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# İÇİNDEKİLER

# ÖNSÖZ

2000 yılından itibaren rekabet hukuku, politikası ve sanayi iktisadı alanlarındaki Türkçe veya İngilizce özgün makalelere yer veren Rekabet Dergisi, rekabet hukuku ve iktisadı disiplinlerine katkıda bulunarak ülkemizde rekabet kültürünün geliştirilmesini amaçlamaktadır. Yılda iki kere yayımlanan Dergimizin bu sayısında üç eser yer almaktadır.

Bu sayımızın Rekabet Kurumu uzmanlarından Yakup GÖKALP tarafından ele alınan "Self-Preferencing Conduct in EU Digital Markets within the Scope of Article 102 of TFEU: A Novel Theory of Harm in EU Competition Law?" başlıklı ilk makalesinde, dijital piyasalardaki dönüşümün neticesinde ortaya çıkan kendini kayırma davranışının yeni bir zarar teorisi sayılıp sayılamayacağı, AB rekabet hukuku bağlamında ele alınmaktadır. Bu çerçevede yazar, kendini kayırma davranışının yerleşik hukuki testlerden bağımsız yeni bir zarar teorisi oluşturmasının, AB rekabet hukuku kapsamında hâkim durumdaki teşebbüslere yüklenen özel sorumluluğu genişletip genişletmediğini, teorik tartışmalar ve içtihat ışığında incelemiştir. Eserde, öncelikle kendini kayırma kavramı örneklerle açıklanmış, sonrasında kendini kayırmanın mahiyeti tartışılmış ve son olarak emsal kararlar ele alınmıştır. Yazar, kendini kayırma davranışının yeni bir zarar teorisi teşkil ettiği, kendini kayırma davranışının ispatı bakımından tüketici zararının tespitinin zorunlu görülmediği ve ispat standardının düşürülmesinin hâkim durumdaki teşebbüslerin özel sorumluluğunu artırdığı sonucuna ulaşmıştır.

Dergimizin bu sayısında yer alan ikinci eser, Doç. Dr. Fatih Buğra ERDEM tarafından yazılan "Exploiting Complexity and Obfuscation: Confusopoly in Legal Perspectives on Competition and Consumer Welfare within the Framework of US and EU Regulations" başlıklı makaledir. Eserde ürün özelliklerinin ve fiyatlarının kasıtlı olarak gizlenmesiyle karakterize edilen ve tüketicilerin rakip teklifleri değerlendirmesini zorlaştıran Confusopoly isimli iş modeline odaklanılmaktadır. Piyasadaki ürün

seçeneklerinin artışının doğası gereği rekabet yanlısı olduğu yönündeki kabulü eleştiren çalışmada, karmaşıklaştırılan tekel stratejilerinin sağlayıcılar üzerindeki rekabet baskısını azaltarak daha yüksek fiyatlara ve daha az şeffaflığa yol açabileceğine ilişkin bulgular ortaya konulmaktadır. Ayrıca, ürün seçeneklerindeki artışın teorik olarak tüketicilere fayda sağlayabileceği, ancak uygulamada bu seçeneklerin değerlendirilmesinin karmaşıklığı sebebiyle piyasa yapısının bozulması ve rekabetin azalması risklerinin ortaya çıkabileceği hususları üzerinde durulmuştur. Çalışma, fiyat yapılarının basitleştirilmesinin tüketici refahını artırabileceği ve firmalar arasında rekabet baskısını yeniden tesis edebileceği sonucuna ulaşmaktadır.

Rekabet Kurumu uzmanlarından Burcu ÇALIŞKAN OLGUN tarafından ele alınan "Enhancing Privacy or Impeding Competition?: Privacy as an Objective Justification in the Light of Apple and Google Cases" başlıklı son çalışmada ise dijital ekonomide artan veri kullanımı bağlamında gizlilik ve rekabet hukuku arasındaki gerilim ele alınmakta; Apple'ın App Tracking Transparency ve Google'ın Privacy Sandbox kuralları üzerinden, kullanıcı gizliliğini artırma iddiasıyla yapılan düzenlemelerin aynı zamanda rekabeti kısıtlayabileceği değerlendirilmektedir. Çalışmada öncelikle genel olarak haklı gerekçe kavramına değinilmiş, ardından gizliliğin arttırılmasının iki farklı senaryo altında haklı gerekçe olarak yorumlanıp yorumlanamayacağı incelenmiştir. Bu çerçevede ilk senaryoda bir teşebbüsün rekabet karşıtı etkiler yaratabilecek davranışlarda bulunduğu ancak bu davranışların AB mevzuatı kapsamında zorunlu kılındığı durumlar, ikinci senaryoda ise bu düzenlemelerin öngördüğü sınırları aşan eylemler değerlendirilmiştir. Akabinde, gizlilik iyileştirmelerinin dışlayıcı uygulamalara karşı bir kalkan olarak kullanılmasının önlenebilmesi amacıyla rekabet ve veri koruma otoriteleri arasındaki iş birliği yolları tartışılmıştır. Yazar, gizliliği artırıcı uygulamaların rekabet hukuku açısından her zaman haklı gerekçe oluşturmadığını; bunun için meşru amaç, gereklilik ve orantılılık şartlarının sağlanması gerektiği ve bu değerlendirmede kurumlar arası koordinasyonun kritik önemde olduğunu savunmuştur. Eser, güncel bir tartışma konusu olan rekabet/gizlilik tartışmasına ışık tutmakta ve uluslararası rekabet hukuku literatürüne katkı sağlamaktadır.

# Self-Preferencing Conduct in EU Digital Markets within the Scope of Article 102 of TFEU: A Novel Theory of Harm in EU Competition Law?

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Original Article

**Yakup GÖKALP**[*, **]

**Abstract**

*The rise of digital markets has transformed business practices, reshaping the landscape of anti-competitive conduct and giving rise to new theories of harm, including self-preferencing. Although self-preferencing differs from established legal tests such as refusal to deal, margin squeeze, or tying under EU competition law, it is not entirely detached from these concepts. However, unlike these well-defined legal tests, the boundaries of the legal standard for assessing self-preferencing remain unclear, granting greater discretion to enforcers.*

*Furthermore, the absence of explicit references to self-preferencing in investigation reports by the European Commission and national competition authorities heightens legal uncertainty regarding the legal test applied. This ambiguity effectively lowers the minimum standard of proof required for self-preferencing to be considered a violation under Article 102 TFEU. In fact, while established legal tests consider specific criteria when assessing potential abusive conduct, such criteria are notably absent in the evaluation of self-preferencing. This uncertainty blurs the boundaries of the "special responsibility" attributed to dominant undertakings and removes the possibility of safe harbours for such undertakings.*

**Keywords:** *Competition Law, Self-Preferencing, Theory of Harm, Special Responsibility, Abuse of Dominant Position, Digital Markets*

[*] Rekabet Kurumu, Rekabet Uzmanı (ygokalp@rekabet.gov.tr, ORCID ID: 0000-0002-3488-054X). Mevcut çalışmada yer alan görüşler, yazarın kendi görüşleri olup Rekabet Kurumunu bağlayıcı değildir.

[**] This study is based on the master's thesis submitted to the University of East Anglia by the author.

# ABİDA'nın 102. Maddesi Kapsamında AB Dijital Pazarlarında Kendini Kayırma Davranışı: AB Rekabet Hukukunda Yeni Bir Zarar Teorisi mi?

31 Aralık 2024'de alındı; 23 March 2025'de kabul edildi.
Araştırma Makalesi

**Yakup GÖKALP**

## Öz

*Dijital piyasaların gelişimi teşebbüslerin iş yapış şeklini değiştirmiş ve haliyle rekabet karşıtı davranışların görünümünü de değiştirmiştir. Nihayetinde bu durum kendini kayırma (self-preferencing) gibi yeni (novel) zarar teorilerinin ortaya çıkmasına zemin hazırlamıştır.*

*Kendini kayırma, AB rekabet hukuku kapsamında mal vermenin reddi (refusal-to-deal), marj sıkıştırması (margin squeeze) veya bağlama (tying) gibi yerleşik hukuki testlerden farklı, yeni bir zarar teorisine işaret etmekte ise de anılan hukuki testlerden tamamen bağımsız değildir. Öte yandan kendini kayırma vakaları söz konusu olduğunda benimsenen hukuki testin sınırlarının yerleşik hukuki testlerden farklı olarak belirsiz olması uygulayıcılara daha fazla takdir yetkisi tanımaktadır.*

*Ayrıca, Avrupa Komisyonu ve ulusal rekabet otoriteleri tarafından yürütülen soruşturmalar kapsamında hazırlanan raporlarda kendini kayırma davranışına açıkça atıfta bulunulmaması, uygulanan teste ilişkin hukuki belirsizliği artırmakta ve TFEU'nun 102. Madde kapsamında bir kendini kayırma davranışının ihlal olarak kabul edilebilmesi için sağlanması gereken asgari ispat standardının seviyesini fiilen düşürmektedir. Nitekim muhtemel bir kötüye kullanma davranışı yerleşik hukuki testler bağlamında incelenirken dikkate alınan belirli kriterler mevcut iken kendini kayırma davranışı söz konusu olduğunda böylesi kriterlerin varlığından bahsetmek mümkün olmamaktadır. Bu belirsizlik hâkim durumda bulunan teşebbüslere atfedilen "özel sorumluluğun" sınırlarını genişleterek bulanıklaştırmakta ve bu teşebbüslerin güvenli limanlara sığınma ihtimalini elimine etmektedir.*

**Anahtar Kelimeler:** *Rekabet Hukuku, Kendine Kayırma, Zarar Teorisi, Özel Sorumluluk, Hâkim Durumun Kötüye Kullanılması, Dijital Pazarlar*

## INTRODUCTION

The increasing importance of digital transformation in daily life has attracted the interest of legislators, regulators, and other stakeholders, resulting in numerous initiatives to create legislative frameworks in this field (Akman 2022, p. 290). This transformation has led to the rise of firms and platforms like Google, Apple, Facebook, Amazon and Microsoft collectively known as GAFAM, which dominate digital markets by obtaining excessive data from their platforms (Garces and Fanaras 2018, p. 34).

Consequently, the anti-competitive practices of these platforms have frequently been a focal point for competition authorities. The interest of competition authorities in digital markets is well justified. Without this oversight, large dual-role platforms with substantial data-acting simultaneously as both marketplace operators and participants in the downstream market-might have incentives to cripple competition in corresponding markets (Evans and Schmalensee 2024, p. 37). However, conducting a competitive analysis of platforms that function as intermediaries by connecting multiple suppliers, advertisers, and consumers presents some challenges compared to conventional markets (Stucke and Ezrachi 2024, p. 5). The intricate structure of digital markets also complicates the formulation of commitments to cease infringements and the application of competition law in less interconnected areas (Akman 2019, p. 589).

Presumably, firms operating as dual platform in digital markets have a tendency to favour their own platforms due to the vast amount of data they possess or algorithm they use (Hanley 2020, p. 345), necessitating intervention by European Commission (Commission) and National Competition Authorities (NCAs) specifically targeting self-preferencing practices.

This study aims to explore the application of EU competition law concerning self-preferencing in digital markets from various perspectives. It also includes theoretical discussions on self-preferencing, examines cases by the Commission and NCAs. The study aims to address the following questions:

(a) Is self-preferencing truly a novel theory of harm and a departure from previous case law in light of recently concluded cases? Answering

this question raises further questions, as discussed below.

(b) Does self-preferencing expand the concept of "special responsibility" attributed to dominant firms in EU?

## 1. UNPACKING SELF-PREFERENCING: CONCEPTUAL FRAMEWORK AND A NOVEL THEORY OF HARM

### 1.1. Defining Self-Preferencing and its Various Forms

Due to the complexity and unique conditions of digital markets, infringements can vary significantly, leading to the development of unfamiliar theories of harm, such as self-preferencing, which have faced intense criticism for deviating from established theories (OECD 2020, p. 53). Although self-preferencing is a concept specific to digital markets and has recently become a frequent topic of discussion (Mouton 2022, pp. 12-13), what constitutes self-preferencing is not distinctly outlined (Colomo 2024, p. 5). Simply put, self-preferencing occurs when a platform operator employs various methods to favour its own party over competitors in downstream markets, pursuing a stronger market position and creating conflict of interest between the platform operator and other undertakings in those markets (Katz 2024, p. 34). Self-preferencing can also be defined as a firm's prioritization of its own products and services by leveraging its market power in one market to gain an advantage in adjacent markets (Crémer, Montjoye and Schweitzer 2019, p. 6).

Recently, some platforms, notably those designated as gatekeepers[1], have begun to function both as operators of marketplaces and players in those markets themselves (Kittaka, Sato and Zennyo 2023, p. 2). As the vertically integrated structure of supply chains is traditionally considered pro-competitive under EU competition law[2], it can be problematic due to the risk that undertakings operating in digital

[1] Commission uses the term "gatekeepers" to describe major technology companies that manage one or more core platform services. These undertakings are recognized by the Commission based on their user base, the amount of data they handle, and their impact on digital markets and consumer behavior.

[2] Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJEU C265/07, paras 13-14.

markets and holding a dominant position may favour their own affiliates (Kraemer 2020, p. 12).

In digital markets, the ability to transfer market power seamlessly from one relevant market to another at little to no cost has heightened the risks associated with self-preferencing (Graef 2019a, p. 450).

Whilst self-preferencing can manifest in various forms that may be considered anti-competitive, this paper will specifically focus on self-preferencing through data, algorithms, and differentiated fees. Unlike the distinction made in this paper, Graef introduces a different distinction and, categorizing self-preferencing hinges on whether the dominance firm is vertically integrated (Graef 2019a, pp. 452-453).

### 1.1.1. Data Driven Self-Preferencing

Platforms have become a crucial entry point for business looking to enter the market, but not necessarily penetrate it (Graef 2019a, p. 449). Consequently, firms with a dual platform role possess data on the business operating as sellers on their platforms, enabling them to better align their marketing strategies more effectively and potentially hinder competition in the downstream market (OECD 2020, p. 55). To illustrate the extent of data control, Robertson coined the term "*data-opolies*" in her study (Robertson 2020, p. 189). Anti-competitive conduct through data is fundamentally underscored by concepts such as forced free riding and content scraping.

Forced free riding occurs when firms rely on a platform to access consumers and achieve optimal results for themselves (Shelanski 2013, p. 1699). Privileged access to data by dominant firms, mainly those with an integrated structure, undermines the level playing field and has sparked controversy in numerous cases (Crémer et al. 2019, pp. 68-69). For example, in online markets in the US, some firms have accused Google of scraping data from competing firms and benefiting it to gain a competitive advantage through Google Search, which Google operates (Shelanski 2013, p. 1699). Similarly, in 2019, the Commission unveiled that it had started an investigation into allegations regarding Amazon's utilisation of data from third-party sellers operating on its site (Commission 2019a). As detailed in the following section of the study, the Commission also found that Amazon favoured its own services over

those of third parties in its fulfilment services by benefiting undisclosed data of third parties.[3]

In such scenarios, the anti-competitive concern naturally arises if the platform operator uses its exclusive access to data to set its competitive parameters such as prices and product features, thereby discouraging competitors from innovating (Caminade, Carvajal, and Knittel 2022, p. 31). This raises the question of whether a platform's investment in innovation, provided it has sufficient resources, is adequate to address these concerns. No matter what questions arise, the EU, and pending US and UK Acts (CMA 2024) aim to prohibit platform operator from using non-public data collected from third parties (Caminade et al. 2022, pp. 31-33).

The ownership of data by dominant undertakings is critical because data can, in some cases, become the primary determinant of competition and even an "essential facility" (Condorelli and Padilla 2020a, p. 17). Therefore, the potential for restricting competition in the downstream market through privileged access to data underscores the necessity for regulation to address these concerns. Even as some argue that a platform's access to data is a reward for its investment, the proportionality of such a privilege remains unclear (Crémer et al. 2019, p. 66). As a final point, Khan views that regulation of data in the possession of dual-role platforms should prioritize the protection of the competitive process over solely focusing on consumer welfare, emphasizing the importance of platforms for small businesses (Khan 2017, p. 803).

Alternatively, some argue that self preferencing through data does not directly harm consumers but rather disadvantages competitors, asserting that the primary aim of competition law is to safeguard consumer welfare (Bowman and Manne 2021).

### 1.1.2. Self-Preferencing Through Algorithm

Another form of self-preferencing occurs when a dominant undertaking designs its algorithm to favour its own subsidiary in rankings, thereby promoting its own products and services. Self-preferencing through

[3] Commission Decision, Cases AT.40462- Amazon Marketplace and AT.40703- Amazon Buy Box, 20.12.2022.

algorithms has garnered attention of competition agencies, resulting in numerous reports and investigations by various competition authorities.

The joint document prepared by the competition bodies of France and Germany highlighted this issue, citing Google Shopping as an example where dual platforms manipulate rankings by deceiving algorithms manually, thereby creating disadvantageous market conditions for their competitors (Autorité de la Concurrence and Bundeskartellamt 2019, p. 25). Similarly, a report by the Competition and Markets Authority (CMA) has raised concerns about online platforms potentially manipulate rankings to favour businesses that provide higher commission income, either to maximize profits or due to established commercial relationships (CMA 2021). The Polish competition watchdog also launched an investigation into the online shopping platform Allegro for allegedly using algorithms to give preferential treatment to its subsidiary in competitive parameters such as sales and promotions (OECD 2020, p. 54).

When analyzing EU case law on digital platforms, the focus is on the consequences of algorithms rather than their mere functioning or usage (Picht and Leitz 2024, p. 12). Therefore, employing algorithms by digital platforms is not per se illegal. However, the design of an algorithm is considered problematic if it extends a firm's market power in one market to neighbouring markets (leveraging) or if it prioritizes its own products and services (self-preferencing).

### 1.1.3. Self-Preferencing Through Raising Rivals' Costs

Another way digital platforms may favour their own services is by raising costs for competitors. While raising rivals' costs is not inherently illegal, the Non-Horizontal Merger Guidelines provide clarity on the types of conduct that may be deemed anti-competitive.[4] Recently, there have been complaints and investigations regarding platform operators in digital markets raising costs for competitors to enhance the attractiveness of their own products and services.

In 2019, Spotify filed a complaint with the Commission, alleging that Apple charges a fee for applications developed by third parties



[4] Commission (n 3) paras 31, 41-43 and 58.

whereas exempting its own applications from such fees (Commission 2021). Similarly, in the case of Amazon, which will be discussed in detail in the following sections of this study, in 2021, the Italian competition authority imposed an administrative fine on the grounds that Amazon exploiting its dominant position in the e-commerce intermediation market to raise logistics costs for its competitors (Motta 2022, p. 28).

## 1.2. Self-Preferencing as A Standalone Abuse

This subsection will first discuss the fundamental principles applied in the enforcement of Article 102, followed by an examination of the similarities between self-preferencing and established legal tests. Finally, it will explore the ways in which self-preferencing diverges from these established legal tests.

### 1.2.1. Fundamental Principles of Article 102 And Self-Preferencing

In EU competition law, the abuse of a dominant position is addressed under 102 of the Treaty on the Functioning of the European Union (TFEU). Instance of abuse are diverse, and Padilla categorizes cases of abuse under Article 102 into three types: exploitative, exclusionary, and reprisal as detailed in his book (O'Donoghue and Padilla 2020, pp. 262-263). Besides, there are foundational principles that courts refer to and uphold when evaluating a conduct under Article 102.

Undoubtedly and *foremost*, EU case law does not prohibit the mere possession of a dominant position, but it does draw the attention of the Commission when abusive conduct is demonstrated (Whish and Bailey 2012, pp. 192-193). However, undertakings in a dominant position bear a special responsibility[5] that prohibits them from acting in ways that restrict, distort, or prevent competition within the EU single market.[6] This principle remains relevant today, with the *Michelin*[7] decision notable as one of the first to address the special responsibilities of dominant undertakings.

[5] Case C-209/10 Post Danmark A/S v. Commission, ECLI:EU:C:2012:172 [2012], para. 23.

[6] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', (2009) C 45/02 para 1.

[7] Case 322/81 Michelin v. Commission, ECLI:EU:C:1983:313 [1985], para 56-58.

Secondly, broadly speaking, Article 102 of EU competition law promotes competition based on parameters such as price, quantity, and quality (Whish and Bailey 2012, p. 199). This principle is known as competition on the merits, which defines the boundaries of dominant undertakings' responsibilities. Considering *AKZO* decision, the Court considers actions by dominant undertakings aimed at undermining competition through methods other than competition on the merits to be problematic.[8]

Finally, it is crucial to clarify that competition law aims to safeguard the consumers and not all exclusionary conduct is inherently anti-competitive (Ohlhausen and Taladay 2022, p. 465), as exemplified in the *Post Danmark*[9] and *Intel* rulings.[10]

When it comes to building a bridge between self-preferencing and Article 102, there is uncertainty regarding whether self-preferencing constitutes a new theory of harm or falls under existing categories such as refusal-to-deal, tying, or margin squeeze. Though the Commission's guidelines on the abuse of a dominant position only mention certain types of infringements (Whish and Bailey 2012, p. 192), Article 102 is designed to be flexible enough to encompass novel and uncommon types of infringements (Graef 2018, p. 558).

In case law, the behaviour of conventional platform operators, akin to self-preferencing, is evaluated in terms of preserving the competitive process rather than shielding specific competitors. Even though this study focuses on dominant undertakings favouring their own products and services in digital markets, such behaviour also occurs in traditional markets. The *GT-Link*[11] and the *Deutsche Bundesbahn*[12] decisions address situations where operators favoured their own services in downstream markets.

Just as in conventional markets, online platforms facilitate communication by connecting sellers and users, providing significant benefits to consumers (Katz 2024, p. 18). However, a critical question arises regarding whether the services provided by these platforms are

[8] Case C-62/86 AKZO v Commission, ECLI:EU:C:1991:286 [1991], para 69-71.

[9] Post Danmark A/S v. Commission, para. 22.

[10] Case C-413/14 P Intel v. Commission, ECLI:EU:C:2017:632 [2017] paras 133-136.

[11] Case C-242/95 GT-Link A/S v. Commission, ECLI:EU:C:1997:376 [1997] paras 8, 41 and 46.

[12] Case IV/33.941 Hov Svz/Mcn [1994], paras 4, 154, 248 and 260.

essential for the competitiveness of downstream businesses. Therefore, it is crucial to investigate whether the condition of indispensability is necessary to assess preferential treatments as abusive. Additionally, exploring other theories of harm such as tying and margin squeeze can shed light on their relationship with self-preferencing.

### 1.2.2. Established Legal Tests and Self-Preferencing

There is growing debate about what types of behaviour should be considered anti-competitive when vertically integrated platforms compete with third parties (Padilla, Perkins & Piccolo 2022, p. 374). Self-preferencing occurs when a dual platform engages in conduct that gives its own services a competitive advantage. Colomo attributes the occurrence of self-preferencing behaviour to the fulfilment of one of two conditions. The first is the indispensability condition, where the input provided by the platform is indispensable for competing in the adjacent market (Colomo 2020, p. 26). If this condition is not met, it must be demonstrated through substantive economic analysis that the preferential treatment has an exclusionary effect (Colomo 2020, p. 26). Failing to do so would likely disconnect the self-preferencing from established case law and increase uncertainty, granting the Commission a broad margin of discretion.

Conversely, it would be misleading to imply a complete disconnect between the established theories of harm in EU case law and self-preferencing. As explained in more detail below, self-preferencing can emerge as leveraging of market power from one product market to a tied product (tying), margin squeeze, or, less commonly, refusal-to-deal (Colangelo 2023, p. 541). The dual role of platforms as both market participants and middleman bringing market participants, coupled with their critical status deemed "indispensable" for businesses to compete, necessitates an examination of the interaction and between self-preferencing and refusal-to-deal.

### 1.2.3. Refusal-To-Deal and Self-Preferencing

The fulfilment of the indispensability condition depends on meeting all the criteria set out in the *Bronner*[13] judgment. In this landmark ruling,

[13] Case C-7/97 Oscar Bronner GmbH v. Commission, ECLI:EU:C:1998:569 [1998].

the Court set forth specific requirements for determining when access to a facility or service controlled by a dominant firm is indispensable for competition in a downstream market.

Self-preferencing is often associated with refusal-to-deal in monopolistic undertakings (Hovenkamp 2023, p. 1) Hence, it is pertinent to refer to the *Bronner* decision, which extensively addresses refusal-to-deal. In the *Bronner* case, the European Court of Justice (CJEU) evaluated Bronner's complaint that it could not effectively compete in the downstream market without access to products and services controlled by Mediaprint. The court scrutinised whether these services were indispensable for competing in the downstream market. Finally, the CJEU concluded that the indispensability condition was not met due to the availability of alternative distribution channels and the possibility for Bronner to establish its own, although less advantageous, delivery system (Cotter 2010, p. 165).[14]

The legal test applied in this decision, commonly known as the Bronner test, requires four criteria to be satisfied for refusal-to-deal claims to be upheld: (i) the refusal of access to products and services must lead to the elimination of competition in the downstream market; (ii) insufficient ground for the refusal; (iii) access to the input must be essential for the business's ongoing operations; and (iv) no viable substitute for the element to which access is sought (Jakab 2020, p. 4).

Based on these conditions, it explicitly appears that the indispensability condition is typically required for the conduct of a dominant undertaking to be recognised as an abuse under the essential facility doctrine. However, the *Google Shopping* decision[15] suggests that the indispensability condition is not necessary in cases of self-preferencing, which is often analysed under Article 102. In fact, the report prepared by the Commission argues that for self-preferencing behaviour, a specific form of leveraging, to be considered abusive, it is not mandatory to meet the criteria of the *Bronner* test (Crémer et al. 2019, p. 6). Instead, it is sufficient to show that the behaviour in question is anti-competitive (Crémer et al. 2019, p. 6). Nonetheless, in light of the case law, the indispensability condition is not required for all abusive practices under Article 102 (Russo, Schinkel, Gunster

[14] Oscar Bronner GmbH v. Commission, paras 45-50.

[15] Case AT.39740, Google v. Commission.

& Carree 2010, p. 182). Undeniably, such a flexible approach to self-preferencing and a departure from the indispensability requirement by the Commission indicate potential excesses.

### 1.2.4. Tying, Margin Squeeze and Self-Preferencing

The resemblance between self-preferencing and established legal tests extends beyond the context of refusal-to-deal. At first, in some cases, self-preferencing can appear as tying. For instance, undertakings with market power like Amazon and Google, selling products from two different relevant product markets through their own platforms supports this notion (Condorelli and Padilla 2020b, pp. 152-153; Bougette, Gautier & Marty 2022, pp. 140-142). Alongside the *Bronner* decision, another landmark case applying the essential facility doctrine in the software market in EU case law is the *Microsoft*[16] decision. In this case, the Court of First Instance determined that Microsoft held a dominant position in the PC operating systems market. It was found that Microsoft's refusal to license its workgroup server operating systems, which were offered in the downstream market, constituted anti-competitive behaviour. The Court concluded that providing interoperability was crucial for market entry, thus *Microsoft*'s refusal to license these systems was deemed an abuse of its dominant position.[17] In the *Microsoft* decision, similar to the *Bronner*, the Court evaluated whether the four conditions outlined above were satisfied.[18] However, in the *Microsoft* decision, the Court relied on a distinct theory of harm known as tying.

