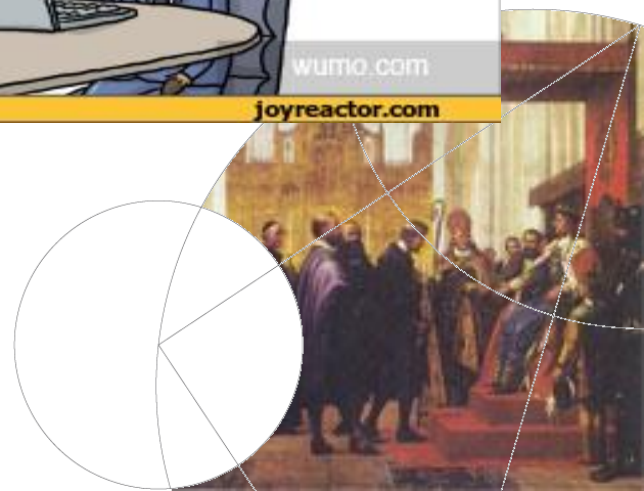




Self-favoring and discrimination on digital platforms



ASCOLA 25 June 2020
By Christian Bergqvist, ph.d.



EU's new platform regulation

Self-favoring appears to be real on **digital platforms**, as indicated by the anti-trust investigations of:

- *Amazon*, investigation opened in 2019 on the matter of self-favoring when listening products followed an inquiry
- *Google Shopping*, decision rendered in 2017 on the matter of preferential treatment of own services (self-favoring)
- *Facebook*, (allegedly) favors own advertisements warranting complaints in France

Motivating the adoption of a **Regulation** (19/1150), mandating:

- Article 5 requiring disclosure of **ranking** parameters on **online** (general) **search engines** (but not vertical/specialized)
- Article 7 requiring **disclosure** of self-favoring/preferential treatments in **online searches**

But **referring** actual **conflicts** to resolving under to **Article 102** regardless of the somewhat **underdeveloped practice**



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Google Shopping is **pending** before General Court, but:

- Revolve around **self-favoring** in respect to **internet searches** where own **offering** are allotted more **prominent displays** in the ranking following a search
- Provides an **opportunity** to **explore** the ability to **check self-favoring** under Article 102

