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ECOSYSTEMS AS QUASI-ESSENTIAL FACILITIES: SHOULD WE IMPOSE PLATFORM NEUTRALITY?

Abstract

The Google Shopping judgment raises the question of the possibility of attributing some of the characteristics of essential facilities to specific digital infrastructures and services. Such characteristics could lead to imposing access and neutrality obligations on digital 'gatekeepers' for the benefit of business partners, which may compete with some of their activities. This contribution examines the legitimacy and effectiveness of such injunctions. The aim is to examine successively the necessary scope of such obligations by questioning the place of the criterion of the indispensability of access, to consider the limits of such kind of asymmetrical regulation of competition, and to consider the possibility of addressing them through structural remedies.

JEL CLASSIFICATION: L13, L42, L50

SUMMARY

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1 Introduction

On November 10th, 2021, the General Court, has assimilated, in its Google Shopping judgement, the Google search engine to a quasi-essential facility.¹ In such case the Commission does not have to demonstrate the indispensability of the access. Therefore, impairing access would be part of an anti-competitive exclusionary strategy if no objective justification is provided.

The press release of the Court of Justice of the EU explicitly brought the situation of Google Search closer to that of an essential facility. Two conclusions can be drawn. First

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¹ Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021].

a distortion of access would be anti-competitive in nature. Second, a company has a particular responsibility to ensure that its commercial partners have access to an unbiased indexation. However, and significantly, it did not use the qualification of essential facility but noted that the search engine had characteristics that made it similar to this in terms of its critical place for Internet users in the matter of access to information on the web. This crucial operator character in the words of Marie-Anne Frison-Roche² makes it possible to bypass the condition of indispensability of the service as defined as necessary for the activation of the essential facilities theory in the Bronner judgment.³

“[...] The general results page has characteristics akin to those of an essential facility in as much as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market. However, the General Court confirms that not every practice relating to access to such a facility necessarily means that it must be assessed in the light of the conditions applicable to the refusal to supply set out in the judgment in Bronner, on which Google relied in support of its arguments. In that context, the General Court considers that the practice at issue is based not on a refusal to supply but on a difference in treatment by Google for the sole benefit of its own comparison service, and therefore that the judgment in Bronner is not applicable in this case”.⁴

This is not a case-by-case market practice assessment based on the effects; it is hardly a case of activation of the essential facilities doctrine (refusal to contract). As a matter of fact, it is case of sanctioning, through the characterisation of a foreclosure, distortions introduced in the access of third parties to an infrastructure to which they previously had free access and equal treatment.

² Marie-Anne Frison-Roche, ‘Proposition pour une notion: l’opérateur crucial’ (2006) 07 Recueil Dalloz 1896.

³ Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitung (Bronner) [1998].

“§41: [...] not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.”

“§45 It should be emphasised in that respect that, in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.”

⁴ General Court of the European Union, ‘The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison-shopping service over competing comparison shopping services’ (2021) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf>> accessed 13 October 2022.

The purpose of this article is to shed light on the concept of quasi-essential facility which is underlying to the EU General Court judgement and to draw some lessons from it as regards to the competitive treatment of practices by dominant operators. These practices could be seen as a progressive reduction of access to some of their infrastructures leading, if not to an absolute closure, at least to a relative one. An absolute closure, according to the logic of the Commission's February 2009 Communication,⁵ corresponds to a refusal of access. A relative closure may take the form of access under degraded and discriminatory conditions,⁶ so that, for example, an as efficient competitor would not be able to provide a service of equivalent quality or would be subject to obstacles that would not allow it to compete on level playing field.

However, two specificities of our case must be highlighted.

A first specificity is the change in access policy. This policy, which was initially based on non-discriminatory opening, no longer guarantees a level playing field between user companies. The downstream activity of the vertically integrated company now enjoys a competitive advantage over its competitors active on the downstream market alone. The economic question may then be that of self-preference. The theory of damage may come down to discrimination, the anti-competitive nature of which would have to be demonstrated. This character can be classically assessed through the evaluation of the net effect of the practice or through alternative economic tests, the relevance of which can be discussed in the framework of the more economic approach.

A first test could be the absence of economic sense. Does the change in strategy make sense from a profit maximisation perspective or does it have no other explanation than to hinder competitors? In ordoliberal terms, it would be a matter of sanctioning a practice that is an impediment to competition and not a performance competition on the part of a dominant operator. A company could then be sanctioned if it implements a strategy aimed at increasing rivals' costs or degrading their performance without objective justification. In this context, the consumer could not *a priori* benefit from the practice. It would then logically be up to the presumed infringing company to show that its change of attitude is necessary to achieve efficiency gains, does not lead to the elimination of all competition and that a fair share of the gains would be passed on to the consumer.

⁵ Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45

⁶ *ibid* §79 "Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply".

A second test could be the sacrifice test. If the firm foregoes a profit, it would be engaged in some form of predatory strategy.⁷ The risk of a false positive is then significant since the purpose of the competitive incentive is to provide all the necessary incentives to pass on efficiency gains to consumers. Furthermore, in the digital sector, the two-sided nature of business models, the strategy of scale and the desire to amplify network effects in an ecosystem can explain strategies that do not maximise profit at every moment in every market.⁸

An example of a strategy of foregoing a profitable transaction can be found in a precedent in US case law based on a comparable theory of harm: *Aspen Skiing* (*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)).⁹ Indeed, the damage theory developed by the EU General Court is not completely new. The 1985 US Supreme Court judgment in *Aspen Skiing* followed a very similar logic. First, it concerned a facility that could not be described as essential. The access requested concerned the possibility of commercialising multi-domain ski passes. Similarly, this possibility already existed and had just been abolished. Access to the market of competitors (a neighbouring ski area in this case) which had been facilitated in the first period, is hindered in a second period, the manager of the main ski areas not being able to provide an objective justification. The Supreme Court has developed in *Aspen* a demonstration echoing the ordoliberal distinction between performance competition and impediment competition. Indeed, the Court states that "the evidence supports an inference that Ski Co. was not motivated by efficiency concerns" (§ 610). But conversely a change in a market strategy "does not violate Section 2 if valid business reasons exist for that refusal" (§ 605). In the case of *Shopping*, however, the issue is specific since the firm that worsens the conditions of access of competing firms does not forego a profit but increases it. There is therefore no sacrifice.

A second specificity relates to the ability or lack of ability of downstream firms to respond to the change in strategy of the vertically integrated firm. Should the destabilisation of downstream partners and competitors be treated as an abuse of economic dependence which exists in the domestic competition laws of certain Member States? Should we go so far as to consider that certain platforms have the characteristics of essential quasi-facilities in relation to which there are no realistic

⁷ In the Communication from the Commission (n 5), sacrifice is defined in §64 to 66. In §65 "In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided".

⁸ Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 *Journal of the European Economic Association* 990.

⁹ Marina Lao, 'Aspen Skiing and Trinko: Antitrust Intent and Sacrifice' (2005) 73 *Antitrust LJ* 171; "Aspen, however, held that a monopolist's refusal to deal with rivals may violate Section 2 if the monopolist lacks legitimate competitive reasons or the refusal" (p. 171).

alternatives from a technical and financial point of view for the companies using their services? If so, should these infrastructures be subject to an indispensability test such as that set out in the Bronner case law? If an infrastructure is so qualified, any company must be able to access it under reasonable and non-discriminatory technical and tariff conditions. In other words, the management of the infrastructure must meet neutrality requirements.

Such an obligation could be imposed on online intermediation platforms if they have evolved to a situation of ultra-dominance or if their customers have opted for single homing. Then, there is no alternative to access a given digital ecosystem even if it is not dominant in the sense of competition law. We should nevertheless consider the risk to shift from an essential facility logic to a convenient facility logic.¹⁰ Access would be given to a competitor to enable it to compete more effectively and less expensively with a vertically integrated operator on the downstream market. This amounts to coercing the dominant company to the benefit of its competitors and could come under the heading of asymmetric regulation of competition.