Petit, in his study challenging Vestordorf's assertion that abuse requires the presence of an essential facility, argues that self-preferencing resembles tying (Petit 2015, p. 5). According to Petit, in a traditional tying scenario, a dominant undertaking in the market for complementary products can exploit its dominant position in product A by linking it preferentially to product B and leverage its dominance in product A to gain advantage in product B (Petit 2015, p. 5). Therefore, arguably, in some cases, there may be similarities between the appearance of self-preferencing and tying. Both practices

[16] Case T-201/04 Microsoft v. Commission, ECLI:EU:T:2007:289 [2007], paras 689-691.

[17] Ibid, para. 356.

[18] Ibid, para. 116.

may involve leveraging a dominant position to promote the company's own products or services, potentially at the expense of competitors and consumers.

Second, in some cases, a margin squeeze, which is deemed abusive under EU competition law if it creates unfair trading conditions where competing parties do not compete on a level playing field, may also overlap with self-preferencing from an equity perspective (Fumagalli and Motta 2024, p. 5). For instance, in the *Teliasonera*[19] decision, the Court found that pricing practices (specifically margin squeezing) by the dominant undertaking could be abusive if they detrimentally affected the profitability of firms in the downstream market, even without dominant undertaking's input being indispensable or having a regulatory obligation to supply products to the downstream market.

The Court also emphasised that the need for a case-by-case analysis. It considered behaviour lacking economic justification other than intent to restrict competition, likely resulting in anti-competitive effects in the retail market, to be abusive.[20]

Similarly, in the *Telefonica*[21] and *Slovak Telekom*[22] decisions, the indispensability condition was not deemed a mandatory for establishing abuse. What is more, in the *Slovak Telekom* decision, the *Bronner* test conditions were not required when the dominant undertaking grants access to the essential element but imposes unfair commercial conditions.[23] Instead, margin squeeze was recognised as a distinct theory of harm, and a lower standard of proof than that required by the Bronner test was applied in refusal-to-deal cases.

Finally, although not economically proven, there is a view that abandoning the legal test from the *Bronner* judgment undoubtedly risks reducing motives for firms to innovate (Colangelo 2023, p. 542). As evidenced by the cases examined above, the essential facilities doctrine has progressively begun to take on water like the Titanic over time and faces further decline with the *Google Shopping* decision.

[19] Case C-52/09 Konkurrensverket v. Commission, ECLI:EU:C:2011:83 [2011].

[20] Ibid, para. 72.

[21] Case C-295/12 Telefónica SA v. Commission, ECLI:EU:C:2014:2062 [2014].

[22] Case C165/19 P Slovak Telekom A/S v. Commission ECLI:EU:C:2021:239 [2021].

[23] Ibid, para. 50.

### 1.2.5. Self-Preferencing as A Novel Theory of Harm

Under this sub-heading, firstly, the anti-competitive concerns that justify prohibiting self-preferencing are explained. Platforms cause a conflict of interest by serving as both the platform operator and a market participant (G7 2022, pp. 111-112). The anti-competitive concern associated with self-preferencing is that it may lead to the foreclosure of competition in the downstream market (a secondary line injury as stated by Akman (Akman 2012, p. 240). Furthermore, if the vertically integrated structure proves inefficient, consumers may have fewer alternatives and undermining innovation (Hunt, Darbaz & Scherf 2022).

Conversely, regarding innovation, Colomo's paper argues that intervening in the market to promote innovation based on speculative assumptions rather than observable characteristics of the relevant market is problematic (Colomo 2016, p. 25).

As a result, the anti-competitive effects of preferential treatment can be categorised into two main areas: market foreclosure and consumer harm. To establish that preferential treatment has anti-competitive effects, it is necessary to demonstrate either the partial or total exclusion of competing businesses from the market due to discriminatory practices, or the occurrence of consumer harm (Fumagalli and Motta 2024, p. 5).

Secondly, therefore, is self-preferencing considered anti-competitive under competition law? At its core, self-preferencing entails a dominant entity prioritizing its own products and services, which involves discriminating between internal interests and those of external parties. However, due to the ambiguous nature of the effects of discriminatory practices assessed under Article 102 (Akman 2012, p. 245), the question arises whether such practices are inherently abusive or require a detailed effects analysis. Therefore, a case-by-case analysis is required to evaluate its market impact, thereby avoiding a per se infringement approach (Crémer et al. 2019, p. 66). A blanket ban on self-preferencing may inadvertently discourage investment, diminish incentives for innovation, and overlook any efficiencies it may bring. It should be borne in mind that there is insufficient evidence to definitively prove that self-preferencing invariably harms the market to a degree that warrants categorizing it as per se illegal, and that its effects

on competition may sometimes be beneficial (Katz 2024, pp. 41-42).

As a result, in the context of the by object or effect debate, if self-preferencing is deemed abusive regardless of the fulfilment of the indispensability condition, it is crystal clear that the impact of the self-preferencing on the market must be demonstrated through rigorous economic analysis, and any reasonable justifications for such practices must also be carefully considered (Fumagalli and Motta 2024, p. 5; Bougette, Budzinski & Marty 2023).

Apart from basic issues discussed above, the legal classification of self-preferencing also deserves particular scrutiny. As evident from the established legal tests discussed earlier, self-preferencing shares similarities with abusive leveraging theories (OECD 2020, p. 56). The challenge lies not in its comparison to other theories of harm, but rather in its ambiguous boundaries and classification as potentially abusive even when a dominant undertaking grants itself an advantage that may not lead to market foreclosure or consumer harm. However, there is no obstacle to prohibiting self-preferencing under Article 102, even without classifying it under any established legal test. Indeed, referring to the *Google Shopping* decision, Akman argues that even as the commercial relationship between Google Search and competing firms is ambiguous, it is incorrect to claim that Article 102 is inadequate to address such behaviour (Akman 2017, pp. 329-332). Ezrachi also assessed the *Google Shopping*[24] case, a prominent example often associated with self-preferencing, classifying it under the category of less favourable access (Ezrachi 2018, pp. 293-295).

Surely, there is no barrier preventing the classification of self-preferencing as an anti-competitive practice under the abusive leveraging claim of Article 102. However, categorizing self-preferencing- a form of discriminatory practices where a platform's affiliate is favoured over competing undertakings in the downstream market- as a subset of the broader concept of "leveraging" creates legal uncertainty and reduces predictability for undertakings.

Accurately categorizing self-preferencing is crucial because proper classification ensures legal certainty by clarifying which party bears the burden of proof and facilitates the development of reasoned arguments (Akman 2012, p. 237). Therefore, it is essential that the theory of



[24] Commission Decision, Google Shopping, Case AT.39740, 27.06.17.

harm associated with an alleged abusive practice be clearly defined and not open to interpretation, as this clarity ensures certainty and predictability in legal enforcement (Wardhaugh 2020, p. 203).

Self-preferencing partly resembles various existing legal categories and presents a hybrid model. This is because self-preferencing conduct cannot be classified as refusal-to-deal, as it does not require the indispensability condition and, of course, Bronner test to be fulfilled. It cannot be considered a margin squeeze due to the lack of clear pricing behaviour, although favouring one's own affiliate by increasing commissions for firms operating in the downstream market might be an exception. Finally, meanwhile it does not precisely align with tying, it is most likely to be associated with this theory among the established harms.

To link the Court's decision in the *Microsoft* case to hypothetical self-preferencing practice, consider that in the *Microsoft* case, the supplier's software system is pre-installed on PC's, granting Microsoft an advantage over other suppliers.[25] Similarly, a platform operator benefits from being the sole operator of the platform in question. Furthermore, Microsoft gains this advantage without facing competition, simply by setting its own product as a default.[26] Likewise, the platform operator positions its subsidiary more favourably than its competitors, regardless of competitive parameters. Thus, it is reasonable to assert that tying is the closest existing legal category to self-preferencing. In both scenarios, it is assumed that the undertakings have gained a competitive advantage independently of competition on the merits. However, it would be accurate to suggest that the similarity between self-preferencing and tying is limited because the dynamic of business engagement between the platform operator and the seller differs significantly. Unlike tying, self-preferencing does not necessarily involve a contractual obligation that binds the seller to the platform.

Lastly, the Commission's perspective on self-preferencing as a distinct theory of harm, separate from established legal tests, is evident in the draft guidelines on exclusionary abuses issued lately on August 1, 2024, for public consultation. The draft address self-preferencing in the section "conduct with no specific legal test" (see paras 156-162 of the draft). It is treated separately from established legal tests and

[25] Microsoft v. Commission, para. 1042.

[26] Microsoft v. Commission, para. 1069.

noted as potentially exclusionary in certain cases. However, it would be erroneous to draw definitive conclusions about the Commission's approach regarding the legal nature of self-preferencing solely based on a draft.

To summarise; self-preferencing can exhibit by manipulating algorithm, benefiting of non-public data, or raising rivals' costs. Such practices often raise anti-competitive concerns, especially when platforms operate in a dual role, due to factors such as the lack of legal barriers preventing algorithm designs that favour their own affiliates, the ability to pre-empt downstream competition using non-public data from third parties, or the potential to stifle competition by increasing competitors' costs through practices like raising commission fees.

In EU competition law, self-preferencing is currently handled under Article 102. Although it intersects with established legal tests, it does not align perfectly with any single one and presents a novel legal test. Therefore, self-preferencing can be considered a novel theory of harm that shares similarities with established legal tests while also presenting unique aspects, often categorised as a subset of the leveraging theory.

Finally, whereas instances of self-preferencing in digital markets are presently scarce, they are expected to grow in frequency in the future. The following section examines the decisions made by the EU competent authorities and NCAs to gain deeper insights into self-preferencing conduct as a novel theory of harm and standalone abuse.

## 2. ASSESSING SELF-PREFERENCING CASES IN DIGITAL MARKETS: LEGAL TESTS APPLIED BY THE COMMISSION AND NCAS

### 2.1. Commission Cases

#### 2.1.1. *Google Search (Google Shopping)* Case

##### 2.1.1.1. The *Google Shopping* Case of the Commission

When examining self-preferencing behaviour in digital markets, the pivotal case is unquestionably the *Google Shopping* case[27], which has

[27] Commission Decision, Google Shopping, Case AT.39740, 27.06.17.

sparked considerable debate due to uncertainties surrounding the theory of harm associated with such practices (Akman 2017, pp. 370-374). The Commission's investigation of Google began with the release of a Statement of Objections in 2015 and concluded in 2017 with the imposition of an administrative fine and remedies, following an extensive investigation focused primarily on two main anti-competitive concerns (Commission 2015b).

Firstly, the Commission asserted that Google leveraged its dominant position in the market for general search services to prioritize its own comparison shopping service (CSS) by designing its search algorithm to ensure its service appeared prominently in search results. Secondly, the Commission was concerned that Google disadvantaged competing firms in the CSS market by demoting their visibility in search result (Robertson 2022, p. 16). In essence, the Commission's primary concern in the *Google Shopping* case was the potential for Google to foreclose competition in the downstream market in the long term by leveraging its dominance through preferential treatment. This decision will be examined in detail with respect to the counter-arguments against legal test employed in the ruling.

Firstly, a prevalent argument is that simply favourably positioning Google's own service should not be grounds for an infringement finding and does not align with precedent (Vesterdorf 2015, p. 8). The criticism that the *Google* decision diverges from established case law primarily stems from the non-fulfilment of the indispensability condition typically required in refusal-to-deal infringements and critics argue that Google Search is not indispensable, as there are alternative services available (Vesterdorf 2015, p. 8). In contrast, Google's general search services drive the vast majority of internet traffic to shopping comparison services, making it implausible to argue that an equally effective alternative exists. Additionally, if firms face no difficulties accessing services provided by the monopolist, they are unlikely to consider creating alternative to its services (Lao 2013, p. 314). Looking at Google's presumably quasi-monopoly in the search engine market (Chirita 2015, p. 123), it seems questionable that CSSs would create an alternative to Google's search service without a clear refusal to supply, given the network effects and costs. Moreover, the Commission shows that Google's general search services page is almost an essential component, with the traffic generated by this page being an input

that competing CSS cannot effectively substitute.[28] The first page of a Google search is particularly crucial, accounting for 95% of clicks, while the second page accounts for only 2%.[29]

However, the issue here differs from refusal-to-deal cases where access to the essential facility is completely restricted. In contrast, Google does not prevent competing CSSs from accessing Google search but instead favours its own affiliates by relegating competitors lower on the search results page. The absence of the requirement for indispensability and Commission's omission of the term "indispensable" in its legal assessment underscore its position regarding the essential facility doctrine in the Google Shopping (Graef and Costa-Cabra 2020, p. 28). This approach contradicts with the notion that if the indispensability criterion is not met, self-preferencing should not be considered anti-competitive (Vesterdorf 2015, pp. 5-9; Colomo 2020, p. 26), and that case law should not be extended from indispensable to dispensable inputs (Jakab 2020, p. 4).

Additionally, Google claims that the Commission fails to meet the conditions of the Bronner test and that the test applied constitutes a novel theory of harm inconsistent with established case law[30].

Conversely, the Commission argues that it is a well-established practice for a dominant firm to leverage its market power.[31] Moreover, the Commission justifies its departure from the Bronner test by pointing out that Google actively favoured its own subsidiary rather than merely engaging in passive refusal of access.[32]

Finally, regarding the commitments imposed on Google, the Commission noted the inapplicability of the Bronner test, as Google was not required to undertake commitments such as transferring assets or entering into contracts- actions typically relevant in cases involving refusal-to-deal infringements.[33] Although the Commission's approach might align with that in the *Commercial Solvents*[34] decision,

[28] Google Shopping case paras 567, 583-584.

[29] Ibid, para. 457.

[30] Google Shopping case paras 644-647.

[31] Ibid, para. 649.

[32] Ibid, para. 650.

[33] Ibid, para. 650.

[34] Joined Cases 6 and 7/73 Commercial Solvents v. Commission, ECLI:EU:C:1974:18 [1974], paras 15-18.

where the refusal to supply was indirect through practices that could have an equivalent effect (*constructive refusals to deal*), the necessity of the indispensability condition was also questioned in that decision (Colomo 2019, pp. 535-541; Graef 2019a, pp. 477-479). While these points are well-understood, the Commission interestingly invokes the umbrella of leveraging theory and asserts that self-preferencing does not constitute a novel theory of harm.[35]

Though Google based its claims on a refusal-to-deal argument, one might argue that self-preferencing could be construed as a type of margin squeeze or tying, an incumbent theory of harm, given that competing CSSs, systematically demoted by Google, have been forced to raise their advertising expenditures to compete effectively (Sousa 2020, p. 6). However, the author believes that this does not overshadow the fact that the Commission did not rely on any specific legal test and pragmatically avoided invoking the essential facility condition.

To comprehend the legal test employed by the Commission, it is also crucial to analyse the remedies mandated for ceasing the infringement.[36] Interestingly, Graef suggests that the remedies imposed on Google resemble those typically used to address essential facilities infringements (Graef 2019b, p. 58). Furthermore, the way an infringement is ceased deviates from the remedies typically imposed on a dominant undertaking in cases involving tying infringements (Colomo 2020, p. 19).

The author argues that a stringent application of the indispensability criterion would undermine the effectiveness of Article 102 and further entrench the power of dominant undertakings. As evidenced from the decisions discussed in the previous section, the indispensability element is not a mandatory requirement in all types of abuses under article 102.

Secondly, a primary criticism of the *Google Shopping* decision is also the lack of a clear explanation for departing from established case law, which has created uncertainty regarding its limits and implications (Colomo 2020, p. 26). Specifically, in the *Google Shopping* case, the lack of clarity regarding the boundaries of self-preferencing has affected the specificity of the obligations imposed on Google. Explicitly, by examining self-preferencing under Article 102(c), the Commission

[35] Google Shopping case paras 649-652.

[36] Google Shopping case paras 693-705.

bypassed Bronner criteria and, departed from established precedent by requiring Google to treat third-party entities equally with its own subsidiary to ensure search neutrality in online services (Valdivia 2018, p. 43). Jakab criticizes the decision for alleging unfair trading conditions without once mentioning discrimination (Jakab 2020, p. 5). Ironically, the Commission assigned Google the responsibility of creating a level playing field- a task that should have been the Commission's- while failing to provide clear guidance on achieving this objective. Essentially, due to uncertainty surrounding the legal test applied, the Commission addressed this issue by imposing an obligation on Google to promote fair competition.

As a final word, to illustrate how the Commission deliberately avoided evaluating the legal test applied in the Google Shopping, it is noteworthy, as Graef correctly observes, that only 9 out of the 755 paragraphs in the decision address the legal test (Graef 2019a, p. 475).

Thirdly, Google's conducts should be scrutinised in terms of its effect on market conditions and consumers. Critics claim that prohibition of Google's self-preferencing practices are aimed more at shielding competitors rather than fostering a competitive process or protecting consumers. EU competition law primarily aims to protect consumers, thereby indirectly ensuring the integrity of the competitive process.[37] Article 102 is fundamentally assessed based on whether the behaviour of the dominant undertaking leads to a decline in consumer welfare (Rousseva and Marquis 2013, p. 42). However, in reviewing the *Google* decision, it seems that the Commission concentrated more on the harm caused to CSSs by Google's conducts rather than on the implications of this preferential treatment for consumers themselves.[38]

The *Google Shopping* decision thus casts doubts on the main objective of EU competition law. Though the decision asserts that abusive conduct harming consumers is prohibited, the Commission has not adequately demonstrated consumer harm, and assessments on this issue have been limited.[39]

At last but not least, based on the assumption of the Commission, emblematically self-preferencing practices, which can be viewed as

[37] Konkurrensverket v TeliaSonera Sverige paras 22-24.

[38] Google Shopping case para. 606.

[39] Google Shopping case paras 332 and 593-607.

a new category encompassing elements of various legal tests such as refusal-to-deal, tying, and margin squeeze, appear to be exempt from clear criteria such as legal standards, consumer harm and burden of proof, unlike more established theories of harm (Colomo 2020, p. 20; Cantell 2021, p. 39). This lack of clarity extends to determining under what circumstances self-preferencing may be deemed unlawful (Sousa 2020, p. 4).

The identification of self-preferencing as an infringement, without the application of a specific legal test and solely based on Google's arrangement of its search page which reduced traffic to competing CSSs, thereby eliminating potential competition in the downstream market, illustrates that the threshold for intervention under EU competition law has shifted to a factual assessment rather than adhering strictly to established legal criteria (Petit 2021, p. 1460). In fact, the Commission did not demonstrate the actual impact of Google's conduct on competition; it deemed the potential impact on Google's rivals in the downstream market to be sufficient.[40]

Finally, the *Google Shopping* decision highlights the Commission's more interventionist approach to digital markets. Google appealed the decision to the General Court (GC), which partially upheld the Commission's ruling.

#### 2.1.1.2. Judgment of The General Court

The GC partially upheld the Commission's decision, disagreeing with the argument that the conducts strengthened Google's dominant position in the online search services market, but affirming that the preferential treatment was anti-competitive and warranted sanctions (Colomo 2023, pp. 234-236).[41] The GC also affirmed that Google's search function constitutes a quasi-essential input in the general search market due to the lack of alternatives for competing CSSs, and ruled that self-preferencing should be assessed on a case-by-case basis and is not inherently illegal.[42]

[40] Google Shopping case paras 602-603.

[41] Case T-612/17 Google Shopping v. Commission, ECLI:EU:T:2021:763 [2021], paras 703-704.

[42] Ibid para. 224; paras 518-523; para. 610.

The issue at hand becomes apparent here. The GC evaluated self-preferencing solely based on the factual circumstances and did not explicitly use "self-preferencing" term as the Commission did. It also relied on the leveraging theory without applying a specific legal test, which unfortunately, did not contribute to resolving the legal uncertainty stemming from the Commission's decision (Deutscher 2021, pp. 1360-1361).

Like the Commission's approach, the GC referenced the well-established leveraging theory of abuse in EU case law and grounded its decision on this principle.[43] Google has appealed the GC decision, and its judgment CJEU[44] confirmed that self-preferencing is not *per-se* anti-competitive, emphasizing the need for a case-by-case analysis. Additionally, the Court recognized self-preferencing as a legal test separate from established legal tests, generally treating it as a subset of the leveraging of market power. In this context, the author views the CJEU has unequivocally established in this judgment that it regards self-preferencing as a standalone abuse.

### 2.1.2. *Amazon* Case

Before analyzing the competition investigations launched against Amazon, it is vital to understand Amazon's operating system. It is well known that Amazon operates both as a platform operator and a seller, which enables it to manage the sale and delivery of products on its marketplace through its own system. Additionally, third-party sellers also use the platform, paying a commission to Amazon for their sales (Nadler and Cicilline 2022, p. 210). These sellers are categorised into three groups: sellers who handle the sale and delivery of products through Amazon's fulfilment network (FBA), sellers who manage the sale and delivery through a commercial partner other than Amazon-Merchant Fulfilled Network (MFN), and sellers who use a commercial partner other than Amazon for sale and delivery but have the Prime label, indicating they meet Amazon's standards for Prime shipping-Fulfilled Prime (SFP) (Nadler and Cicilline 2022, p. 210).[45]

[43] Google Shopping v. Commission para. 240.

[44] Case C-48/22 P Google LLC, Alphabet Inc., Computer & Communications Industry Association v. Commission, ECLI:EU:C:2024:726 [2024].

[45] Commission Decision, Cases AT.40462- Amazon Marketplace and AT.40703- Amazon Buy Box, 20.12.2022, paras 28, 30 and 143.

To date, the Commission has initiated two competition investigations against Amazon The first one pertains to Amazon's use undisclosed data from third-party sellers to benefit its own retail business (*Amazon Marketplace*). The second one, known as the *Amazon Buy Box* investigation, involves Amazon's indirect interference with the selection of the Buy Box winner by employing an algorithm that prioritizes retail sellers participating in its FBA system-owned by Amazon and encompassing logistics services-and its own affiliate over other sellers.[46] For completeness, the Buy Box is a highly competitive and attractive area for consumers, prominently displaying winning sellers based on criteria such as price and delivery time in a white box located on the right side of the page (Katz 2024, p. 18).[47]

Firstly, like the *Google Shopping* decision, Amazon's conduct is predicated on the theory that it favours its affiliates due to its dual role as a marketplace operator. The *Amazon* decision is significant as it illustrates the exclusionary nature of anti-competitive self-preferencing by dual-platform undertakings through use of excessive data obtained from sellers (Bougette 2023). However, if Amazon manipulates rankings through the algorithm or data acquired, it could diminish the attractiveness of selling on Amazon for other sellers, potentially leading to a decline in Amazon's revenue. These inconsistencies in Amazon's investigation, coupled with the minimal impact of the algorithm's favouritism on Amazon's overall profitability, place the Commission in a challenging position to substantiate claims of self-preferencing through discriminatory practices (Veljanovski 2022, p. 31). This difficulty is compounded by the need to prove that such practices have a material negative impact on competition and consumer welfare. As a result, in 2022, the investigation into *Amazon Marketplace*'s use of non-public data concluded with commitments refrain from using non-public data to shape its marketing strategy.[48]

Secondly, the investigation inspected claims that Amazon provided preferential treatment to sellers utilizing its fulfilment services and those with the Amazon Prime label over other sellers using MFN.[49] From the perspective of the legal test applied, there is no contractual

[46] Ibid, Amazon cases, paras 1-8.

[47] Ibid, Amazon Marketplace and Buy Box cases, paras. 36-48.

[48] Amazon Marketplace and Buy Box cases paras 290-293.

[49] Ibid, paras. 27-30 and 172–177.

provision between Amazon and the sellers mandating participation in the FBA system, thus negating the presence of tying as defined by Article 102 (Graef 2019a, p. 470). Yet, based on the *Google Shopping* and *Amazon* decisions, there is a view that self-preferencing is closely linked to tying, and that making market entry more difficult, rather than explicitly restricting it, is sufficient for such behaviour to be considered abusive under Article 102 (Geradin and Smith 2023, pp. 43-45).

Consequently, in this decision, the Commission relied on the leveraging theory of harm, like its approach in the *Google Shopping* decision.[50] Given Amazon's ability to control the weighting of criteria such as price, delivery speed, cost, and Prime eligibility within the Buy Box evaluation algorithm (Nadler and Cicilline 2022, p. 209), there is a high likelihood that it will favour its own affiliates or other distribution channels where they can generate higher revenue. Amazon can easily prioritize its own services, FBA participants, or merchants with the Prime label by adjusting the criteria for inclusion in the Buy Box, thereby ensuring that preferred merchants win. As last, Amazon *Buy Box* investigation concluded in 2022 with Amazon committing to ensure that a second offer is displayed alongside the Buy Box winner, aiming to address concerns about Amazon's self-preferencing conduct.[51]

### 2.1.3. *Apple* Case

Following Spotify's complaint, the Commission launched an investigation into Apple's conduct within the Apple store to assess potential anti-competitive practices. Subsequently, the Commission concluded that Apple had abused its dominant position by enforcing anti-steering provisions that prevented app developers from offering alternative and potentially cheaper music subscription services to iOS users, thereby favouring its own apps, which was deemed illegal under Article 102(a) of the TFEU (Commission 2021c). The Commission's finding highlighted that Apple's practices restricted consumer choice by hindering developers of alternative music streaming apps from communicating directly with iOS users, which led to reduced options for consumers and higher prices, creating unfavourable trading conditions (Commission 2024).

[50] Amazon Marketplace and Buy Box cases paras 163 and 169.

[51] Amazon Marketplace and Buy Box cases paras 290-293.

While the reasoned decision has not yet been released, the author views Apple's conducts as exhibiting tendencies toward self-preferencing. For iOS devices, while it's not impossible to distribute apps outside the Apple App Store, doing so is highly restrictive, which entrench Apple's possibly dominant position in the iOS app distribution market. Specifically, Apple appears to leverage its dominant position within the App Store to prioritize its own music streaming service.

Mandating app developers to utilize Apple's in-app payment system forces them to incur a 30 percent commission on each transaction, thereby placing them at a competitive disadvantage (Lavie 2024, p. 234). Given Apple's pricing practices, their actions could be construed as a combination of margin squeezing and self-preferencing.

## 2.2. NCAs Cases

### 2.2.1. *Amazon* Cases

#### 2.2.1.1. The *Amazon* Case of The Italian Competition Authority (AGCM)

Besides the Commission's competition investigations into Amazon, several NCAs have also commenced their own inquiries, with the investigation initiated by AGCM being particularly noteworthy. The AGCM's examination primarily focuses on whether Amazon has exploited its dominant position in the marketplace intermediation services market by favouring sellers enrolled in its FBA services, as detailed in sub-section 3.1.2, through preferential access to the Buy Box and participation in the Prime program (Italian Competition Authority 2021).

According to AGCM's findings, Amazon has strategically enhanced the appeal of its FBA service for sellers by linking the Prime label to increased consumer visibility and amplifying sales performance, while also providing FBA sellers with benefits such as participation in major sales events like Black Friday and Cyber Monday (Italian Competition Authority 2021). Moreover, Amazon's approach differs significantly between FBA participants and other sellers on its platform, as FBA sellers face fewer performance criteria, while non-FBA sellers are subject to rigorous standards (Italian Competition Authority 2021).

The AGCM contends that this behaviour restricts sellers, chiefly those unable to afford participation in multiple marketplaces simultaneously, from exploring alternative platforms (Bougette 2023).

