

SELF-PREFERENCING: A GERMAN PERSPECTIVE



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I. INTRODUCTION

Whether a dominant undertaking's self-preferencing constitutes an abuse was central to the *Google Search (Shopping)* case:² is the preferential ranking of Google's (or Alphabet's) own comparison shopping service on the Search Engine Result Page ("SERP") an abuse? The question is, however, by no means confined to the *Google Shopping* case, and will continue to come up especially in multisided markets, where a positive feedback loop — once started by self-preferencing — may crowd out competitors regardless of the competitive merits.

The issue is multifaceted. First, one can ask whether self-preferencing can and should be allocated to one of the existing categories of abuse (and accordingly be subject to the requirements established for that specific abuse), whether it should be considered an "unnamed" abuse — and if so, what the test for identifying the abuse should be —, or whether it is no abuse at all (see Section II below).

Second, if one considers the current law to be inapplicable or at least insufficiently clear, there is a question whether self-preferencing should be made illegal *de lege ferenda*, be it by specifying it to be an abuse in competition law or prohibiting it in regulation. Germany is currently considering an amendment to its Act against Restraints of Competition ("ARC") which would give the Bundeskartellamt the power to prohibit self-preferencing by decision where the Bundeskartellamt has entered a finding that an undertaking active on multi-sided markets has "pre-eminent, market-transcending significance for competition" (see Section III below).

Third, one has to distinguish the conceptual question whether self-preferencing can be an abuse from the question how to identify self-preferencing, in particular in areas where subjective assessments are involved in finding the order of preference.

² Commission Decision of June 27, 2017, Case AT.39740, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf; see, e.g. Christian Bergqvist & Jonathan Rubin, *Google and the trans-Atlantic antitrust abyss*, CONCURRENCES N° 3-2019, 1. For my own preliminary view before the decision was handed down, and for further references to earlier literature, see Florian Wagner-von Papp, *Should Google's Secret Sauce be Organic?* MELBOURNE JOURNAL OF INTERNATIONAL LAW 16 (2015), 608. The decision has changed my view with regard to the extent of multi-homing; but as the discussion below will make clear, I am not yet entirely satisfied with the transparency of the standard established for abusive self-preferencing.

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II. DOES SELF-PREFERENCING FALL UNDER ANY OF THE ESTABLISHED CATEGORIES OF ABUSE OR UNDER THE GENERAL PROHIBITION OF AN ABUSE?

A. Discrimination

Given that self-preferencing entails differential treatment of oneself and others, the obvious starting point would be an application of the non-discrimination clause. In the EU, Article 102(c) TFEU provides: “Such abuse may, in particular, consist in: ... (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.” Similarly, the equivalent in German law in § 19(2) no. 1 ARC provides: “An abuse occurs, in particular, where a dominant undertaking ... directly or indirectly treats another undertaking differently from similar undertakings without an objective justification.”³ The question is, however, whether the non-discrimination rule applies to differential treatment within a vertically integrated undertaking vis-à-vis third-party undertakings competing on a downstream (or upstream) market.

German courts have explicitly rejected a comparison between how the dominant undertaking treats itself (including companies belonging to the same group of companies or “undertaking” in the European sense of a single economic entity) and how it treats third-party undertakings; self-preferencing is explicitly excluded from the non-discrimination rule in § 19(2) no 1 ARC, because other undertakings are not “similar” to the dominant undertaking (including the group of companies that belong to the same single economic entity).⁴

One of the earlier decisions on this issue handed down by the Federal Court of Justice concerned a scenario not unlike a brick-and-mortar version of *Google Search (Shopping)* in that a dominant undertaking provided free ad space to a subsidiary: In *Stuttgarter Wochenblatt*, a “free” (i.e. ad-financed) newspaper that was considered to have a dominant position offered free ad space to a 100 percent-owned subsidiary which operated a travel agency.⁵ The Federal Court of Justice held that the subsidiary was not “similar” to the competing travel agencies. It reasoned that the free goods or services provided by the parent undertaking to a subsidiary cannot constitute an abuse, because the parent could just as well make the subsidiary pay for the goods or services, and then absorb the loss within the group of companies.⁶