This approach is not new in the history of competition law. In the United States, the Alcoa decision of 1945¹¹ required the vertically integrated company to leave a living profit for its competitors on the downstream market.¹² The aim was not to ensure that the pricing practice did not drive out a competitor that was as efficient as the vertically integrated company, but to impose on the latter a pricing strategy that would enable it to keep its competitors on the market. Such reasoning also implicitly involves a trade-off between consumer welfare and competitor welfare if an effects-based approach is adopted. However, aiming to constrain the behaviour of the dominant vertically integrated operator can also be defended if one considers that the consumer gains from maintaining effective rivalry on the downstream market (in terms of freedom of choice, diversity of potential innovation paths, etc.) or that the foreclosure of competitors could lead to a vertical extension of the dominant position which could be irreversible.

For all these reasons, neutrality requirements are particularly relevant for digital platforms. They could extend beyond the usual scope of essential facilities. The Digital

¹⁰ Derek Ridyard, 'Compulsory Access under EU Competition Law: a New Doctrine of "Convenient Facilities" and the Case for Price Regulation' (2004) 11 European Competition Law Review 669; Analysing the EU Commission decision in Microsoft, Ridyard denounces a "move towards a new "convenient facilities doctrine" (an asset without access to which it would be jolly inconvenient for rivals because they would need to offer customers a better product in order to overcome the advantages of the incumbent" (p. 670).

¹¹ *United States v. Aluminum Co. of America* [1945] US Court of Appeals for the Second Circuit 148 F.2d 416 [1945].

¹² John B Meisel, 'The Law and Economics of Margin Squeezes in the US versus the EU' (2012) 8 European Competition Journal 383.

Market Act (DMA)¹³ and the Digital Market Act (DSA)¹⁴ impose specific and asymmetrical obligations on companies that are qualified as gatekeepers or considered as systemic platforms. Their margins of freedom in relation to third-party companies using their services are reduced without a balance of effects being required to sanction them in the event of failure to comply with the rules laid down. The logic is therefore less that of applying competition rules than of regulating the said competition. Insofar as digital markets are more likely than others to tip over into situations of lasting dominance and that the conditions of competition can be altered by the dominant company which plays the role of private regulator of its ecosystem, competition can prove to be unfair if not inequitable. It is then a question of correcting, through regulation, these competitive risks which result less from a 'natural monopoly', as would be the case in the theory of essential facilities, than from a 'market failure' in certain digital ecosystems.¹⁵

Several questions then remain. First, should a right of access to a platform be guaranteed to companies that are 'dependent' on it, even if it does not meet the indispensability criteria? Second, should the burden of proof be reversed when a dominant company unilaterally changes its strategy to the detriment of its complementors? Thirdly, when examining self-preferencing practices, should the protection of the competitors and of the market structure be one of the aims of competition law? Fourthly, should platform neutrality be imposed, possibly to the detriment of consumers, by prohibiting per se self-referencing practices for example? Fifthly, in order to avoid the costs and limits of intrusive regulation of behaviour, should we go as far as structurally separating the activities of platforms and service providers, i.e. dismantling platforms that play a dual role?

The article is structured in three sections.

The first section presents the theory of damage involved in Google Shopping as interpreted by the Court. It shows how the progressive closure of access to a quasi-essential facility could be read as an exclusionary abuse.

A second section analyses the practice sanctioned from an economic analysis perspective.

Our third section discusses three questions arising from the EU General Court ruling in the light of industrial organisation insights: what could be the impact of a requirement of equal treatment such as it could result from the Court's judgment?

¹³ European Parliament and European Council (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L 265.

¹⁴ European Parliament and European Council Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) [2020] COM/2020/825 final.

¹⁵ Specific to the inner dynamics of digital ecosystems prone to tipping tendencies. See Nicolas Petit, 'Big Tech & the Digital Economy – The Molygopoly Scenario' (Oxford University Press 2020).

2 Shopping, between a constructive refusal of access of quasi-essential facilities and a strategic second-phase discrimination

In November 2010, the EU Commission, following complaints by search service providers, opened an antitrust investigation into allegations that Google had abused his dominant position in the online search market.¹⁶ Seven years after opening formal proceedings and an unsuccessful commitments procedure, the EU Commission issued a prohibition decision fining Google 2.42 billion euros for abusing dominance with his search engine by giving illegal advantage to his own comparison service. Bostoen qualifies the EU Commission decision “at best ambiguous” relatively to the legal qualification of the abuse, “given it oscillated between leveraging and favouring”.¹⁷ The author further qualifies leveraging as an “umbrella” term that may include different forms of abuses, including refusal to supply.

Google appealed the decision of the Commission and raised six pleas to this aim.¹⁸ In his decision of November 10th, 2021, T-612/17, the EU General Court dismissed Google’s appeal and confirmed the finding from the EU Commission decision that the search engine abused its dominant position by favouring its own comparison-shopping service over competing comparison-shopping services.

If Google did not dispute the fact that it holds a dominant position on the 13 national markets at the core of the proceedings (§119), the legal qualification of the abuse was trickier. From the theory of harm of favouring, leveraging, discrimination or refusal to supply, the decision of the EU General Court judgment brings clarification on the abusive practices.

First and foremost, attention should be paid to the evolution of Google’s strategy, from an initial opening that was perceived as normal relatively to his business model to a discrimination in the access of the service. This “open early, close late” strategy in digital markets has been reviewed by the economics literature¹⁹ and the economics of open and closed systems were the subject of a joint report from the Competition and Markets Authority and the French Autorité de la concurrence.²⁰ In the first stage, the platform needs to reach a critical mass of users, both to compensate for the service

¹⁶ European Commission, ‘Antitrust: Commission probes allegations of antitrust violations by Google’ (2010).

¹⁷ Friso Bostoen, ‘The General Court’s Google Shopping Judgment Finetuning the Legal Qualifications and Tests for Platform Abuse’ [2022] 13 *Journal of European Competition Law & Practice* 75.

¹⁸ All the six pleas were summarized in Natalia Moreno Belloso, ‘Google v Commission (Google Shopping): A case summary’ [2021] <[Google v Commission \(Google Shopping\): A Case Summary by Natalia Moreno Belloso](#)>, available at SSRN, accessed on 24 November 2022.

¹⁹ Bruno Jullien and Wilfried Sand-Zantman, ‘The economics of platforms: A theory guide for competition policy’ [2021] 54 *Information Economics and Policy*.

²⁰ UK Competition and Markets Authority and French Autorité de la concurrence ‘The Economics of open and closed systems’ (2014).

being free of charge in one side of the market and to gain in credibility and attract businesses on the other side.²¹ The judgment from the General Court points out an “abnormality” in Google’s favouring his own specialised results over third-party results, as it “seems to be the converse of the economic model underpinning the initial success of its search engine” (§179). Then question arises as to whether the deviation in Google’s behaviour, this second stage closing strategy, constitutes competition on the merits or not on a market where it acquired a ‘super-dominant position’. This change of behaviour had the double effect of a decrease in the visibility from his competing CSS and an increase in the visibility of results from Google’s own CSS.²² Moreover, if the users and the businesses were attracted on the market due to the first “open” stage of the strategy, they were then secured because of the market power of Google which made switching nearly impossible. In deviating from the usual practices on the market, Google is infringing his particular responsibility as a dominating operator.

While considered as an ‘abnormal’ behaviour, Google contested that the Commission did not meet the indispensability criterion set by the Bronner judgement in characterizing a refusal to supply, which states that the access to the service must be indispensable for carrying a business on a market where there is no actual or potential substitute. The Commission does not explicitly refer to a refusal to supply, but only to a favouring abuse, which is acknowledged by Google since they plead that “It is irrelevant that the decision used a different form of words to punish a refusal to supply” (§200). Their plea followed a backward reasoning, according to which the Commission should have met all the criteria of a refusal to supply to impose a duty to supply as a remedy. The General Court dismissed their reasoning as “there can be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied” (§244).