Finally, The AGCM determined that Amazon's practices were abusive and imposed a fine, while also mandating behavioural remedies to enhance the visibility of third-party sellers on the marketplace, with these remedies to be overseen by a monitoring trustee to ensure Amazon operates on an equal footing with sellers in terms of order fulfilment services.

The ambiguity surrounding the legal test applied in the *Amazon* decision has sparked much debate. In academic terms, Motta categorised Amazon's conducts as an instance of self-preferencing by raising rivals' costs (Motta 2022, p. 28). Additionally, since the Amazon marketplace (the tying product) and FBA service (the tied product) represent two distinct relevant product markets, Amazon's preferential treatment of its own service could potentially be viewed as a form of tying. Moreover, Moggiolino et al. have also pointed out legal ambiguities in the *Amazon* decision, arguing that it raises concerns related to tying and refusal-to-deal (Maggiolino and Ghezzi 2022, pp. 29-30). Specifically, the decision characterizes Prime membership and other associated services as "essential", which can imply that Amazon may be leveraging its dominance in one market to gain an advantage in another one (Maggiolino and Ghezzi 2022, pp. 29-30). The study suggests that the behaviour could be characterised as tying, essential facility abuse, and self-preferencing based on the wording of the decision. However, Lombardi argues that the wording of the decision may not be compatible with all three types of legal tests (Lombardi 2022, p. 5).

Analyzing the *Amazon* decision solely within established frameworks of abuse may result in legal inconsistencies and a lack of coherence. From the author perspective, the AGCM has grounded its conclusion of anti-competitive self-preferencing on the leveraging theory of harm, akin to the approach observed in the Commission's *Google Shopping* ruling. However, delineating the legal test purely based on the wording used by the AGCM risks misunderstanding and disregards the interconnectedness between self-preferencing and established theories of harm. Thus, acknowledging self-preferencing as a distinct theory of harm and considering it as a subset of the broader leveraging theory,

which acts as a foundational concept, could aid in clarifying and resolving complexities in antitrust assessments.

#### 2.2.1.2. Other Competition Investigations Targeting Amazon

German (Bundeskartellamt) and Austrian competition authorities have also launched investigations into Amazon's utilization of data in its dual role and potential anti-competitive practices related to self-preferencing. Both authorities have indicated that Amazon will undertake corrective measures to improve conditions for sellers on its marketplace (Bundeskartellamt).[52]

### 2.2.2. *Apple* Cases

In addition to the Commission, the Dutch Competition Authority (ACM) and the Bundeskartellamt have also investigated Apple's conduct. In 2022, the Bundeskartellamt initiated proceedings under the relevant section of German law, driven by concerns that Apple's App Tracking Transparency Framework might have anti-competitive effects on its interactions with third-party apps through self-preferencing (Bundeskartellamt 2022). As part of its investigation into mobile app stores, the ACM interviewed Apple regarding allegations of preferential treatment for its own apps over third-party apps, to which Apple responded by asserting that such practices would not make economic sense, as it has no incentive to discourage app developers from creating high-quality apps (ACM 2019, p.6 and p. 84).

### 2.2.3. *Other* Cases

In 2016, the *Streetmap* decision[53], which predates even the *Google Shopping* case, is significant in discussions surrounding self-preferencing. This ruling by the UK High Court, issued while the UK was still part of the EU, centred on allegations that Google had engaged in anti-competitive conduct by giving preferential treatment to its own

[52] See Bundeskartellamt, 'Case No: B2 – 88/18; Federal Competition Authority (2019), Press release. Retreived December 30, 2024 from https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf.

[53] Case Streetmap EU v Google economic entity [2016] EWHC 253 (Ch.).

mapping application, Google Maps, leveraging its dominant position in online search and advertising services. Although comparisons were made with the *Microsoft* case involving tying or bundling practices, the Court classified the alleged conduct as discriminatory rather than tying (Colangelo 2023, p. 543). It ultimately rejected *Streetmap*'s claims due to the absence of a coercive element similar to that in the *Microsoft* case and concluded that the anti-competitive effects of the conduct on the market were not demonstrated (Colangelo 2023, pp. 543-544).

Unlike the other rulings, the High Court did not presume the presence of market foreclosure effects but instead conducted a thorough and specific analysis of the case, carefully examining whether there was a causal connection between Google's alleged abuse and any anti-competitive effects in the market. Ultimately, the Court concluded that Google's preferential treatment did not have a significant impact on competition within downstream market.

In contrast to other cases, in 2020, the Amsterdam Court of Appeal regarded self-preferencing as an independent theory of harm. It scrutinised allegations that NVM, the owner of Funda, the largest online real estate platform in the Netherlands, engaged in self-preferencing practices by prioritizing its agents over those of VBO within the framework of TFEU 102(c) (Yefremova 2020). The court concluded that no infringement had occurred, as VBO did not adequately substantiate its claims of discrimination (Yefremova 2020). Furthermore, the decision was distinguished from the *Google Shopping* case, with self-preferencing being deemed a form of discriminatory abuse (Colangelo 2023, pp. 543-546). Critically, Court, unlike the *Google shopping* decision, had not relinquished from analysing the effect of conduct on the downstream competition.

In 2021, the Autorité de la Concurrence (ADLC), investigated the conduct of Google under the French Commercial Code and TFEU 102, concluded that Google had abused its dominant position in the market for ad servers for publishers of websites and mobile apps.[54] The ADLC examined Google's preferential practices involving its advertising technologies, the Doubleclick for Publishers (DFP) ad server and the Doubleclick AdExchange (AdX). It determined that Google had favoured AdX through DFP and vice versa.[55]

[54] Google ad servers decision, case number: 21-D-11, 07.06.2021, para. 454.

[55] Ibid, paras 235-239.

From a legal perspective, it is notable that the authority did not solely rely on the concept of self-preferencing, as it has in many other decisions, and instead exclusively used the term "favourable treatment".[56]

In 2021, the AGCM imposed fines and behavioural remedies on Google for denying Enel X access to the Android Auto platform, thereby giving preference to its own navigation app (Gottlieb 2021).[57] Similarly, in 2022, the Polish competition authority fined the online shopping platform Allegro for favouring its subsidiary in the downstream market through self-preferencing, which involved structuring its algorithm based on data obtained from third-party sellers (Concurrences 2022).

To summarise; the number of investigations and market studies into self-preferencing is increasing over time. Uncertainties surrounding preferential treatment, which originated from the Google Shopping ruling and have continued to dominate the competition agenda with the involvement of NCAs, persist. The legal framework applied by the Commission in the Google Shopping ruling diverges from established legal standards and represents a departure from EU case law, rendering this case distinctive. The legal basis in the *Google Shopping* ruling revolves around the leveraging theory entrenched in case law, where Google's promotion of its own products and services by leveraging its dominant position in online search services for its comparison-shopping site, Google Shopping, constitutes the foundation for anti-competitive conduct.

The decision's most notable aspect is that, despite being the first to scrutinize self-preferencing before the Commission, the evaluation of the applied legal test is highly restricted, thus lacking in legal clarity.

While the examples of abuse of dominant position provided in the guidelines are not exhaustive and there is merit in exploring new theories of harm under Article 102, one would expect a more thorough examination of the legal framework in a decision addressing previously unexplored conducts.

The main issue is that the Commission did not frame self-preferencing as a new theory of harm or explicitly reference it or established any legal tests in its findings, opting instead for a cautious and well-founded approach by considering self-preferencing within the

[56] Ibid, paras 402, 419 and 432.

[57] AGCM decision numbered 29645 dated 27.04.2021 Enel X.

framework of the leveraging theory of harm, as emphasised throughout the decision.

The *Google* decision suggests that undertakings operating as dual platforms will be considered to engage in anti-competitive conduct if they prioritize their own subsidiaries in the downstream market. While this rationale may seem reasonable, application of the Article 102 without demonstrating a clear link between the alleged anti-competitive conduct and consumer harm limits the operational freedom of dual platforms and may stifle innovation. In the *Google* case, criticism was directed at the Commission for not sufficiently demonstrating how Google's actions affected both the market and consumers. Nonetheless, the GC upheld the Commission's approach to the legal test used, determining that Google's favouring of its own subsidiary on its search page constituted an abuse.

Most of the NCAs' decisions regarding self-preferencing similarly resemble the Commission's approach in the *Google* case, as they refrain from employing established legal test and instead consider the mere act of preferential treatment as constituting anti-competitive behaviour. However, both the *Streetmap* and *Funda* judgments are grounded solely in the self-preferencing theory of harm, with the platform operators' practice entirely analysed through the lens of discrimination and self-preferencing. Notably, in the *Funda* judgment, the court found that claims that NVM's prioritization of its agents disadvantaged the complainant VBO were unfounded, clearly demonstrating that preferential treatment does not necessarily lead to exclusion or anti-competitive effects.

Consequently, the author concludes that self-preferencing can only be deemed an abuse if harm to consumers is demonstrated through sophisticated econometric analysis-such as counterfactual analysis to show the potential detrimental effects of the conduct-or if there is clear evidence of market foreclosure risk in the downstream market.

## CONCLUSIONS

This paper explores whether self-preferencing constitutes a novel theory of harm independent of established legal tests and, if so, whether it extends the special responsibility of dominant undertakings under Article 102, considering both theoretical discussions and case law. As a part of the study, answers to the research questions have been sought, and findings have been produced that contribute to the existing literature.

The first and main finding of the paper is that self-preferencing constitutes a novel theory of harm that is distinct from, yet bears some similarities to, established legal tests. EU competition law, as interpreted by case law, predominantly adopts an approach that entirely disregards the potential positive effects of self-preferencing, creating legal uncertainty by ambiguously extending the boundaries of special responsibility for undertakings in dominant positions. Upon examining the case law, it becomes apparent that self-preferencing does not completely fit into any pre-existing theories of harm and is considered a relatively new and distinct theory. This shift has gone largely unnoticed because neither the Commission, the courts, nor the NCAs-except for the *Funda* judgment- have explicitly grounded their rulings on self-preferencing, instead building the harm theory on leveraging of market power.

More precisely, self-preferencing conduct differs from several established antitrust concepts. It is distinct from refusal-to-deal because it does not hinge on the fulfilment of an indispensable condition for downstream firms. Similarly, self-preferencing is not akin to tying, as seen in the *Microsoft* decision, where a contractual relationship between the platform operator and downstream firms is absent. Moreover, self-preferencing does not align with margin squeeze practices, which typically involve pricing strategies. Instead, it represents a situation where a platform operator favouring its own services by using data from third parties or manipulating algorithms.

However, scenarios may arise where self-preferencing is akin to allegations of a price squeeze. For example, if the platform operator engages in practices that increase costs, such as raising commission fees for competitors while keeping them lower for its downstream subsidiary, this may suggest a scenario where margin squeeze and self-preferencing are interrelated. Similarly, even in the absence of a

contractual obligation, self-preferencing resembles tying, as it involves leveraging the market power of one service over another when these services belong to two distinct relevant product markets. Moreover, despite their differences, there is a clear similarity between the two legal tests: in the case of refusal to supply, access to the indispensable input is entirely denied, whereas in cases of self-preferencing, access to the input is provided on less favourable terms. For example, in the *Google Shopping* case, court characterised Google's online search services as "quasi-essential" rather than "essential," and found a violation by linking self-preferencing with refusal-to-deal, despite this linkage not being explicitly stated in the ruling. Finally, self-preferencing is considered a standalone abuse under Article 102. Although similar to established legal tests, it differs in significant ways from them.

The second finding of the paper is that, unlike established legal tests, self-preferencing does not require proof of a direct link between the conduct and consumer harm, which lowers the standard of proof and obscures the delineation of safe harbours, thereby extending the special responsibility of dominant undertakings. Critically, deviating from established EU case law in *Google Shopping* case eases the burden of proof required to investigate abuse of dominance in digital markets. This could potentially disincentives innovation among dominant undertakings, particularly GAFAM.

While self-preferencing can sometimes lead to competitive benefits, such as lower prices for consumers, its evaluation should be conducted on a case-by-case basis. In this context, exclusionary effects or consumer harm stemming from the conduct must be demonstrated through clear evidence or econometric analysis, rather than being automatically deemed illegal. Contrary to the Commission's approach in *Google Shopping*, self-preferencing represents a novel and distinct theory of harm that requires careful consideration in the evolving landscape of digital markets. Consequently, unlike established legal tests that provide safe harbours for dominant firms, the unclear boundaries of the legal test applied in self-preferencing cases complicate the definition of special responsibility.

In conclusion, self-preferencing represents a novel theory of harm that extends the special responsibility of dominant undertakings, with its limits remaining unclear due to insufficient legal assessment of such behaviour in existing case law.

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# Exploiting Complexity and Obfuscation: Confusopoly in Legal Perspectives on Competition and Consumer Welfare within the Framework of US and EU Regulations

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Original Article

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**Abstract**

*Confusopoly describes the strategy where undertakings inundate consumers with excessive choices and complex pricing structures, leading to "boundedly rational" decisions that impair consumers' ability to make optimal choices. This phenomenon is characterized by the deliberate obfuscation of product attributes and prices, making it difficult for consumers to evaluate competing offers. While sophisticated consumers can navigate these complexities, naive consumers are often swayed toward suboptimal choices, benefiting firms at their expense. The study challenges the notion of confusopoly that varying supply is inherently pro-competitive. It contends that confusopoly strategies reduce competitive pressure on providers, leading to higher prices and less transparency. The paper also examines the broader implications of information asymmetry, arguing that while an increase in product options can theoretically benefit consumers, it often leads to market disruption and reduced true competition due to the complexity of evaluating these options. The study concludes by proposing that simplifying price structures could enhance consumer welfare and restore competitive pressure among firms. It highlights the need for a holistic approach in regulatory frameworks to address the dual aspects of consumer protection and antitrust concerns. This includes ensuring transparency and reducing information overload to enable consumers to make more informed decisions.*

**Keywords:** *Confusopoly, Information Overload, Decision Fatigue, Obfuscation, Competition Law*

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# ABD ve AB Düzenlemeleri Işığında Karmaşıklık ve Karartmadan Yararlanma: Rekabet ve Tüketici Refahına İlişkin Hukuki Perspektiflerde Confusopoly

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**Öz**

*Confusopoly, teşebbüslerin tüketicileri fazla seçenek ve karmaşık fiyatlandırma yapıları ile manipüle ederek, tüketicilerin en uygun seçimleri yapabilme kabiliyetini zayıflatan, "sınırlı rasyonel" kararlara yönlendiren iş modeli olarak tanımlanmaktadır. Bu olgu, ürün özelliklerinin ve fiyatlarının kasıtlı olarak gizlenmesiyle karakterize edilmekte ve tüketicilerin rakip teklifleri değerlendirmesini zorlaştırmaktadır. Bilinçli tüketiciler bu karmaşıklıkların üstesinden gelebilirken, dikkatsiz tüketiciler genellikle optimal olmayan seçimlere yönelebilmektedir. Bu çalışma, piyasadaki ürün seçeneklerinin artışının doğası gereği rekabet yanlısı olduğu yönündeki faraziyeyi eleştirmektedir. Çalışma, karmaşıklaştırılan tekel stratejilerinin sağlayıcılar üzerindeki rekabet baskısını azaltarak daha yüksek fiyatlara ve daha az şeffaflığa yol açabileceğine ilişkin bulgular ortaya konmaktadır. Aynı zamanda bilgi asimetrisinin daha geniş etkilerini inceleyerek, ürün seçeneklerindeki artışın teorik olarak tüketicilere fayda sağlayabileceğini, ancak tatbikatta bu seçeneklerin değerlendirilmesinin karmaşıklığı nedeniyle genellikle piyasanın bozulmasına ve gerçek rekabetin azalmasına sebebiyet verebileceği üzerinde durulmuştur. Çalışma, fiyat yapılarının basitleştirilmesinin tüketici refahını artırabileceği ve firmalar arasında rekabet baskısını yeniden tesis edebileceği önerisiyle sonuçlanmaktadır. Çalışma, tüketicinin korunması ve antitröst kaygılarının farklı endişelerini ele alarak şeffaf ve bütüncül bir yaklaşım modeli ortaya koymaktadır.*

**Anahtar Kelimeler:** *Confusopoly, Aşırı Enformasyon, Karar Yorgunluğu, Karartma, Rekabet Hukuku*

## INTRODUCTORY REMARKS

The Office of Fair Trading (2013) defined confusopoly as "*a situation wherein firms make price structures or product attributes unnecessarily confusing, making it difficult for consumers to evaluate rival offers and thereby deterring switching. As a result, firms must compete less hard on price. Mobile phone contracts, retail energy tariffs and bank accounts are frequently cited as examples of this*." Indeed, due to the multitude factors required to be considered, true competition among companies was largely diminished, as it was impractical for most consumers to take well-informed decisions regarding the most advantageous deals (Burke 2007). Even though the number of alternatives increases, some options become the dominant choice in the process because they are designed more advantageously than others. The options that are assumed to be increased here are just showing the product/service/tariff to be sold as more advantageous. So, what is misleading is the pricing. That is why, as a rule, it is easier to compete for actors who can offer a wider range of products. It makes easier to counteract competitors' moves (Putsis and Bayus 2001), makes it difficult for competitors to imitate their offerings by making it costly (Piazzai and Wijnberg 2019), has a positive effect on consumer loyalty, and ultimately triggers consumers' purchasing impulses by applying the "confusopoly" strategy (Draganska and Jain 2005). All in all, companies that have more than one product/service strategically ignore potential demand at the beginning when creating a new product and create a dominant design based on the feedback they receive (Suarez and Utterback 1995, p. 415).

Indeed, highly competitive markets provide numerous choices for consumers, which also bring an externality in its wake. While increased competition drives prices down, the complexity makes it hard for consumers to get the right deal. As competition intensifies sellers are left with no choice but to exploit consumers' vulnerabilities, often using what are known as consumer-exploiting strategies (Kalaycı and Potters 2010; OECD, 2022, p. 9).

Although from a regulatory perspective, confusopoly appears to be entirely a matter of consumer protection as it prevents the consumer from making the optimal choice, it is also antitrust issue (Patterson 2017, pp. 150-152) since confusopoly reduces the competitive pressure on providers. Intensive concentration, especially in oligopolistic markets,

enables providers to offer services/products at much higher prices, much more unobtrusively (Ayal 2011, p. 91, 130). From an antitrust law perspective, it can be argued that the options presented by various providers, which help consumers make choices, may be intentionally limited through confusion, further diminishing competitiveness. So, from a deductive methodology, it could be argued that simplifying prices is the best way for suppliers to draw consumers' attention (Gaudeul and Sugden 2007, pp. 23-27).

The issue of "confusopoly", known as either obfuscation strategies or product overpopulation, confuses consumers towards boundedly rational decisions and causes "decision fatigue", thus depriving consumers of their right to make optimal choices. Hence, it often becomes nearly impossible (or very expensive) to evaluate all the possibilities by comparing them with each other (Ellison and Ellison 2009, p. 427; Nicole, Genakos and Kretschmer 2021). Essentially, confusopoly involves flooding the buyer with excessive information or alternatives. In other words, it is a market disruption in which the number of elements included in the price is made more complex to prevent a fully informed decision (Siciliani, Riefa and Gamper 2019) due to heavy search/compare cost. Although this does not pose a problem for sophisticated customers (SC), who can easily choose the best option; whereas naïve consumers (NC) are easy to be persuaded with fewer options (Ayal 2011, p. 91) and in fact, the goal is to exploit these consumers by pushing them toward subobtimal choices (Gabaix and Laibson 2006, pp. 505-509).

In the United States (US), Patterson (2017) evaluated confusopoly over the famous case of *Toys R Us* (2000) where Costco offered "combo packs" to its members to sell unwanted additional products by reducing the ability to compare with alternative retailers. Meanwhile, across the Atlantic, the European Union (EU) Commission (2025) has recently adopted a competition policy through the watchword of making markets work for people to relaunch the debate about the role of competition in people's lives by stating that:

> "*In a competitive market, businesses will try to make their products different from the rest. This results in greater choice – so consumers can select the product that offers the right balance between price and quality* (European Commission 2025)."

It is necessary to accept the fact that there are too many alternatives in highly competitive markets as a natural externality of the market. In this context, a problem may arise in terms of supply-side and a solution can be sought legally with an ex-ante regulatory approach. However, in oligopolistic and monopolistic markets, a narrower range of products is expected. Nevertheless, deliberately expanding this scale to create buyer confusion will not make the market resemble a highly competitive market and should be interpreted as an abuse of dominant position.

This article is aims to analyse confusopoly strategies, which threaten the quality of competition and consumer welfare in today's markets where consumer preferences have become less rational, within a multifaceted legal framework. The main objective of the article is to challenge the traditional assumption that an abundance of choices leads to intense competition and to reveal the drawbacks of confusopoly strategies in terms of both consumer protection and competition law. Within this framework, the article first examines the effects of information asymmetry, decision fatigue and information overload on consumer behaviouri and then explores how these issues relate to the principle of "merit-based competition" in competition law. The following sections assess confusopoly within the context of consumer law and unfair competition provisions, supported by examples from various sectors demonstrating how such strategies are implemented in practice. This study intentionally omits Turkish competition law, as the notion of confusopoly has recently emerged in Anglo-Saxon literature and albeit very limited in the EU, therefore has not yet been established in other regions. Hence, this paper constitutes a preliminary investigation of the subject, establishing a foundation for subsequent, jurisdiction-specific evaluations. Finally, while emphasising the necessity of regulatory interventions, the article argues that consumer welfare can be enhanced and real competition can be restored through simplified price structures and transparency-oriented policies. This approach offers a holistic solution both to enable consumers to make informed choices and to limit manipulative tendencies in the market structure.

## 1. CONFUSOPOLY UNDER "CAVEAT EMPTOR" PRINCIPLE

The assumption that increasing the number of astute firms to intensify competition inherently enhances consumer welfare should be re-examined since such a scenario can deteriorate consumer well-being by exploiting predictable deviations from rational behavior. The principle of "caveat emptor" under common law emphasizes the buyer's responsibility to thoroughly investigate products, with sellers required to disclose material information (Agarwal 2020, pp. 40-44; Nigam 2020, pp. 2-7). In legal systems where the common law system prevails, the principle of "caveat emptor" (aka. let the buyer beware) lies at the basis of sales relations as subjected to exceptions. The buyer, accordingly, must minutely dig into the sold product. In return, sellers shall provide material information as per their duties to disclose (concealment doctrine) if there is any. However, this does not mean that the sale of a product in which the buyer is fully informed about all its complications will not cause any legal problems after the sale. For example, caveat emptor can hardly be seen in the EU due to broadly-based consumer protection regulations. Meanwhile, across the Atlantic, the US Consumer Financial Protection Bureau (CFPB) also initiated a project, namely "Know Before You Owe" to take precautions against practices relating to confusopoly. A holistic approach is taken to enable consumers to make conscious decisions without being exposed to information glut (infoglut) (Cordray 2020, p. 117).

All in all, the principle of "caveat emptor" is insufficient to protect consumers in markets overwhelmed by complex choices and excessive information. While this principle remains foundational in common law systems, its impact is significantly limited in jurisdictions with strong consumer protection regulations, such as the EU and the US. These regulations aim to counteract the negative effects of confusopoly by enhancing transparency and reducing information asymmetry. However, the persistence of confusopoly practices indicates that current regulatory measures may not be fully adequate (Roldan 2021).

## 2. THE LAW AND ECONOMICS OF CONFUSOPOLY

The benefit that can be obtained from the multitude of products depends on the transparency in prices. Since each buyer's needs is different, increasing options would be beneficial in theory (Patterson 2017, p. 150). However, evaluating these options requires arcane knowledge. Due to the systematization of the market, as the options increase, it would not be profitable to be too transparent (Patterson 2017, pp. 22-23).

All economic approaches developed focus on the irrationality of the consumer. Just as filling out a consent form in every new window on the internet in the digital age is automatically approved without being read after a while (consent boredom), consumer purchasing behaviour can similarly be manipulated to benefit companies employing such strategies. Therefore, examining the concept of confusopoly from both legal and economic perspectives is essential.

### 2.1. True Price

True pricing is integral to a broader global movement aimed at quantifying and integrating the social and environmental impacts of production and consumption into economic systems. It represents the sum of the conventional market price of a product and the additional costs associated with its social and environmental externalities (Bruyn et. al. 2018; CPB/PBL 2013). Confusopoly and true pricing are antithesis of each other and therefore fundamentally oppositional in nature. Confusopoly thrives on price obfuscation to increase consumer confusion. In contrast, true pricing is founded on transparency ensuring that pricing structures remain simple and straightforward so consumers can clearly understand what they are purchasing and paying for. Indeed, true pricing has the potential to dismantle confusopoly by restoring consumer autonomy and encouraging fair competition based on value.

The primary concern is that true pricing, rather than serving its intended purpose, may instead be used to manipulate environmentally-aware consumers, turning confusopoly into a viable and profitable business model. In cases where consumer demand for sustainable goods is strong enough to offset the "true price," the necessity for

regulatory frameworks aimed at supporting private collaboration—beyond environmental standards, certifications, or mechanisms to ensure efficient production scales—may diminish (Dolmans 2020).

Customers who wish to evaluate the value of a product often end up focusing solely on price due to obfuscation strategies, causing them to overlook more reasonable alternatives. This, in turn, allows the same seller to offer the identical product at different price points by bundling it with various (intransparent) add-on services, thus creating opportunities for differential pricing (Motta and Peitz 2020, p. 18). Empirical evidence suggests that in the absence of price transparency, market prices tend to be higher (Kwoka Jr. 1984, pp. 211-216). Consequently, confusopoly models, which undermine the establishment of an efficient competitive environment, pose significant challenges. In this context, the true price gap must be assessed on a case-by-case basis, as deferring these costs could lead to significant long-term repercussions for future generations (Malinauskaite and Erdem 2023, p. 1216). In short, true pricing acts as an antidote to the confusion and inefficiency created by confusopolies, empowering consumers and fostering fair competition. However, the shift toward true pricing requires more than a normative aspiration; it demands a coordinated approach involving technological innovation (e.g. algorithmic price comparison tools and AI-driven choice architectures), robust regulatory frameworks (including mandatory price transparency standards, simplified disclosures, and restrictions on dark patterns), and a proactive commitment from businesses to prioritize long-term consumer trust over short-term profit maximisation. For instance, jurisdictions that enforce unit pricing and standardize telecom and utility billing formats have demonstrated measurable improvements in consumer understanding and market efficiency. Similarly, companies that voluntarily adopt plain-language pricing models—such as subscription services with upfront cost calculators—have both reduced consumer complaints and gained competitive advantages rooted in clarity and trust. Thus, implementing true pricing is not merely a theoretical ideal but a practical strategy requiring structural, institutional, and cultural realignment across the digital economy.

In short, true price and confusopoly represent opposing forces in the marketplace, with one prioritizing transparency and fairness, and the other relying on confusion and complexity to sustain higher prices.

However, the persistent myopia in consumer decision-making, driven by obfuscation strategies, exacerbates the challenge. Consumers often focus narrowly on price without fully grasping the hidden costs or add-ons embedded in confusopoly models. This highlights the critical need for clarity in pricing, as lack of transparency not only distorts consumer choices but also undermines competition.