Under German case law, a duty to treat other undertakings equal to one’s own affiliates exists only where there is a (usually sector-specific) regulatory obligation not to discriminate between companies belonging to the same group and third-party undertakings.⁷

In the jurisprudence of the European Court of Justice, there appear to be no equally explicit statements that the non-discrimination rule does not apply to differential treatment between a person belonging to the same single economic unit and third-party undertakings. *Heike*

3 Author’s translation. The German wording is: “Ein Missbrauch liegt insbesondere vor, wenn ein marktbeherrschendes Unternehmen ein anderes Unternehmen ... ohne sachlich gerechtfertigten Grund unmittelbar oder mittelbar anders behandelt als gleichartige Unternehmen.”

4 Bundesgerichtshof, June 29, 1982, KVR 5/81, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1982, 2775, 2776 — *Stuttgarter Wochenblatt*; Bundesgerichtshof, February 10, 1987, KZR 6/86, NJW 1987, 3197, 3198/3199 — *Freundschaftswerbung*; Bundesgerichtshof, 31 January 2012, KZR 65/10, WuW 2012, 501 = WuWE DE-R 3549 = NJW 2012, 2110 — *Werbeanzeigen* (where the dominant producer of Yellow Pages made available the prices for ad placements to its subsidiary and its own agents at an earlier time than to competing ad agencies; the Federal Court of Justice rejected “similarity” of the third-party ad agencies with the subsidiary and agents belonging to the dominant single economic entity); see also Bundesgerichtshof November 12, 1991 KZR 2/90, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 1992, 199, 201 — *Aktionsbeiträge*. For further references see, e.g. Volker Emmerich, *Der gleichartigen Unternehmen üblicherweise zugängliche Geschäftsverkehr*, NEUE ZEITSCHRIFT FÜR KARTELLRECHT 2015, 114, 115; Heike Schweitzer, Justus Haucap, Wolfgang Kerber & Robert Welker, MODERNISIERUNG DER MISSBRAUCHSAUFSICHT FÜR MARKTMÄCHTIGE UNTERNEHMEN (Nomos 2018) 124/125; Andreas Fuchs, in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds.), WETTBEWERBSRECHT (6th edn 2020) § 19 GWB para. 103.

5 Bundesgerichtshof, June 29, 1982, KVR 5/81, NJW 1982, 2775, 2776 — *Stuttgarter Wochenblatt*.

6 *Ibid.*

7 See, e.g. OLG Düsseldorf October 14, 2009, VI-U (Kart) 4/09, WuW 2010, 222, 224/225 = WuWE DE-R 2806, 2808/2809 para. 56 — *Trassennutzungsänderung* (stating both the rule that usually the dominant undertaking comprising the entire single economic entity is not a “similar” undertaking, and the exception for the railway sector); Emmerich, n. 4, at 215. Only apparently broader is the statement in Bundeskartellamt May 24, 2016, B9-136/13, WuW 2016, 503, 505 para 37 — *DB Fahrkartenvertrieb*, which seems to indicate that differential treatment between an affiliated company and a competitor could more broadly be discriminatory in the meaning of § 19(2) no. 1 ARC where, exceptionally, the “advantageous treatment of an affiliated company results in a discrimination against a competitor” (“*Demgegenüber kann in Ausnahmefällen eine Verpflichtung zur Gleichbehandlung mit sich selbst bestehen, wenn eine Besserstellung eines Konzernunternehmens zu einer Diskriminierung eines Wettbewerbers führt*”). The logic of this sentence is entirely circular if one disregards the reference to the commentary by *Nothdurft* (Jörg Nothdurft, in Langen & Bunte (eds.), KARTELLRECHT KOMMENTAR (12th edn, Luchterhand 2014) § 19 GWB para. 211 f. (now, in the 13th edn. 2018: para. 304, with cross-references to paras 84, 323 [*sic*; should be 326], and 451); *Nothdurft* refers to the exceptional regulatory duties not to discriminate (with numerous further references to the case law); and in *DB Fahrkartenvertrieb*, the regulatory duty not to discriminate was grounded in the necessary cooperation between the Deutsche Bahn and its competitors in ticketing.