Nevertheless, Google favouring his own specialised results over third-party results, which resulted in an abuse, was only possible because his search engine characteristics

²¹ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] §178 “Unlike the latter infrastructures, the rationale and value of a general search engine lie in its capacity to be open to results from external (third-party) sources and to display these multiple and diverse sources on its general results pages, sources which enrich and enhance the credibility of the search engine as far as the general public is concerned, and enable it to benefit from the network effects and economies of scale that are essential for its development and its subsistence in a market in which, by their very nature, few infrastructures of that kind can subsist, given those network effects. A very large number of users is needed to reach the critical mass capable of compensating for the service being free of charge on one side of the market and generating advertising income on its other side. Accordingly, for a search engine, limiting the scope of its results to its own entails an element of risk and is not necessarily rational, save in a situation, as in the present case, where the dominance and barriers to entry are such that no market entry within a sufficiently short period of time is possible in response to that limitation of internet users’ choice.”

²² Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021]. First part of the first plead in law “the Commission did not prove that the practices at issue had led to a decrease in traffic from Google’s general results pages to competing comparison shopping services”, rejected by the Court. Second part of the first please in law: “the Commission did not prove that the practices at issue had led to an increase in traffic from Google’s general results pages to its own comparison-shopping service”, rejected by the Court.

were akin to an essential facility, in the sense that there is no “economically viable” (§224) substitute. While the indispensability criterion could not be met by the Commission, since *there are alternatives available*, Google’s general results pages accounted for such a proportion of the traffic that “could not be replaced by other sources of traffic currently available”. Indeed, the Commission describe the traffic from other general search services as “insignificant and unlikely to increase” (§226) due to the high barriers to entry characterizing the market for general search services.

Furthermore, even if all the criteria of an essential facility were met, the question of the refusal is still pending. Google did not refuse the access to its search engine, instead, the company changed its strategy by imposing discriminating access which resulted in a distortion of competition. The refusal to supply is strictly framed in the 2009 communication from the EU Commission which provides guidance on the application of the former art 82 to abusive exclusionary conduct.²³ The Commission starts by reminding the aim to protect the right for any undertaking to choose its trading partners to avoid undermining the companies’ incentives to invest and innovate. This disclaimer from the Commission aside, the communication distinguishes between actual refusal on the part of the dominant undertaking and a “constructive refusal” which is deemed sufficient to characterise the abuse. The concept of “constructive refusal” is illustrated by degrading the supply of the product, which could be linked to Google’s behaviour. While not expressly refusing the access, the discrimination in the access to Google’s favour was a degradation of the supply of the service, which has an eviction effect on the upstream neighbouring market and so a leveraging of the dominant position from downstream to the upstream market.

There are previous examples in case law where the indispensability criterion was not met. From the US side, this is the *Trinko* case²⁴ and from the EU side, the *Microsoft* case.²⁵ Geradin discusses what EU competition lawyers can learn from the *Trinko* case, taking the *Microsoft* case among others as an example.²⁶ In the *Microsoft* case, the company was fined in 2004 for abusing its dominant position by leveraging its dominance position in the PC operating systems to the work group servers market. Two

²³ Communication from the Commission (n 5).

²⁴ *Verizon Communications Inc. V. Law Office of Curtis V. Trinko, LLP* [2004] US Supreme Court (02-682) 540 U.S. 398. In the frame of a class action lawsuit, *Trinko* claimed that the harm resulted from an inferior access to a telecom infrastructure provided by an incumbent local exchange carriers. The conduct was also infringing the 1996 Act with impose incumbent local exchange carriers to provide competitors the access to their local telecommunications network. The Supreme Court dismissed the claim for failure to state an antitrust claim and stressed that the benefit of a judicial antitrust claim should be weighed against its costs when there already a regulation.

²⁵ Case COMP/C-3/37.792 *Microsoft* [2004].

²⁶ Damien Geradin, ‘Limiting the scope of Article 82 EC: What Can the EU Learn from the US Supreme Court’s Judgment in *Trinko* in the wake of *Microsoft*, *IMS* and *Deutsche Telekom*?’ (2004) 41 *Common Market Law Review* 1535.

types of abuses were addressed in the decision from the EU Commission, among which the refusal to share by Microsoft an interoperability information with his competitors which was needed to compete against the dominant company in the work group server market. The Microsoft case shares several similarities with the Google's case, notably the strategy of first granting access to information to other firms and then withdrawing the previously shared information. Then, there is also the tricky indispensability criteria, which was "overlooked" by the Commission according to Geradin. The reason underlying this is probably because the competitors were already on the market before and needed to access the interoperability information to merely be able to continue to compete. There again, a parallel can be drawn with the Google case. Nevertheless, Microsoft was fined for leveraging and not for a refusal to deal.

At the end, the main issue stands in the alternatives available and whether the indispensability criterion excludes any. It would be tempting to frame the alternatives and only sustain the indispensability criterion when they cannot perfectly substitute for the quasi-essential facility. However, this analysis might be risky and drifting into convenient facilities. On the other hand, how to ensure equal treatment of competitors when the business strategy from the dominant firm is non-replicable because his business is vertically integrated and his service quasi-essential on the market? This calls for a discussion on the legal and economic analysis of such practices.

3 Allowing for convenient facilities or banning self-preferencing: protecting competition or competitors?

A parallel could be drawn between essential facilities²⁷ and the economics of innovation and intellectual properties when assessing the economic risks associated with convenient facilities. In the 2009 communication from the Commission,²⁸ the very first sentence under the section "refusal to supply" set the position from the Commission that "any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property" (§75). In the same paragraph the Commission identifies the risks of an obligation to supply, such as a decrease in the incentives for the firm to invest and innovate as they would anticipate that competitors may free ride their efforts. Additionally, an obligation to supply could also result in harming consumers who would not benefit from the investment nor innovation effort from the market players. Therefore, it is with "careful consideration" that the Commission would assess a refusal to supply. This necessity to protect

²⁷ On the application of the essential facilities doctrine to the EU digital markets; see Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) 53 *Revue Juridique Thémis de l'Université de Montréal*.

²⁸ Communication from the Commission (n 5).

innovation and investment was at the core of every essential facilities case, both from the EU and transatlantic side. From the EU Competition law side, the restrictive Bronner case law set up the three conditions to grant access to an input: the refusal is likely to eliminate all competition on the market, the refusal cannot be objectively justified, and the input is indispensable.

Back to our benchmark, innovation and intellectual property policies also have for goals to protect the innovation efforts and investments from the firms in the market. Among the legal and economics instruments to incentivise firms to innovate, there is the patent system, which allows the firms to benefit from a monopoly profit over their innovation during a limited period. Thereof, any policy of innovation balances between consenting market power, to incentivise firms to innovate, and avoiding consenting too much market power for the social optimum, which would be an access for all consumers to the innovation at a competitive market price. In comparison with the theory of essential facilities, firms must have the opportunity to gain market power on the merits, as a return for their innovation and investment efforts. It seems relevant here to remind that the firms have a right to become dominant if they achieve this dominant position competing on the merits. In a parallel reasoning, the market players have incentives to produce innovation and investment efforts because they received the signal from the EU case law that essential facilities are strictly framed. If the indispensability criteria were to be completely removed from the Bronner case law, the risks would be higher for the firms to face refusal to deal or to access case law. This situation would create legal uncertainties decrease their innovation and investment efforts, harming both all the market players and the consumers.

An alternative solution would be to sustain the indispensability criteria, but as a less restrictive criteria, with the assessment of the alternatives. Indeed, in the Google Shopping case, it is clear from the Court decision that there are alternatives available, but they cannot replace the traffic generated by Google. Hence, an evolution of the case law, that would protect the economic incentives for the market players could consist in, on a case-by-case analysis, verifying that the alternatives could perform as substitute, and if not, in practice, the service or product would be indispensable. The burden of this assessment could lie on the platform which benefit from an informational advantage.²⁹

²⁹ It is not a foregone conclusion under EU Competition law, it which it is up to the Commission to establish the damage. See T-604/18, *Google and Alphabet v Commission (Google Android)* [2022], §79 “In particular, where the Commission finds an infringement of the competition rules on the basis that the facts established cannot be explained other than by the existence of anticompetitive behaviour, the Court will find it necessary to annul the decision in question if the undertaking concerned puts forward arguments which cast the facts established by the Commission in a different light and which thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that there has been an infringement.”

