Self-preferencing is when an entity favours its own products over the competitive competing products of other entities. Obviously, entities try to maximise their profits, the research and development. Thus, why would they have a positive duty to not favour themselves? In the past, antitrust law has found certain reasons why there must be some forms of control (e.g. discrimination, refusal to supply, essential facilities, or leveraging conduct).

Why turn now to self-preference? It is because the antitrust agencies are trying to depart from the restrictive elements or finding a case under established legal terminologies. Competition law agencies want to be more aggressive,

THE TOPIC WAS THEN CALLED DISCRIMINATION, IT IS NOW CALLED SELF-PREFERENCING.

WILLIAM E. KOVACIC
fearing that markets become tipping and that they might come too late because new markets are dynamic. Antitrust agencies develop new terminology in order to get rid of the constraints of precedence.

As for the most appropriate approach towards self-preferencing, we should continue using the traditional antitrust tools. What we are looking at is not something new: the market itself and its dynamism are new, but ultimately, we are as always trying to distinguish between competition on merits versus anticompetitive conduct. If we were to come up with self-preferencing as a terminology, then we are looking at uncertainty. The anticompetitive conduct labelling of competition on merits, while the game is going on, may mean that some players are throwing cold feet in investing in these markets, or they may not understand exactly what the rules are.

It is a concept that underpins many different categories of recognized categories of abuse. For example, refusal to supply, margin squeeze, discrimination and tying – all of which are recognized categories of abuse of dominance – to some degree involve the leveraging of market power from a market where a company is dominant to a vertically-related or neighbouring market where that company may not be dominant. It is also clear that, as a legal matter, the categories of abuse under Art. 102 are never closed. For example, margin squeeze does not appear in the categories of abuse set out in Art. 102(a)-(d), yet the Court of Justice nonetheless recognized it a distinct category of abuse in Deutsche Telecom and TeliaSonera.

The question is whether competition authorities’ treatment of self-preferencing as a standalone abuse is a legitimate enforcement innovation in response to the emergence of innovative digital business models. Unsurprisingly, the academic literature on this point reveals different viewpoints – as (obviously) does the Google Shopping case. Authors and litigants need to be clear whether their argument on self—preferencing boils down to: “it isn’t the law”; or “regardless whether it is or isn’t the law, it shouldn’t be”; or “regardless whether it is or isn’t, or should or shouldn’t be, the law, it shouldn’t apply to my industry or my company’s practices.”

The approach being taken by the European Commission (and other competition authorities) to tackle self-preferencing as a standalone abuse seems to rest on “competition on the merits” as the relevant litmus test. In the context of the ongoing appeal in the Google Shopping case, the Commission has reportedly articulated a three-step test for determining when the conduct of a dominant company treating its own service differently to the way it treats a rival’s similar service can be abusive: (i) the difference in treatment has a significant impact on an important parameter of competition (e.g. traffic in the case of Google Shopping); (ii) the significant impact is capable of having an anti-competitive effect; and (iii) the dominant company has no objective justification for the difference in treatment.

The test appears to work backwards: if a commercial practice meets the legal test for anti-competitive effect and there is no objective justification for that practice, then the practice is unlawful – regardless whether it falls within an established category of abuse. While this may make sense from a theoretical perspective and underpins the Commission’s willingness not to be tied to categories of abuse and focus more on whether conduct has anti-competitive effects, this three-step test provides little guidance to dominant platforms on the line between permitted conduct and prohibited conduct. In particular, the case law on the legal and evidential test for establishing “anti-competitive effect” is still evolving.

A key question is whether this legal uncertainty will result in supposedly dominant digital platforms taking an unduly conservative approach to their commercial conduct, in particular, their ‘enveloping strategy’ of moving into new

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Rod Carlton

Self-preferencing by digital platforms is a form of leveraging behaviour. Enforcement action against leveraging behaviour is not a novel issue under the competition rules relating to abuse of dominance.

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Some self-preferencing conducts can take the form of price discrimination (e.g. margin squeeze or selective discounting) or non-price discrimination (e.g. preferential access or display of products, quality degradation, selective vertical restraints).

Some of the self-preferential treatments, especially regarding online platforms, can be achieved by contracts concluded with intermediary platforms. This can promote exclusive prominence or preferential display of products by tying or inducements. Those can achieve similar effects to self-preferencing.