Schweitzer et al. claim that the European courts have never applied the non-discrimination rule in such cases, opting for the general rules on exclusionary abuses instead.⁸

However, the *European Commission* stated in the decision *HOV SVZ/MCN* that “where an undertaking in a dominant position on a market uses its dominant position to impose discriminatory conditions in respect of equivalent transactions on a second market, thus promoting its own services, this constitutes an abuse within the meaning of Article 86 of the Treaty [now Article 102 TFEU],” and found discrimination in the meaning of (now) Article 102(c) TFEU to exist where Deutsche Bahn (“DB”) applied lower tariffs for transport between Germany and German ports (the “northern journeys”) than for transport on the “western journeys” between Germany and Dutch or Belgian ports, leading to an increased use of intra-German routes served exclusively by *DB/Transfracht*.⁹ As Nicolas Petit notes,¹⁰ this decision was affirmed by the Court of First Instance, which concluded that “DB imposed dissimilar conditions for equivalent services, thus placing the other parties operating on the western journeys at a disadvantage in competition with itself and its subsidiary Transfracht.”¹¹

Furthermore, the European Court of Justice stated in *GT-Link*: “The fact that a public undertaking which owns and operates a commercial port waives those duties on its own ferry services and reciprocally on those of some of its trading partners is likewise 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, within the meaning of Article 86(c) [now Article 102(c)].”¹² While this quotation is not entirely unambiguous because it does not make clear whether the Court would also have applied Article 102(c) if the port owner had waived the duties only for on its own ferry services (and not also on some of its third-party trading partners), there is no reason why waiving the duties on its own ferry services should be mentioned if only the discrimination amongst the trading partners were considered objectionable.

Nicolas Petit concedes that such cases are rare and that the facts underlying these cases “may well have featured an essential facility,” but notes that the reasoning was not explicitly based on the essential facility doctrine and that “the presence of bottleneck industries seemed at best circumstantial.”¹³

However, if there were a *general* duty not to discriminate between terms offered to subsidiaries in vertically integrated undertakings on the one hand and competitors on the other hand, the more differentiated approach to margin squeezes would be nullified:¹⁴ any price discrimination between the vertically integrated undertaking and its competitors (at least if not objectively justified) would automatically be an abuse under Article 102(c). As this is clearly not the case, there must be an additional factor that excludes the application of the non-discrimination rule.

Petzold has suggested that only exploitative but not exclusionary aspects of discrimination should fall under Article 102(c) TFEU; but he concedes that various statements in the case law are incompatible with this interpretation.¹⁵ Additionally, Petzold suggests that discrimination between the vertically integrated undertaking and its competitors on the downstream market should not fall under Article 102(c) TFEU, but again has to concede that cases like *GT-Link* appear to undermine this general argument.¹⁶

Perhaps I am unduly influenced by the German case law, and I am aware of the impermissibility of transferring categories established in national law to European law, but it seems to me that the presence of a situation in which there is an at least quasi-regulatory relationship between the dominant undertaking and downstream third-party competitors (often in the context of former state monopolies and essential facilities) is not entirely coincidental to the European courts’ application of the non-discrimination rule to the cases mentioned above. Indeed, it seems to me to be a defining feature of these cases. Petit concedes that this is *de facto* a feature of the cases in which the European institutions applied

8 Schweitzer et al., n. 4, at 125.

9 Commission Decision of March 29, 1994, IV/33.941 [1994] OFFICIAL JOURNAL L 104/34 [248] - HOV SVZ/MCN.

10 Nicolas Petit, *Theories Of Self-Preferencing Under Article 102 TFEU: A Reply To Bo Vesterdorf*, available at <https://ssrn.com/abstract=2592253>, under I.A.1.