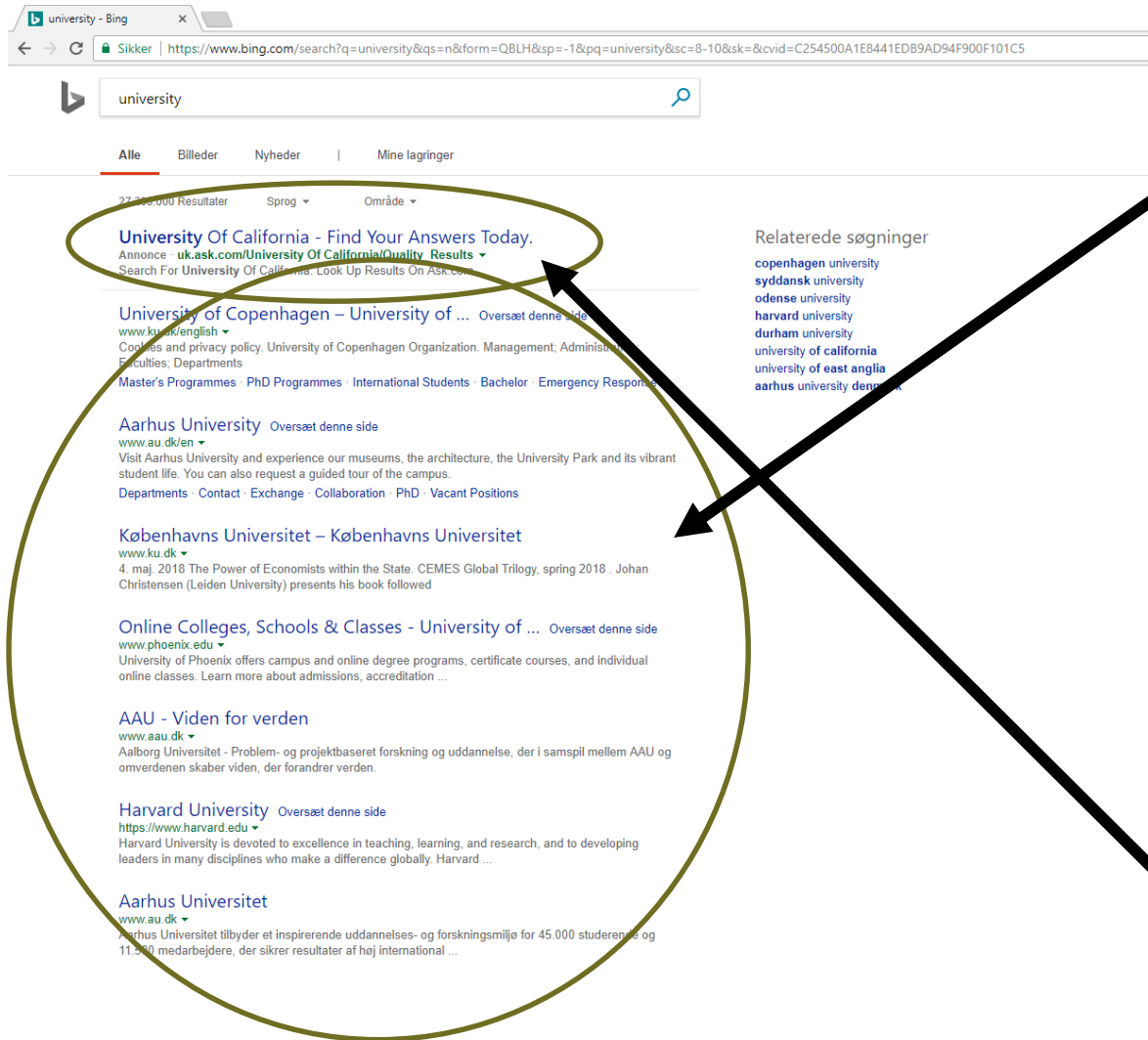


Search engines allow you to search



However, two alternative methods are available:
a) General (horizontal) search covering the entire internet for whatever you are looking for, or
b) Specialized (vertical) search focusing on a specific subject matter, e.g. places and events