The first theory of harm is the classic one is regulatory evasion. If price regulation limits profits at the network level, by degrading access to the rivals on the downstream level profits can be shifted from the regulated network part to the competitive downstream market. There is a very clear application in utilities and in analogy to online platforms to the extent that there are implicit caps in prices. For example, if there is a commitment to 0-price on the consumer side, because organic search is a free product and is monetised on the advertising side, you cannot easily extract rents from downstream players using your organic search. But it is possible to divert advertising rents from downstream rivals by foreclosing them.

The second traditional theory of harm is defensive leveraging. The downstream rival to your affiliate may be a complement today but might become a competitor to your platform in the future, as we saw in Microsoft cases in the US and some European cases. The Google Search case has elements of both the first and the second theories of harm.

A third applicable theory of harm can be simple rent-extraction. By foreclosing the downstream rivals to enhance upstream leverage and rent extraction, the dominant firm can impose stricter conditions because it lowers the dependence on a large downstream provider. The preferential treatment of the affiliate can also reinforce single homing on one side of the platform, to extract advertising rents from the other side.

We can discuss three potential solutions: the structural options, the behavioural remedies and remedies to foster intra-platform competition. A traditional tool kit has been to look at separation options (e.g. ownership unbundling in energy). This was difficult to implement in some sectors (e.g. the telecoms in the UK). Online platforms are even more complex: the bottom-neck dynamic is hard to pin down. If the preferencing is achieved by a specific contractual clause, it is easier to handle. If it is something more organic, then it is more difficult to address. In Google Shopping, the Commission remedy has been trying to effectively introduce a form of functional separation in vertical search. It allowed rivals to Google to pick up their traffic (with some challenges).
Rameet Sangha

As for objective justifications or pro-competitive effects, there is scope to put forward some rationales. The Crémer report stressed that self-preferencing is not a per se abuse but should be subject to an effects test. In addition to the essential facility doctrine, self-preferencing is problematic when it is likely to result in a leveraging of market power and is not justified. The nature of the pro-competitive rationale will depend very much on the nature of the platform in question, and what the precise theory of harm is.

An illustration of that is marketplaces, i.e. one type of platform that connects consumers with retailers (e.g. Amazon). In hybrid marketplaces, several retailers sell through that marketplace but also have their own retail arm. The platform’s revenues will increase as consumers’ purchases increase, but it might be interested in having its own retail arm. It might also encourage other retailers using the platform to improve their offering through the platform, and price-comparison by the consumer.

The pro-competitive rationale will vary depending on the platform in question. Platforms make revenues in different ways and the speed of development of these markets should definitely be taken into account. An ex-ante code of conduct might be more flexible and appropriate for these industries.

Niamh Dunne

What are the different legal frameworks and instruments available to regulate the self-preferencing? Competition authorities can use the antitrust rules (important remedial and sanction powers) and national jurisdictions can use private enforcement. One of the benefits of using the antitrust rules is that they are already existing and there is a rich jurisprudence.

It is very piecemeal as we need enforcement against distinct individuals and entities. It can take a very long time (e.g. Google Shopping took 7 years to lead to a decision). The philosophical objection is that the source of harm in self-preferencing should not be recognised as an independent theory of harm. It is not inconsistent with market working well. We might thus take a different regulatory perspective and go for top-down regulation (e.g. setting a code of conduct ex-ante, especially for gatekeeper platforms). The Furman report suggested the Digital Markets Unit as an appropriate authority to do so. This alloxs a form of control ex-ante. However, it would require significant political will to set up new agencies, and to tackle highly innovative companies in very dynamic markets: determining what is good for consumers remains particularly difficult in that area. We might go for a more hybrid antitrust approach. This is the underlying idea of the new competition tool, advocated by the Commission this month, in order to have distinct instances of intervention against large digital undertakings. However, this is not antitrust enforcement as such. It is a supplementary tool that goes after structural competition issues, rather than individual instances. Although this tool is flexible, it is based on the notion that the existing gaps in the competition rules are necessary restraints to regulatory intervention. Finally, another approach is co-regulation. It has been taken in the P2B Regulation, applicable to online platforms, and imposing certain obligations of fairness and transparency with respect to how they run their business. The Regulation sets an ex-ante code of conduct but is not meant to be enforced top-down by a designated central regulator. On the one hand, the Regulation encourages voluntary compliance by online platforms, making it clear what they can and cannot do, and trying to ensure that they stick within the limits. On the other hand, it intends to facilitate greater private enforcement by businesses themselves. The benefits of this are that it develops a credible and sustainable regime. The disadvantage is the potential ineffectiveness: if it doesn’t succeed in encouraging voluntary cooperation, can we achieve effectively through private enforcement more involuntarily compliance from digital platforms?