11 Judgment of the Court of First Instance of October 1997 21, Case T-229/94 (*Deutsche Bahn AG v. Commission*) [1997] ECR II-1695 [93].

12 Judgment of the Court of Justice of July 17, 1997, Case C-242/95 (*GT-Link A/S v. De Danske Statsbaner (DSB)*) [1997] ECR I-4449 [41].

13 Petit, n. 10.

14 Friedrich Wenzel Bulst in LANGEN & BUNTE KARTELLRECHT KOMMENTAR Vol II (13th edn Luchterhand 2018) Article 102 para. 212.

15 Daniel Petzold DIE KOSTEN-PREIS-SCHERE IM EU-KARTELLRECHT (NOMOS 2012) 158–163.

16 Petzold, n. 15, at 163–167.

the non-discrimination rule. Petzold notes that cases that have applied the non-discrimination rule to vertically integrated undertakings may not be capable of being generalized because they all concerned (former) public undertakings or undertakings with special or exclusive rights.¹⁷

It is true, as Petit points out, that the courts in these cases did not apply the duty to deal test before finding an infringement of the non-discrimination rule; nor did they mention sector-specific regulation as an element of the non-discrimination rule. However, while it is perfectly legitimate to use the list of examples in Article 102 TFEU as a way to categorize and systematize the case law, the ultimate issue is not whether there is discrimination, but whether there is an abuse. The assessment whether there is an abuse has to take into account how much scope remains for competition despite the presence on the market of a dominant undertaking. Where there is a natural monopoly, it is not a good idea to hope for competition in the market to develop spontaneously; if one wants competition, one has to go either for competition for the market or for competition on the downstream (or upstream) market. Where competition on an up- or downstream market is all one can hope for, it makes sense to prohibit discrimination to the extent that it would distort competition on the downstream market as well. Similar considerations apply to incumbents, often former state monopolists, on liberalized markets with sector-specific regulation, such as railways, telecommunications, or postal markets; while here competition may develop at least on those partial markets that are not characterized by natural monopolies, any additional discriminatory measures applied by the incumbent vis-à-vis its competitors may stifle the development of the residual competition otherwise possible.

While *every* dominant position requires that the market be not easily contestable, there is a spectrum between bare dominance of an undertaking scraping above 40 percent market share in a market with *some* entry barriers on the one hand, and a full-fledged natural monopoly or incumbent in a network industry on the other hand. It is true that the case law rarely distinguishes these situations explicitly from each other: “dominance is dominance is dominance” does not quite have the same ring as “a rose is a rose is a rose,” but the law seems to impose the special responsibility to all dominant undertakings alike (very occasional references to “super-dominance” notwithstanding). And yet, it seems to me that the courts, in deciding cases, do take into account *how* contestable the dominant position is, and that special rules may apply in the context of former state monopolies or regulated sectors. It would be better if these considerations, which appear to underlie the decisions implicitly, were made explicit.

In conclusion, it seems to me that vertically integrated undertakings need not, in general, offer the same or similar conditions to third parties as they do to themselves and their affiliates. The exceptions to this general rule are public undertakings and undertakings that are subject to a regulatory regime that entails non-discrimination. While the European case law (in contrast to German case law) does not explicitly state this particular combination of rule and exception, this interplay of rule and exception does seem to explain satisfactorily both the results of the cases in which the European courts found a discriminatory abuse *and* the cases in which Article 102(c) was not even mentioned even though a vertically integrated undertaking afforded preferential treatment to one of its affiliates compared to downstream competitors.

Other than in these exceptional instances, the non-discrimination rule of Article 102(c) TFEU does not apply. However, a *de facto* duty not to discriminate could still result from other case categories of exclusionary abuses.

¹⁷ Petzold, n. 15, at 165 in footnote 632 (noting that these are also the cases for which German law makes an exception, see above n. 7).

