

Project title: Platform envelopment in the online pharmacy industry: an effects-based approach
Project dnr: 454/2021

Research aim and questions, results so far and output going forward

Aim

The aim of this project is to define a legal test for determining when self-preferencing should be an abuse of dominance under article 102 TFEU. In order to achieve this aim, this project also seeks to understand what self-preferencing actually is and why it may be a problem under article 102 TFEU. Likewise, the aim is to understand manifestations of self-preferencing (self-preferencing is an example, according to the economic literature, of a platform envelopment strategy) such as through the more favourable positioning of a platform's own products or through the use of business user data to then compete with those users. In particular, this project seeks to understand how these practices might be applied in certain markets such as ecommerce/online pharmacy markets.

This project also aims to determine whether the existing categories of abuse and their respective legal tests under article 102 TFEU should apply to self-preferencing and if so how and when. Similarly, this project seeks to determine whether self-preferencing should be addressed as a separate category of abuse with its own legal test. This will also involve determining how the existing categories of abuse or a new category of abuse might be best suited to address specific forms of self-preferencing such as in ecommerce/online pharmacy markets. In turn, this thesis aims to define a legal test for self-preferencing more generally, either by identifying a suitable legal test from existing categories of abuses or by designing a new legal test, that addresses the competition law problems that are posed by self-preferencing. The aim is also to design a flexible legal test that can take into consideration specific manifestations of self-preferencing such as the leveraging of data advantages which is particularly prominent in e-commerce markets.

Research questions

The main research question is the following:

- How should we define the legal test for self-preferencing under article 102 TFEU?

In order to answer the main research question, several sub research questions will be addressed. These are the following:

- How can we conceptualize self-preferencing? What is self-preferencing? Is it even a thing?
- Why is self preferencing problematic and how does it manifest itself? What examples do we have from the case law and decisional practice on self-preferencing? Do they have common elements?
- Why does self-preferencing often manifest itself in platform markets? Why is self-preferencing prominent in e-commerce markets such as the online pharmacy market? How does self-preferencing manifest itself in the online pharmacy market? How might examples such as the leveraging of data advantages in ecommerce/online pharmacy markets be classified as self-preferencing?
- How can we define self-preferencing? Is there a common element in the examples of self-preferencing that can fit into one definition?
- How might article 102 TFEU address self preferencing? Are the current categories of abuse and their respective legal tests suitable? How might they be applied to different manifestations of self-preferencing such as in the ecommerce/online pharmacy market?
- Should self preferencing be considered a separate category of abuse? What is meant by a separate category of abuse? Why are certain categories of abuse also referred to as independent forms of abuse? What makes self-preferencing different from other categories of abuse? Would

addressing self-preferencing as a separate category of abuse be better suited to address self-preferencing in ecommerce/online pharmacy markets?

- How should we define the legal test for self-preferencing? Does it need its own legal test? Are the already existing legal tests not suitable? If so, which one is most suitable and why? How can this legal test take into account specific forms of self-referencing such as the leveraging of data advantages?
- How should we define the legal test in light of different policy goals (i.e. Ordoliberal v Chicago school)? What are the advantages of either approach? Should a different legal test be applied depending on the context and the sector? How should the legal test for self-preferencing be designed and applied in certain markets such as ecommerce/online pharmacy markets?

Results and output going forward

The outline of the final draft of this project has been created. The project is split up into three parts. The first part will include various chapters conceptualizing self-preferencing. This part seeks to understand what self-preferencing is, why it is a problem and its different manifestations. This will also involve looking at examples of self-preferencing in platform markets such as ecommerce/online pharmacy markets in order to understand the commonalities between the different forms of self-preferencing and why they are problematic. The second part will include a number of chapters thoroughly analyzing the EU case law and decisional practice pertaining to existing categories of abuse under article 102 TFEU in order to understand whether they are suitable to address self-preferencing. This section will also assess whether self-preferencing should be considered a separate category of abuse under article 102 TFEU. This assessment will also take into consideration specific forms of self-preferencing that may manifest themselves in certain platform markets such as the ecommerce/online pharmacy market and how the different categories of abuse may be adapted to them.

Part three will consist of various chapters assessing what the legal test for self-preferencing should be. This will involve determining which existing legal test under article 102 TFEU is most suitable for addressing self-preferencing or whether a new legal test should be defined. If a new legal test should be defined, this part will try to define that legal test. The legal test will be designed in light of the existing case law, decisional practice and academic literature. Economic considerations will also be taken into account. Furthermore, principles such as legal certainty as well as different schools of competition law such as the Ordoliberal school and the Chicago school will be used to provide various approaches for designing a legal test for self-preferencing. This legal test will also be designed taking into consideration specific manifestations of self-preferencing that are particularly prominent in platform markets such as the ecommerce/online pharmacy market. In particular, this legal test will be adapted to specific practices such as the leveraging of data advantages where the unique characteristics of data, and even health data, might alter the assessment of competition on the merits and exclusionary effects.

So far, the first chapter which includes amongst other things the research aim, questions and methodology has been written. The chapter on article 102(c) TFEU has been written. The chapter on the refusal to deal case law and decisional practice has also been written. The chapter defining the legal test for self-preferencing, should it be considered a separate category of abuse, has also been partly written.

Chapter I and the chapter on article 102(c) TFEU has also been submitted for a two year revision which was approved. The revision was carried out by an esteemed colleague at the legal department of the economics faculty at Uppsala University.

The preliminary parts/chapters that remain to be written are the following:

Part I and its respective chapters on the conceptualization of self-preferencing. In part II, the chapters analyzing the case law and decisional practice relating to margin squeeze abuses and tying abuses remain as well as the chapter on self-preferencing as a separate category of abuse. In part III, the

chapters defining the legal test for self-preferencing need to be completed. There are two years left of the PhD for completing these remaining chapters.

The aim is to complete the final draft of the PhD by summer 2026 so that there is time for a final seminar to receive feedback and time for this feedback to be incorporated into the PhD. The aim is to have the absolute final draft completed before December 2026.