### 2.2. Information Overload Problem

People with processing power biases may experience a choice overload, where the abundance of options available to them may result in suboptimal decisions (Haynes 2009, pp. 204-212). Consequently, businesses may intentionally provide excessive amount of information to consumers to obscure true product value and bound consumers' financial literacy (Persson 2017). In this way, confusopoly leverages the information overload problem to entrench its position as a dominant market strategy. By providing consumers with complex, fragmented and irrelevant (therefore confusing) information, businesses reduce consumer autonomy and make competition based on true pricing and value less effective. Therefore, addressing information overload is crucial for ensuring that competition law can effectively safeguard consumer interests and promote a healthy, transparent marketplace (Lianos 2019, pp. 643-648).

When consumers are overwhelmed with excessive information, they often make poorer decisions than if they had been given less to process (Paredes 2003, p. 417). In other words, limited consumer attention restricts competition in product markets, as prices tend to be lower when consumers invest more time and focus on evaluating options (Anderson and de Palma 2012, pp. 1-25; Eppler and Mengis 2004, pp. 325-344). This issue is particularly pronounced for novice consumers, who may struggle more significantly with information overload (Chen, Shang and Kao 2009, pp. 48-58). For the average customer, the challenge is not only knowing where to find relevant products, but also understanding which items to focus on, making it difficult to navigate the marketplace effectively.

While it may appear that consumers have the freedom to choose in a market governed by confusopoly, this freedom is often illusory due

to the impact of information overload. The sheer volume of complex, fragmented, and obfuscated information presented to consumers significantly limits their ability to make truly informed decisions. In such environments, the abundance of options is more paralyzing than liberating, as it overwhelms consumers' cognitive capacities and forces them to rely on heuristics or superficial factors, such as brand reputation or default choices. As a result, the illusion of free choice is eroded by structural manipulations that steer consumer behavior in ways favorable to businesses, rather than reflecting genuine consumer preferences. Thus, while choices may seem free on the surface, they are often shaped and constrained by the deliberate creation of informational barriers that distort the decision-making process.

### 2.3. Choice Overload – Decision Paralysis

Market power can be obtained through buyer confusion (Scitovsky 1950, p. 23). Time and responsiveness play a crucial role in the decision-making process. While it is commonly believed that having a vast array of choices is advantageous, this assumption warrants closer examination. This section explores consumer behavior in the context of an overwhelming number of options—a phenomenon referred to as "choice overload" or "overchoice"—and whether it leads to decision-making paralysis. Findings suggest that a streamlined, well-curated product portfolio can offer a competitive edge for businesses (Chailan 2013; Azami, Karbasian and Yousefian 2024; Kırca et. al. 2020). Retailers, in particular, could benefit from reducing the number of similar products on shelves, making choices clearer and easier for consumers. However, from the consumer's perspective, the preference for variety often complicates this dynamic, highlighting a divergence in priorities between businesses and their customers (Manolica et. al. 2021, p. 5920).

Customers are usually presented with a plethora of options while navigating purchase choices. According to conventional economic theories like the rational choice theory, customers are naturally better off having more options. Recent studies, however, cast doubt on this idea by highlighting the issue known as choice overload, which occurs when there are too many options available, making decision-making more challenging. According to studies, decision paralysis,

in which customers completely give up on their choice because of the overwhelming intricacy of the analysis, might result from choice overload. This paralysis frequently occurs when an excessive number of options interact with important characteristics such as decision task difficulty, choice set complexity, preference uncertainty, decision goals, and asymmetric information. Recent research, which used surveys and logistic and ordinary least squares regression shows that asymmetric information and decision task difficulty greatly increase choice overload, which in turn increases the risk of decision paralysis (Wang et. al. 2021, p. 364). The findings highlight a crucial problem for customers: the more options available, the more difficult it is to decide, which frequently leads to customers giving up on their purchases. When coupled with the findings from choice overload, this emphasizes the possible advantages of making decision environments simpler for customers and merchants alike (Adriatico et. al. 2022, p. 55).

## 3. ANTITRUST LAW ANALYSIS OF CONFUSOPOLY

The phenomenon of confusopoly, wherein firms deliberately obscure pricing structures and product offerings, raises significant challenges for antitrust law. Traditional competition law postulates, such as emphasising on the role of information in competitive markets, are rendered less effective in the face of modern confusopoly practices. Hayek (1989, pp. 3-7)'s assertion that individuals often lack complete information when making economic decisions further reinforces the need to reconsider how competition law addresses markets where firms exploit consumer behavior by complicating the decision-making process (Stucke 2011, p. 107). By fostering consumer confusion, confusopoly undermines the fundamental principles of market transparency and efficiency, thus requiring a nuanced antitrust framework to mitigate its effects.

In the context of the EU competition law, the principle of "special responsibility" for dominant undertakings, as outlined in cases such as *Michelin* v. *Commission* (1983) becomes particularly relevant. Firms in dominant positions are obligated to avoid practices that harm competition, which includes leveraging confusopoly strategies to create barriers for consumers and competitors alike. The Draft Guidelines on Article 102 of the Treaty on the Functioning of the European Union

(TFEU) focus primarily on exclusionary conduct by dominant firms but fail to address exploitative practices like confusopoly. Nonetheless, this guideline offers valuable insights into evaluating whether a firm's behavior constitutes an abuse of dominance by deviating from "competition on the merits" and creating exclusionary effects that distort the competitive landscape (Colomo 2024, p. 387; Pera 2022, p. 248).

Confusopoly practices may be evaluated under the framework of exclusionary abuse, especially when they lack economic justification beyond harming competitors or misleading consumers. This aligns with the "no economic sense" test employed in US antitrust law, which evaluates whether a firm's actions serve any legitimate business purpose other than suppressing competition (Werden 2006, p. 413; Jacobson and Sher 2006, pp. 770-801). Similarly, in EU competition law, abnormal conduct—defined as behavior with no economic rationale other than excluding rivals—has been emphasized in cases such as *Intel* v. *Commission* (2009). Confusopoly tactics, such as excessive product differentiation and obscure pricing models, could be categorized as abnormal behavior if they primarily aim to restrict competition rather than enhance consumer welfare as seen in *Google Shopping* (2021), *Michelin* (1983) and *Intel Corporation* (2017) cases.

The concept of confusopoly undermines the fundamental nature of competition, which assumes that market players are capable of making rational and informed choices. This implicitly aligns with the legal rationale in the *Google Shopping* and *Intel* cases, where the Court of Justice of the European Union (CJEU) underscored the significance of maintaining competition on the merits. The General Court affirmed the Commission's determination that Google favored its own comparison shopping service, thereby diminishing the prominence of competitors, a practice that distorted consumer choice by quietly altering the information structure of search results. This manipulation did not conform to a competitive process predicated on better performance or innovation; rather, it exploited gatekeeping authority to engender artificial consumer "confusion" and dependency—similar to a digital confusopoly. On the other hand, in the *Intel* judgment, the CJEU clarified that not all price-based actions by dominant corporations are inherently abusive; rather, it necessitated that the Commission evaluate whether such actions genuinely result in foreclosure effects on equally

efficient competitors. This rationale emphasizes that maintaining the integrity of competition requires attention to behaviors that obstruct the market's ability to promote efficiency and informed customer choices. Businesses jeopardize the structural conditions of fair competition when they implement opaque or complicated pricing methods (or loyalty rebates, like Intel) that obfuscate comparability and cause decision frictions. This issue is similar to the fundamental issue of confusopoly. Accordingly, both decisions show judicial attempts to differentiate between methods that structurally hinder the competitive process—whether through exclusionary behavior or confusion-based market distortion—and competition on the basis of merits. It becomes clearer why ostensibly non-coercive market activities (such as complexity or obfuscation) may nonetheless be subject to antitrust scrutiny when they undermine the informational underpinnings of competition itself when confusopoly is placed inside this jurisprudential framework.

Confusopoly could be seen in monopolistic and oligopolistic markets (Kalaycı 2016). Since the alternatives will increase in markets where there are more providers, it is natural for a confused situation to occur in the consumer's mind. In this study, since confusopoly is a strategy based on businesses that stay afloat only by intentionally misleading their customers, the situation in markets with perfect competition was not considered as confusopoly. Monopolies can prevent price clarity by increasing the choices. In oligopolistic markets, since tacit collusion is inevitable, any competition based on price will only result in race-to-the-bottom (Petit 2016), so obfuscation strategies are frequently used as a side-way. So, the most relevant provision in terms of confusopoly would be the prevention of abuse of dominance. Also, the strategic use of confusopoly also exacerbates the risks of tacit collusion among firms. Spiegler (2016), Crosetto and Gaudeul (2014) have highlighted how firms use spurious differentiation to avoid direct price competition and sustain artificially high prices. By keeping products distinctive and difficult to compare, firms can discourage price-sensitive consumers, thereby stabilizing higher margins and reducing the effectiveness of competition. This behavior becomes particularly problematic when firms leverage market intelligence to align their strategies, effectively enabling coordinated practices that undermine competitive dynamics. Addressing these challenges requires regulatory interventions, such as mandating standardized product labeling and pricing structures, to enhance transparency and empower consumers.

By intentionally fostering uncertainty—such as through complex pricing models, hidden fees, or obscure product features—firms can manipulate consumer decision-making and reduce price sensitivity. This tactic is particularly evident in *Eastman Kodak* (1927), where Kodak leveraged information asymmetry in its aftermarket services, restricting spare part sales to independent service operators (ISOs) and forcing consumers to rely on its own services. In a highly competitive market, the monopolization of the aftermarket negatively impacts consumers and disrupts market efficiency. Therefore, anti-monopolization lawsuits play a crucial role in protecting aftermarkets. For instance, in the *Kodak* case, the company sought to control the aftermarket by halting the sale of spare parts to ISOs and forcing customers to use its own service. This practice significantly harmed the competitive environment. Moreover, the existence of information asymmetry prevents consumers from making rational decisions, leading to poor choices. Such behavior highlights strategies that create market power through information asymmetry, reducing consumer welfare and presenting critical issues that need to be addressed under competition law.

Akerlof (1970), in his seminal work on "The Market for Lemons," argued that information asymmetries disrupt competitive markets by increasing consumer reliance on imperfect signals rather than product value. So, there is a need for realising how confusopoly practices are strategically employed by firms to distort competition in markets, creating challenges for competition law. By using spurious differentiation—such as varying product formats, pricing schemes, or packaging—firms make it intentionally difficult for consumers to compare products effectively. This lack of comparability allows firms to avoid direct price competition and maintain higher profit margins. Crosetto and Gaudeul (2017) demonstrated that firms could sustain artificially high prices by ensuring that products remain idiosyncratic and difficult to compare, thereby discouraging "savvy" consumers who typically push prices lower in transparent markets. This behavior is exacerbated when firms have access to information about their competitors, enabling tacit collusion and coordinated strategies. From a competition law perspective, these findings underscore the need for regulatory interventions, such as promoting standardization in product presentation and labeling, to counteract these practices and enhance market transparency for consumers.

In conclusion, confusopoly represents a significant obstacle to the effective functioning of competition law. Its ability to exploit information asymmetries, inflate perceived switching costs, and distort market competition calls for a re-evaluation of traditional antitrust principles. Regulatory measures aimed at increasing transparency, reducing spurious differentiation, and addressing exploitative practices are essential to counteract the adverse effects of confusopoly. As markets evolve and consumer behavior becomes a more central consideration in competition law, integrating insights from behavioral economics and modern market practices will be crucial for ensuring that competition law remains an effective tool in promoting market fairness and efficiency.

In terms of competition law, the market is idealised with four main pillars: products/services with cheaper prices, higher quality more choices, and superior innovation. The EC (2025) also stated that "better competitors in global markets" is also considered in adopting competition policies. This pillar is excluded since it is not directly about the market structure but the EU's principle of vital interest. This paper, as it stands, explores whether consumers really take advantage of having more choices and demonstrates that limiting supply is a violation of competition, while varying supply seems procompetitive. In other words, this research presents a view that the assumption that "as choice increases, the benefits of competition also increase" should be reconsidered.

## 4. CONFUSOPOLY AS AN UNFAIR COMPETITION PRACTICE

Confusopoly, through its use of manipulative practices like false representation, inadequate disclosure, dark commercial patterns, spoofing, misleading advertisements, and deceptive pricing, poses significant challenges to the principles of fair competition and consumer protection. These tactics not only exploit consumer vulnerabilities but also distort market dynamics, providing deceptive firms with an unfair advantage. Unfair competition law must also evolve to address these sophisticated practices, combining stringent enforcement with regulatory innovations to ensure transparency, restore consumer trust, and promote healthy competition.

### 4.1. False Representation of Products (Misrepresentation)

Confusopoly often relies on false representation of products, where businesses deliberately provide misleading or incomplete information about their offerings to confuse consumers and distort competition (Renda et. al. 2009, p. 17). Misrepresentation can take various forms, such as exaggerating product features, hiding flaws, or suggesting false equivalences between products. For instance, a firm might claim that its product is "premium" or "best value" without providing substantive evidence or benchmarks for comparison. Such practices not only violate consumer trust but also breach the principles of unfair competition law, which aims to ensure that consumers are not deceived or misled in their purchasing decisions. Many jurisdictions explicitly prohibit misrepresentation as it undermines the integrity of market competition, forcing competitors to either match deceptive claims or lose market share, thereby distorting fair competition.

### 4.2. Disclosure Requirement

The disclosure requirement basically serves to "substitute a philosophy of full disclosure to achieve a high standard of business ethics" as stated in *Affiliated Ute Citizens of Utah* v. *United States* (1972). One of the primary challenges in combatting confusopoly lies in the failure to meet disclosure requirements, which are essential for consumer transparency. Under most unfair competition frameworks, sellers are obligated to disclose critical information about their products, such as price, quality, terms of sale, and additional fees. Confusopoly thrives on obscuring or fragmenting this information, making it difficult for consumers to make informed decisions. For example, bundling products or services without clearly stating the total cost creates confusion and leads to hidden charges. Legal frameworks, such as the EU Consumer Rights Directive 2011/83/EU, mandate transparency in disclosure to prevent such practices. However, the effectiveness of these requirements depends on enforcement mechanisms, as firms often comply superficially while continuing to obscure key details in complex terms and conditions. Strengthening disclosure requirements and ensuring standardization in the presentation of product information are critical to addressing confusopoly's impact on consumer choice and competition.

### 4.3. Dark Commercial Patterns

Confusopoly also employs dark commercial patterns, manipulative design techniques that exploit cognitive biases to mislead consumers into making decisions that they would not otherwise make. Examples include hiding important information in fine print, using countdown timers to create a false sense of urgency, or employing confusing layouts that make it difficult to find essential details like cancellation options (Bogliacino et. al. 2024, p. 7). These patterns often blur the line between persuasion and deception, raising significant concerns under unfair competition law. By intentionally complicating the decision-making process, dark commercial patterns disadvantage both consumers and competitors who operate transparently. Regulators are increasingly scrutinizing such practices, as evidenced by recent regulations in the EU and U.S, such as Article 25 of Digital Services Act numbered 2022/2065, Recital 42 and Article 7 of General Data Protection Regulation numbered 2016/679, §§ 41-58 of Federal Trade Commission Act and §§ 8401-8405 of Restore Online Shoppers' Confidence Act, targeting companies that use manipulative user interfaces. Addressing dark commercial patterns requires proactive regulatory measures, such as banning deceptive designs and implementing user-friendly standards to ensure fair competition (Ireland 2021). For instance, in 2023, the Federal Trade Commission filed a lawsuit against Amazon, alleging that manipulative user-interface designs as dark patterns were integrated to enroll consumers into its Prime subscription service without their clear consent and made it challenging for them to cancel their subscriptions.

### 4.4. Spoofing

Spoofing, a practice where sellers create fake or exaggerated demand signals, is another tactic used in confusopoly to manipulate consumer behavior and distort competition (Fox 2021, p. 1246). This technique often involves using false indicators, such as "only 3 left in stock" notifications or artificially inflating online reviews and ratings, to mislead consumers into making hasty purchasing decisions. Spoofing is particularly harmful as it creates a false sense of product scarcity or popularity, pressuring consumers into choices they might not make under normal circumstances. From the perspective of unfair competition law, spoofing undermines the level playing field by giving

deceptive firms an unfair advantage over honest competitors (Aggarwal and Khan 2024). Legal frameworks addressing spoofing typically require transparency in marketing practices and impose penalties for firms that falsify demand signals. Combating spoofing is essential to preserving consumer trust and ensuring that competitive advantages are based on genuine product value rather than manipulative tactics.

### 4.5. Misleading Ads

In the context of confusopoly, misleading advertisements are a pervasive issue that directly conflicts with advertising laws designed to ensure truthful and transparent communication (Willis 2023, pp. 895-896). Advertisers often capitalize on consumer confusion by using vague or exaggerated claims, omitting critical details, or employing bait-and-switch tactics (Dhall 2008, p. 29; Bogliacino et. al. 2022, pp. 1-18). For instance, an advertisement might highlight a low base price while concealing mandatory add-on costs in fine print, misleading consumers about the true price of the product. From an ad law perspective, such practices are considered unfair and deceptive, violating regulations like the US Federal Trade Commission Act (15 U.S.C. §§ 41-58). or the EU Misleading and Comparative Advertising Directive (Directive 2006/114/EC). These laws require that advertisements provide accurate and clear information about products, including all costs and conditions. However, the enforcement of such laws must be strengthened to address the sophisticated tactics used in confusopoly, which often skirt the boundaries of legality while creating substantial consumer harm.

### 4.6. Deceptive Pricing

Deceptive pricing is a fundamental strategy of confusopoly, where firms obscure the true cost of their products or services to manipulate consumer perception and hinder price comparison. Common tactics include hidden fees, drip pricing (revealing costs incrementally during the purchasing process), and false discounts (advertising inflated "original prices" to make discounts appear larger) (Chiles 2017, p. 5). Such practices not only mislead consumers but also create an uneven playing field, as transparent competitors struggle to compete with artificially low base prices (Staelin, Urbany and Ngwe 2023, pp.

826-846; van Tonder 2021, pp. 470-485). Under unfair competition law, deceptive pricing violates principles of market fairness and consumer protection. Regulatory frameworks, such as the EU Unfair Commercial Practices Directive, explicitly prohibit misleading price indications, requiring that all fees and charges be disclosed upfront. However, enforcement remains a challenge, as firms continually adapt their strategies to exploit loopholes. Addressing deceptive pricing requires not only stricter legal oversight but also greater emphasis on consumer education to help buyers recognize and avoid manipulative pricing schemes (Willis 2023, pp. 895-896).

## 5. CONFUSOPOLY UNDER CONSUMER PROTECTION LAW

The need for confusopoly arises from the interplay between search costs and price elasticity. If the search costs for consumers are low, meaning they can easily compare prices, then demand for a product becomes highly elastic in response to price increases. Consumers with minimal search costs will quickly switch to alternative sellers if a firm raises its price even slightly, making it difficult for firms to charge higher prices without losing customers. However, a monopolistic pricing equilibrium can still exist in markets where there are no significant numbers of consumers with zero search costs. In such cases, the complexity introduced by confusopoly—such as complicated pricing structures or opaque pricing models—helps to reduce the elasticity of demand by creating barriers to comparison, allowing firms to maintain higher prices without fear of losing all their customers (OECD 2018, pp. 22-23). This explains why confusopoly strategies are often employed: they effectively prevent consumers from making easy price comparisons, ensuring that firms can sustain monopolistic pricing despite the presence of low search costs (Diamond 1971, pp. 156-168; Anderson and Renault 2018, p. 177; Civic Consulting 2017, p. 30).

The proliferation of price comparison websites, publicized product complaints, and product review videos or articles enables consumers with full information to identify the most suitable options for themselves, even in the presence of price abuse. However, confusopoly strategies hinder this process by making it difficult for consumers to calculate switching costs or the true cost of a product. As a result,

confusopoly activities in the competitive sphere can significantly influence consumer policy, and, conversely, changes in consumer policy aimed at enhancing transparency and reducing confusion can directly impact the dynamics of competition (MacCullogh 2018, p. 76).

Suppliers in many industries deliberately complicate price structures and consumer packages, making it exceedingly difficult for customers to evaluate the benefits of different options. As a result, consumers often resort to heuristics or general impressions rather than conducting thorough analyses, which limits their ability to make informed decisions (Akerlof and Shiller 2015; Thaler and Sunstein 2008; Wenzel 2018, pp. 89-98; Sunstein and Thaler 2003, pp. 175-179; Carlin 2009, pp. 278-287; Siciliani 2014, pp. 507-521). This issue is increasingly studied in the evolving field of behavioral economics, where it is evident that perceived "switching costs"—often exaggerated compared to actual switching costs—play a critical role in shaping market dynamics. Addressing these perceived barriers is essential for fostering healthy competition and empowering consumers to navigate complex markets effectively (MacCullogh 2018, p. 76).

According to Stiglitz, imperfect consumer information enables firms to maintain prices above marginal costs, creating oligopolistic power (Stiglitz 1989, p. 769). Indeed, a mandatory disclosure requirement may act as a countermeasure to confusopoly by forcing sellers to present critical information in a standardized and understandable format. Regulatory measures, such as the EU's Consumer Rights Directive (Directive 2011/83/EU), require businesses to disclose total prices, including taxes and additional costs, which prevents sellers from hiding fees in fine print. These measures can mitigate confusopoly by enabling consumers to compare products more effectively. However, some scholars argue that mere disclosure may not suffice if consumers face information overload, which still leaves them vulnerable to confusion despite full compliance with disclosure laws (Grubb 2015 p. 303). Also, enforcement of disclosure requirements in confusopoly contexts is particularly challenging due to the dynamic and adaptive nature of obfuscation strategies. Ellison and Wolitzky (2012) argue that firms continuously innovate ways to confuse consumers, rendering static disclosure rules insufficient. This underscores the need for ongoing regulatory vigilance and adaptive frameworks (Ellison and Wolitzky 2012, p. 417).

Consumers do not consistently act in accordance with the principles of rational economic behavior. Instead, their decision-making processes exhibit identifiable patterns that are often predictable. Firms that possess the ability to analyze and anticipate these patterns are able to exploit deviations from rational decision-making to their advantage. While it is commonly assumed that increasing the number of such firms within a competitive market would inherently benefit consumers, this assumption is flawed. Intensifying competition among firms that capitalize on consumer irrationality may, paradoxically, exacerbate consumer detriment rather than alleviate it.

The complexity of modern markets further compounds the issue. Unlike algorithmic systems capable of precise calculations, consumers lack the ability to effortlessly compare products across a diverse range of options, particularly when information is obscured or framed in ways that hinder comprehension. To address these challenges, regulatory interventions must go beyond merely encouraging competition. Policymakers should consider mandating the development and adoption of quasi-pay-as-you-go models. Such models would require firms to provide transparent, straightforward, and non-misleading product options, thereby offering viable economic alternatives to consumers that are not predicated on exploitative practices. By enforcing these measures, regulators can aim to mitigate the detrimental impact of consumer irrationality in the marketplace, ensuring that competition serves to enhance consumer welfare rather than undermine it.

## 6. SECTORAL ANALYSES

Confusopoly practices are pervasive across various sectors, exploiting consumer confusion to hinder price transparency and competition. Industries such as airfares, streaming media services, and energy tariffs are prime examples where complexity in pricing structures and product offerings undermines informed decision-making (CMA 2016, para. 9.3). In the airfare industry, hidden fees for baggage fees etc., unbundled services, and opaque pricing make it challenging for consumers to assess the true cost of a ticket (Halsey 2014). Similarly, streaming media services employ tiered membership plans with varying features, data caps, and exclusive content, complicating direct comparisons across platforms. In the energy sector, tariff structures are

often convoluted, with bundled discounts, peak-hour charges, and additional fees obscuring the actual cost of services (Howe 2024, p. 376; Bar-Gill 2014, pp. 468-471; Tor 2019). For example, paragraph 8 of Article 6 added to the board decision on the amendment of the board decision on differentiated fuels numbered 8730 taken by Turkish Energy Market Regulatory Authority in 4 May 2024 in the Official Gazette numbered 32536, it was stated that from 15 May 2024, distributor license holders can sell differentiated fuel, but there will no longer be more than one price for the same type of fuel at fuel stations. The decision, which was made in order to eliminate uncertainties and comparison difficulties in the eyes of the consumer, aims to enable the customer, who will not be able to make a correct analysis over the difference and price difference between ultra force, power or VPro gasoline, to make their decisions more clearly. This section provides a sectoral analysis of how confusopoly manifests in these industries, examining its impact on consumer behavior, market dynamics, and regulatory challenges.

### 6.1. Banking Transactions

The banking, in particular credit card transactions, industry epitomizes the challenges posed by confusopoly, where the deliberate use of complex and overwhelming information hinders consumers from making informed financial decisions. As highlighted by the British Office of Fair Trading, credit card providers exploit the inability of consumers to process intricate and excessive data. By creating "noise" through lengthy and complex disclosure statements, these providers obscure the true costs and terms associated with their products, leading to confusion and potential financial harm for consumers. This tactic effectively transforms otherwise simple products into daunting decisions for the average consumer (Competition and Market Authority 2017, p. 74; Senate Economics References Committee 2015, pp. 39-44).

The financial services sector, particularly credit cards, is rife with examples of such practices. Hidden fees, variable interest rates, introductory offers with unclear expiration terms, and penalties buried in fine print all contribute to an environment of confusion (Persson 2017; Richards et. al. 2020 pp. 859-889). A report by the Daily Mail underscores this issue, revealing that credit card companies in the

UK have profited significantly from consumer misunderstandings, extracting an estimated £400 million annually through complex terms hidden in small print. This financial opacity, combined with information overload, leaves consumers struggling to identify the most suitable credit card or banking product, undermining the market's competitiveness (Poulter 2008).

One proposed remedy to counteract such confusopoly practices is the adoption of the Schumer Box, a standardized and straightforward disclosure tool mandated by US federal law. The Schumer Box requires credit card companies to present essential financial information—such as interest rates, fees, and penalties—in a clear, concise, and uniform format. By simplifying and standardizing information presentation, consumers are empowered to make direct comparisons across products, reducing confusion and enhancing transparency (Harvey 2014, p. 59). It is alike with "unit pricing" as a boon for shoppers since the price per kilogram or litre of a product is displayed alongside the total checkout price, enabling shoppers to sufficiently assess the value of packages varying significantly in size (Macey 2007).

The implementation of such tools in global markets, including Europe, could be a crucial step toward curbing the adverse effects of confusopoly in financial transactions. In addition to standardized disclosures, regulatory interventions targeting the complexity of financial products are essential. Simplifying product structures and ensuring clear communication of terms could help prevent the exploitation of information asymmetry. Further, fostering consumer education on financial literacy can empower individuals to navigate these opaque markets more effectively. Addressing confusopoly in banking and credit card services is not only a matter of consumer protection but also vital for promoting fair competition and restoring trust in financial markets.

### 6.2. Mobile Tariffs

There are empirical studies showing that businesses intentionally (strategically) confuse their customers (Nicolle, Genakos and Kretschmer 2021). So much so that, Thereasa Gattung, Telecom New Zealand's former CEO, admitted that mobile phone tariffs were

deliberately designed to obfuscate consumers' perceptions (Kruger 2010). Indeed, the mobile telecommunications industry provides a clear example of confusopoly, where companies deliberately introduce numerous and complex tariff plans to confuse consumers, thereby reducing price competition. In the UK mobile market, firms have been observed offering a multitude of dominated tariffs—plans that are inferior to others in every aspect—as a strategy to obfuscate and mislead consumers (Brennan, Crosetto and Gaudeul 2021; Larsen et. Al. 2008). This deliberate complexity makes it difficult for consumers to effectively compare available options, leading to suboptimal choices and enabling firms to maintain higher average prices, despite offering largely similar services (LSE 2021). In the UK, there is a detailed study to show confusopoly in mobile tariffs (Nicolle, Genakos and Kretschmer 2021). So, markets can be confusing in ways more than just the number of possibilities (Han, Jun and Yeo 2021, p. 540). According to theoretical evidence, firms in a market have an active motivation to increase confusion by establishing a "confusopoly" if customers are prone to make inferior decisions when they are confused. This can appear in the telecom industry as "foggy pricing," which is the practice of offering a plan or product that is significantly less good than another from the same company (Nowak 2006, p. 4; Farrell 2012, pp. 251-259).