The debate on “how indispensable is the indispensability criterion” was also tackled as regards to the Slovak Telekom case,³⁰ which shared some similarities with the Google Shopping case. Indeed, the dominant company was supplying input (data) to its competitors and then withheld the necessary network information from its alternative operators for the unbundling of the local loop. The access to the data was not refused but degraded, in the sense of a “constructive refusal to supply” as provided in the 2009 communication from the Commission. The EU Court of Justice took the opportunity to clarify that the indispensability criterion is not by itself decisive when it comes to other abusive practices than a refusal to supply (§50 of the decision). Which confirms the intention from the EU case law to limit refusal to supply while allowing for other competitive theories of harm.

Since the evolution of the case law on essential facilities seems very unlikely, Google’s strategy of a first opening and then close access to his service could be assessed under the self-preferencing theory of competitive harm.³¹

The *Google Shopping* case gave rise to a wide literature on the self-preferencing theory of competitive harm and question whether article 102 TFUE establishes a duty for dominant undertaking to not favour their own products over the offering from their competitors. Ultimately, both legal and economics scholars, address how to analyse economically and qualify legally a situation in which, after an initial phase of openness to competitors, a platform with a dual role gradually closes down not by refusing access but by possibly degrading the access.

First, the application of the Bronner criteria to the self-preferencing practices in the on-going Google case was rejected by Vesterdorf. The former president of the Court of first instance of the EU bases its reasoning both on the right for dominant undertakings to compete on the merits, stressing the aims of Art.102 to protect competition and not competitors, and on the very limited circumstances under which a product or a service was characterized as an essential facility.³² Petit challenges the former legal analysis, which he finds “disconcerting” because restrictive to the essential facilities theory only, while there is an alternative legal basis under EU competition law to tackle self-

³⁰ Jose Rivas, ‘How indispensable is the indispensability criterion in cases of refusal to supply competitors by Dominant Companies? (Slovak Telekom, C-165/19 P) [2021] <[How Indispensable is the Indispensability Criterion in Cases of Refusal to Supply Competitors by Dominant Companies? \(Slovak Telekom, C-165/19 P\) - Kluwer Competition Law Blog](#)> accessed on 4 Oct. 2022.

³¹ The closing strategy here takes a relative but not absolute form. It proceeds from an opaque demoting. A parallel could be drawn with the “theoretical” openness of Android - everyone can access the code (open source) but access to essential functionalities (the Play Store) is conditional on the eventual fork being validated by Google. This amounts to discriminating between users and leaving alive those who do not threaten the market position. See Simonetta Vezzoso, ‘Android and Forking Restrictions: On the Hidden Closedness of ‘Open’ (2018) 2 Market and Competition Law Review 17.

³² Bo Vesterdorf, ‘Theories of self-preferencing and duty to deal-two sides of the same coin?’ (2015) 1 Competition Law & Policy Debate 4-9.

preferencing such as tying, discrimination or unfair pricing.³³ Ibáñez Colomo questions the underlying legal issues associated with the use of ‘self-preferencing’ as a label, which would capture several types of anticompetitive practices under existing legal qualifications. He also stresses the role of competition law to incentivise better products or services, in the broader question that was raised, which is whether the competitive advantage that results from integration, horizontal or vertical, is a legitimate one.³⁴ Padilla and others analyse under which circumstances a vertically integrated gatekeeper platform is incentivized to abuse his dominant position via self-preferencing. The authors built a two-period model in which the gatekeeper has the option during the second period to privilege its own product instead of third-party sellers on his platform. They found that the incentive for the gatekeeper to abuse its dominant position is related to the evolution of demand for the devices sold.³⁵ Bougette and others also review how and under which incentives a platform may implement self-preferencing practices and whether it can take the form of an exploitative or an exclusionary abuse. They also review the literature that distinguishes between self-preferencing practices that are welfare decreasing or welfare enhancing, the former relying on more ambitious presumptions.³⁶

Acknowledging that under certain conditions self-preferencing can be welfare enhancing for the consumers, the question remains whether a distinction between the welfare effects of self-preferencing practices can be translated into EU Competition law. The conclusions from AG Rantos in a reference for a preliminary ruling in the *Servizio elettrico Nazionale* case provide guidance as regard to the situation in which competitors are injured but where there is a possibility of positive effects for the consumers.³⁷ To his opinion, AG Rantos assesses that the preservation of the competitive structure cannot constitute an autonomous objective that would be an alternative to consumer well-being. Supported by the Court case law, the AG Rantos adds that “preserving an effective competition structure is intrinsically linked to an ultimate purpose, namely consumer protection” (§96). The AG rejects the antinomic interpretation of these two objectives from the referring court.

Following the conclusions from the AG that the protection of consumer well-being, and not the protection of a certain market structure is “the ultimate aim” (§106), one

³³ Nicolas Petit ‘Theories of self-preferencing under Article 102 TFEU: A reply to Bo Vesterdorf (2015) Competition Law & Policy Debate.

³⁴ Pablo Ibanez Colomo, ‘Self-Preferencing: Yet Another Epithet in Need of Limiting Principles’, (2020) 43 World Competition.

³⁵ Jorge Padilla, Joe Perkins, and Salvatore Piccolo, ‘Self-Preferencing in Markets with Vertically Integrated Gatekeeper Platforms’ (2022) 70 The Journal of Industrial Economics 371.

³⁶ Patrice Bougette, Olivier Budzinski, and Frédéric Marty ‘Self-Preferencing and Competitive Damages: a Focus on Exploitative Abuses’ (2022) The Antitrust Bulletin.

³⁷ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2021] Opinion of AG Rantos.

could imagine that self-preferencing in the context of vertically integrated firm with pro-efficient justifications would not be sanctioned by EU Competition law. It is not the object of the two-phase strategy of first opening then closing the access that would be sanctioned, but its anticompetitive effects. The following reasoning is confirmed with the clear reading from the conclusions from AG Rantos: “the form or type of conduct that is adopted by a dominant undertaking is not decisive in itself. What matters is whether the conduct tends to restrict competition or is capable of having that effect” (§61). Indeed, a self-preferencing practice can be deemed as abnormal under competition law provisions when it deviates from a “competition on the merits” and from the “special responsibility” of the dominant operator. It is case by case analysis, in which the specific “factual, legal and economic context of that practice” (§56) are weighted to decide whether the practice is consistent with competition on the merits.

Hence, a self-preferencing practice cannot be rejected for the only purpose of protecting the structure of the market. Then, should its effects be verified in terms of consumer welfare? And how to analyse a self-preferencing practice that could have positive effect on the welfare in a static perspective but negative effect on the structure of the market putting at risk dynamic efficiencies?

Once more, the conclusions from AG Rantos can shed lights on our questionings. First, the AG reminds of the objective difficulty in quantifying any changes in consumers well-being (§107), since this well-being can be assessed not only in prices, but also in innovation, quality or choice (§107). Requiring its assessment would be an elegant solution from an economic standpoint, but widely inefficient from the perspective of applying competition law in a timely manner. Therefore, it seems unlikely that we could face a case-law where the welfare effects of the self-preferencing practice are measured. Secondly, when sanctioning an exclusionary practice, the likely restrictive effect on the structure of the market is not a sufficient proof from the competition authorities. Instead, they should demonstrate “that such an exclusionary practice impairs the effective competition structure, while at the same time verifying that it is also liable to cause actual or potential harm to consumers” (§108).