General (horizontal) search



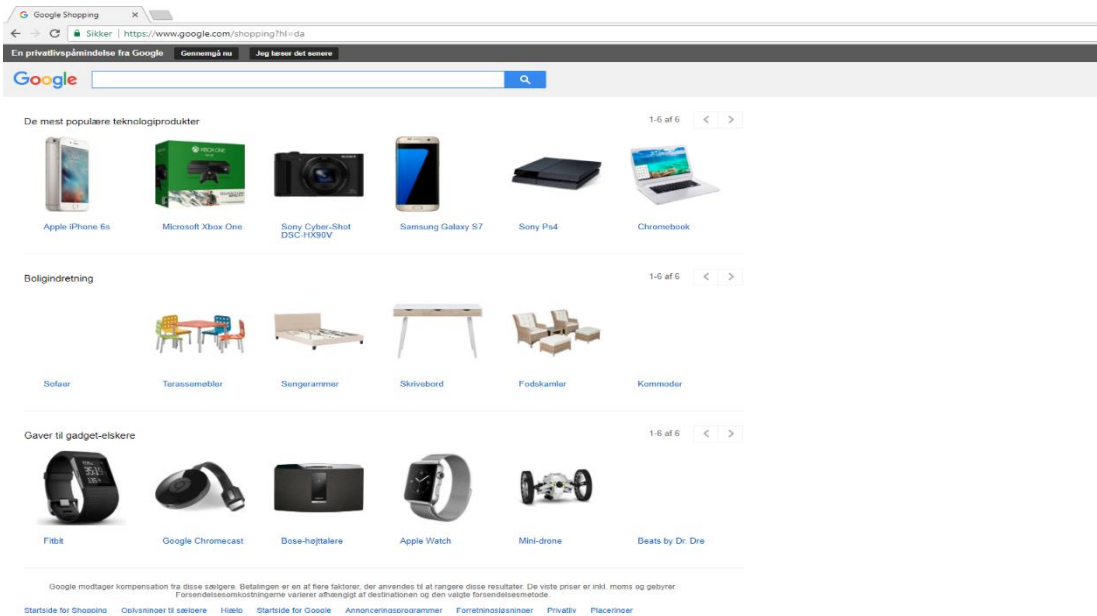
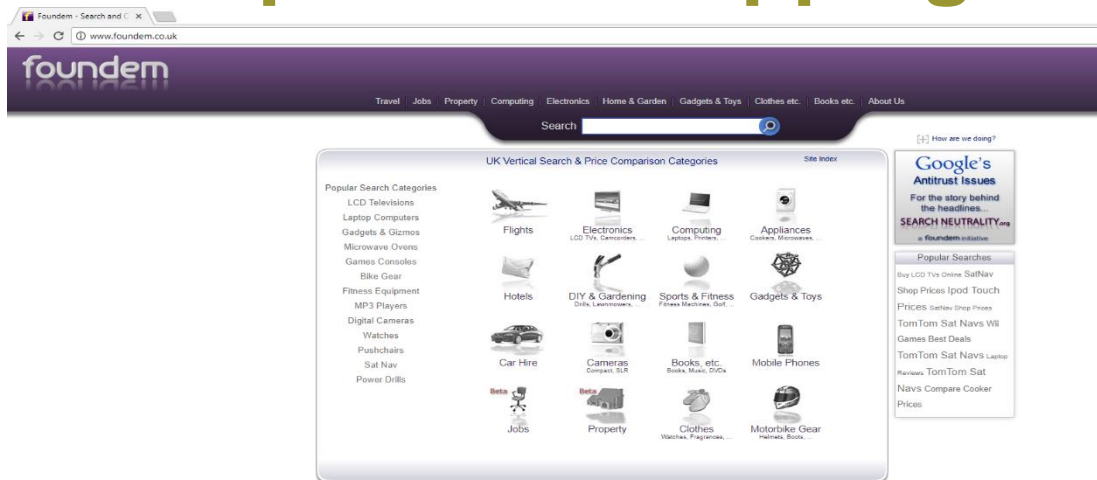
- Following a general inquiry, a general search will yield a generic (organic) index of hits (organic blue links)
- The quality depends on the algorithms, which constantly are improved by tracking users actual clicking (called "click-through-rates") thus, creating a strong network and bandwagon effect
- Further to the generic index, some links might be sponsored, generating an income for the search engine

Specialized (vertical) search

The image displays two web browser screenshots side-by-side. The left screenshot shows the Expedia website's search interface, featuring a search form with fields for origin, destination, dates, and number of travelers, set against a tropical beach background. The right screenshot shows the Yelp website's search interface, with a search bar and a grid of service categories including Restaurants, Shopping, Nightlife, Active Life, Beauty & Spas, Automotive, Home Services, and More Categories.

- If you are looking for specific services, e.g. travels or places/events, you should turn to a specialized search, e.g. Expedia or Yelp, focusing on travels and places/events, respectively
- Google also offers specialized searches e.g., *Google Images*, *Google Flights*, *Google Maps*, etc.

Comparison shopping compares prices



- Comparison shopping allows users to compare prices and characteristics across different providers of product and services (see recital 191) and is **not a specialized search service** (see recital 193-195)
- *Google* is active in this market with *Google shopping* (originally known as *Froogle/Google Product Search*)
- *Foundem* is a competitor (and one of the original plaintiffs)



What you learn at business school

Wulffmorgenthaler.com

Let's assume you are going to an important business event and realized you are without a tie

Searching on the Internet with *Google*

Se get a hugo boss tie arlington

Sponsorerede

Fix-fastening tie clip with...
78,00 \$
HUGO BOSS
Gratis forsend...

Hand-polished logo cufflinks...
98,00 \$
HUGO BOSS
Gratis forsend...

Italian-made silk tie with...
98,00 \$
HUGO BOSS
Gratis forsend...

Italian-made tie in micro-...
98,00 \$
HUGO BOSS
Gratis forsend...