These practices exploit consumers' limited capacity to process complex information, often resulting in decisions based on superficial factors such as brand familiarity or default options rather than thorough comparisons. The proliferation of confusing tariffs fosters consumer inertia, where the perceived effort required to understand and switch to better options outweighs the potential benefits. This inertia is particularly advantageous for firms, as it reduces customer churn rates and allows them to sustain higher prices without facing significant competitive pressure. To counter the adverse effects of confusopoly in mobile tariffs, regulatory interventions are essential. Policies aimed at enhancing transparency and simplifying consumer choices, such as eliminating dominated tariffs and promoting standardized formats for presenting tariff information, can empower consumers to make informed decisions (Andersson and Mattsson 2015; Friesen and Earl, pp. 239-253). Additionally, fostering the development of comparison tools or platforms that simplify the evaluation of complex tariff structures can further mitigate the challenges posed by confusopoly,

fostering a more competitive and consumer-friendly market environment (Fletcher 2021).

Selecting a mobile plan can be a challenging and overwhelming experience, even for tech-savvy consumers. The sheer number of available combinations—spanning hundreds of plans and devices—makes the decision-making process complex. While certain features, such as the number of texts or call minutes, are relatively straightforward to understand, others, like gigabytes of data, mixed usage allowances, or on-network benefits, can be more difficult to interpret. The situation becomes even more confusing when consumers struggle to compare offerings both within a single provider's plans and across multiple operators (Lorrai 2020, p. 32, 48). It has been observed that operators employ a powerful tool: the complexity of their products. Specifically, bundling handsets with mobile plans has proven to be a pivotal strategy in reducing transparency and confusing consumers. This tactic enables firms to raise prices, even in highly competitive markets where the overall diversity of product offerings is decreasing (Nicolle, Genakos and Kretschmer 2021).

### 6.3. Insurance Policies

Given that insurers make their policies nearly impossible to grasp, it is not surprising that customers misinterpret them. The insurance market's structure, insurance products, and regulatory framework have made it possible for the industry to develop into a "confusopoly." A "group of companies with similar products who intentionally confuse customers instead of competing on price" is known as a confusopoly. Economists and consumer activists have long recognized the insurance business as a confusopoly (Gans 2005).

The insurance industry, much like the mobile phone sector, is designed to be confusing, offering a wide array of price packages with differing features such as local and international coverage, data, and additional services. This excessive complexity overwhelms consumers, making it difficult to make informed comparisons and decisions, reducing market transparency, and leading to poor customer experiences, especially during claims. Scholars and consumer advocates have long identified insurance as a confusopoly. For example, in home

and contents insurance, consumers face numerous insurers (currently, 47 non-life and 19 life insurers are actively engaging business in Turkey), comparison websites, lengthy product disclosure documents, varying claim payout methods, and inconsistent terminology, inclusions, and exclusions (Financial Rights Legal Centre 2019, p. 4).

Hence, personalized pricing by insurers can serve as a method of price obfuscation, significantly increasing consumers' search costs while potentially avoiding scrutiny under competition law. This practice contributes to the creation of a "confusopoly," where competing firms reduce direct competition by deliberately confusing consumers with numerous and complex pricing structures. Industries such as utilities, telecommunications, and financial services (particularly insurance) are prime examples of this phenomenon. Notably, the proliferation of tariffs coincided with the rise of the Internet as a shopping platform, likely as a strategy to counteract the advantages offered by price comparison tools, preventing consumers from fully benefiting from reduced search costs (United Nations 2021, pp. 21-22; Siciliani 2019, p. 387; Siciliani 2014, p. 419; Gans 2006).

## 7. GAPS AND AMBIGUITIES

After the Guidance Paper on the application of Article 102 of TFEU, many business models have evolved and since this guidance is no longer sufficient, a new draft guideline for Article 102 has been prepared. There are important signals here as to which strategies a dominant undertaking can use within the framework of "competition on the merits". Concurrently, the law according to paragraph 55 of the Draft Guideline Article 102 has already departed from performance-based analyses, and has specified that anti-consumer behaviour that prevents the consumer from making a choice, the use of misleading information, infringements of other areas of law that affect competition parameters, discriminatory behaviour and favouritism, sudden and abnormal changes in behaviour, and whether a hypothetical competitor that is as effective as the dominant undertaking could adopt the same behaviour.

With the implementation of this Communiqué, in order for the conduct to be justified, the conduct must be objectively necessary, a.k.a. *objective necessity defence*, or produce economic efficiencies that offset or even outweigh the adverse effect of the conduct on competition,

so-called *efficiency defense* (Fischer, Hornkohl and Imgarten 2024). The objective necessity may derive from legitimate commercial objectives, such as protecting the dominant undertaking against unfair competition. It may also arise from technical grounds, for example, to maintain or improve the performance of the dominant undertaking product. What has been covered so far, it is clear that there is no objective necessity to apply confusopoly strategies. On the other hand, the efficiency defense requires showing that the exclusionary effects resulting from the dominant undertaking's conduct are offset or even outweighed by efficiency advantages that also benefit consumers. In order to prove the efficiency defense, the dominant undertaking must show that the gains from the conduct in question outweigh the possible adverse effects on the interests of consumers and do not eliminate effective competition. In the Confusopoly example, the consumer's ability to make decisions is restricted and, moreover, an effective competitive environment is prevented for the undertakings offering perhaps more advantageous opportunities and prices in the market. Therefore, although not mentioned direcly, confusopoly would likely constitute an infringement under Art 102.

Last but not least, even if confusopoly is examined under competition, unfair competition and consumer law perspectives, confusopoly does not only occur between companies and their consumers, but it can also be observed in the employment relationship between labour and management where, for example, employers manipulate their vendors in distinctive ways (Desjardins 2022, pp. 487-519). The empirical literature proved that consumers are happy with more alternatives despite the fact that they have difficulty in deciding– so fishing in troubled waters (Ayal 2011, p. 131). There are experimental studies substantiating that the more businesses add features to products the more buyers make suboptimal decisions. This, consequently, results in elevated prices. On the other hand, a taboo-breaking findings of Nobel-prized behavioural economists illustrated that homo economicus never existed – so, the price increase is inevitable in the absence of perfectly rational buyers (Kalaycı 2011, p. 21).

## CONCLUSION

Confusopoly, as a marketing strategy, conducting research on the best available rate (bar) for a product price among alternatives is intentionally impeded. This strategy subsequently empowers major players to secure enhanced profit margins and exploit higher profits. The paper illustrates that confusopoly unveils noteworthy consequences for antitrust regulations. The intentional confusion surrounding product characteristics and pricing practiced by companies weakens the concept of logical consumer decision-making, resulting in decisions that are "bounded rational". This calculated intricacy has a disproportionate impact on inexperienced consumers, guiding them towards less-than-ideal buying choices and ultimately favoring companies over consumer welfare.

From a competition law perspective, the traditional view that increasing the number of choices inherently promotes competition and consumer benefit is challenged. The study argues that confusopoly reduces competitive pressure on firms, allowing them to maintain higher prices and lower transparency. This reduction in genuine competition suggests that simply augmenting the number of firms in a market does not necessarily lead to improved consumer welfare. The study advocates for regulatory interventions that simplify price structures and enhance transparency. Such measures would empower consumers to make more informed decisions, thereby restoring competitive pressures among firms. A holistic regulatory approach that addresses both consumer protection and antitrust concerns is essential. This includes ensuring that consumers are not overwhelmed by excessive choices and that the information provided is clear and comprehensible.

In conclusion, the phenomenon of confusopoly necessitates a re-evaluation of traditional competition law postulates. Regulatory frameworks must evolve to address the complexities of modern market practices that exploit consumer behaviour. By simplifying pricing and enhancing transparency, regulators can protect consumer welfare and ensure that markets function more competitively and fairly. This re-evaluation is critical to fostering a market environment where informed consumer choice drives genuine competition.

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# Enhancing Privacy or Impeding Competition?: Privacy as An Objective Justification in the Light of *Apple* and *Google* Cases[1]

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Original Article

**Burcu ÇALIŞKAN OLGUN**[2]

**Abstract**

*While competition law and data protection law generally share a common goal of promoting consumer welfare, tensions arise where privacy-friendly actions raise competition concerns. Recently, Apple and Google cases exemplify how initiatives claimed to enhance user privacy can simultaneously face allegations of abuse of dominance, highlighting the possible conflicting area between privacy regulations and competition law. If a dominant firm can establish a valid objective justification for its conduct, it would not be deemed abusive under Article 102 TFEU. Therefore, a potential solution to the conflict lies in the concept of objective justification. Hence this study aims to investigate whether enhancing privacy can be considered as an objective justification for an anti-competitive conduct under EU competition law. First, the concept of objective justification will be discussed in general. Then, building on these discussions, whether enhancing privacy may be construed as an objective justification under two different scenarios will be examined. The first scenario explores situations where a company engages in behavior that may have anti-competitive effects, but such behavior is mandated by the GDPR; the second will analyze actions that exceed what is mandated by those regulations. Finally, possible and optimal ways of cooperation between competition and data protection authorities to evaluate whether privacy can justify abuse of dominance will be discussed.*

**Keywords:** *Privacy-enhancing measures, Abuse of dominance, Objective justification, Apple ATT case and Google Privacy Sandbox case.*

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# Gizliliğin Artırılması mı Rekabetin Engellenmesi mi?: *Apple* ve *Google* Vakaları Işığında Gizliliğin Haklı Gerekçe Olarak Değerlendirilmesi

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Araştırma Makalesi

**Burcu ÇALIŞKAN OLGUN**

**Öz**

*Rekabet hukuku ve veri koruma hukuku genel olarak tüketici refahını artırma ortak amacını paylaşsa da, gizlilik dostu eylemler rekabet endişeleri doğurduğunda iki alan arasında gerilimler ortaya çıkmaktadır. Son zamanlarda gündeme gelen Apple ve Google vakaları, kullanıcı gizliliğini artırmayı amaçladığı iddia edilen girişimlerin aynı zamanda hâkim durumun kötüye kullanılması suçlamalarıyla karşılaşabileceğine dair örnekler olup, gizlilik düzenlemeleri ile rekabet hukuku arasındaki olası çatışma alanını göstermektedir. Hâkim durumdaki bir firma, davranışları için geçerli bir haklı gerekçe ortaya koyabilirse, söz konusu davranışlar ABİDA'nın 102. maddesi uyarınca kötüye kullanım olarak değerlendirilmeyeceği için bu çatışmanın potansiyel bir çözümü haklı gerekçe kavramında yatmaktadır. Bu nedenle, bu çalışma, gizliliğin artırılmasının AB rekabet hukuku çerçevesinde rekabet karşıtı davranışlar için haklı gerekçe olarak kabul edilip edilemeyeceğini araştırmayı amaçlamaktadır. Öncelikle, genel olarak haklı gerekçe kavramına yer verilecektir. Ardından, bu tartışmalara dayanarak, gizliliğin artırılmasının iki farklı senaryo altında haklı gerekçe olarak yorumlanıp yorumlanamayacağı incelenecektir. İlk senaryo, bir şirketin rekabet karşıtı etkiler yaratabilecek davranışlarda bulunduğu ancak bu davranışların GDPR tarafından zorunlu kılındığı durumları; ikincisi ise bu düzenlemelerin öngördüğü sınırları aşan eylemleri değerlendirecektir. Son olarak, gizlilik iyileştirmelerinin dışlayıcı uygulamalara karşı bir kalkan olarak kullanılmasını önleyebilmek amacıyla rekabet ve veri koruma otoriteleri arasında olası ve optimal iş birliği yolları tartışılacaktır.*

**Anahtar kelimeler:** *Gizliliği artırıcı uygulamalar, Hakim durumun kötüye kullanılması, Haklı gerekçe, Apple ATT vakası ve Google Privacy Sandbox vakası.*

## INTRODUCTION

With the growth of data-driven economies, the use of data has significantly evolved, marking its emergence as a crucial input (Graef 2016) and a cornerstone for market power (Lasserre and Mundt, 2017). This evolution has led dominant companies to increasingly adopt strategies that not only focus on gathering vast quantities of consumer data but also involve exclusionary practices (Carugati 2022). Such practices effectively block competitors from accessing valuable data, thereby impacting not only privacy[3] rights of consumers but also the fairness of market competition. Therefore, competition law and data protection have become two dominant areas that govern the use of digital information.

The relationship between competition law and data privacy regulations is complex and multi-dimensional. While the objectives of these areas generally align in promoting consumer welfare (Costa-Cabral and Lynskey, 2017), there are cases where conflicts arise at the intersection of these two frameworks (CMA and ICO, 2021). For years, there has been ongoing debates about whether issues related to data privacy and the collection of consumer data should fall within the scope of antitrust enforcement. However, discussions regarding the relationship between the two areas of law have recently taken on a new dimension. Currently it has been pointed to an increased risk of "regulatory gaming" (Abate, Bianco and Casalini, 2024, p. 6) where certain firms might exploit data privacy regulations for exclusionary practices (Colangelo 2023; Wiedemann 2023). This raises important questions about how to effectively address these risks.

This issue is also related to the potential use of double standard in data privacy by dominant data holders. By applying less stringent data privacy standards within their own ecosystem, they gain a competitive advantage, while imposing stricter data privacy requirements on third

[3] The concepts of "privacy" and "data protection" are often used interchangeably, yet they address distinct aspects of individual rights. Privacy broadly refers to the right of individuals to be free from unwanted intrusion into their personal lives or affairs. Data protection, on the other hand, has a more specific focus on safeguarding individuals regarding the processing of their personal data. See: *Handbook on European Data Protection Law*, 2018, pp. 18-20.
Given these definitions, the same factual situation can implicate both concepts in that a breach of data protection can violate an individual's privacy, and conversely, a violation of privacy can involve the unlawful processing of personal data. Therefore, within the scope of this study, these terms may, where appropriate, be used interchangeably.

parties that seek to reuse their data. This practice can create barriers to entry and strengthen the platform's dominance in data markets, all while being presented as adherence to data privacy regulations (Abate et. al. 2024, p. 24).

Recently, this issue has surfaced in relation, particularly to the initiatives launched or announced by Apple and Google. These initiatives, based on their respective claims, offer enhanced user privacy within their ecosystems (CMA, 2022a). However, these privacy-friendly strategies have faced allegations of abuse of dominance by various regulators in Europe, highlighting the tension between privacy regulations and competition law. Notably, in the *Apple* case, these concerns have resulted not merely in allegations, but in the imposition of substantial fines. Consequently, *Apple* and *Google* cases have demonstrated that business models which, on the surface, seemingly prioritize user data protection can simultaneously provoke concerns under competition law.

Apple, on June 22, 2020, introduced a new feature known as App Tracking Transparency (ATT) with a focus on strengthening user privacy (Morrison 2020). However, Apple officially started implementing ATT on April 26, 2021. ATT is a mechanism that requires explicit consent from users for application developers to make use of user data for targeted advertising. This change had a negative impact on the developers as it significantly reduced their ability to collect and use user data for personalized advertising, a crucial factor for their revenue models (Hoppner and Westerhoff, 2021, p. 2-3). Considering the potential negative effects of this shift, Apple's implementation of the ATT feature became the subject of an investigation by the Autorité de la Concurrence (ADLC-French Competition Authority) on October 23, 2020.[4, 5]

[4] ADLC (2021). *Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case.* Retreived September, 23 2023 from https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/targeted-advertising-apples-implementation-att-framework-autorite-does-not#_ftn1.

[5] Apple's initiative has also been subject to scrutiny by competition authorities in other jurisdictions across Europe such as Germany, Italy, and Poland. The Bundeskartellamt (German competition authority) has shared its preliminary view with Apple, stating that Apple's ATT framework may constitute an abuse of dominance under German and EU competition law. However, the ADLC was the first to issue a formal decision on the matter. See: Bundeskartellamt (2022). *Bundeskartellamt reviews Apple's tracking rules for third-party*

On 17 March 2021 the ADLC rejected the request for interim measures, while it decided to continue the investigation on the merits of the case to assess whether there is any anti-competitive conduct.[6] Following its investigation on the merits, the ADLC concluded on 31 March 2025 that Apple had abused its dominant position in the market for the distribution of mobile applications on iOS and iPadOS devices between April 2021 and July 2023, and accordingly imposed a fine of €150 million.[7] The ADLC found that while the stated objective of the ATT framework, namely, the protection of personal data, may be legitimate, the manner in which the framework was implemented was neither necessary nor proportionate to achieving that objective.

In a similar vein, Google's Privacy Sandbox initiative, another supposedly privacy-enhancing measure, has also drawn regulatory attention. Google, with this initiative, plans to phase out third-party cookies on its Chrome browser. Much like ATT's impact on developers' access to user data for advertising, the role of cookies in the online advertising market is also crucial (CMA, 2020, pp. 294-296). They facilitate the gathering of user data across various websites, which forms the basis of targeted advertising. On the other hand, this potential shift raises significant concerns including the risk that it could

*apps*. Retrieved June, 9 2024 from https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html; Bundeskartellamt (2025). *Bundeskartellamt has concerns about the current form of Apple's App Tracking Transparency Framework* (ATTF). Retrieved May 12, 2025 from https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2025/02_13_2025_ATTF.html; The Italian Competition Authority (2023). *Investigation launched against Apple for alleged abuse of dominant position in the app market.* Retrieved September, 23 2023 from https://www.agcm.it/media/comunicati-stampa/2023/5/A561; The Office of Competition and Consumer Protection (2021). *Apple - the President of UOKiK initiates an investigation.* Retrieved September 23, 2023 from https://uokik.gov.pl/news.php?news_id=18092.

Additionally in the United Kingdom (UK), the Competition and Markets Authority (CMA), in the mobile market study, recognized that Apple has taken a positive step towards enhancing privacy and offering greater control over personal data to consumers and yet expressed its concerns for its risks to harm the competition (CMA, 2022b, p. 244).

[6] ADLC (2021). *Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case.* Retreived September, 23 2023 from https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/targeted-advertising-apples-implementation-att-framework-autorite-does-not#_ftn1.

[7] ADLC (2025). Targeted advertising: the Autorité de la concurrence imposes a fine of €150,000,000 on Apple for the implementation of the App Tracking Transparency ("ATT") framework. Retrieved May 12, 2025 fromhttps://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-autorite-de-la-concurrence-imposes-fine-eu150000000-apple.

reduce publishers' ability to monetise content, distort competition in the digital advertising market, and reinforce Google's dominant position.[8] Reflecting on these concerns, Competition and Markets Authority (CMA)[9] and the European Commission (Commission)[10] have decided to investigate this initiative in 2021 to assess whether it distorts competition in digital advertising markets. However, on July 22, 2024, Google announced that they will introduce a new feature in Chrome that users can make an informed choice about their browsing privacy instead of removing third party cookies. Google stated that they would continue consulting with the CMA, the Information Commissioner's Office (ICO), and other regulators worldwide as they finalize this approach.[11] However, as it remains relevant to the subject of the study, it has not been excluded from the scope of the research.

As seen with these cases, while some actions seem to support data protection, they may also be violating competition rules. This situation may suggest a presence of conflict between the two branches of law. Overcoming these conflicts become paramount, not only for the regulatory authorities overseeing the market but also for the companies under examination in order to establish an environment of legal certainty. One of the solutions to this conflict, in other words a possible approach for eliminating responsibility under European competition law, is to rely on the concept of objective justification. Indeed in the context where a dominant entity can effectively establish an objective justification, the conduct under scrutiny would not be considered as abusive under Article 102 of Treaty on the Functioning of the European Union[12] (EU) (TFEU) (Van Der Vijver, 2012, pp. 55-76). This study, hence, aims to clarify the degree to which enhancing

[8] CMA (2021). *CMA to investigate Google's 'Privacy Sandbox' browser changes*. Retrieved September, 23 2023 from https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes.

[9] CMA (2021). *Investigation into Google's 'Privacy Sandbox' browser changes*. Retrieved September, 23 2023 from https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes.

[10] Commission (2021). *Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*. Retrieved September, 23 2023 from https://ec.europa.eu/commission/presscorner/detail/it/ip_21_3143; Commission (2023). *Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology*. Retrieved August, 10 2024 from https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3207.

[11] Chavez, A. (2024). *A new path for Privacy Sandbox on the web.* Retrieved August 2, 2024 from https://privacysandbox.com/news/privacy-sandbox-update/.

[12] Consolidated version of the Treaty on European Union [2012] OJ 1 326/47.

privacy can be recognized as an objective justification for a potential abuse of dominance conduct within the framework of EU competition law.

Notably the application of objective justification relies on various factors, such as the degree of dominance, the nature of the behavior in question, its potential impact, and the type of objective justification being proposed (Van Der Vijver, 2012, p. 75). Therefore, it is important to take each case's unique circumstances into account to determine the applicability of objective justification. This defence has been invoked within different legal contexts, including legitimate business behavior, public interest, and efficiency gains, and has been subject to extensive examination by both competition authorities and scholars (Van Der Vijver, 2012, p. 62). However only recently the concepts of adhering to data protection regulations and enhancing privacy have emerged as a ground for objective justification and it was assessed for the first time in the ADLC's Apple decision on the merits.[13] Therefore, they give rise to new discussions on whether privacy-friendly actions could become a basis for objective justification merely because they are in line with data protection law.

The main aim of this study is to ascertain whether practices improving privacy can be treated as an objective justification for an anti-competitive conduct under the EU competition law. In order to answer this question thoroughly, first of all, the general concept of objective justification will be examined, and its conditions and application will be outlined through the analysis of the EU competition law rules, cases and existing literature in the first chapter.

Subsequently, the extent and manner in which these can be applied to privacy will be discussed in the second chapter. In this context, it is crucial to distinguish between anti-competitive actions that are strictly required by the General Data Protection Regulation[14] (GDPR) and those that exceed its mandates. This distinction highlights that while undertakings have limited flexibility in the first scenario and will not be expected to behave contrary to an explicit legal obligation, they possess greater discretion in situations where they choose to enhance

[13] ADLC, Apple 25-D-02 (2025).

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

data protection beyond what is legally required. In other words, in the first scenario, it is the responsibility of data protection authorities to ensure that the platform meets the compliance standards. However, in the second scenario, where conduct may harm competition while simultaneously enhancing data privacy, the evaluation becomes more complex and necessitates the intervention of competition authorities (Abate et al., 2024, p. 24). Consequently, the research aims to assess the concept of privacy with its dynamic and evolving impacts on competition, determining whether privacy could fulfill the criteria for objective justification for distinct scenarios.

Lastly, possible and optimal ways of cooperation between competition and data protection authorities to evaluate whether privacy can justify abuse of dominance under EU law will be explored in the third chapter. First, the necessity of the collaboration will be analysed, followed by an overview of different methods applied in various countries. Finally, the advantages and disadvantages of these methods will be discussed to find the most suitable approach.

## 1. GENERAL ASPECTS OF OBJECTIVE JUSTIFICATION UNDER ARTICLE 102 OF TFEU

### 1.1. The Concept of the Objective Justification Under Article 102

Article 102 of the TFEU prohibits firms holding a dominant position within the internal market or a substantial part of it from abusing that position. Holding a dominant position is not inherently illegal but abusing of dominance is prohibited (Whish and Bailey, 2021, p. 197). However, dominant firms have special responsibilities not to allow its conduct to distort undistorted competition.[15]

Despite not specifying any exceptions explicitly, Article 102 of the TFEU allows dominant firms to justify their prima facie abusive conduct. In other words, when a dominant firm convincingly provides a justification for its conduct, that conduct will no longer be regarded as abusive (Bornudd 2022, p. 42). This principle could apply to all conducts that potentially fall within the scope of Article 102 of the TFEU (Rousseva 2010, p. 259).[16]

[15] Case T-203/01 *Michelin v. Commission* [2003] ECLI:EU:T:2003:250, para. 57.

[16] In the Draft Guidelines it is stated that it is highly unlikely that naked restriction, which

The process of determining the abuse of a dominant position consists of two phases. Firstly, one of the conduct-specific tests is applied. If this test indicates the conduct is prima facie abusive, the second phase will be applied. Within this second phase the dominant entity is provided with a chance to present an objective justification for their conduct.[17] The aim of this two-stage analysis is to make a distinction between what is considered abusive conduct and what falls within the scope of lawful conduct, in accordance with Article 102 of the TFEU (Østerud 2010, p. 1).

Therefore, the concept of objective justification plays a critical role in distinguishing between conduct that is unlawful and conduct that is permissible under Article 102 of the TFEU. Consequently, the analysis of justification that has been developed by the EU courts and later explicitly outlined in the Guidance Paper[18, 19] is closely linked

is a type of conduct that has no purpose other than restricting competition, could be deemed justifiable although the dominant undertaking may, in theory, attempt to justify such behavior (para. 60).

[17] The structure of a dual framework, featuring both prohibition and justification, is a familiar structure within competition law, as seen with Article 101 TFEU. Any agreements among firms that potentially could negatively impact competition are explicitly prohibited under Article 101(1) of the TFEU. Article 101(3) of the TFEU grants exemption for agreements that fall within the prohibitive scope of Article 101(1) of the TFEU. Agreements meeting the conditions outlined in paragraph 3 are deemed acceptable, as they are considered to provide more benefits than harms.

[18] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7 (Guidance Paper) paras. 28-31.

This document outlines the enforcement priorities of the Commission for applying Article 82 (now Article 102 TFEU) to exclusionary practices by dominant firms. It aims to clarify and predict the Commission's approach in assessing and pursuing cases of exclusionary conduct. It also helps companies determine whether their behavior might trigger intervention under Article 82. However, this document does not constitute a legal statement and does not override interpretations by the CJEU or the General Court of the EU. This guidance specifically addresses abuses by companies with a single dominant position, not collective dominance held by two or more undertakings.

[19] On 1 August 2024, the Commission published the Draft Guidelines on the application of Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings and announced it has been expecting feedback from all stakeholders. According to the press release, the reason for publishing this draft is to provide clarity and legal certainty regarding the application of Article 102 of the TFEU. The Draft Guidelines aim to reflect the Commission's interpretation of EU courts' case law and its own enforcement practices. Commission (2024). *Commission seeks feedback on draft antitrust Guidelines on exclusionary abuses.* Retrieved August, 2 2024 from https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623.

Since this guideline is still in draft form, the guidelines dated 2009 have been used for this study. However, where relevant and limited to the subject of the study, significant changes

to determining whether there is abusive behavior (Friederiszick and Gratz, 2013, p. 2; Mertikopoulou 2014, p. 10).

