploited and unfair practice, including individualized (excessive) pricing. This is an abusive practice, considered if not impossible at least impractical until the emerging of the digital economy. Of partic-

[55] Case T-301/04 - *Clearstream*, para 194 and COMP/38.096 - *PO/Clearstream (Clearing and settlement)*, recital 224-227.

[56] Case IV/35.613 - *Alpha Flight Services/Aéroports de Paris*, EFT 1998L 230/10, recital 109-110.

ular interest for the concept would be *United Brands*,[57] where the Court of Justice accepted differences in levied prices due to differences in costs and "… *the density of competition"*. This is a most pivotal observation, as its rebuts viewing pricing capitalizing on (some) customers' ability to pay a premium as abusive per se. This was more clearly embraced by the General Court in *Deutsche Bahn*,[58] considering, but ultimately rebutting, that the differences in terms and prices could be attributed to the density of competition downstream. The same conclusion would appear to stem from the *Scandlines Sverige AB v Port of Helsingborg*,[59] accepting that demand-related conditions could explain (and justify) price differences and rebuts allegations of exploitive abuse. Preferential treatment against remuneration is therefore most likely outside the concept of abusive discrimination under Article 102 (c), making it unlikely that this conduct can be monitored or policed by conventional enforcement action on platforms under competition law. More open are other forms of individualized (excessive) pricing.

Evaluation the ability to check discriminatory self-favoring

Besides the ambiguity surrounding discriminatory abuse, there are in itself no indications that these cannot be cleared up, providing a frame for policing discriminatory self-favoring under Article 102. It even appears plausible that the self-favoring condemned in the *Google Shopping* decision could have been accommodated under the concept of horizontal discrimination, as it appears to provide some benefit to downstream offerings. Regardless, the Commission did not look into this option. Moreover, other issues could emerge if Article 102 is called to examine or police self-favoring. First and foremost in the form of uncoordinated results when different national enforcers decide to apply different standards. *Post Danmark I* [60] e.g. originated in a national misreading of the concept of abusive discrimination under Article 102 (c) and attempt to applying this in an expanding manner. Intense national enforcement, void of coordination, could risk a repetition of the unfortunate approach to MFN-hotel clauses, where different national enforcers rendered different decisions. Secondly, does it remain questionable that preferential treatment against remuneration is covered by Article 102 (c) regardless of some indications that the Commission would prefer this. However, cases such as *United Brands, Deutsche Bahn* and *Scandlines Sverige AB v Port of Helsingborg* do not render support for this position. Presuming the Platform Regula-

[57] Case C-27/76 - *United Brands Company*, para 228.
[58] T-229/94 - *Deutsche Bahn AG*, para 91.
[59] Case COMP/A.36.568/D3 - *Scandlines Sverige AB vs. Port of Helsingborg*, recital 241.
[60] Case C-209/10 - *Post Danmark v. Konkurrencerådet*, para 8. For further on the national case, and its embedded misunderstandings, see Christian Bergqvist, *Final Curtin or Another Round on Post Danmark*, ECLR 34 (6), 2013.

tion intents to limit preferential treatment against remuneration competition law will not be able to deliver. Thirdly, *Google Shopping* amplifies some of the ambiguity, when the case was not pursued as horizontal (exclusionary) discrimination, regardless of a theory of harm fitting this. A decision raising the question of the ability to pursue horizontal discrimination short of the standards applied in *Google Shopping*. Of course different explanations are available for this ambiguity, including that **i**) the self-favoring in *Google Shopping* was not price based, making it difficult to undertake cost recovery calculations, or in the alternative **ii**) there lacked a clear trading relationship questioning the availability of Article 102 (c)[61] referring to trading partners. However, it might also be that **iii**) the self-favoring demonstrated by Google does not stand out as manifestly non-objective, taking the need to recoup Google investments into considerations. General searches are if not unprofitable, at least less profitable than other offerings, as they are given away free of charge, explaining why Google has an incentive to direct traffic in their direction. This is an argument that appears to have carried some weight with a UK court, exonerating Google of wrongdoing in a parallel, and apparently identical, case.

IV. Conclusions on the Platform Regulation

The adopted Platform Regulation is an important move by the EU to addressing lacunas when it comes to online platforms, search engines and different forms of self-favoring in the digital economy. Representing what was politically attainable, essential questions are nevertheless referred to by standard provisions in EU competition law, including in particular the prohibition on the abuse of dominance in Article 102 TFEU. While plausible, a framework for neglected points can be developed within existing case law, yet it essentially rests upon the outcome of a single case, in casu *Google Shopping*. There needs to be awillingness at a national level to commit an comparable level of resources as the Commission to examine these issues clearly. The *Google Shopping* decision, currently on appeal to the CJEU, had been 10 years in the making and involved prohibitively high standards in terms of economic evidence. While clearly establishing a reading of Article 102 covering what could be regarded as abusive self-favoring, as an artefact of enforcement action under EU competition law it requires so substantial resources, that replication at national level could be difficult. Moreover, the concept of discrimination remains

[61] E.g. Pinar Akman, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law*, J. L. Tech. & Policy 2017, pp. 330-331 appears sceptic against accepting a trading relationship, within the meaning of Article 102(c), when using Google to browse the internet.

somewhat unclear further elevating the risks of mistakes and uncoordinated decisions. We already have examples of this. Central elements in the adopted Regulation could easily prove a "bridge too far", mandating clarifications by Courts or other decision bodies within a relative short timeframe. Ideally, this could be addressed by close coordination between the Commission and national competition authorities tasked with enforcing Article 102 across Europe. Moreover, parallel to the code of conducts to be offered on the Regulation,[62] the Commission should revisit its promise made in 2005[63] for formal guidance on the concept of discriminatory abuse, as a supplement to what is now the *Enforcement Paper*. A move like that would clear up much ambiguity. For the benefit of Article 102 in general and the policing of obligations in the Platform Regulation more specifically.

[62] C.f. Article 17.

[63] See MEMO/05/486 - *Commission discussion paper on abuse of dominance – frequently asked questions.*