B. Refusal to Deal

Bo Vesterdorf has argued that in the absence of an essential facility as defined in *Bronner*, there can be no duty not to discriminate between the dominant undertaking and competitors;¹⁸ and, he argues, even application of the restrictive essential facility principle does not (always) require equal treatment.¹⁹ It seems to me that for the reasons outlined above, it is true that where an essential facility is concerned, a duty not to discriminate seems to be much easier to justify. The relevant questions then become what degree of dissimilar conditions can still be tolerated without distorting competition on the up- or downstream market and what preferential conditions may be accepted in order to reward investment in the essential facility or the taking of risks.

The term “essential facilities doctrine” has some baggage; like the U.S. Supreme Court, I consider the relevant question to be whether there is a duty to deal or not, which does not necessarily require recourse to the essential facilities doctrine. But apart from this terminological issue, I agree with Vesterdorf’s assessment that if the vertically integrated undertaking does not have a duty to deal with third parties, then the imposition of dissimilar terms should not as such constitute an abuse.²⁰

Application of the refusal to deal cases (instead of the general non-discrimination rule) also means that in the definition of the obligations the extent to which the dominant undertaking has made investments and taken risks can be considered.

C. Tying and General Abuse – The Google Search (Shopping) Case

As explained above, the non-discrimination rule in Article 102(c) TFEU does not apply outside the ambit of regulatory obligations (see above A.) and for the most part the duty not to discriminate between an affiliated person within the same single economic entity, on the one hand, and a third-party undertaking, on the other, should be restricted to refusal-to-deal cases (above B.).

However, as Petit notes, the application of rules on other types of abuses, such as tying or even unnamed general exclusionary abuses, may also lead to obligations that may, de facto, approximate a non-discrimination obligation. An abuse exists where a dominant undertaking “through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators [and this] has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.”²¹ Exclusionary conduct may be abusive even if it does not fall into any of the categories contained in the list of examples in Article 102 TFEU or of the categories established in case law.

The Commission in the *Google Search (Shopping)* case did not commit to the application of any particular form of abuse, but instead highlighted the exclusionary effects of Google’s Panda modification to the search algorithm, and that Google leveraged its dominant position to the market for comparison shopping.²²

In principle, there are no methodological objections to such an approach. The reason why I feel slightly uncomfortable is instead that ranking search results is inherently a somewhat subjective task: what is the “best” search result? Google’s argument was that the Panda change to the algorithm was intended to demote webpages with non-original content. In principle, this is a legitimate objective because many webpages with non-original content are not meritorious (objectively “bad” search results); but it is certainly true that Google’s comparison shopping service benefited — coincidentally or perhaps not so coincidentally — from this change.

¹⁸ Bo Vesterdorf, *Theories of self-preferencing and duty to deal – two sides of the same coin?* COMPETITION LAW & POLICY DEBATE Vol. 1(1) (February 2015), available at <http://ssrn.com/abstract=2561355>, at 6–7.

¹⁹ *Ibid.* at 7–8.

²⁰ This is the same reason for which I find the US approach to margin squeezes more persuasive than the European approach (although I would exceptionally be somewhat more accepting of potentially exclusionary effects of above-cost predation). See Florian Wagner-von Papp, *Brauchen wir eine Missbrauchskontrolle von Unternehmen mit nur relativer oder überlegener Marktmacht: Novellierung der allgemeinen Missbrauchskontrolle*, in Florian Bien (ed.), *DAS DEUTSCHE KARTELLRECHT NACH DER 8. GWB-NOVELLE (NOMOS 2013)* 95, 136–143. *Nicolas Petit* (n. 10) shares this view in principle, but notes that the European case law on margin squeeze demonstrates that in the current interpretation of the law, the Court of Justice finds an abuse even in the absence of the conditions of a refusal to deal or predatory pricing. This is correct; but I find it difficult to extrapolate from a rule that lacks a principled rationale.

²¹ Court of Justice of the European Union of March 27, 2012, Case C-209/10 (*Post Danmark A/S v. Konkurrencerådet*) ECLI:EU:C:2012:172 [24].

²² Commission in *Google Search (Shopping)*, n. 2, paras. 331 *et seq.* (see esp. para. 335).