In the frame of demonstrating the effects, the Crémer report suggests reversing the burden of proof for self-preferencing practices in digital markets so the platform would bear the burden of proving that self-preferencing has no long-run exclusionary effects on product market.³⁸ The reversal of the burden of proof is supported by Bougette and others since it would procedurally be efficient to reverse the burden of proof on the

³⁸ Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition Policy for the Digital Era’ (2019) Final Report, European Union.

best-informed party.³⁹ However, this proposal is also criticized, as it would set a too high burden of proof given the limited circumstances under which competition authorities accepted objective justification defence in abuse of dominance cases.⁴⁰ Additionally, one should be cautious with this reversing the burden of proof, which would result in treating self-preferencing as *prima facie* unlawful practice, without acknowledging the potentiality of pro-competitive effects on digital markets, without yet substantial evidence nor competition law practice.⁴¹ Ultimately, sanctioning an abusive practice under EU Competition law follows a casuistic approach, which seems to be one of the drawbacks of competition law versus regulation in digital markets. Indeed, while reducing the risk of errors, the effects of such a prohibition decision is only binding to the sanctioned company.⁴²

Therefore, should self-preferencing be banned *per se*, without any assessment of the conduct's effects in terms of economic or consumers welfare, potentially protecting competitors to the detriment of consumers, or are there other alternative approaches?

4 Regulating equal treatment in the European digital market

There is nothing new in questioning refusals to deal and essential facilities on regulated markets. While briefly referred to earlier in this paper, the Trinko case *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. (2003)) is a good illustration from the US side of an antitrust claim on a regulated market, where the Supreme Court answers on how to approach this interplay. More precisely, the case was about the interplay between the antitrust claim for a refusal to provide access to an essential facility where remedies can be enforced by the sectoral regulator. According to Petit⁴³ the Supreme Court's reasoning was based on a costs/benefits analysis, in which antitrust enforcement would have limited additional benefits where there is already a regulatory structure to reduce and remedy the risks of competitive harm. The European Commission's approach differs since sectoral regulators or remedies do not

³⁹ Patrice Bougette, Axel Gautier, and Frédéric Marty 'Business Models and Incentives: For an Effects-Based Approach of Self-Preferencing?' (2022) 13 *Journal of Competition Law and Practice* 136.

⁴⁰ Rod Carlton and Rikki Haria, 'Self-Preferencing – Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)' (2020) *CPI Antitrust Chronicle*.

⁴¹ Bougette, Gautier and Marty (n 39).

⁴² Anne C Witt, 'Platform Regulation in Europe – Per Se Rules to the Rescue?' [2022] 18 *Journal of Competition Law & Economics* 670.

⁴³ Nicolas Petit, 'Circumscribing the scope of EC competition law in network industries? A comparative approach to the US supreme court ruling in the Trinko case' (2004) *Journal of Network Industries* 347.

preclude the application of competition law.⁴⁴ However, it seems relevant, in the light of the Google Shopping case and the multiple digital markets regulations, to ask whether regulation should come to the rescue on digital markets when it comes to self-preferencing.

Bougette and others have shown that self-preferencing is not systematically detrimental to the consumer if an effects-based approach is adopted.⁴⁵ However, two dimensions specific to digital ecosystems must be taken into consideration.

First, the conditions to characterise the eviction of a complementor (i.e. a company that uses the services of a platform but that may compete with the services it provides itself or with those of other operators that the platform could favour if they prove to be more profitable in terms of commissions) may be difficult to characterise *ex post* because of the opacity of the algorithms. The increasing requirements on platforms in terms of transparency of algorithms can be explained in this context (see Regulation 1150/2019 on promoting fairness and transparency for business users of online intermediation services, e.g. *Platform to Business Regulation*). However, is transparency sufficient and should it not be complemented by higher requirements in view of the private regulatory power that the company has in relation to the firms operating in its ecosystem? The dominant firm (even if this dominance is specific to an ecosystem)⁴⁶ may face a responsibility commensurate with its power, knowing that it is able both to determine the rules of the competitive game and to change them unilaterally.

Secondly, digital markets are more exposed to the emergence of structural competition failures. Winner-takes-all logics and the importance of barriers to entry due to the incumbency advantage (which is linked to the diversity of activities and the control of massive, constantly renewed, and diversified data flows) imply that the dominant position once extended by anti-competitive leverage or more likely by merit alone will be very difficult to challenge in the future. Similarly, the manipulation of algorithms by artificially reducing the visibility of a third-party service results in a deterioration in the natural results of search engines which may have a self-perpetuating effect in the long term even after the practices have ceased.⁴⁷

This can result in numerous damages to competition which divided into several categories. It may involve an alteration of consumers' freedom of choice or an

⁴⁴ 2003/707/CE, *Deutsche Telekom AG* [2003]; §54 “The Court of Justice of the European Communities and the Court of First Instance of the European Communities have consistently held that the competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition”.

⁴⁵ Bougette, Gautier and Marty (n 39).

⁴⁶ Argument against equating ‘power’ in ‘platform power’ to market power in Orla Lynskey, ‘Regulating ‘Platform Power’ (2017) LSE Legal Studies Working Paper 1/2017, 10.

⁴⁷ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2021] §385, §399, §430.

irreversible weakening of the market structure, leading to impairing the competition process that is detrimental to innovation and the dynamic efficiency of markets.

Several sets of solutions are possible.

A first set of solutions consists in EU initiatives leading to the complementing of competition rules by sectoral regulation tools placing asymmetric obligations on firms qualified as gatekeepers or holding regulatory power over a given ecosystem. The DMA, the DSA and the P2B Regulation are examples of this approach. They aim to strengthen the powers of complementors by guaranteeing them better access to information, data portability that reduces their dependence on a given ecosystem and by imposing on these same ecosystem keystones or gatekeepers' obligations⁴⁸ of transparency of algorithms, accountability of decisions, and appeals that suspend dereferencing decisions.

A second set of solutions consists in extending remedies inspired by the theory of essential facilities to platforms by subjecting them to a neutrality obligation⁴⁹. They are required not to apply differential treatment to the detriment of competitors. The Shopping judgment goes in this direction. Beyond the European case, initiatives have emerged in the United States to apply common carrier status to certain platforms or to regulate them under a public utility regime.

The functioning of digital ecosystems questions some dimensions that have long been neglected by an antitrust law solely based on economic efficiency. These dimensions deal with the question of the exercise of economic power vis-à-vis trading partners and of a private regulatory power. These two dimensions recover the notions of asymmetries of bargaining power in transactions and private regulation on which the U.S. House of Representatives Subcommittee on Antitrust insisted on in its 2020 investigation of competition in digital markets (U.S. House, 2020).

For instance, on 8 June 2021, Ohio AG Dave Yost filed a lawsuit to declare Google a public utility.⁵⁰ According to the press release issued following the filing, "it seeks a legal declaration that Google is a common carrier (or public utility) subject to proper government regulation". Alongside the notion of public utility, therefore, one should consider the common carrier one. We should also quote a Court Justice Clarence

⁴⁸ Cf Bougette, Gautier and Marty (n 39): regulation does not deal with damage caused by dominance as it is the case in Antitrust but with a theory of 'gatekeeper harm' which is the power to manipulate the competitive game in a given ecosystem.

⁴⁹ Lynskey (n 46) points out that the regulation of Google as a public utility was proposed by Marina Lao. Marina Lao, 'Search, Essential Facilities and the Antitrust Duty to Deal' (2013) *Northwestern Journal of Technology and Intellectual Property* 275. Lynskey even shows that the Conseil National du Numérique had developed such reflection that eventually led to a regulation proposal in 2014. Conseil National du Numérique (CNNum), 'Neutralité des plateformes: Réunir les conditions d'un environnement numérique ouvert et soutenable' (May 2014) <https://cnumerique.fr/files/2017-09/CNNum_Rapport_Neutralite_des_plateformes.pdf> accessed 15 October 2022.

⁵⁰ Common pleas court of Delaware County, Ohio civil division, case n°21 CV H 06 0274.