### 1.2. Different Types of Objective Justification

There are different types of objective justification under Article 102 of the TFEU (O'Donoghue and Padilla, 2020, p. 344). The Guidance Paper[20] and *Post Danmark* case[21] solely referred to two prospects of objective justification which are "objective necessities" and "efficiencies". There is no reference to legitimate commercial interest, but this is a category of objective justification discussed in literature.[22]

Indeed, Van Der Vijver states that it is essential to recognize that the notion of objective justification encompasses a broader scope. He argues that, as pointed out in the *United Brands* case,[23] dominant firms should be granted the freedom where they can exercise a certain level of commercial discretion to engage in reasonable conduct. He further examined the types of objective justification under three headings: (i) legitimate business behavior; (ii) efficiency claims; and (iii) legitimate public interest objectives (Van Der Vijver 2014, pp. 111-139). O'Donoghue and Padilla, with slightly different wording, have also similarly classified them as (i) objective necessity (ii) commercial interests, and (iii) efficiency (2020, p. 344).

In this study, the approach of O'Donoghue and Padilla has been adopted rather than that of the Guidance Paper to be more comprehensive. Therefore, below, the three types of objective justification will be presented.

#### 1.2.1. Objective Necessity

The conduct of a dominant firm can be justified on grounds of objective necessity. According to the Guidance Paper, the objective

proposed in the draft have been noted in the footnotes.

[20] Guidance Paper, para. 29.

[21] Case C-209/10 *Post Danmark v Konkurrencerådet* [2012], para. 41.

[22] In Draft Guidelines, legitimate commercial consideration such as protection from unfair competition is given as an example of objective necessity (para. 168).

[23] Case 27/76 *United Brands* [1978] ECR 207.

necessity relies on external factors to the dominant firm.[24] For instance, exclusionary conduct might be deemed objectively necessary for health or safety reasons specific to the product's characteristics.[25]

Legitimate public policy or public interest can be the underlying cause of objective necessity (Bornudd 2022, p. 44). On the other hand, the General Court, in the cases of *Hilti*[26] and *Tetra Pak II*[27], rejected justifications for anti-competitive actions that were claimed to be aimed at protecting public safety. In this context, the Court highlighted that specific laws and regulatory bodies are assigned to ensure consumer safety. Indeed, as clarified in the *Hilti* case, "*it is clearly not the task of a dominant undertaking to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least inferior in quality to its own products.*"[28]

Moreover, in *Hilti* case, the Court addressed the relevant regulatory bodies as the appropriate point of contact for issues of product safety, while in *Tetra Pak II* the Court concluded that: "*the remedy must lie in appropriate legislation or regulations, and not in rules adopted unilaterally by manufacturers, which would amount to prohibiting independent manufacturers from conducting the essential part of their business.*"[29] Furthermore, in the *Tetra Pak II* case, it was also highlighted that public health protection could have instead involved alerting users of the machines about the technical standards.[30]

As analysis of case law reveals, the Guidance Paper's references to public health and safety as examples of external factors are expanded upon by case law, which may extend to other potential justifications such as technical obstacles,[31] capacity limitations,[32] pharmacovigilance

[24] In the Draft Guidelines, the expression "external factor" is not included.

[25] Guidance Paper, para. 29.

[26] Case T-30/89 *Hilti* [1991] ECR II-1439, para. 118, upheld on appeal in Case C-53/92 P *Hilti AG v Commission* [1994] ECR I-667, ECLI:EU:C:1994:77.

[27] Case T-83/91 *TetraPak II* [1994], para. 83, upheld on appeal in Case C-333/94 P *Tetra Pak II* [1996] ECR I-5951, ECLI:EU:1996:436.

[28] Case T-30/89 *Hilti* [1991] ECR II-1439, para. 118.

[29] Case T-83/91 *TetraPak II* [1994], para. 84.

[30] Case T-30/89 *Hilti* [1991] ECR II-1439, para. 139.

[31] Case 311/84 *Telemarketing* [1985].

[32] Case 98/190/EC *FAG – Flughaufen Frankfurt/Main AG* [1998] IV/34.801.

efforts[33, 34] and ensuring passenger safety.[35] In other words, though the Commission so far identified only public health and safety as examples of "external factors" in the Guidance Paper, it is important to recognize that the list is not exhaustive.

### 1.2.2. Commercial Interest

Dominant firms have the right to protect their commercial interests (Albors-Llorens 2007, p. 1741; O'Donoghue and Padilla, 2020, p. 345). Sufrin describes the commercial interest as an interest aligned with the rational profit-maximizing behavior of a firm that does not hold a dominant position (Jones and Sufrin 2016, pp. 375-376). This defense is more commonly asserted in cases of predatory pricing (O'Donoghue and Padilla, 2020, p. 345) or refusal to supply (Jones and Sufrin, 2016, p. 376).

In *United Brands* case, where the company stopped supplying a distributor to penalize it for taking part in a competitor's promotion, the Court of Justice of the European Union (CJEU) notably stated that "*the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interest if they were attacked.*"[36] The judgment suggests that even though a dominant firm has a special responsibility, it still has the right to some level of commercial freedom.

The General Court, in its several judgments, has presented a more limited interpretation of the commercial freedoms for dominant firms. According to these judgments, a dominant company can not justify its conduct if its actual aim is to strengthen its dominance or abuse it.[37] However, the General Court's judgments raised a significantly restricted approach to the commercial freedom of dominant firms as it carried the implication that any measure effectively defending their market

[33] Case T-321/05 *AstraZeneca* [2010].

[34] Pharmacovigilance involves the scientific and procedural monitoring of drug safety, with actions taken to minimize risks and enhance the benefits of medications, see: Commission. *Pharmacovigilance.* Retrieved March, 14 2024 from https://health.ec.europa.eu/medicinal-products/pharmacovigilance_en#:~:text=Pharmacovigilance%20is%20the%20process%20and,increase%20the%20benefits%20of%20medicines.

[35] Case T-814/17 *Lietuvos gelezinkelia*i [2020].

[36] Case 27/76 *United Brands* [1978] ECR 207, para. 189.

[37] Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 243; Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para. 315.

share could be construed as reinforcing their market dominance. This limitation on dominant firms is criticized in the literature, as it nearly amounts to an implicit prohibition of dominance itself, despite the established precedent affirming that holding such a position is not inherently illegal (Van Der Vijver 2014, p. 116).

It should also be highlighted that no dominant undertaking has yet managed to effectively use the commercial interest defense in any resolved case. This lack of successful application could be attributed to the European Court's strict perspective on this defense. As a result, the concept of commercial interest defense can be considered still theoretical, with no successful application to date.

### 1.2.3. Efficiency

Another type of objective justification the dominant firms may rely on is efficiency.[38] For efficiency defense, it must be evaluated whether the exclusionary effect of such a system, which negatively impacts competition, is offset or outweighed by efficiency benefits that are advantageous to consumers. If the exclusionary effect has no connection to market and consumer advantages, or if it exceeds what is necessary to achieve those benefits, the system should be considered abusive under competition law.[39]

According to the Guidance Paper, a dominant firm's exclusionary conduct could be justified on the basis of efficiencies that ensure no net harm to consumer welfare.[40] The Commission introduces four cumulative conditions to be fulfilled for an efficiency defense under Article 102 TFEU[41]: *"(i) the efficiencies have been, or are likely to be, realised as a result of the conduct, (ii) the conduct is indispensable to the realisation of those efficiencies, (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and*

[38] Case C-209/10 *Post Danmark v Konkurrencerådet* [2012], para. 42; Case C-95/04 P, *British Airways plc v. Commission* [2006] ECR I-2331, ECLI:EU:C:2007:166, para. 86; Case C-52/09 *TeliaSonera*, para. 76; Case T-203/01, *Michelin v. Commission* [2003] ECLI:EU:T:2003:250, para. 98.

[39] Case C-95/04 P, *British Airways plc v. Commission* [2006] ECR I-2331, ECLI:EU:C:2007:166, para. 86.

[40] Guidance Paper, para. 30.

[41] They reflect the conditions set forth in Article 101(3) of the TFEU (O'Donoghue and Padilla 2020, p. 347).

*consumer welfare in the affected markets, (iv) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition."*[42]

Additionally, according to the Guidance Paper, the effectiveness of an efficiency argument is linked to the level of dominance of the firm. Particularly, the Guidance Paper states that the exclusionary conduct of a very highly dominant firm is generally not justifiable based on efficiency grounds.[43]

The undertaking may present evidence to argue that its behavior leads to pro-competitive advantages, such as improvements in price, quality, choice, and innovation. Yet, it is essential that these advantages should not cause harm either to competition or to consumer welfare (Bornudd 2022, p. 46). For example, in the *Google Shopping* case, where Google was accused of self-preferencing its own services over those of its rivals within shopping engines, Google presented five main arguments in its defense against the Commission's allegations of anti-competitive behavior regarding its search service. The first three arguments claimed that Google's actions were pro-competitive because they improved the quality of its search service, suggesting that these benefits outweighed any exclusionary effects. The fourth argument invoked fundamental rights under the EU Charter, while the fifth one cited technical constraints that prevented equal treatment of results from Google's own and competing comparison shopping services. The Commission concludes that none of Google's five claims provide a valid justification for its actions.[44]

The General Court upheld the Commission's decision by acknowledging that Google's algorithms might improve the service but highlighted that Google failed to justify the unequal treatment of its own results versus competitors' results. The Court emphasized that the core issue was the lack of equal treatment, not the presence of service improvements by approving the Commission's view. It also dismissed Google's claim that equal treatment would harm competition and noted that technical constraints did not justify Google's practices. Ultimately, the Court concluded that Google's actions could lead to higher prices for consumers, reduced innovation, and less consumer

[42] Guidance Paper, para. 30.

[43] Guidance Paper, para. 30.

[44] Case AT.39740 *Google Shopping* [2017], Section 7.5.

choice, thus rejecting Google's defense and upholding the finding of anti-competitive conduct.[45] It can be inferred from this case that objective justifications, particularly those related to efficiency and pro-competitive advantages, must be closely scrutinized to ensure they do not mask exclusionary practices. Even when a company claims that its conduct improves service quality or other consumer benefits, these justifications will not be accepted if they simultaneously result in unequal treatment of competitors or harm to consumer welfare.

In summary, the EU Courts rarely elaborate extensively on efficiency justifications in their judgments. Moreover, defenses based on efficiency justifications, when raised, are usually rejected (Whish and Bailey, 2021, p. 221; O'Donoghue and Padilla, 2020, p. 351). Notably, in recent high-profile digital platform cases, all efficiency defenses put forward by the companies were rejected.[46] According to Bornudd, this timid approach can be attributed to several reasons.[47] Firstly, the legal framework on efficiency criteria is strict, leaving little room for proof. Secondly, it is rare for competition authorities to proceed with cases they deem to have justification. Therefore predominantly only less convincing or insufficient efficiency claims make it to the justification examination by the EU Courts (Bornudd 2022, p. 47).

### 1.3. Legal Requirements of Objective Justification

The application of objective justification can be influenced by a multitude of factors. It is hard to argue that there is a clear consensus in the literature and case law regarding the requirements. However, it can be stated that the concept of objective justification is primarily based on the principle of proportionality (Rousseva 2006, p. 33).[48]

[45] Case T-612/17 *Google Shopping* [2021] ECLI:EU:T:2021:763, paras. 558 and 566.

[46] Case AT.39740 *Google Shopping* [2017], Section 7.5; Case AT.40099 *Google Android* [2018], Section 11.5; Case AT.40220 *Qualcomm* [2018], Section 11.6; Case AT.39711 *Qualcomm* [2019], Section 12.9; and Case AT.40411 *Google AdSense* [2019] Section 8.3.5.

[47] For a detailed discussion on the reasons why efficiency defenses have not been very successful, see: O'Donoghue and Padilla, 2020, pp. 351-354; Jones and Sufrin, 2016, pp. 374-375; for the policy recommendations brought forward due to the lack of detailed evaluations see: Friederiszick and Gratz, 2013.

[48] In addition to proportionality, Van Der Vijver (2012, p. 69) also listed the intent of undertakings, necessity and the effect of the conduct on the relevant market among the legal requirements of an objective justification, thereby arguably distinguishing proportionality and necessity as separate factors.

The proportionality test, in general, evaluates if there is a fair balance between the stated objective, the methods used to reach it, and the potential effect on the market. The proportionality test evaluates whether a public or private measure reasonably aims at a legitimate interest without exceeding what is necessary. It involves two key assessments, namely suitability and necessity tests. The suitability test checks if the means employed are appropriate and likely to achieve a legally protected interest or objective. The second test, the necessity test, determines if the measure is essential to achieve the objective and if there are less restrictive alternatives available that can produce the same result (Rousseva 2006, p. 33). In essence, the suitability test involves a preliminary assessment and serves as a softer version of the more critical necessity test (Van Der Vijver 2014, p. 143), which will be analyzed in detail below.

According to the necessity test, a dominant entity is required to employ the least competition-restricting methods to achieve its stated objectives. The significance of the necessity test was not clearly evident in earlier rulings, like that of *United Brands*. Indeed, in this judgment, the CJEU ruled that a dominant company generally has a right to respond to competitors' actions as part of a commercial counter-attack. The judgment does not require the company to choose the least anti-competitive option. However, over time, this test has gradually become more prominent in the CJEU judgments involving objective justification. For instance, the *TetraPak II* case can be seen as an early precedent that shows the requirement of a necessity test. In this case, the General Court was not persuaded that the stated objective of the prima facie abuse, namely the protection of public health, could not be achieved through alternative methods.[49] Then in the *British Airways* case, the CJEU more solidly defined the necessity principle, stating that if the exclusionary effect of a rebate system exceeds what is necessary to achieve efficiency benefits, it must be considered abusive.[50] Similarly, in the *Microsoft* case, because Microsoft's actions were not essential for achieving the desired efficiencies, the General Court determined that Microsoft could not base its defense on objective justification.[51] More recently, in the *Romanian Power Exchange/OPCOM* case, the

[49] Case T-83/91 *TetraPak II* [1994] ECR II-755, ECLI:EU:T:1994:246, para. 84.

[50] Case C-95/04 P *British Airways plc v. Commission* [2006] ECR I-2331, ECLI:EU:C:2007:166, para. 86.

[51] Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, para. 1152.

defendant argued that discriminatory actions against foreign electricity sellers were justified because they were aimed at protecting against tax differences. Nonetheless, the Commission maintained that less competition-restrictive methods existed to address such tax issues.[52] Over time, the necessity test has become more prominent in CJEU judgments, emphasizing that a dominant company's actions must not go beyond what is necessary to achieve its objectives, with various cases illustrating the application of this principle.

Depending on the objective justification in question, the relevance of proportionality might change. For instance, proportionality might not be considered highly relevant in cases involving efficiency claims. The focus of such analysis is on determining if pro-competitive outcomes exceed anti-competitive consequences. However, proportionality appears to be crucial in cases related to arguments based on public interest and legitimate business conduct (Van Der Vijver 2014, pp. 71-73). In relation to the latter, the CJEU stated in the *United Brands* that the company's response *"must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other"*.[53] In this case, the CJEU appeared to establish a connection between the principle of proportionality and the relative economic power of the companies involved.

Proportionality is flexible enough to suit the specific conditions of a case, becoming a more stringent standard as the degree of market dominance increases. However, the very flexibility of proportionality also makes it a complex concept in legal terms, challenging to define and apply consistently within the framework of competition law (Van Der Vijver 2014, p. 72).

### 1.4. Burden of Proof

Once the Commission preliminarily indicates an abuse, the dominant firm has two defenses available: (i) challenging the preliminary finding of abuse, or (ii) plea for objective justification (Van Der Vijver 2014, p. 172). The responsibility falls on the dominant firm to provide all the required proof to show that its actions are objectively justified. Ultimately, it is the Commission's task to evaluate if the behavior in

[52] Case AT.39984 *Romanian Power Exchange/OPCOM* [2014], paras. 198-227.

[53] Case 27/76 *United Brands* [1978] ECR 207, para. 190.

question is objectively justified or not.[54] This procedural structure aligns with the principle that the burden to prove a breach of Article 102 TFEU rests primarily with the competition authority (O'Donoghue and Padilla, 2020, pp. 347-348).

On the other hand, the standard of proof required for justifications for abuse of dominance cases has not been definitively established. The General Court, in the *Google Shopping* case, stated that a company must present its justifications "convincingly"[55] and, when it comes to efficiencies, provide more than just "vague, general, and theoretical arguments".[56] Specifically, for efficiency justifications, the Commission requires that the company must "demonstrate efficiencies with a sufficient degree of probability, and based on verifiable evidence".[57] Since there is no known case where an objective justification defense has been evaluated in detail, the level of proof that a company needs to provide remains unclear.

## 1.5. Conclusion

The EU Courts' case law started to systematically include the concept of objective justification in the analysis of abuse of dominance cases from the late 1980s. It has been recognized in the relevant cases and mentioned in the Guidance Paper that objective justification can exempt unilateral business conduct from being considered as abuse of dominance. Due to this impact, objective justification is crucial when it comes to both setting the boundaries for regulatory actions on the conduct of firms in a dominant position and making efficiency analyses an integral component of the examination of violations.

This concept of objective justification includes three primary types: objective necessity, commercial interest, and efficiency. Objective necessity involves external factors such as health or safety concerns, although courts have mostly rejected such justifications. Commercial interest, which is not explicitly recognized by the Guidance Paper, permits dominant firms to protect their interests, though this defense has rarely succeeded due to the courts' strict interpretation. Lastly,

[54] Guidance Paper, para. 31.

[55] Case T-612/17 *Google Shopping* [2021] ECLI:EU:T:2021:763, para. 577.

[56] Case T-612/17 *Google Shopping* [2021] ECLI:EU:T:2021:763, para. 553.

[57] Guidance Paper, para. 30.

efficiency justifications require that any exclusionary effect be balanced by consumer benefits, with stringent criteria making these defenses challenging to prove.

Regarding the legal requirements of objective justification, proportionality stands out as the most critical criterion. This involves the suitability test, which checks if the means employed are likely to achieve the goal, and the necessity test, which determines if less restrictive alternatives are available. Over time, the necessity test has gained prominence in CJEU judgments, emphasizing that dominant firms must use the least anti-competitive methods to achieve their objectives.

Although the concept of objective justification has been featured in cases for a long time, the implementation often remained to be more theoretical than practical and attempts to invoke objective justification rarely succeeded. The EU case law reveals that the EU Courts interpret objective justification narrowly, focusing solely on objective factors. Building on this understanding, the following chapter will explore how enhancing data protection can be considered as an objective justification.

## 2. ASSESSMENT OF DATA PROTECTION AS AN OBJECTIVE JUSTIFICATION

In the previous chapter, a general framework was outlined on how objective justification, its types, and its conditions have been evaluated in competition law practices to date. Based on these assessments, this chapter will discuss how the defense of enhancing data protection can amount to objective justification. This defense can be put forward in cases where a dominant entity engages in behaviors that are intended to increase the protection of user personal data under the GDPR while having the potential to negatively impact competition.

Firstly, theoretical discussions will be provided on what type of objective justification privacy could fall into. Then, various scenarios in which data protection can be invoked as objective justification will be explored. One scenario will involve actions that align with what data protection regulations mandate, the other will examine actions that exceed what is mandated by those regulations. To establish a reference

point, this chapter focuses on the *Apple* case. Although the *Google Privacy Sandbox* case is also relevant, it is only briefly referenced due to the absence of a final decision on the merits. This section will not cover a detailed analysis of these cases such as technical complexities, instead it will provide a general overview and use them as examples to highlight the underlying challenges. It aims to illustrate the conflict between data protection and competition law that has motivated the research question.

### 2.1. First Look: Data Protection Can Be An Objective Justification

It is useful to indicate where the conflict between data protection and competition law originates, before discussing under which type of objective justification privacy can be examined. The GDPR's primary aim is to protect individuals from unauthorized processing of their personal data as stated in Article 1(1) of the GDPR. This has resulted in a restrictive regulatory framework where the processing of personal data is generally prohibited unless the data controller can justify it based on a legal ground specified under Article 6(1) of the GDPR. This typically limits the processing of personal data including the exchange of personal data between companies. On the other hand, in some cases, a dominant undertaking's refusal to share personal data with competitors could constitute a breach of competition law when (i) data is essential for competitors' activities, (ii) it could lead to competitors' exclusion from the market by preventing them from accessing a resource, (iii) if an IP right is involved, the emergence of a new product is prevented (iv) there is no objective reason for the refusal (The Publications Office of the EU 2022, OFCOM 2022). Thus this creates one of the significant friction points between data protection and competition law (Graef, 2016; CMA and ICO, 2021; Kerber and Specht-Riemenschneider, 2021).

According to the general principles of the law, if there were a hierarchical relationship between data protection and competition law regulations, this conflict could be resolved. However, both the right to protect personal data[58] and the objective of maintaining an open market economy with free competition[59] are fundamental principles

[58] Article 16 of the TFEU.

[59] Articles 119 and 120 of the TFEU.

within the TFEU. As Wiedemann argues, these two principles are equally important, since no hierarchy exists between them (Wiedemann 2023, p. 29). In that regard, objective justification can serve as a tool to resolve such conflicts that arise between these competing principles since it provides a company that enhances privacy the opportunity to be exempt from the threat of violating competition laws.

The assessment of privacy as an objective justification must be conducted according to the limits of the previously outlined analysis. As stated in the previous chapter, the Commission will only accept an objective necessity if it is influenced by factors external to the company.[60] Although the Guidance Paper mentions only public health and safety as "external factors", this should not be seen as an exhaustive list (Unekbas 2022, p. 153). Based on this point of view in the literature, Bornudd claims that regulatory frameworks like the GDPR are examples of such external factors that impact the operations of firms bound by them. Any practices involving the processing of personal data within the EU are inevitably governed by the limitations imposed by the GDPR (Bornudd 2022, p. 50).

On the other hand, it may be argued that data protection, being a public policy issue, cannot be used as an objective necessity in competition law cases due to precedents set by the *Hilti* and *Tetra Pak II* cases (Tombal 2021, p. 23). In these cases, the General Court dismissed public policy as a valid justification, with the emphasis that it is the role of regulatory authorities, not dominant market players, to enforce such policies. However, Bornudd claims that this argument may not hold for data protection. Because unlike the situations in these cases, where safety enforcement was the responsibility of the authorities, the GDPR assigns responsibility directly to companies for protecting data. Therefore, when a company's action is with upholding a policy interest like data protection, precedents like *Hilti* and *Tetra Pak II* should not prevent it from claiming such responsibilities as a justification under competition law (Bornudd 2022, p. 55). One can object to this argument since the difference between the safety and privacy regulation may not be as substantial as Bornudd suggests in this context. Because while it is the responsibility of companies to comply with these regulations and take necessary measures, the enforcement of them is the responsibility of the relevant authorities. Besides, in



[60] Guidance Paper, para. 29.

accordance with the analogy in *Hilti* and *Tetra Pak II,* Unekbas (2022, pp. 153-154) argues that data protection authorities, not profit-driven companies, are better suited to handle issues related to protecting consumer privacy since privacy law already has its own regulators.

Additionally, the objective necessity of data protection may arise from valid commercial or technical reasons. For companies like Apple and Google, as demonstrated in ADLC's decisions, privacy has become a priority that extends beyond just adhering to data protection laws. Both companies are vocal about their commitment to setting high standards in data protection. As public interest in privacy increases, so does its strategic value to companies responsible for implementing it, making it a legitimate commercial consideration because it adds value (Bornudd 2022, pp. 51-52).

Moreover, the GDPR impacts global companies significantly as non-compliance with GDPR can lead to severe penalties, up to 4% of a company's annual turnover.[61] Thus, GDPR compliance can critically affect a company's revenue streams. Given these considerations, GDPR compliance can be seen as a legitimate commercial consideration (Bornudd 2022, pp. 51-52).

Regarding efficiency defense, as EU competition law evolves from a stance of rigid separation to one of nuanced integration, the likelihood of recognizing privacy as a factor in efficiency arguments is expected to grow (Unekbas 2022, p. 146). Although enhancing privacy can be considered an improvement in product quality, it is unlikely to justify abusive practices when combined with a reduction in the number of available alternatives for consumers (Unekbas 2022, p. 159).

In summary, enhancing data protection can potentially serve as an objective justification under EU competition law in three ways: objective necessity, commercial interest and efficiency. However, this depends on several factors and is subject to stringent conditions that might differ case by case. Therefore, in the next part, one of the most important conditions, proportionality, will be discussed.

[61] Article 83(5) of the GDPR.

### 2.2. First Scenario: Anti-competitive Behavior Mandated By The GDPR

The first scenario explores situations where a company engages in a behavior that may have anti-competitive effects, but such behavior is mandated by the GDPR. In addressing such situations that fall under the scope of the first scenario, *Deutsche Telekom* case may provide guidance. Deutsche Telekom, the German dominant telecom operator, attempted to justify its seemingly abusive pricing strategies by arguing that sector-specific regulations dictated the prices it could charge its end consumers. In 2003, the Commission determined that Deutsche Telekom had abused its dominance by setting its wholesale prices for access to the local loop network higher than the retail prices it charged end consumers, effectively making it impossible for competitors to profit from their retail services.[62]

The CJEU decided that anti-competitive behavior does not fall under Articles 101 and 102 of the TFEU, if it is mandated by national legislation, or if the legal framework established by such legislation precludes any potential for competitive activity by the companies involved. In these circumstances, the restriction of competition cannot be attributed to the independent actions of the companies, as required by these articles. However, if the national legislation allows for some degree of competition that could be hindered, limited, or distorted by the independent actions of companies, then Articles 101 and 102 of the TFEU may indeed be applicable.[63]

The CJEU has only narrowly accepted exempting anti-competitive behavior from the scope of Articles 101 and 102 of the TFEU when such behavior is mandated by national legislation or when the legislation entirely eliminates any possibility for competitive activities by the businesses involved.[64] The CJEU, sticking to this view, dismissed the "regulated conduct defense" (Graef 2016, p. 270) in the *Deutsche Telekom* case, concluding that the telecom operator had enough leeway under the existing regulations to adjust its consumer pricing.[65]

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[62] Case COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG*, 21 May 2003.

[63] Case C-280/08 P *Deutsche Telekom* [2010] ECLI:EU:C:2010:603, para. 80; Case C-359/95 P, *Ladbroke Racing*, 11 November 1997, ECLI:EU:C:1997:531, para. 33.

[64] Case C-280/08 P *Deutsche Telekom* [2010] ECLI:EU:C:2010:603, para. 81.

[65] Case C-280/08 P *Deutsche Telekom* [2010] ECLI:EU:C:2010:603, paras. 85 and 183.

The judgment establishes that regulation of a sector does not exempt it from competition law scrutiny if the regulation allows for independent decision-making for the undertaking. Similarly, if data protection law allows for autonomous actions by a dominant firm, competition authorities are likely to reject an objective justification defense based solely on compliance with the data protection regulations (Graef 2016, p. 271).

Following the approach established in this decision, when the GDPR leaves no room for a company to choose its course of action, such behavior, even if anti-competitive, does not violate Article 102 of the TFEU. This is because the company cannot be expected to deliberately breach GDPR requirements (Wiedemann 2023, p. 19). However, the challenge often lies in determining when an action is mandated by GDPR regulations and when the GDPR gives some range of motion for the companies. In this regard, understanding and interpreting the mandates of GDPR is highly critical.

Consequently, when a company is explicitly prohibited from sharing data due to data protection laws, it cannot be accused of abusing its market dominance. However, this defense is applicable only within a limited scope. It does not apply if the company has at least some degree of discretion within which competitive activities are possible.