The question is: to what extent is Google prevented from favoring its own services? What if it favors its own services because they are (a) objectively or (b) at least subjectively better on the merits than the services of its competitors?

And here we come back to the considerations on the non-discrimination rule. The reason why we generally do not apply this rule to preferential treatment within the single economic entity is that (1) the preferential treatment could also be achieved by treating the single economic entity's own services similar to third parties but instead forgo payment indirectly; and (2) that even the dominant undertaking is not generally required to further its competitors' cause (see above A.).

Here, Google could have used the space it uses for advertisements to promote its own comparison shopping services and so achieved a prominent placement.²³ It is difficult, then, to treat as an abuse the promotion of its own services more prominently than other comparison websites without more. It seems that the abusive nature of the conduct only comes about because Google's algorithm may have promoted Google's own services not *transparently*: search users were, in the Commission's view, not sufficiently informed that the algorithm would self-preference Google's own services.²⁴ If true, this may indeed distort competition in that users will not recognize the reduction in quality of the search engine (provided ranking criteria are deteriorated by a promotion of Google's own services) and therefore fail to switch to "better," i.e. neutral search engines.²⁵ To a large extent, the persuasiveness of the assessment of Google's conduct as abusive turns on the statement: "As for the Shopping Unit, while the 'Sponsored' label may suggest that different positioning mechanisms are used, that information is likely to be understandable only by the most knowledgeable users."²⁶

III. THE REFORM OF THE GERMAN ARC AND THE PROHIBITION OF SELF-REFERENCING

Currently, the 10th Amendment of the German ARC is being discussed. The Ministry's Draft Bill²⁷ recommends the introduction of a new § 19a, under which the Bundeskartellamt may declare an undertaking which operates to a substantial degree on multisided and network markets to have a "pre-eminent, market-transcending significance for competition." According to the draft's wording ("may declare") and the interpretative notes, the Bundeskartellamt has discretion whether to enter such a declaration.²⁸

Factors to be considered in this assessment are to be the undertaking's dominant position on one or several markets, its access to resources, its degree of vertical integration and activity on related markets, its access to competitively relevant data, and its significance for access of third parties to up- or downstream markets and the influence this position has on the business activity of third parties.²⁹

After this declaration has been made, or at the same time,³⁰ the Bundeskartellamt may, by decision, prohibit, among other things, self-preferencing when it comes to mediating access to up- or downstream markets (§ 19a(2) no. 1 in the Draft Bill's version), provided the conduct is not objectively justified. This prohibition is, unsurprisingly, based on the Commission's *Google Search (Shopping)* decision and the recommendation of the "Commission Competition Law 4.0."³¹

23 The payment consists in the opportunity costs of using its own ad space. Wagner-von Papp, n. 2, at 640–641.

24 See Commission in *Google Search (Shopping)*, n. 2, paras. 534–536. See also the transparency requirements in Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OFFICIAL JOURNAL L 186/57, and Jean Tirole, *Competition and the Industrial Challenge for the Digital Age* (April 3, 2020), available at https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/competition_and_the_industrial_challenge_april_3_2020.pdf (doubting that mere transparency requirements are sufficient to avoid anticompetitive harm from self-preferencing, but acknowledging that vertically integrated platforms "cannot treat equally a rival offering that is inferior to its own" and concluding without a firm policy recommendation for self-preferencing).

25 For the probably limited scope for distortion see Wagner-von Papp, n. 2, at 642–643.

26 *Ibid.* para. 536.

27 Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), as of January 24, 2020, 09:32.

28 *Ibid.* p. 77. For proportionality reasons, the interpretative notes suggest that the finding should usually be time-limited to between 5 and 10 years.

29 § 19a(1), 2nd sentence, nos. 1–5 in the Draft Bill's version.

30 Fifth sentence of § 19a(2) of the Draft Bill ("The decision under paragraph 2 may be combined with the declaration under paragraph 1").