Thomas' concurring in a Supreme Court judgment ruling on the suspension of Donald Trump's account by Twitter issued in April 2021. It seems more and more obvious that some kind of regulation may be applied to digital platforms in addition to competition laws enforcement.

Following Kirat and Marty, a qualification as public utility or common carrier can be used to control the right of an economic actor such as a platform to exclude third parties without having to characterise an infrastructure as an essential one.⁵¹ Within the US legal framework qualification of common carrier allows public authorities to regulate the exercise of the right to exclude.⁵² There is no need to demonstrate a dominant position in a given relevant market. Additionally, such a qualification is not limited to network industries and can encompass activities beyond the scope of 'natural monopolies'. According to the US Supreme Court case law this qualification may be applied since: « a business, by circumstances and its nature, ... rise[s] from private to be a public concern » (German Alliance Ins. Co. v Lewis, 233 U.S., 389, 1914).

The application of a public utility regulation can be justified to guarantee the access to an infrastructure under non-discriminatory conditions. It is the notion of public interest that makes it possible to qualify a company in this way and that can lead it to be regulated in such a way as to give access to its services to all users without discrimination.⁵³ The same reasoning applies to the proposal to apply to Google Ohio's State law on public utilities. According to the State Attorney General, "[t]here is a fair argument that some digital platforms are sufficiently akin to common carrier or places of accommodation to be regulated". The definition of public utility under Ohio law provided by the Public Utility Commission of Ohio states that: "an entity may be characterized as a public utility if the nature of its operation is a matter of public concern and if membership is indiscriminately and reasonably made available to the public. A corporation subjects those services to public utility or common carrier status when it serves a substantial part of the public in a way that makes its methods of operations a matter of public concern, welfare, and interest".

⁵¹ Thierry Kirat and Frédéric Marty 'Affectation with a public interest, between antitrust laws and regulation: Lessons from the U.S. experience of the first decades of the 20th century for online ecosystems' (2022) 1 OFCE Working Papers 1-2022 <<https://www.ofce.sciences-po.fr/pdf/dtravail/OFCEWP2022-01.pdf>> accessed 22 November 2022.

⁵² Adam Candeub, 'Bargaining for Free Speech: Common Carriage, Network Neutrality and Section 230' (2020) 22 Yale Journal of Law and Technology 391.

⁵³ The notion of a common carrier as used by Thomas in his opinion does not relate to the market for goods and services but to the market for ideas, in: Nathalie Nielson, 'Le blocage de "Parler", le droit antitrust et le libre marché des idées' (2021) XXXV Revue internationale de droit économique 75.

Nevertheless, the same underlying economic issues prevail with regard to market access and thus self-preferencing Justice Clarence Thomas, significantly uses the notion of gatekeeper, covers in his reasoning both the market of goods and services and the market of ideas: « [The gatekeeper] can suppress content by deindexing or down listing a search result or by steering users away from certain content by manually altering autocomplete results ».

A regulation appears as possible way to tackle competition law related issues which consequences go far beyond the efficiency dimension.

The same holds true in the EU, with the DMA (Digital Markets Act). Its objectives are not efficiency-related as the one of competition rules (Article 102 TFEU). The DMA, unlike the NCT (New Competition Tool) of June 2020, is promoted as complementary to competition rules. It addresses issues of market access (contestability) and ensuring undistorted competition (fairness). It is a matter of preserving both the competition for the market (among ecosystems) and the competition on the market (within an ecosystem).

The shortcoming of this solution is the usual costs and limitations of sectoral regulation.⁵⁴ Moreover, such regulation would not only be permanent but would also cover extraordinarily diverse markets and a perimeter that would shift as Big Tech diversifies.

The last set of solutions holds in the different modalities of unbundling as implemented in the liberalisation of the network industries. Preventing conflicts of interest without incurring the costs of incessant monitoring and undue limitation of the strategic autonomy of firms can be achieved through two tools. One is functional separation and involves compliance and corporate governance rules that are sufficiently robust to ensure the existence of Chinese walls between different divisions of companies. The other, radical, is a structural remedy, a dismantling of the vertically integrated company. This remedy, proposed by Lina Khan,⁵⁵ is rooted in the mythology of American antitrust, although it is rarely used and is highly contested in terms of the procedural costs involved and possible efficiency losses. It is a deterrent argument, but is it credible? The last major structural remedy is one that has been applied to AT&T in 1982,⁵⁶ but in a very specific context much more related to sector specific liberalisation. It appears that the dismantling of companies, except in the event of dissolution of trusts

⁵⁴ Dennis W. Carlton and Randal C. Picker, 'Antitrust and Regulation' in Nancy L. Rose (ed.) *Economic Regulation and Its Reform: What Have We Learned?* (National Bureau of Economic Research 2014).

⁵⁵ Lina Khan, 'The Separation of platforms and commerce' (2019) 119 *Columbia Law Review* 973. Lina Khan differentiates between behavioural remedies aiming to policy the behaviour of firms and structural remedies which target their incentives to engage in a practice. The author argues that the structural integration of dominant platforms results in putting them in competition with businesses depending on them and identified competitive risks such as discrimination, lock in effect and appropriation of sensitive business information. Therefore, the separation is relevant in digital markets favouring monopolistic market structure. While recognizing that structural separations have been abandoned in the US, the author makes an overview of five separation systems and identify their similarities, among which that the success of a separating is dependent from its timing and that a ban can take different forms, from complete to partial, and be coupled with common carriage rules. In the specific case of digital markets, Lina Khan argues that behavioural remedies would be more costly and challenging to implement due to the information asymmetry between the integrated platform and the public enforcers, hence, structural remedies would overcome this opacity. Finally, recognizing that vertical integration can generate efficiencies, the author stands for a case-by-case analysis, analyzing, among which, whether the digital platform is dominant and serves a gatekeeper intermediary and whether that dominance is likely to be durable and persistent.

⁵⁶ *United States v. American Tel. And Tel. Co.* [1983] 552 F. Supp. 131 (D.D.C. 1983).

such as Standard Oil in 1911,⁵⁷ is very rare in US Antitrust practice. According to Crandall, only four to five structural remedies have been used in cases not resulting from mergers or other business combinations.⁵⁸ Not only it is difficult to separate a company that has earned its market position through organic growth but it also appears that the implementation of a structural remedy results in a long process challenging its effectiveness and therefore imposes significant transaction costs.⁵⁹

Additionally, the Commission's practice shows an "overwhelming preference" for structural remedies in merger cases, contrasting to antitrust cases, where structural remedies are very rare.⁶⁰ This observation was aligned with the Art 7 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

"Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy"

Structural remedies in Art 102 cases are subsidiaries to behavioural ones following the reasoning that Art 102 does not prohibit dominant, but only its abuse, while merger control monitors structures. However, Korbinian Reiter⁶¹ points out three counterarguments: an anticompetitive conduct can consist of a change in the structure of the undertaking, the structure of the undertaking may be a precondition for anticompetitive conduct, and the structure of the undertaking can be the consequence of an abusive conduct. Additionally, and despite of the inherent difficulties of implementing structural remedies, they have the advantage to have an effect on the incentives of the market players.⁶²

The New Competition Tool⁶³ (NCT) welcomes market structure-based competition tool to tackle structural risks for competition and structural lack of competition with a

⁵⁷ Standard Oil Co. Of New Jersey v. United States [1911] 221 U.S. 1.

⁵⁸ Robert W. Crandall, 'The Failure of Structural Remedies in Sherman Act Monopolization Cases' (2001) 80 The Oregon Law Review 109.

⁵⁹ Judge Wyzanski's position in the 1953 decision is fully evocative: "it takes no Solomon to see that this organism cannot be cut into three parts and viable." *U.S. v. United Shoe Mach.*, 347 U.S. 521, 1954.

⁶⁰ This observation was confirmed by a study from Frank Maier-Rigaud and Benjamin Loertscher in which they reviewed 309 Commission decisions to accept or impose remedies in antitrust and merger cases between November 2004 and November 2018. Frank Maier-Rigaud, Benjamin Loertscher 'Structural vs. Behavioral remedies' (2020) CPI Antitrust Chronicle.

