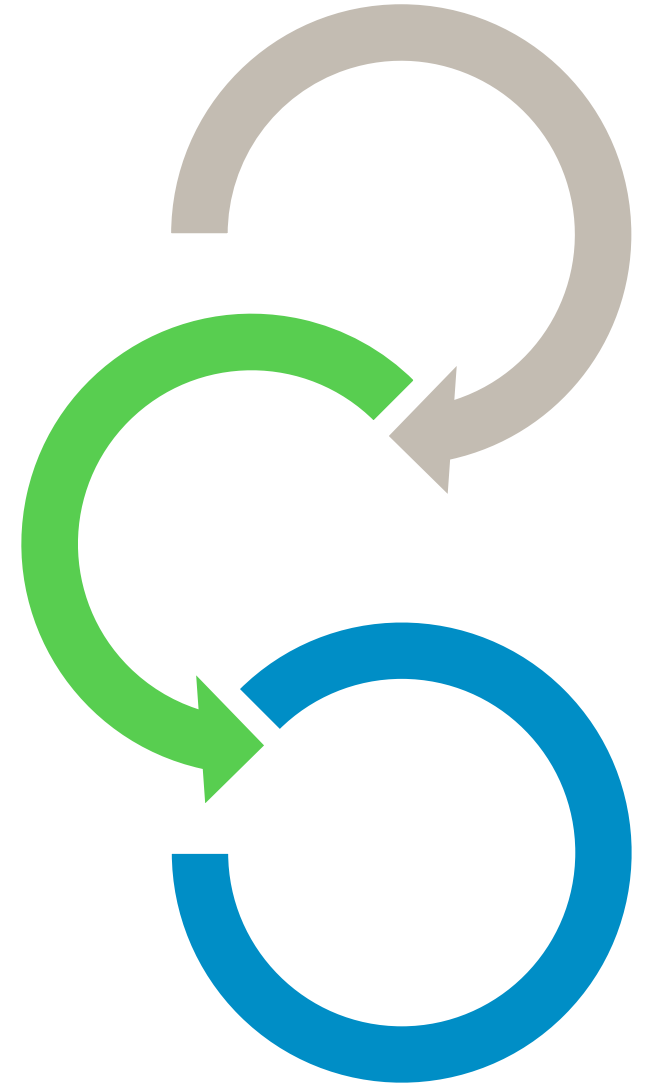


Disentangling Article 6(5) of the Digital Markets Act

Dr. Inge Graef
EC DMA Stakeholder Workshop
5 December 2022

Recital 51 of the DMA:

- Online search engines
- Software applications in software application stores
- Videos in video-sharing platforms
- Newsfeed of online social networks
- Search results in online marketplaces
- Virtual assistants



Article 6(5) of the Digital Markets Act

“The gatekeeper shall not treat **more favourably**, in **ranking and related indexing and crawling**, services and products offered by the gatekeeper itself than **similar services or products of a third party**. The gatekeeper shall apply **transparent, fair and non-discriminatory conditions** to such ranking”.

Scope and objectives

Ranking (Article 2(22)):

“**relative prominence** given to goods or services [...] irrespective of the technological means used for such presentation, organisation or communication and **irrespective of whether only one result is presented or communicated**”

Related indexing and crawling (recital 51):

“already during **crawling**, as a discovery process by which new and updated content is being found, as well as **indexing**, which entails storing and organising of the content found during the crawling process, the gatekeeper can favour its own content over that of third parties”

Similar services or products of a third party:

- When are services or products **separate**
- Recital 51: including “partly or entirely embedded [services] [...] which are considered or used by certain end users as a [...] distinct or additional [service]”
- What benchmark: consumer versus business perspective

Scope and objectives

- More favourable treatment of own services:
 - ✓ • ‘Pure self-preferencing’
 - ? • ‘Hybrid differentiation’: for instance, when the use of a gatekeeper’s ancillary services leads to a higher ranking

- Recital 51:

*“gatekeepers have the ability to undermine directly the **contestability** for those products or services on those core platform services, to the detriment of business users which are not controlled by the gatekeeper”*

Work stream on Differentiated treatment

JOURNAL ARTICLE

Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence

Inge Graef 

Yearbook of European Law, Volume 38, 2019, Pages 448–499,

<https://doi.org/10.1093/yel/yez008>

Published: 12 November 2019

CPI ANTITRUST CHRONICLE JUNE 2020

Hybrid Differentiation and Competition
Beyond Markets
By Inge Graef



Implementation and monitoring

COMMISSION NOTICE

Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council

- Requirement of transparency
- Fair and non-discriminatory conditions
- Compliance needs to be demonstrated by the gatekeeper
- Ban includes **measures having equivalent effect**: control over design of rankings should not favour the gatekeeper
- Role of economics and computer/data science

Outlook

- Focus is on the process of ranking
- Role of the goals of contestability and fairness:
 - “contestability should relate to the **ability of undertakings to effectively overcome barriers to entry and expansion** and **challenge the gatekeeper on the merits** of their products and services” (recital 32)
 - “unfairness should relate to an **imbalance between the rights and obligations of business users** where the gatekeeper obtains a disproportionate advantage” (recital 33)
- Rankings are inherently discriminatory and require trade-offs between interests