Hugo Textured Skinny Tie -
58,50 \$
Bloomingdale's
Særligt bud



BOSS Store

Website

Rute

4,5

20 Google Maps

Men's butik i Virginia

Ligger i: Fashion Centre at Pe

Adresse: 1100 S Hayes St Ste
22202

Åbningstid: Lukket indtil 11.0

Telefon: (703) 418-0690

Foreslå en ændring · Administrer
virksomhedsprofil

Spørgsmål og svar

Se alle spørgsmål (1)

Populære tidspunkter

Choosing a product e.g. "Hugo Boss ties" still involves multiple searches

1. general search
2. comparison shopping (using the Shopping Unit)
3. vertical search providing content for the boxes
4. (sponsored links)

HUGO BOSS - Style, Refined | Premium Casual Pieces

[Annonce] www.hugoboss.com/

Refine your style with elevated modern looks made with HUGO BOSS precision and expertise. Business or casual, each piece elevates the next for style that is uncompromisingly BOSS.

Arlington · 3 steder i nærheden

BOSS Menswear Store Arlington - Discover HUGO BOSS

<https://www.hugoboss.com/boss-store-1100-s-hayes-st...>

BOSS Menswear Store, 1100 South Hayes Street #N01D, 22202, Arlington, Discover our... Sign up to receive collection preview mailers from HUGO BOSS.

BOSS Menswear Store Arlington - Discover HUGO BOSS

<https://www.hugoboss.com/boss-store-menswear-110...>

BOSS Menswear Store, 1100 South Hayes Street #N01D, 22202, Arlington, Discover our stores!

Searching on the Internet with *Google*

Se get a hugo boss tie arlington

Sponsorerede

				
Fix-fastening tie clip with...	Hand-polished logo cufflinks...	Italian-made silk tie with...	Italian-made tie in micro-...	Hugo Texture Skinny Tie - ...
78,00 \$	98,00 \$	98,00 \$	98,00 \$	58,50 \$
HUGO BOSS	HUGO BOSS	HUGO BOSS	HUGO BOSS	Bloomingdale's
Gratis forsend...	Gratis forsend...	Gratis forsend...	Gratis forsend...	Særtilbud

HUGO BOSS - Style, Refined | Premium Casual Pieces

www.hugoboss.com/

Refine your style with elevated modern looks made with HUGO BOSS precision and expertise. Business or casual, each piece elevates the next for style that is uncompromisingly BOSS.

Arlington - 3 steder i nærheden

BOSS Menswear Store Arlington - Discover HUGO BOSS

<https://www.hugoboss.com/boss-store-1100-s-hayes-st...>

BOSS Menswear Store, 1100 South Hayes Street #N01D, 22202, Arlington, Discover our ...

Sign up to receive collection preview mailers from HUGO BOSS.

BOSS Menswear Store Arlington - Discover HUGO BOSS

<https://www.hugoboss.com/boss-store-menswear-110...>

BOSS Menswear Store, 1100 South Hayes Street #N01D, 22202, Arlington, Discover our stores!



BOSS Store

Website Rute Gen

4,5 20 Google-anmek

Herretøjsbutik i Virginia

Ligger i: Fashion Centre at Penta

Adresse: 1100 S Hayes St Ste #N01D, 22202

Åbningstid: Lukket indtil 11.00

Telefon: (703) 418-0690

Foreslå en ændring · Administrer virksomhedsprofil

Spørgsmål og svar

Se alle spørgsmål (1)

Populære tidspunkter

- Google refers to its services as universal searches (disputing the separation between horizontal and vertical searches)
- Labels the Shopping Unit as innovation (an improvement to the general search)
- Utilizes several services for the boxes

DG COMP's theory of harm

- Google acts abusively (see recital 341) when only Google's own offerings are allotted and displayed with premium placement and pictures etc. as this can direct traffic away from competitors
- Google disputes any malicious intent, but the matter of the premium displaying and effect in terms of traffic, are supported by facts



1. The Google way is innovation

- Assuming I need a defense attorney, the boxes and universal search functions provide a superior level of information adjunct to my generic index
- It even offers directions, opening hours and reviews
- I'm therefore somewhat inclined to see this as an improvement to general searches

defence attorney

All News Images Maps Videos More Settings Tools

About 41,600,000 results (0.65 seconds)

Map of Oklahoma showing locations like Young Grady, Tulsa, and Broken Arrow.