⁶¹ Korbinian Reiter 'Market Design Powers of the European Commission? Remedies under Articles 7 and 9 Regulation 1/03' (2020) 13 Munich Studies on Innovation and Competition *Springer* 213-251.

⁶² Patrice Bougette, Frédéric Marty 'Quels remèdes pour les abus de position dominante ? Une analyse économique des décisions de la Commission européenne' (2012) 3 Concurrences 30-45.

⁶³ European Commission 'New Competition Tool' Inception Impact Assessment 04 June 2020.

limited sectoral scope, which could include digital or digitally enabled markets. The policy aims intervene before a dominant company forecloses or raises its costs, so without a prior finding of an infringement to Art 102. The tool would allow the Commission to tackle competition problems that cannot be addressed by EU competition rules, for example, the tool would not require the company to be dominant. The economic evaluation of the NCT⁶⁴ makes a strong case for not limiting its applicability to dominant firms and for the possibility to address practices not tackled under competition law, such as algorithmic tacit collusion. However, the authors are more cautious when it comes to the structural risks for competition, when the harm is about to affect to market. The report also identifies some concerns concerning its implementation, among which the fact that a broad interpretation of the mandate of the NCT deprives firms of legal certainty and allows courts for more interpretation.

The DMA itself provides for structural remedies in case of repeated failures. Indeed, Article 75 states that

“The Commission should investigate and assess whether additional behavioural, or, where appropriate, structural remedies are justified, in order to ensure that the gatekeeper cannot frustrate the objectives of this Regulation by systematic non-compliance with one or several of the obligations laid down in this Regulation. This is the case where the Commission has issued against a gatekeeper at least three non-compliance decisions within the period of 8 years, which can concern different core platform services and different obligations laid down in this Regulation, and if the gatekeeper has maintained, extended or further strengthened its impact in the internal market, the economic dependency of its business users and end users on the gatekeeper’s core platform services or the entrenchment of its position. A gatekeeper should be deemed to have maintained, extended or strengthened its gatekeeper position where, despite the enforcement actions taken by the Commission, that gatekeeper still holds or has further consolidated or entrenched its importance as a gateway for business users to reach end users”.

In this context, an intervention on the market structure might be necessary to remedy a situation of structural competition failure. This is the case, for example, with the British market investigations. Their purpose is not to set the rules of the game as legislation does, nor to establish a legal precedent as a judgment does, but to address a competitive situation that is deemed unsatisfactory.

⁶⁴ Gregory S. Crawford, Patrick Key, Monika Schnitzer ‘An Economic Evaluation of the EC’s Proposed “New Competition Tool” (2020) Publications office of the European Union.

As Amelia Fletcher writes: “market investigations can also address markets which have become 'stuck' in bad equilibria, which are good for neither firms nor society, but where some form of intervention is required to make the shift to a better equilibrium.”⁶⁵

From a theoretical point of view, the guarantee of neutrality could be achieved through structural remedies that would be capable of resolving the problems of conflicts of interest and avoiding the costs associated with constant supervision of the behaviour of pivotal operators. However, this solution has many limitations, such as its infringement of the fundamental rights of firms and its economic cost. Is regulation not then a more reasonable solution?

The arguments in favour of regulating the activities of certain platforms considered, if not essential, then socially critical are not limited to marketplaces or search engines. Here, the indispensability character is rather difficult to defend unless the analysis is based on some of the elements presented above. If we follow the logic of the European texts, regulatory supervision can be envisaged in several cases.

This may firstly be the case if the target company occupies a position that puts it in a position of access lock. This corresponds to the gatekeeper position that a given platform enjoys for access to a digital ecosystem and echoes the DMA.

Specific regulation can also be justified in this same approach by the fact that a given search engine is in a *de facto* monopoly position for access to the Internet (which was the case for Google Search insofar as it was also pre-installed on Safari and therefore in the iOS ecosystem). The structuring effects of the algorithm on the market dynamics may then give it a critical character that calls for specific *ex ante* obligations, insofar as the characterisation of *ex post* manipulations may be difficult and the remedies that may be imposed in the context of a competition procedure may prove insufficient to correct the anti-competitive effects.

Ex ante measures can also be justified on the basis of a market structure that would inherently favour the implementation of anti-competitive practices both because of the opacity of its functioning and the incentives it would generate for the dominant undertaking. This argument can be applied to an infrastructure that is much more obviously crucial than marketplaces or even search engines, in this case the hardware infrastructure needed for the cloud.

For instance, this is the position supported by Benzina.⁶⁶ His demonstration focuses on the infrastructure-as-a-service used in cloud services (IaaS). This covers data centers, servers, storage capacities and networks. This infrastructure supports two sets

⁶⁵ Amelia Fletcher 'Market investigations for digital platforms: Panacea or complement' (2021) 12 Journal of European Competition Law & Practice 44.

⁶⁶ Kamila Benzina 'Cloud Infrastructure-as-a-Service as an Essential Facility: Market Structure, Competition, and the Need for Industry and Regulatory Solutions' (2019) 34 Berkeley Tech. LJ 119.

of services: platform-as-a-service (PaaS) and software-as-a-service (SaaS). The first services correspond to resources essential to companies such as databases and application development tools (programming languages, libraries, etc.). The second services allow applications and services to be run directly on the cloud for the benefit of customers. The essential point to consider for our purposes is that the architecture and management choices of this infrastructure layer have a framing effect on the next two layers and can contribute to a lock-in effect on the user companies.

The IaaS layer corresponds to a set of hardware resources developed and made available to third parties by a given operator. This layer is essential for developing and testing algorithms and applications, hosting websites, managing internal company applications and managing native cloud applications.

There is no 'natural monopoly' *per se* in the field. Amazon, Microsoft, Google, Alibaba and IBM offer competing infrastructures. However, these are ecosystems between which user firms can only move with great difficulty because of the locking effects specific to the technologies developed and the complementary nature of the investments made. The investments required from the firms concerned make it very difficult, if not illusory, for them to make new entries. Indeed, the level of stranded costs for new entrants plays as barriers to entry. Admittedly, the incumbents have previously invested to acquire their positions, but they have been able to do so gradually, particularly through internal growth operations, and have been able to absorb their investments through their use primarily for their own activity, as shown in the case of Amazon and AWS.⁶⁷ Developing a competing infrastructure would not only be difficult to finance given the sunk costs of failure but would also face difficulties in gaining access to key technologies due to the research and development investment intensity of the dominant operators and controlled patents. New entrants would also face switching costs from the incumbents' customers. Not only would the transition from one IaaS provider to another be costly, but it would be particularly complex technically. The new entrant would have to provide particularly demanding security and performance guarantees to overcome the risk aversion of users.

IaaS is therefore also a candidate for the application of the essential facilities theory to digital infrastructures, much more so than certain marketplaces that would have locked their customers in by encouraging them to single home via loyalty programs, or even more so than search engines. However, the indispensability criterion in the sense of the Bronner judgment cannot be satisfied insofar as there are alternatives. Nevertheless, it appears that inter-IaaS competition is limited and that the users of

⁶⁷ Edward Snyder, Jason Canaday, Marley Hughes 'Amazon's Three Major Lines of Business' (2022) George J. Stigler Center for the Study of the Economy & the State Working Paper, available at SSRN, accessed 14 October 2022 <<https://ssrn.com/abstract=4162112>>.

each IaaS can be locked out and potentially be the object of anti-competitive or restrictive strategies. The problem is thus similar to that of the DMA. The preservation of the competition process and the prevention of abusive behaviour based on the exploitation of situations of economic and technological dependence may justify the consideration of regulatory solutions geared to the objectives of maintaining the contestability of markets and the fairness of their operation.