31 Interpretative notes to the Draft Bill, p. 78, referring to the 10th recommendation of the Commission Competition 4.0: Bundesministerium für Wirtschaft und Energie, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft — Bericht der Kommission Wettbewerbsrecht 4.0 (September 2019), available (in German) at https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.pdf?__blob=publicationFile&v=12, p. 6.

The provision seeks to provide greater legal certainty by making a prohibition decision dependent on a declaration of the undertaking's "pre-eminent, market-transcending significance."³² The fact that the prohibition by decision may be combined with the declaration of this pre-eminent position slightly reduces this benefit; but it is only breaching the prohibition decision that may result in a fine³³ – in other words, the conduct is only prohibited for the future. However, § 19a(3) in the Draft Bill's version clarifies that §§ 19 and 20 of the ARC (the general prohibition of abuses of dominant positions and the prohibition of abuses by undertakings with only relative or predominant market power) remain applicable. The new § 19a in the Draft Bill's version therefore does *not* result in a safe harbor until the declaration and prohibition decision have been issued.

This is not the place to analyze in depth the new provision, whose fate in the legislative process is not yet certain anyway. The intention of facilitating quick intervention in multisided markets is understandable, as is the recognition that the focus on particular relevant markets may in some instances not reflect the true distortive influence that can be exercised by undertakings in multisided markets. It will remain to be seen, however, whether introducing yet another, not particularly well-defined position with "special responsibilities" will really bring greater clarity. The approach of prohibiting borderline critical conduct only for the future seems to me to be commendable in principle (just as the *Motorola* SEP decision³⁴ in my view rightly abstained from imposing a fine). Leaving open the possibility of the application of §§ 19, 20 ARC largely destroys this effect; but on the other hand, it is understandable that the legislator is unwilling to give undertakings that engage in the conduct enumerated in § 19a(2) carte blanche if the conduct constitutes at the same time an abuse of a dominant position.

IV. CONCLUSION

Prohibiting self-preferencing should remain the exception. Under current law, the non-discrimination rule in Article 102(c) TFEU is arguably only applicable to self-preferencing in the exceptional cases where the undertaking is under a regulatory duty not to discriminate. It is possible to find that the prohibition of exclusionary abuses can result in de facto obligations not to discriminate and therefore a de facto prohibition of self-preferencing. However, finding such an abuse must take into account the reasons why the non-discrimination rule does not generally prohibit self-preferencing: the possibility of achieving the same effect by other – unobjectionable – means, and the absence of a general duty of even the dominant undertaking to further its competitors' causes. I continue to have some reservations whether this was sufficiently considered in the *Google Search (Shopping)* decision; at least, the decision should have made clearer what the precise factors were that led the Commission to find that self-preferencing was abusive (was it, as I and others have speculated, the fact that search users were misled about the distortion of the search result ranking that came about through self-preferencing? If so, when is a ranking that depends on subjective assessments of quality distorted? And when is such a distortion made sufficiently transparent to prevent a finding of abuse if a "sponsored" label does not suffice?).

In principle, the approach in the Draft Bill for a 10th Amendment to the German ARC to introduce a provision by which a competition authority may prohibit specified conduct for the future (similar to a regulatory scheme) seems a good idea when it comes to conduct that is not ex ante obviously abusive but may have demonstrable exclusionary effects. Whether the provision on self-preferencing in § 19a of the Draft Bill really achieves this effect is a matter for separate discussion.³⁵

³² Interpretative notes to the Draft Bill, p. 76.

³³ § 81(1) no. 2(a) in the Draft Bill's version.

³⁴ Commission Decision of April 29, 2014, Case AT 39.985, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

³⁵ Thomas Höppner considers the definition of the abuse to be commendable, but takes issue with the concept of an ex nunc prohibition decision. Höppner, *Plattform-Regulierung light*, WuW 2020, 71, 76 *et seq.* Christoph Degenhart criticizes the provisions from a (German) constitutional perspective. Degenhart, *Verfassungsfragen einer 10. GWB-Novelle auf der Grundlage des Referentenentwurfs vom 24.01.2020*, WuW 2020, 309 *et seq.*

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