Young Grady
5.0 ★★★★★ (1) - Attorney
Coffeyville, KS - (620) 251-9000

Tulsa Criminal Defense Law Firm
5.0 ★★★★★ (1) - Criminal Justice Attorney
Tulsa, OK - (918) 256-3400
Closed - Opens 8:30AM

Wyatt Law Office
5.0 ★★★★★ (6) - Criminal Justice Attorney
Tulsa, OK - (918) 594-0000
Closed - Opens 8AM

Criminal defense lawyer
A criminal defense lawyer is a lawyer specializing in the defense of individuals and companies charged with criminal activity. Wikipedia

Top Ten criminal defense attorneys

Johnnie Cochran	Mark Geragos	F. Lee Bailey	Leslie Abramson	Alan Dershowitz

People also search for

Defendant	Witness	Plaintiff	Legal profession

Criminal defense lawyer - Wikipedia
https://en.wikipedia.org/wiki/Criminal_defense_lawyer
A criminal defense lawyer is a lawyer (mostly barristers) specializing in the defense of individuals and companies charged with criminal activity. ... Some jurisdictions use a rotating system of appointments, with judges appointing a private practice attorney or firm for each case.

Defense attorney legal definition of defense attorney - Legal Dictionary
<https://legal-dictionary.thefreedictionary.com/defense+attorney>
Definition of defense attorney in the Legal Dictionary - by Free online English dictionary and encyclopedia. What is defense attorney? Meaning of defense ...

2. Google needs to make a profit

- Google's business essentially evolves around selling advertisements. Either on content pages or through sponsored links on the Internet

The screenshot shows the homepage of 'The Local Denmark'. At the top, there is a navigation bar with 'THE LOCAL dk' logo and a search bar. Below the navigation bar, there is a large advertisement for 'DEN MEST FLABEBE' featuring a man in a white shirt and tie, with the text 'THE BOOK OF MORMON OG FRIGRENDRE MUSICAL. MAN ENDNU HAR SET. CPH CULTURE'. Below the advertisement, there is a news article titled 'Data of over 40,000 in Denmark may have been shared with Cambridge Analytica' with a sub-headline '41,820 Facebook users in Denmark may have unwittingly had their data forwarded to controversial analysis firm Cambridge Analytica'. There is also a red 'Sign up to our newsletter' button and a 'SIGN UP here for a daily dose of Denmark in your inbox' button. At the bottom, there are two small news snippets: 'Detained Danish politician returns home after Bahrain entry refusal' and 'Inventor Madsen viewed murder video before Swedish journalist's death; prosecutor'.

The screenshot shows a Google search for 'defence attorney'. The search results page includes a map of Oklahoma with several locations marked, including 'Young Grady', 'Tulsa', and 'Wyatt Law Office'. Below the map, there is a list of 'Criminal defense lawyer' results, including 'Young Grady', 'Tulsa Criminal Defense Law Firm', and 'Wyatt Law Office'. Each result shows a rating, address, and phone number. To the right of the map, there is a 'Criminal defense lawyer' sidebar with a list of 'Top ten criminal defense attorneys' and a 'People also search for' section. At the bottom, there is a 'Criminal defense lawyer - Wikipedia' entry and a 'Defense attorney legal definition of defense attorney - Legal Dictionary' entry.