For example, it may be a question of promoting data portability, service interoperability or preventing anti-competitive tying strategies between the different layers of cloud services. As Benzina points out,⁶⁸ the sanctioning by competition rules of strategies amounting to the crowding out of competitors or commercial partners, through predatory pricing or tying, would be particularly difficult to obtain because of the costs, delays, and low probability of success of actions brought by complainants, especially in the case of the US Antitrust.⁶⁹

However, opting for structural solutions, such as unbundling, could prove particularly difficult from a technical point of view, especially in view of the risks of lost efficiencies, and costly for the firms concerned, for whom cloud activities are among the most profitable business lines.

5 Conclusion

Having completed this overview, it is time to return to the questions presented in our introduction.

The first question concerned the relevance of the competition tool to ensure equal competition when a platform exercises a dual role placing it in a position to manipulate its algorithms to crowd out user firms and giving it the incentives to engage in this strategy. The opacity of the algorithms and the subsequent difficulty of characterising the theory of damage may lead to under-enforcement of the rules through too many cases of false negatives. It may then be possible to reverse the burden of proof, as recommended by Crémer and others.⁷⁰

The second question concerned the situation of firms using services provided by large platforms and various digital ecosystems and the need to guarantee them access under non-discriminatory conditions even if each of these platforms and ecosystems does not meet the indispensability criterion necessary for the activation of the essential facilities theory as defined in the Bronner judgment. In American antitrust law, the

⁶⁸ Benzina (n 66) 138.

⁶⁹ Hal J. Singer 'Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone is Concerned About' (2017) 17 Antitrust Source.

⁷⁰ Crémer and others (n 38).

courts had to deal with this issue in particular in the *Hecht* case in 1977. For the District of Columbia Court of Appeals "[to] be 'essential' a facility would be economically infeasible, and its denial of its use inflicts a severe handicap on potential market entrants" (*Hecht v Pro-Football Inc*, 570 F2f 982,985, 992, D.C. Cir. 1977). The standard is then much less demanding. How can such a logic be applied without leading to a framework that would force installed operators to 'subsidise' new entrants or their commercial partners in a convenient facility logic?⁷¹ Recourse to the concept of abuse of economic dependence, as it exists in many Member States' laws, could then be a tool for protecting current commercial partners.

The third question was related to the core of competition law: its goals. A *per-se* ban of self-preferencing under competition law would amount to protect the market structure or competitors. Ultimately, competition law in the EU aims to protect consumer welfare, and the protection of the market structure can only be linked to this goal, but not substitute for it. While recognizing that self-preferencing practices are harming competitors by default, it can only be banned under competition law if there are no welfare effects beneficial for the consumers.

A fourth question concerned the treatment of the evolution of firms' strategies in terms of opening up to complementors and implementing self-preference strategies. Competition law cannot sanction such practices *per se*. First, a firm's business model may evolve over time in a direction that may not be systematically unfavourable to the consumer. A case-by-case assessment of the effects is necessary. The same applies to self-preference, whose net effects cannot be considered as unfavourable in themselves. Nevertheless, taking *ex post* effects alone into account may pose problems. On the one hand, it is the special responsibility of a dominant operator (even if this dominance is specific to a given ecosystem) not to treat identically situated commercial partners in different ways, otherwise this could lead to exploitative or predatory abuses on the downstream market. On the other hand, the effects of discrimination (which may take the form of downgrading, de-indexation, etc.) may be irreversible and competitive remedies may not be sufficient to restore the competitive situation that would have prevailed in the absence of the practice. In this context some form of *ex ante* regulation as introduced by the P2B Regulation, or the DMA may be necessary.

The fifth and final question concerned structural solutions, in other words, dismantling and the imposition of a 'speciality principle'⁷². Can these be less costly to implement than permanent regulation, which is the responsibility of competition

⁷¹ Ridyard (n 10).

⁷² Conseil d'Etat, Caisse des écoles du 6ème arrondissement [1906] commented by Maurice Hauriou 'La distinction des établissements publics et des établissements d'utilité publique, Note sous Conseil d'Etat, 22 mai 1903, Fourcade, 22 mai 1903, Darestre et autres, S. 1905.3.33' (2014) *Revue Générale du Droit*.

authorities with limited resources? We have seen that this 'radical restorative remedy' is often put forward in the literature, but that its actual implementation has only rarely been observed because of its economic cost, its complexity, and its impact on the fundamental rights of firms.

It therefore appears that some form of ecosystem neutrality obligation, even outside the scope of essential facilities, can be considered as the 'worst solution except for all the others.'

Promoting rules that impose neutrality on critical digital ecosystems (which therefore act as gatekeepers or bottlenecks) for third parties avoids the pitfalls that characterise alternative solutions but does not constitute a first-order optimum with regard to the undesired effects that these rules may induce.

When considered in a favourable light, neutrality requirements fulfil several objectives without incurring disproportionate economic costs. Neutrality helps to prevent strategies of extension or consolidation of dominant positions. Prevention is even more necessary as the remedies resulting from antitrust decisions have barely proven their capacity to restore the conditions of competition and to correct the effects of the sanctioned practices. Moreover, they avoid the implementation of structural remedies whose potential costs in terms of economic efficiency and implementation difficulties have been discussed. Neutrality obligations may also appear to be less restrictive and less intrusive than specific regulation of the different digital ecosystems identified as critical.

Beyond this aspect, neutrality requirements can also be discussed insofar as they undoubtedly lead to a change in the role assigned to competition rules. Accordingly, as Orbach points out, the mandated neutrality standards lead to the imposition of an obligation on dominant platforms to treat all trading partners alike, not with a view to efficiency but with the aim of "preserving fairness in the marketplace by levelling the playing field to ensure that all market participants enjoy equal opportunities"⁷³.

The emphasis put on platform neutrality leads to the view that the existence of discrimination in market access conditions is an antitrust issue. In addition, mandating platform neutrality has a meaning that goes far beyond that of net neutrality in that it both signifies a major constraint on the business model of digital companies and leads to impose them duties that usually fall within the scope of the essential facilities theory.

This trend towards imposing neutrality obligations on the pivotal firms in the main digital ecosystems is not limited to the DMA but is part of a gradual extension of the rules applicable to public undertakings formerly holding exclusive rights to firms

⁷³ Barak Orbach 'Mandated Neutrality, Platforms, and Ecosystems' (2021) Discussion Paper n°21-28, December.

whose market positions are due to their own merits⁷⁴. The obligations imposed on the companies concerned are intended to offer equal opportunities to rival companies and are therefore not subject to the same restrictive conditions that fall under the application of Article 102 of the Treaty in relation to the essential facilities doctrine.

This broadening of Article 106 TFEU's scope leads to its application to any situation in which an undertaking that has private regulatory power over its trading partners and that is likely to be in a situation of conflict of interest. Nevertheless, the restrictive conditions induced by the effects-based approach to the application of Article 102, which require the Commission to consider the net effect of the practices in the light of relevant economic and legal context, do not apply in this case.

Thus, while the neutrality obligations that emerge from the Commission's policy are more effective in guaranteeing a level playing field than alternative solutions (antitrust enforcement, ecosystem regulation or the imposition of structural remedies), attention must be paid to their impact on the effects-based approach defended by the Court Justice.

⁷⁴ Pablo Ibáñez Colomo 'Will Article 106 TFEU Case Law Transform EU Competition Law?' (2022) 13 *Journal of European Competition Law and Practice* 6, pp.385-386. The author relies on the case T-93/18 judgement *International Skating Union v. Commission* as an example of the broadening of Art 106 TFEU's interaction with Article 101 and 102. In *International Skating Union* a sport federation organises competitions but also clears competitions organise by third parties through eligibility rules which were found to restrict competition. The press release from the judgement explicates the conditions of which Art 101 applies "In that regard, the General Court considers that the obligations binding on a sports federation in the exercise of its regulatory function under Article 101 TFEU are those consistently set out in the case law relating to the application of Articles 102 and 106 TFEU, 2 with the result that, in those circumstances, the ISU is required to ensure, when examining applications for authorisation, that third-party organisers of speed skating competitions are not unduly deprived of access to the relevant market, to the extent that competition on that market is distorted."