### 2.3. Second Scenario: Enhancing Data Protection Beyond What The GDPR Mandates

The second scenario involves when a company implements measures that are, at least seemingly, aimed at enhancing data protection, but are not explicitly mandated by the GDPR. Companies may voluntarily adopt a higher standard of data protection than required by law while potentially impeding competition in the process. This conduct, while intended to increase users' privacy, may have anti-competitive effects and could be considered an abuse of dominance under Article 102 of the TFEU.

The ADLC highlighted this issue in the *Apple* case, describing the ATT framework as an additional measure meant to enhance user privacy without substituting for other forms of consent needed for

data collection and processing by other entities.[66] Similarly, the UK *Google Privacy Sandbox* case fits this scenario since Google aims to protect users from third-party tracking and associated privacy breaches by blocking third-party trackers in Chrome. This will enhance privacy by reducing the number of data controllers collecting information. These cases do not fall into the first scenario, as the company's actions exceed what is strictly required by the GDPR.

Considering whether a data protection justification may be deemed proportionate, it is essential to understand that such assessments should always be case-specific. Regarding enhanced privacy features specifically, determining proportionality involves evaluating whether these features are suitable and necessary for achieving the stated goal of enhanced privacy. Moreover, if multiple suitable measures are available, the least restrictive option should be chosen. It is also crucial to recognize that just because a company's actions are regulated does not automatically exempt them from scrutiny under competition laws (Bornudd 2022, p. 52).

In that regard, it could be argued that overly stringent data protection policies might not pass the proportionality test. Specifically, overly excessive data protection measures may not be seen as appropriate or the least restrictive means to achieve the goal of enhanced privacy. In contrast, simply meeting the minimum GDPR compliance requirements is likely to be considered appropriate and necessary for achieving legitimate data protection objectives. Regardless, the degree of GDPR compliance serves as a valuable indicator of whether privacy measures are proportionate (Bornudd 2022, pp. 52-53).

Until recently, there was no established case law where the degree of excessiveness was discussed within the context of using data protection as a justification in abuse of dominance cases. However, in addition to ADLC's interim decision, the final decision of the ADLC regarding Apple's ATT framework which has been announced recently now provides meaningful guidance on how such justifications are assessed. Since the *Google Privacy Sandbox* case resulted in a commitment with



[66] ADLC, *Apple* 21-D-07 (2021), para. 155.

the CMA[67] and the process is still ongoing with the Commission,[68] there is no assessment related to the objective justification. Therefore, the focus will primarily be on the ADLC's interim and final decisions.

The ADLC, in both of its decisions, evaluated whether Apple's actions were necessary and proportionate to achieve its goal. In this assessment, it considered the interests of all stakeholders, including Apple, users, and application developers/publishers, and analyzed the impacts on both competition and data protection posed by the ATT framework in relation to Apple's objective of providing a high level of personal data protection and privacy. The ADLC also received the opinion of the French Data Protection Authority (*Commission nationale de l'informatique et des libertés*-CNIL), which issued its opinion once for the interim decision on December 17, 2020 and again for the final decision on May 19, 2022.

It should be noted that in both of its decisions the ADLC analyzed the necessity and proportionality of the ATT prompt to determine whether Apple has applied unfair trading conditions under Article 102(2)(a) of the TFEU.[69] This involves determining if the dominant company's actions were reasonable. To assess reasonableness, the case law determines whether the practice is necessary and proportionate to achieve the company's objectives or corporate purpose.[70]

There is a subtle nuance in the burden of proof between assessing the necessity and proportionality of the ATT prompt in the context of abuse of dominance and evaluating it under objective justification. In the former, competition authorities are responsible for proving

[67] To address CMA's competition concerns, Google proposed commitments in February 2022 which were approved by CMA. These solutions involve limitations on the sharing of data within Google's ecosystem, not to engage in any form of self-preferencing practices when using the Privacy Sandbox technologies and ensure that both CMA and UK's data protection authority (ICO) are actively involved in creating and evaluating the Privacy Sandbox initiatives. CMA (2023). *Google's Privacy Sandbox commitments: Implementation and what comes next.* Retrieved September, 23 2023 from https://competitionandmarkets.blog.gov.uk/2023/04/28/googles-privacy-sandbox-commitments-implementation-and-what-comes-next/.

[68] The latest development in case number AT.40670 is the response to the Statement of Objections which was received on 01/12/2023. See: Commission (2023). *AT.40670 - Google-Adtech and Data-related practices*. Retrieved August, 15 2024 from https://competition-cases.ec.europa.eu/cases/AT.40670.

[69] In the final decision, these elements were also assessed within the framework of the objective justification analysis.

[70] ADLC, *Apple* 21-D-07 (2021), paras. 139-143; ADLC, Apple 25-D-02 (2025), paras. 493-494.

that a behavior constitutes a violation. In the latter, the company under investigation must prove that the behavior is objectively justified. However, since the evaluations are quite similar in nature, ADLC's analysis in the context of abuse of dominance assessment in both decisions can serve as precedents for assessments of objective justification. The criteria and approach assessed by the ADLC discussed below can also be applied to the *Google* case, which, similar to the *Apple* case, has yet to receive a decision beyond CMA's commitment decision.

### 2.3.1. ADLC's Interim Decision

Before going into the details of the ADLC's assessment, it is important to note that the ATT framework was officially implemented in April 2021, the technology in question had not yet been implemented at the time of CNIL's opinion (dated December 17, 2020) and ADLC's decision on interim measures were delivered. As such, the earlier decision was based on a pre-implementation assessment, and did not take into account the actual effects of the conduct.

According to the CNIL, Apple's ATT prompt provides consumers with a straightforward and clear method to either consent to or refuse app tracking. The prompt includes two buttons, *"Allow tracking"* and *"Ask app not to track"* which are equally accessible and formatted similarly to ensure simplicity in making a choice. The CNIL also noted that the language used in the ATT prompt is neutral.[71]

The CNIL supports the inclusion of clear information about tracking in the prompt, as it is crucial for users to understand the extent of data collection and how it will be used for advertising purposes. The prompt's design, which requires users to consent to tracking on each app individually, is seen as a positive feature that enhances user awareness and control over their data.[72] The CNIL also stated that neither the GDPR nor the national laws implementing the ePrivacy Directive[73] prevent software developers like Apple from designing and requiring prompts that register user choices regarding data privacy.

[71] ADLC, *Apple* 21-D-07 (2021), paras. 56-57.

[72] ADLC, *Apple* 21-D-07 (2021), para. 58.

[73] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L 201.

The regulatory framework actively encourages developers to consider data protection rights in product design and helps data controllers and processors meet their obligations.[74] Furthermore, it was highlighted that even if Apple is not legally obliged to obtain user consent for ad tracking on behalf of application developers, data protection regulations do not prevent Apple from implementing a system that requires application publishers to obtain user consent before tracking.[75]

The CNIL recognized that Apple's proposed changes could be beneficial for both users and application publishers. The ATT prompt enhances user control over personal data by allowing choices to be made simply and informatively, while also preventing application publishers from tracking users without their explicit consent, either through technical means or contractual agreements. For application publishers, particularly smaller ones, the CNIL noted that this tool simplifies the process to meet their legal obligations regarding user data consent.[76]

Considering this opinion, the ADLC determined that Apple's implementation of its ATT framework was aimed at a legitimate objective, aligning with the company's long-term strategy of prioritizing high privacy standards, which also responds to user demand.[77] This implementation was not deemed anti-competitive in itself, thus representing a legitimate commercial interest.[78]

Following the CNIL's opinion, the ADLC, first assessed the location and the wording of ATT prompt allowing the consumer to accept or refuse the tracking and determined that its wording is neutral and does not suggest that one option is preferable over the other in parallel to the opinion of the CNIL.[79] Additionally, following the initial announcement of the ATT framework, Apple's decision to delay its implementation was welcomed by the ADLC to give application developers time to adjust to the new policy.[80] Furthermore, it was stated that competition regulations do not prevent Apple

[74] ADLC, *Apple* 21-D-07 (2021), para. 60.
[75] ADLC, *Apple* 21-D-07 (2021), para. 61.
[76] ADLC, *Apple* 21-D-07 (2021), paras. 62-64.
[77] ADLC, *Apple* 21-D-07 (2021), paras. 144-146.
[78] ADLC, *Apple* 21-D-07 (2021), para. 147.
[79] ADLC, *Apple* 21-D-07 (2021), paras. 148-149.
[80] ADLC, *Apple* 21-D-07 (2021), para. 154.

from creating its own consent mechanism alongside the platforms developers use to comply with GDPR, provided that the intent is legitimately aimed at enhancing user privacy protection.[81] Referring to the opinion of the CNIL, it was argued that Apple's stance that an operator may implement additional data protection measures beyond those mandated by regulation seems to align with both the letter and the spirit of the GDPR.[82]

The ADLC considered these factors and ultimately determined that Apple's policy was reasonable. It found the policy neither unnecessary nor disproportionate, thereby justifying it based on Apple's legitimate business interests.[83] The ADLC's approach was comprehensive, addressing not only traditional aspects of competition policy but also incorporating the objectives and principles of the relevant data protection regulations. The ADLC observed that the ATT prompt's implementation might not be considered to place excessive or disproportionate restrictions on application developers.[84] In the light of all these assessments, the request for interim measures was denied by the ADLC on March 17, 2021, the investigation continued on its merits.[85] As presented in the first chapter, although the tool of objective justification is recognized in the EU competition law, authorities and courts appear reluctant to accept objective justification defenses. Therefore, the acceptance of the reasonableness of Apple's initiative, one of the digital market players where the EU competition policy has taken an interventionist approach in recent years, and the decision given in favor of Apple constitute an exceptional example. Moreover, it can be argued that CNIL ve ADLC's interpretation regarding proportionality test, is slightly different than the interpretation in *Hilti* and *Tetra Pak II* cases. While in ADLC's decision, Apple is seen as a regulator that ensures and/or helps app developers fulfill their responsibilities arising from the GDPR, the other two cases highlight that ensuring consumer safety is the responsibility of the regulators not the private entities.

81 ADLC, *Apple* 21-D-07 (2021), para. 156.

82 ADLC, *Apple* 21-D-07 (2021), para. 157.

83 ADLC, *Apple* 21-D-07 (2021), para. 164.

84 ADLC, *Apple* 21-D-07 (2021), p. 4.

85 ADLC (2021). *Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case.* Retreived September, 23 2023 from https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/targeted-advertising-apples-implementation-att-framework-autorite-does-not#_ftn1.

Therefore, this different analysis in the EU cases shows that it is difficult to specify conditions that fit every situation. Ultimately, each behavior should be evaluated case by case, taking into account its impact on stakeholders in the affected market, the design and implementation of the conduct, and the consistency of the measures with existing legal frameworks, such as the GDPR and national laws.

Wiedemann argued that the general strategy adopted in the decision is persuasive and applicable to other scenarios. Behavior that might initially seem to violate Article 102 of the TFEU could be justified if it aligns with a legitimate business goal and the methods employed are necessary and proportionate to achieve this aim. Therefore, a key consideration is whether the same degree of data protection could be accomplished through less competitive restrictive alternatives (Wiedemann 2023, p. 31).

On the other hand, it can be argued that while this decision provides guidance, it leaves several issues unresolved. For instance, what occurs if privacy protection is not the genuine motive behind a practice (Giovannini 2021)? In the case law referenced in the first chapter, the CJEU has specified that the defense of "commercial interests" is limited. It cannot be applied if the real intent behind a company's actions is to strengthen and abuse its dominant market position. This limitation becomes relevant when considering cases where data protection is cited as a legitimate commercial interest. In cases such as *Apple's ATT* and *Google's Privacy Sandbox*, behaviors that are seemingly protective of data privacy serve to strengthen the market positions of these companies. Both companies possess sufficient economic resources and access to extensive user data, enabling them to operate independently of external entities. This independence allows them to dictate terms that third parties must comply with, often tilting these terms in their own favor (Wiedemann 2023, p. 32).

While the interim decision offered a preliminary assessment based on the anticipated effects of the ATT framework, the ADLC's final decision explained below, issued after the actual implementation, provides a more definitive evaluation of the framework's competitive and legal implications, including its compatibility with objective justification.

### 2.3.2. ADLC's Final Decision

As CNIL's opinion played an important role in this decision, it would be appropriate to begin with it. The CNIL provided a second opinion on the merits of the case on May 19, 2022, in which it assessed how Apple's ATT framework was actually being implemented this time.[86]

As a preliminary observation, the CNIL recalled that its earlier opinion (dated December 17, 2020) was based on Apple's assurance that application developers would have full flexibility to customize the ATT prompt, including the ability to inform users about how their data would be used.[87] However, upon reviewing the actual implementation of the ATT framework, the CNIL identified key shortcomings. Specifically, it found that the ATT prompt does not allow application developers to include the full information needed to informed consent under the relevant data protection regulations. As a result, application developers are compelled to supplement the ATT prompt with a separate Consent Management Platform (CMP) interface to fulfill their legal obligations. This leads to a dual-layer consent process, where users are asked twice for consent concerning the same processing purpose.[88]

The CNIL further noted the asymmetric user experience depending on the users' response. If a user refuses consent via the ATT prompt, the user must not be presented with a second consent request for the same processing purpose. However, if a user grants via the ATT prompt, the processing can proceed only if the user also gives valid consent via the CMP for the same purpose, as required under data protection law.[89]

Moreover, the CNIL found that requiring application developers to collect user consent twice for the same data processing purpose, through Apple's ATT prompt and CMP, introduces unnecessary complexity. According to the CNIL, this burden could be avoided with minor adjustments to the ATT design. Specifically, the inclusion of a clickable hyperlink could allow the ATT prompt to meet the consent requirements under French law and the GDPR.[90] In conclusion, the

[86] ADLC, Apple 25-D-02 (2025), para. 271.
[87] ADLC, Apple 25-D-02 (2025), para. 272.
[88] ADLC, Apple 25-D-02 (2025), paras. 273-274.
[89] ADLC, Apple 25-D-02 (2025), para. 275.
[90] ADLC, Apple 25-D-02 (2025), para. 276.

CNIL stated that a redesign of the ATT prompt could preserve the core privacy protections, while eliminating excessive complexity and improving regulatory compliance.[91] Therefore, contrary to Apple's claims, aligning the ATT framework with competition law requirements would not compromise the effectiveness of its data protection features.[92]

When it comes to ADLC's assessment, as a preliminary observation, it reiterates, as already noted in its interim decision, that when a dominant company introduces measures aimed at enhancing personal data protection and ensuring the validity of user consent, such initiatives are presumptively legitimate and, in principle, do not infringe competition law. Indeed, the ATT framework provides several data protection benefits by enhancing user control over personal data. Although the objective of the ATT framework is legitimate, its implementation must not distort competition.[93] However, ADLC concluded that Apple's ATT framework imposes burdensome conditions on application developers that are neither necessary nor proportionate to achieve its stated privacy goals; negatively affects competition by placing certain operators, especially smaller ones, at a competitive disadvantage and these restrictions lack objective justification.[94] The following paragraphs explain how the ADLC arrived at this conclusion through its detailed assessment of the ATT framework's design, implementation, and competitive impact.

Firstly, the ADLC assessed the mandatory nature of the implementation of the ATT framework. This requirement is enforced through review mechanisms and non-compliance may lead to suspension or removal of the application. The ADLC concluded that Apple used its dominant position in the iOS application distribution market to unilaterally impose the ATT framework on application developers.[95]

Secondly, the ADLC examined whether the ATT framework was necessary and proportionate to the legitimate privacy objectives advanced by Apple. To that end, the ADLC, firstly, stated that third-party applications are unable to rely solely on Apple's ATT framework

91 ADLC, Apple 25-D-02 (2025), para. 279.

92 ADLC, Apple 25-D-02 (2025), p. 4.

93 ADLC, Apple 25-D-02 (2025), paras. 498-501.

94 ADLC, Apple 25-D-02 (2025), paras. 498-502.

95 ADLC, Apple 25-D-02 (2025), paras. 503-513.

to fulfil their legal obligations under data protection law and are therefore required to implement additional consent mechanisms. This undermines Apple's claim that ATT addresses a market failure in privacy protection, as the system fails to meet the regulatory requirements necessary to justify such an objective. As noted by the CNIL in its 2022 opinion, this results in duplicative consent requests, which unnecessarily complicates the user experience on iOS and increases friction in accessing third-party applications.[96]

Additionally, given Apple's special responsibility as a dominant undertaking, it is required to ensure that the design of its ATT framework remains neutral and does not unjustifiably disadvantage one form of consent collection over another. However, the implementation of the ATT has created a procedural asymmetry, whereby refusing consent to tracking involves a single user action, while granting consent requires an additional step, often through a separate CMP. This unequal treatment favors refusal over acceptance, which may lead to anticompetitive effects particularly for third-party applications that rely on advertising revenue.[97]

Within the context of assessment of necessity and proportionality, lastly, the ADLC identified an asymmetry in treatment between Apple and third-party apps. While the latter were required to obtain dual consent from users for tracking activities (through both ATT and CMP), Apple uses a single prompt to collect user consent for equivalent tracking activities.[98] To assess the necessity and proportionality of the ATT framework, the ADLC examined its practical impact on user experience, the neutrality of its design, and the asymmetrical treatment of third-party applications compared to Apple's own services; it ultimately concluded that the framework imposed unnecessary complexity, lacked neutrality, and resulted in unfair advantage to Apple, and was therefore neither necessary nor proportionate to achieve Apple's stated privacy objectives.

Thirdly, the ADLC conducted an in-depth investigation into the impact of Apple's ATT framework on digital advertising markets, particularly in the iOS ecosystem. It examined how ATT affected application developers and advertising service providers. The ADLC

[96] ADLC, Apple 25-D-02 (2025), paras. 520-526.

[97] ADLC, Apple 25-D-02 (2025), paras. 527-532.

[98] ADLC, Apple 25-D-02 (2025), paras. 533-541.

found that the implementation of ATT significantly reduced user consent rates, thereby impairing the ability to conduct targeted advertising. It concluded that these effects disproportionately harmed smaller publishers and advertising service providers that lack proprietary user data and rely heavily on advertising revenue. While larger players like Meta or Google could adapt using their own data ecosystems, smaller actors experienced revenue losses, reduced ad effectiveness, and greater difficulty in monetizing their services.[99]

Lastly, the ADLC assessed the objective justification. Apple argues that the ATT framework contributes to efficiency gains by addressing consumer demand, which has introduced a new dimension of non-price competition, namely, privacy protection. It also highlights that the ATT mechanism has received positive recognition from consumer organizations and data protection authorities in France and Italy. Additionally, Apple claims that the ATT system is both objectively necessary and proportionate to achieve its privacy-enhancing goals.[100]

However, the ADLC concluded that the design and implementation of the ATT prompt were neither necessary nor proportionate to achieve the privacy objectives claimed by Apple. In line with the CNIL's opinion, it noted the framework introduced undue complexity in the user experience when interacting with third-party applications and undermined the system's neutrality.[101] As a result, the lack of necessity and proportionality led the ADLC to reject any claim of objective justification under Article 102 TFEU.

The ADLC emphasized that the modest adjustments proposed by the CNIL would have allowed Apple to achieve the privacy goals of the ATT framework without undermining its core function, namely, providing a simple and standardized consent interface. The ADLC also found that these changes would have preserved user protection while avoiding unnecessary complexity, as noted by the CNIL. Importantly, the ADLC clarified that ATT is not designed to enable application publishers to meet their legal obligations under data protection law. Rather, it is an additional mechanism introduced by Apple, which does not itself ensure valid consent within the meaning of the GDPR or national data protection law. This distinction is relevant when assessing

[99] ADLC, Apple 25-D-02 (2025), paras. 547-605.

[100] ADLC, Apple 25-D-02 (2025), para. 611.

[101] ADLC, Apple 25-D-02 (2025), para. 614.

proportionality, as a dominant undertaking may adopt legitimate consumer protection measures, but must do so in a manner compatible with competition law obligations.[102]

Briefly, the decision highlights that such initiatives must be designed and implemented in a way that avoids unnecessary complexity, ensures procedural neutrality, and does not result in asymmetrical treatment between the dominant firm and its rivals.

### 2.4. Conclusion

With the increasing importance of data-driven businesses and privacy, companies are likely to refuse to share personal data with competitors under the excuse of enhancing privacy. In such cases, the improvement of personal data protection could potentially be presented by companies as an objective justification defense, categorized under objective necessity, commercial interest, or efficiency. While such a defense might justify potentially anti-competitive behavior, meeting legal conditions such as proportionality becomes crucial.

This study suggests distinguishing between two scenarios. As we discussed within the first scenario, the CJEU has provided guidance on when anti-competitive behavior mandated by regulations like the GDPR would be exempt from scrutiny under Articles 101 and 102 of the TFEU. If the regulation leaves no room for companies to choose their course of action and completely precludes any possibility of competitive activity, then such anti-competitive behavior will be objectively justified. However, if the regulation allows some degree of independence and those independent actions of companies have negative effects on competition, then Articles 101 and 102 remain applicable. The key determining factor is whether the GDPR requirements eliminate all discretion for companies to act in a competitively viable manner or not.

In the second scenario, we have examined actions that go beyond GDPR requirements and come to the conclusion that such measures may be justified if they are suitable, necessary, and proportionate for legitimate privacy goals. Together, the interim and final decisions provide important guidance on how proportionality is applied in practice by



[102] ADLC, Apple 25-D-02 (2025), paras. 616- 618.

competition authorities. The interim decision reflects the conditions under which a privacy measure may be considered proportionate, particularly where its design is neutral and its implementation minimally restrictive. The final decision, however, demonstrates how additional complexity, lack of neutrality, and asymmetrical treatment of competitors can lead to a finding of disproportionate conduct, even when privacy is invoked. These contrasting outcomes help determine the boundaries of acceptable conduct under Article 102 TFEU and offer a valuable analytical framework for assessing similar measures in future enforcement contexts.

The main problem, therefore, lies in determining which behaviors are actually required by law or exceed the limits of what is required by law. This highlights the necessity for cross-institutional cooperation between competition and data protection authorities to effectively manage these overlapping concerns. The *Apple* case illustrates the value of such collaboration: the CNIL's opinions played a pivotal role in both the interim and final decisions of the ADLC by offering expert assessments on whether the ATT prompt met the requirements of informed consent. These findings are directly used in the ADLC's proportionality analysis. The case highlights how coordinated regulatory input can improve both the accuracy and legitimacy of competition law enforcement in complex digital markets where privacy and competition concerns intersect. The next chapter will explore how such cooperation can be structured to address these challenges.

## 3. CROSS-REGULATORY COOPERATION

As indicated in the previous chapter, when examining whether enhancing privacy constitutes an objective justification, it is required to consider both the general framework for objective justifications developed in the case law of the European courts and the relevant data protection regulations. This requirement highlights the importance of cooperation between competition and data protection authorities. Therefore, this section will discuss the necessity of such cooperation, followed by an overview of the various forms of cooperation between the two authorities in different countries, and finally, it will debate which model is most suitable.

### 3.1. The Necessity of Cooperation

In the digital economy, the extensive collection, access, and distribution of data pose challenges within the realms of both competition and data protection law. Specifically, while the practices of gathering and processing data are scrutinized for adherence to data protection regulations and privacy rights, they, at the same time, may also cause competition law issues. Thus, there is a growing convergence and interaction between these regulatory frameworks and the authorities that enforce them. This relationship does not only carry a complementary nature but also has the potential for inconsistencies or conflicts in enforcement efforts (OECD 2024b, p. 1).

Although competition law and data protection serve distinct purposes and are enforced by different authorities, both are essential in ensuring that companies handle data in ways that align with individuals' interest. These regulations safeguard diverse yet complementary interests. Therefore, it is important to apply competition and data protection laws in a synergistic manner for consistency and to avoid potential discrepancies (OECD 2024b, p. 1).

The *Meta*[103] judgment highlighted the significance of collaboration and coordination between competition and data protection authorities. This case revolved around the abuse of dominance through the violation of data protection regulations, specifically the GDPR. In February 2019, the Bundeskartellamt (German Competition Authority) determined that Meta held a dominant position within the social network market and was abusing this dominance. The abuse was identified as Meta's practice of forcing users to consent for combination data gathered via its various services and third-party sources to access the Meta network. This action was deemed to lack a valid legal basis under the GDPR, constituting exploitative abuse according to the German Competition Act.[104] The decision was challenged by Meta and the discourse escalated to the EU level, with the CJEU involved via a preliminary reference from the Düsseldorf Court, assessing the merits of the case.

[103] Facebook announced in October 2021 that it changed its company name to Meta. See: Meta (2021). *Introducing Meta: A Social Technology Company.* Retrieved February, 3 2024 from https://about.fb.com/news/2021/10/facebook-company-is-now-meta/.

[104] Bundeskartellamt (2019). *Case B6-22/16 Facebook*. Retrieved February, 13 2024 from https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568.

The CJEU clarifies that if a national competition authority needs to decide on whether an undertaking's data processing complies with the GDPR during an abuse of dominance case, it must cooperate with the relevant data protection authority to ensure consistent application of the GDPR.[105] Furthermore, in the following part of the judgment, the CJEU outlined procedural guidelines on this matter.[106] The approach outlined by the CJEU in the *Meta* judgment seeks to ensure coordination and consistent outcomes between distinct yet complementary regulatory frameworks (OECD 2024b, p. 9).

Considerations of data protection and therefore the cooperation between two regulators may emerge when assessing the theory of harm, designing remedies or formulating objective justifications. Indeed it has become increasingly common for digital companies to use privacy as a shield for potentially anticompetitive behavior (Colangelo 2023). Although privacy alone is unlikely to serve as a valid justification for such conduct, it is essential for competition authorities to critically evaluate the purported privacy enhancing justifications presented. Alleged privacy-related justifications for potentially anticompetitive behavior must be carefully assessed on a case-by-case basis.

More specifically, determining when enhancing privacy aligns with the provisions of the GDPR and when it goes beyond these provisions requires an interpretation of the GDPR or relevant data protection regulations. Therefore, for the most accurate assessment, communication with data protection authorities may be necessary. Consequently, cooperation between authorities becomes particularly important in the evaluation of objective justification.

### 3.2. The Models of Cooperation

Although the necessity for collaboration between competition and data protection authorities in data-related matters is widely recognized, the optimal methods and practical outcomes of each method are still not yet certain. There are different levels of cooperation in various countries, each providing valuable perspectives and learnings (OECD 2024a, p. 26).

[105] Case C-252/21 *Meta v Bundeskartellamt* [2023] ECLI:EU:C:2023:537, para. 52.

[106] Case C-252/21 *Meta v Bundeskartellamt* [2023] ECLI:EU:C:2023:537, para. 56-63.