3. Rights theory of harm?

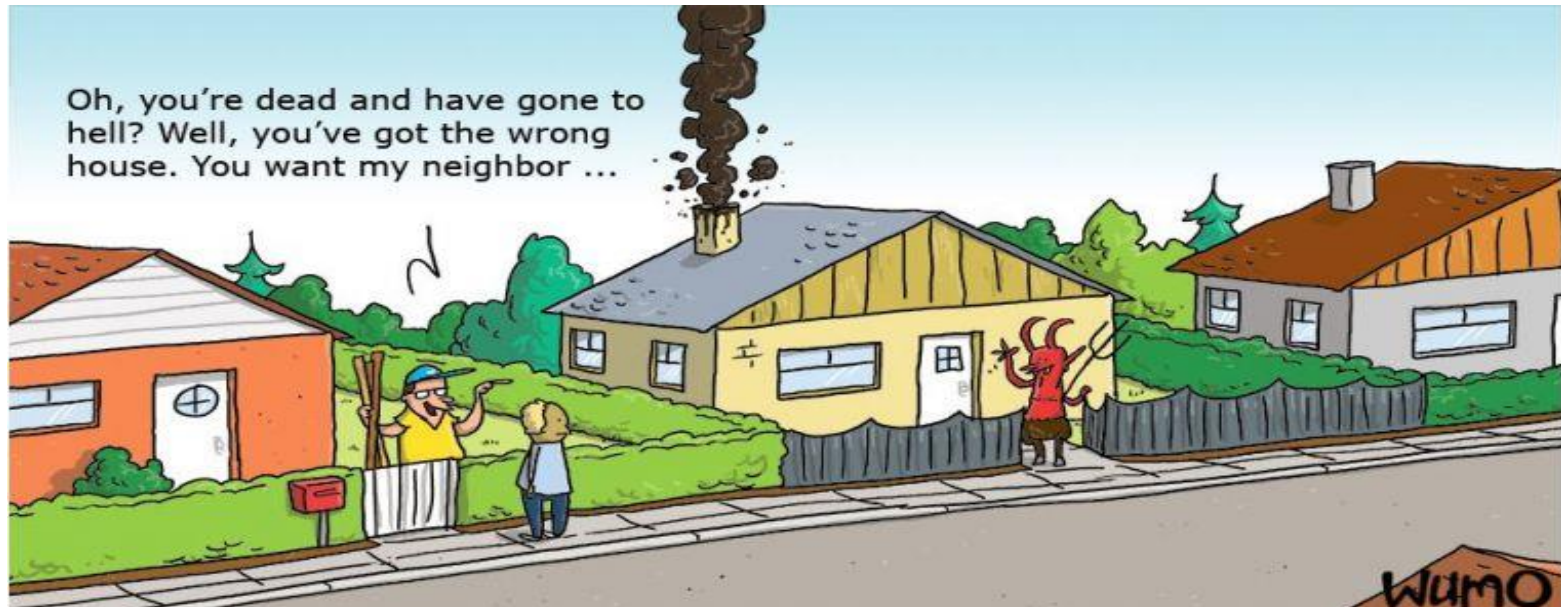
- The case echos discrimination, but isn't pursued as such, giving ground for Google's claim of being convicted under a novel and unsupported theory of abusive leverage



The concept of abusive discrimination

The concept of **abusive discrimination** under Article 102 is somewhat **underdeveloped**:

- *Post Danmark I* (2012) e.g. originated from a national misreading of the concept and case-law
- *MEO* (2018) requires anti-competitive effect rebutting that all forms of discrimination would amount to abuse
- *BdKEP/Deutsche Post* (2004) identified three forms of discrimination



The concept of abusive discrimination

BdKEP/Deutsche Post (2004) recital 93 states that:

- *"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"*



The concept of abusive discrimination

BdKEP/Deutsche Post (2004) recital 93 states that:

1. Horizontal (foreclosure) discrimination, where “...*the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself..*”. Relevant if the dominant undertaking is **active downstream**
2. Vertical (foreclosure) discrimination, where “...*the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis other customers of the dominant firm*” Relevant if the dominant undertaking is not **active downstream**
3. Vertical (exploitive) discrimination “...*the customer suffers commercially in such a way that its ability to compete in whatever market is impaired*”. Relevant if the **preferential treatment is based upon payment** most likely rebutting this as abusive unless exploitive



The notion of abusive discrimination

- *Google Search* (2017) involved self-favoring in the form of preferential display of affiliated services and the (malicious) downgrading of competing services:
 - **The case echos discrimination**, but isn't pursued as such, indicating some ambiguity by DG COMP on the concept
 - The **abusive conduct** is initially **defined** (recital 2) as the **favorable treatment of own services**, but later (recital 342 and 344) as the **downgrading of competing services**. However, the merits of the case points to their combination, leaving the reader confused
 - The abuse is supported by **substantial effect analysis** indicating a **high threshold** for condemning self-favoring
- *Google Search* indicates “challenges” when it comes to checking self-favoring under Article 102
- As Google already published its ranking policy, the case also indicates that transparency doesn't preclude manipulation



EU's new platform regulation

The Platforms Regulation represent what was politically attainable, referring issues to Article 102

- Article 102 might not yield acceptable replies and it will take some years before this becomes apparent
- Moreover, the approach might be fragmented repeating the unfortunate approach to MFN-hotel clauses
- EU has promised to issue guidelines on the regulation. However, guidelines on discriminatory abuse would also be relevant (as promised in 2005)



Questions