In the first approach, agencies engage in informal ad-hoc cooperation when a competition authority may seek input from a data protection authority before finalizing such as an interim measure or remedy (Reyna 2020, p. 12). For example, in both the interim decision and the final decision on the merits in the *Apple* case in France, the ADLC consulted the CNIL to assess the data protection implications of Apple's conduct, as explained above.[107] Similarly, in the UK *Google Privacy Sandbox* case, the CMA consulted the ICO on a case-specific basis. In addition, similar to the *Apple* case in France, in June 2022, the Bundeskartellamt initiated proceedings against Apple under Section 19 (a) of the German Competition Act and Article 102 TFEU to examine if Apple's ATT constitutes self-preferencing or impedes competition on Apple devices.[108] In a similar vein, the Bundeskartellamt, also, has consulted with the German Data Protection Authority to assess the relationship between the ATT and data protection laws, and to consider if Apple's practices, which claim to enhance user privacy, could justify potential competitive restrictions (OECD 2024c, p. 6).[109]

Another form of ad-hoc cooperation can occur at a very high level, such as through participation in joint networks or forums. Examples include the Digital Regulation Cooperation Forum established in the UK in 2020,[110] the Digital Regulation Cooperation Platform launched in the Netherlands in 2021,[111] the Digital Platform Regulators Forum

[107] Collaboration between the two authorities was also seen in the *GDF Suez* case in 2014. In this case, the ADLC required GDF Suez to grant competitors access to its customer information. However, after consulting with the CNIL and following their guidance, the company was required to notify users about the sharing of their data with competitors and provided them with the option to opt out. See: ADLC (2014). *GDF Suez*, 14-MC-02. Retrieved August, 13 2024 from https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/14mc02.pdf.

[108] Bundeskartellamt (2022). *Bundeskartellamt reviews Apple's tracking rules for third-party apps*. Retrieved June, 9 2024 from https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html.

[109] Additionally, the Bundeskartellamt coordinated with data protection authorities throughout the Meta investigation since it is related to the interaction between privacy and competition law concerns. See: Bundeskartellamt (2019). Case Summary. Retrieved August, 13 2024 from https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[110] CMA (2023). *The Digital Regulation Cooperation Forum.* Retrieved June, 9 2024 from https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum.

[111] Authority for Consumers & Markets (2023). *The Digital Regulation Cooperation Platform*. Retrieved June, 9 2024 from https://www.acm.nl/en/about-acm/cooperation/national-cooperation/digital-regulation-cooperation-platform-sdt.

initiated in Australia in 2022,[112] and the Irish Digital Regulators Group also launched in 2022.[113] These forums are often voluntary and aim to develop coherent regulatory approaches within the digital sphere. A similar initiative was proposed by the European Data Protection Supervisor (EDPS). Recognizing the impact of big data, machine learning, and artificial intelligence, the EDPS suggested creating a Digital Clearinghouse for privacy, competition, and consumer protection agencies to share information and discuss enforcement to benefit individuals. The EDPS has organized several meetings and issued statements to support this initiative.[114]

These cooperation fora bring together regulators to work in a coordinated manner, exchange expertise, and achieve better outcomes for common issues especially in digital markets (OECD 2024a, p. 29). This indicates a broader, policy-focused approach rather than dealing with specific cases individually. Additionally, this type of cooperation involves regular meetings and ongoing communication among counterparts. This goes beyond ad-hoc cooperation, which typically occurs on a case-by-case basis and may lack the continuity and systematic approach seen in structured cooperation. Although this type of cooperation is classified as an ad-hoc by Reyna (2020, p. 13), it could be argued that they are more policy oriented and more structured because of the scope and the nature of the structure.

In the second model, legislation explicitly outlines the methods for cooperation between different regulatory agencies. Lawmakers establish formal communication channels between authorities to facilitate more streamlined enforcement in cases that are of mutual interest (Reyna 2020, p. 12). For instance, in the UK, the Digital Markets Competition and Consumers Bill[115] introduces mechanisms to enable coordination between the CMA, which implements the digital markets regime, and other regulators, including ICO. The

[112] Australian Government (2022). *The Digital Platform Regulators Forum.* Retrieved June, 9 2024 from https://dp-reg.gov.au/.

[113] Ireland Data Protection Commission (2022). *Regulators welcome National Digital Strategy.* Retrieved June, 9 2024 from https://www.dataprotection.ie/index.php/en/news-media/latest-news/regulators-welcome-national-digital-strategy.

[114] EDPS (2020). *Big Data & Digital Clearinghouse*. Retrieved June, 9 2024 from https://www.edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en.

[115] UK Parliament (2024). *Digital Markets, Competition and Consumers Act 2024*. Retrieved June, 9 2024 from https://bills.parliament.uk/bills/3453.

Bill mandates the CMA to consult with relevant regulators, such as the ICO, before exercising its powers in ways that might impact the ICO's data protection functions. Additionally, the Bill extends existing provisions to allow information sharing between the CMA and the ICO, facilitating their respective statutory duties (OECD 2024d, p. 8). To give an example from another jurisdiction, Section 50 (f) (1) of the German Competition Act permits the exchange of information, including confidential details, between these authorities in Germany. Although in *Meta* judgment, the CJEU emphasized the necessity for such cooperation, no equivalent cooperation rules exist at the European level. Currently, there are limited formal regulations for cooperation between competition and data protection authorities (OECD 2024c, p. 6).

As an intermediate solution between informal ad-hoc cooperation and formal legislation on cooperation, another method of cooperation could be the signing of a protocol for collaboration between authorities. In France, on December 12, 2023 the CNIL published that a joint declaration had been signed with the ADLC to deepen their cooperation.[116] Despite having distinct objectives, the CNIL and the ADLC seek to harmonize their actions, ensuring predictability and consistency to deter privacy-harming behaviors. They will integrate "privacy" and "competition" considerations in their respective analyses and actions. In 2023, the Turkish Personal Data Protection Authority and the Turkish Competition Authority also signed a cooperation and information-sharing protocol. This agreement aims to enhance the enforcement of their respective laws through joint efforts in cases that fall under the jurisdiction of both authorities and require swift and effective action. The protocol includes the publication of joint reports to raise awareness and deliver a unified message to businesses, as well as the organization of joint presentations, discussion programs, and training sessions.[117] Spain followed these steps and on June 4, 2024, the Catalan Data Protection Authority announced that it had signed a collaboration protocol with the Catalan Competition Authority

[116] CNIL (2023). *Data protection and competition: the CNIL and the Autorité de la concurrence sign a joint declaration.* Retrieved June, 9 2024 from https://www.cnil.fr/en/data-protection-and-competition-cnil-and-autorite-de-la-concurrence-sign-joint-declaration.

[117] The Turkish Competition Authority (2023). *A Cooperation and Information Sharing Protocol was signed between the Personal Data Protection Authority and the Competition Authority*. Retrieved June, 9 2024 from https://www.rekabet.gov.tr/tr/Guncel/kisisel-verileri-koruma-kurumu-ile-rekab-6df0abc2d373ee118ec700505685da39

to address market and competition challenges related to the use of personal data.[118] The protocol is designed to enhance information sharing, provide mutual support for specific activities, and promote training and awareness initiatives.

In a third model, agencies that have jurisdiction over practices violating multiple legal provisions can collaborate to issue joint decisions and enforce unified remedies. This integrated approach allows for a coordinated response from the relevant regulatory bodies (Reyna 2020, p. 12). In relation to this type, the first thing that comes to mind might be the joint statement between CMA and ICO (2021) emphasizing their shared perspectives on the relationship between competition and data protection in the digital economy. They highlight the crucial role of data and the strong synergies between the goals of competition and data protection. They also committed to work together to address any perceived conflicts between their objectives. These joint communications suggest a deliberate and planned approach to their cooperation. However, the cooperation between the CMA and ICO does not specifically fall under the third category described. Because the cooperation described between them appears to be more focused on policy alignment, mutual understanding, and proactive engagement rather than joint enforcement actions targeting specific legal violations across multiple domains simultaneously.

As a final model, certain agencies have jurisdiction over both data protection and competition matters. For instance, the Federal Trade Commission (FTC), one of the two federal agencies enforcing US antitrust laws, is also responsible for consumer protection and privacy law enforcement in the US. A notable example of parallel supervision is the *Facebook/WhatsApp* merger, which was approved by the FTC in 2014. In response to the transaction, the FTC's Bureau of Consumer Protection notified the involved parties of their existing obligations to protect user data privacy. This action complemented the intervention by the FTC's Bureau of Competition, recognizing the crucial role of data privacy in protecting user rights and as a competition parameter that could have been impacted by the merger (OECD 2024a, pp. 27-28).

[118] Catalan Data Protection Authority (2024). *Agreement between the APDCAT and the ACCO to work together in the face of market challenges and competition when personal data is used.* Retrieved June, 9 2024 from https://apdcat.gencat.cat/en/sala_de_premsa/notes_premsa/noticia/Acord-ACCO.

Moreover, there are various examples of this merged authority approach in Europe as well. Indeed, in countries such as Bulgaria, Poland, Malta, France, the UK, Ireland, Spain, Netherlands (from 2013), Finland and Denmark, enforcement powers related to competition law and consumer protection have been allocated to a single administrative authority (Cseres 2020). These examples demonstrate that consolidating authorities with different legal domains into a single entity is possible in Europe, showcasing Europe's existing experience in this regard.

Therefore, there appears to be a growing agreement across various countries on the necessity of enhancing cooperation between regulators. This cooperation can manifest in various forms, ranging from informal activities initiated by the regulators themselves to legislative reforms implemented by policymakers. However, it appears that a one-size-fits-all approach applicable to all situations and countries has not yet been achieved.

### 3.3. Optimal Solution

To determine the most ideal approach of cooperation between regulatory authorities, it is essential to recognize the benefits and limitations of different approaches stated above. It could be argued that the informal ad-hoc cooperation serves as a valuable mechanism for regulatory authorities to share priorities, exchange best practices, and consult with one another on specific cases. However, this kind of cooperation has limitations. Without a formal legal structure to guide exchanges, competition authorities may be reluctant to collaborate with other agencies, particularly in situations where it could slow down proceedings. Additionally, there might be hesitation to share confidential business information or potential conflicts between authorities concerning the results of an investigation (Reyna 2020, p. 14). Moreover, there is a significant risk that the outcomes of procedures could be invalidated if they do not adhere to formal requirements due to the lack of a legal basis for information exchange.

On the other hand, regarding integrated dialogue approach, given the current division of competences between competition and data protection authorities, establishing clear procedural rules for their interaction on sensitive issues, such as evidence gathering and

maintaining independence, is essential. Although this approach could ensure consistent enforcement across different legal domains, it also has drawbacks. It may complicate and prolong proceedings, and public enforcement could become reliant on reaching consensus between authorities with varying mandates (Reyna 2020, p. 16).

Alternatively, centralizing authority and expertise within a single regulatory body could deepen insights into data-related dynamics in digital markets and more effectively incorporate diverse policy factors in enforcement actions. This approach may lessen the reliance on external coordination and diminish the likelihood of discrepancies (OECD 2024a, p. 28). However, when considering the merged authorities, it is important to recognize that combining an authority responsible for upholding a fundamental right with those focused on market efficiency and consumer economic interests poses risks of combining the protection of a non-economic data protection right with the protection of economic interests such as competitive markets, consumer economic interests (Reyna 2020, p. 16).

Furthermore, consolidating authorities under a single entity for both legal domains would require a completely different structure and a significant transformation for countries who have already established two different regulatory bodies. However, the required level of cooperation can be achieved without such a structural and fundamental change for most cases because existing authorities can establish formal cooperation channels and frameworks that allow for the necessary information sharing. This approach would maintain the specialized expertise of separate authorities while still fostering collaboration, thereby minimizing disruption and preserving the effectiveness of each regulatory body. Therefore, it would be more appropriate to initially establish formal cooperation channels between the authorities before considering the option of merging them.

When evaluating the benefits and drawbacks of all these different approaches together, truly effective cooperation is most feasible when formal agreements or legislations are established to facilitate and structure these interactions for several reasons. First of all, the formal approach provides a structured and consistent framework for cooperation, ensuring that competition authorities are obligated to collaborate with data protection agencies which informal ad-hoc cooperation might not achieve. Secondly, it facilitates the safe environment for sharing

of confidential business information between authorities, addressing potential hesitations and protecting sensitive data. Thirdly, formal cooperation channels can achieve the necessary benefits without requiring a significant structural transformation of existing authorities, which would be complex and disruptive. Moreover, providing a legal framework helps maintain the independence and division of competence of different authorities, ensuring that their specific mandates are respected. Therefore, by adopting formal collaborative measures, competition and data protection authorities can ensure that privacy considerations are effectively integrated into the assessment of objective justifications for potential abuses of dominance.

Currently, various forms of cooperation exist across EU member states, ranging from informal ad-hoc consultations to more structured protocols and legislative provisions, but these are not harmonised under the EU law (EDPB 2025, p. 8). However, despite these advancements, there are still gaps and challenges that need to be addressed to achieve a harmonized and effective regulatory framework across and within the EU. While some jurisdictions have established formal legislative frameworks for cooperation, such as the UK's Digital Markets Competition and Consumers Bill, there remains a lack of uniformity at the EU level. Harmonizing these frameworks could enhance consistency in enforcement and reduce regulatory arbitrage. Furthermore, digital markets operate across borders, posing jurisdictional challenges for enforcement actions. Clear guidelines on jurisdiction and cooperation protocols for cross-border cases are essential to avoid conflicts and ensure effective enforcement. Therefore, it is also important for the authority to communicate with its international counterparts and relevant global forums to foster consensus and promote global regulatory consistency and cooperation.

### 3.4. Conclusion

In conclusion, effective cooperation between competition and data protection authorities is essential to address the complex challenges surrounding the use of data posed by the digital economy. While informal ad-hoc cooperation offers flexibility, it often lacks the necessary structure and obligatory nature, potentially hindering effective collaboration. Formal agreements and legislation provide a

robust framework for consistent interaction, ensuring that competition authorities are compelled to collaborate with data protection agencies, facilitating the secure sharing of confidential information, and maintaining the independence and competence of each authority. This structured approach allows for a more comprehensive and harmonious application of both competition and data protection laws, ensuring that considerations about privacy matters are appropriately integrated into the assessment of potential abuses of dominance. By adopting formal collaborative measures, authorities can better navigate the intersection of these regulatory domains to safeguard both market competition and individual privacy rights.

## FINAL CONCLUSION

This study has explored the extent to which privacy can form an objective justification for abuse of dominance behavior under EU competition law. Through extensive analysis of case law, regulatory decisions, and theoretical frameworks, we have arrived at several key findings.

Within the context of the first sub-question, this study has revealed that objective justification in abuse of dominance cases has historically been assessed under three main categories: objective necessity, commercial interest, and efficiency. The EU Courts and competition authorities have generally applied a strong proportionality test which ensured that the means employed were suitable and necessary without being excessively restrictive, when evaluating these justifications. Despite its theoretical recognition, the practical application of objective justification had been limited, as courts adopted a narrow focus on objective factors and placing a high burden of proof on the dominant firms. Therefore, while objective justification played a crucial role in distinguishing lawful from unlawful conduct, its stringent legal requirements and the high standard of proof made it challenging for firms to successfully invoke this defense in practice.

Regarding the second sub-question, the enhancement of personal data protection as an objective justification defense can be invoked under objective necessity, commercial interest, or efficiency. This defense could potentially justify actions that seem anti-competitive, but it must meet legal requirements such as proportionality to be valid.

This study suggested two different scenarios to assess proportionality within the framework of privacy: the conduct (i) is mandated by regulations and (ii) going beyond the regulatory requirements. For the first scenario in such cases, when anti-competitive behavior is strictly mandated by data protection regulations like the GDPR, following the *Deutsche Telekom* precedent, compliance with these regulations could potentially exempt a company from competition law scrutiny if the regulations leave no room for competitive activity. However, this exemption applies only within a limited scope and does not apply if the company has some degree of discretion within which competitive activities are possible.

In the second scenario, when privacy-enhancing measures go beyond regulatory requirements, such measures might be justified if they are suitable, necessary, and proportionate to achieve legitimate privacy goals. ADLC's interim and final decisions on Apple's ATT framework sets an important precedent for how competition authorities may approach similar cases in the future, particularly in digital markets where privacy and competition concerns increasingly overlap. Although the interim decision treated the privacy justification as proportionate, the final decision drew a clear line that privacy-enhancing measures cannot be shielded from competition scrutiny solely based on companies' enhancing privacy intent. Rather, they must withstand a thorough legal and economic assessment to ensure they do not result in anti-competitive effects.

Finally, this study has underscored the importance of effective cooperation between competition and data protection authorities in accurately assessing privacy-based justifications. Specifically, in determining what is mandated by privacy regulations and what goes beyond those mandates, competition authorities may need to seek the expertise of data protection authorities. While various models of cooperation exist, ranging from informal ad-hoc consultations to more structured frameworks, formal agreements or legislation appear to offer the most robust and reliable approach. Formal cooperation mechanisms presumably will be stronger when it comes to facilitating secure information sharing, ensure consistent enforcement across different legal domains, and provide a clear legal basis for collaborative actions. However, there is still a need for greater harmonization of cooperation frameworks at the EU level to ensure consistent enforcement and

address cross-border challenges in digital markets. In conclusion, while significant steps have been made in promoting cooperation between competition and data protection authorities in the EU, there is still work to be done to achieve a cohesive and comprehensive approach. Continued efforts to standardize cooperation mechanisms, enhance resources, address jurisdictional challenges and promote proactive engagement will be crucial in advancing regulatory frameworks that effectively safeguard both competition and data protection in the digital economy.

As the digital economy continues to evolve, the interplay between data protection and competition law will undoubtedly remain a critical area of focus. The potential for privacy-enhancing measures to impact market competition, and vice versa, necessitates a holistic approach that considers both the protection of individual privacy rights and the maintenance of fair competition.

In conclusion, as discussed in this study, the success of invoking objective justification depends on various factors that might differ case to case. While the existing framework provides a solid foundation, there is still a need for further development to create a more nuanced and cohesive approach that aligns with the complexities of the data-related conducts. Unlike other cases where objective justifications are assessed solely by competition authorities, cases where privacy is the basis for invoking objective justification, may require collaboration between competition and data protection authorities. Such an approach will ensure that both competition and data protection are adequately safeguarded.

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Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621.

Case T-83/91 *Tetra Pak International SA v Commission (TetraPak II)* [1994] ECR II-755, ECLI:EU:T:1994:246.

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# YAYIN İLKELERİ VE MAKALE YAZIM KURALLARI

## 1. YAYIN İLKELERİ

1. Yayın hayatına 2000 yılında başlayan Rekabet Dergisi, Rekabet Kurumu tarafından altı ayda bir yayımlanan hakemli bir dergidir. Rekabet Dergisi'nde, rekabet hukuku, politikası ve sanayi iktisadı alanlarındaki Türkçe veya İngilizce özgün makalelere, vaka yorumları ve benzeri görüşler ile haberlere yer verilmektedir.

2. Rekabet Dergisi'nde yayımlanmak üzere rekabetdergisi@rekabet.gov.tr adresine gönderilen yazılar daha önce başka bir yerde yayımlanmamış veya yayımlanmak üzere gönderilmemiş olmalıdır. Dergimize gönderilen makaleler, **İntihal.net programı** aracılığı ile taranıp, intihal raporları editörlerimiz tarafından incelenmektedir. İncelemede, intihal oranı, intihal raporunun içeriği ile birlikte değerlendirilmektedir. Başka eserlerin yanı sıra yazarın önceki çalışmalarından intihal yapması da kabul edilmemektedir. Değerlendirmede intihal yönünden olumsuz bulunan makaleler yazara iade edilir.

3. Yazarlar, yazılarıyla birlikte, iletişim adresi, telefon ve elektronik posta bilgilerini sunmalıdır. Gönderilen yazılar, editörler tarafından içerik ve "Makale Yazım Kuralları" başlığı altında belirtilen kurallara uygunluk bakımından değerlendirilir. Ardından, yazarın ismi gizlenerek konu hakkında uzman iki hakeme gönderilir. Hakemlerden gelecek raporlar doğrultusunda yazının basılmasına, reddedilmesine veya yazardan düzeltme istenmesine karar verilecek ve bu durum yazara en kısa sürede bildirilecektir. Gerekli durumlarda üçüncü bir hakemin görüşüne başvurulabilir.

4. Rekabet Dergisi'nde yayımlanacak her bir yazı karşılığında yazarına telif ücreti olarak **net 15.000TL** ödenir. Ayrıca 10 adet dergi yazara ücretsiz olarak gönderilir.

## 2. MAKALE YAZIM KURALLARI

1. İlk sayfada şu bilgiler yer almalıdır:

a) Yazının Türkçe ve İngilizce başlığı (Siyah ve tümü büyük harf karakterinde),

b) Yazarın adı, çalıştığı kuruluş ve yazarın **ORCID numarası**[1] (Yazı başlığının hemen altında, sayfanın sağına yanaştırılmış olarak yazar adı belirtilmeli ve soyadın sonuna bir yıldız konulmalıdır. Yıldızlı dipnotta ise yazarın çalıştığı kuruluş unvanı ile koyu yazı karekteriyle ORCID numarası belirtilmelidir),

c) 200 kelimeyi aşmamak üzere Türkçe ve İngilizce özet,

d) Türkçe ve İngilizce olarak en az beş anahtar kelime.

2. Yazılar, kaynakça bölümü dahil olmak üzere çift aralıklı olarak 12 punto Times New Roman karakteri ile yazılmalıdır. Dipnot ve tablolarda ise 10 punto harf büyüklüğü kullanılmalıdır. Dipnotlar numara sırasıyla sayfa altında gösterilmelidir. Tablo ve şekillere numara verilmeli; başlıkları üstünde, kaynakları ise altında yer almalıdır.

3. Kısaltılacak isim ilk defa kullanıldığında, kısaltılmadan ve parantez içinde kısaltması belirtilerek kullanılmalıdır.

4. Metin içerisinde kullanılan yabancı kelimeler italik olarak belirtilmelidir.

5. Metin içerisindeki başlıklar, "Giriş" ve "Sonuç" hariç olmak üzere harf ya da Roma rakamı kullanılmaksızın aşağıdaki şekilde düzenlenmelidir:

[1] ORCID, Open Researcher and Contributor ID'nin kısaltmasıdır. ORCID numarasını almak için http://orcid.org adresinden ücretsiz kayıt oluşturabilirsiniz.

**1. KALIN VE TÜMÜ BÜYÜK HARF**

**1.1. Kalın ve Sadece İlk Harfler Büyük**

**1.1.1. Kalın ve Sadece İlk Harfler Büyük**

6. Açıklama notları sayfa altında dipnot şeklinde ifade edilmelidir. Metin içinde gönderme yapılan bütün kaynaklar ise kaynakça başlığı altında gösterilmelidir. Kaynakça alfabetik sıraya göre hazırlanmalıdır. Bir yazarın birden çok eserine başvurulmuşsa bu durumda yakın tarihli eser sonra gösterilmelidir. Bir yazarın aynı tarihli birden çok eseri varsa, yayın tarihleri sonuna "a", "b", "c" gibi harfler eklenmelidir.

Kaynakçadaki ve metin içindeki kısaltmalar aşağıdaki tabloya göre yapılmalıdır.

| **Açıklama** | **Türkçe** | **İngilizce** |
|---|---|---|
| Sayfa (Page) | s. | p. |
| Sayfalar (Pages) | ss. | pp. |
| Editörlü Kitap (Edited Books) | içinde | in |
| Editör | Ed. | Ed. |
| Editörler | Ed. | Eds. |
| Çeviren | Çev. | Trans. |
| Bölüm | böl. | chap. |
| Diğer Yazarlar | vd. | et al. |

Yazarlar metin içinde yapacakları atıflar ve kaynak gösterimi için **American Psychological Association (APA) tarafından yayımlanan Kılavuzun 6. sürümünde** yer alan kurallara uymalıdır[2]. Gönderme yapılırken ve kaynakça düzenlenirken uyulması gereken biçim kurallarına aşağıda yer verilmiştir:

[2] Daha detaylı bilgi için aşağıdaki bağlantıları ziyaret edebilirsiniz:
- Basics of APA Style Tutorial; (http://flash1r.apa.org/apastyle/basics/index.htm)
- APA Formatting and Style Guide; (http://owl.english.purdue.edu/owl/resource/560/01/)
- Mini-Guide to APA 6th for Referencing, Citing, Quoting (http://library.manukau.ac.nz/pdfs/apa6thmini.pdf)

**Metin İçinde Kaynak Gösterimi**

**a. Tek Yazarlı Eser:**

Metin içinde kaynak gösterilirken yazarın soyadı, eserin yayın tarihi ve doğrudan aktarmalarda da sayfa numarası verilmelidir.

Genel bir alıntı söz konusu ise (Metin 2005) ya da Metin'e (2005) göre; doğrudan alıntılarda ise (Metin 2005, s. 44), Metin'e (2005, s. 101) göre

**b. İki Yazarlı Eser:**

İki yazarlı bir çalışmayı metin içinde kaynak gösterirken her iki yazarın soyadlarına yer verilmelidir:

(Kılıç ve Akgün, 2010, s. 33) ya da Kılıç ve Akgün'e (2010) göre

**c. Üç ve Daha Fazla Yazarlı Eser:**

Metin içinde ilk kez atıf yapıldığında tüm yazarların soyadları verilir; sonraki yerlerde sadece ilk yazarın soyadı verildikten sonra "vd." eklenir. Yazım dili İngilizce ise "vd." yerine "et. al." yazılır:

Kaynak ilk geçtiğinde (Özgümüş, Adaklı& Çelenk, 2004) sonraki geçişinde (Özgümüş vd., 2004) olarak yer alır.

**d. Aynı Konu ile İlgili Birden Fazla Atıf Yapılması Durumunda:**

Atıflar tarih sırasına ve aynı tarihteki atıflar isme göre alfabetik olarak sıralanmalıdır: (Karataş ve Küçükçene, 1990; Deluga, 1995; Brockner, Siegel, Daly, Tyler & Martin, 1997; Francisco, 2000; İşbaşı, 2000)

**e. İkincil Bir Kaynaktan Alıntı:**

Çalışmalarda birincil kaynaklara ulaşmak esastır; fakat bazı güçlükler nedeniyle bu kaynağa ulaşılamamışsa göndermede metin içinde alıntılanan ya da aktarılan kaynak belirtilir.

- Bacanlı'nın (1992) (akt. Özden, 1996) çalışmasında...

- Seidenberg's study (1996) (as cited in Peter, 1993)

**f. Yazarı Belli Olmayan Yayınlar:** Raporlar vb.: Metin içindeki ilk göndermede:

Sayfa numarası belli ise (OECD, 2017, s. 84); belli değilse OECD (2017).

**g. İnternetten Alınan Kaynaklar:**

Metin içi göndermelerde makale başlığı, bölüm başlığı ya da bir web sayfasının adı çift tırnak içinde dergi, kitap, broşür ya da rapor başlığı ise italik olarak yazılır.

"Hacettepe Üniversitesi Bilgi", 2010

**Kaynakça**

**a.Tek Yazarlı Kitap:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl). Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde. Baskı Yeri: Yayınevi.

**Şişman, M. (2007).** *Örgütler ve kültürler.* Ankara: Pegem Akademi Yayıncılık.

**b. İki ya da Daha Fazla Yazarlı Kitap:**

İlk Yazarın Soyadı, İlk Yazarın Adının Baş Harfleri. ve İkinci Yazarın Soyadı, İkinci Yazarın Adının Baş Harfleri. (Yıl). Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde. Yer: Yayınevi.

Yıldırım, A. ve Şimşek, H. (2016). *Sosyal bilimlerde nitel araştırma yöntemleri*. Ankara: Seçkin Yayıncılık.

**c. Gözden Geçirilmiş ya da Genişletilmiş Baskılar:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl). Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde (Gözden geçirilmiş/genişletilmiş x. baskı). Baskı Yeri: Yayınevi.

Korkmaz, A (2013). *Dil bilgisi terimleri sözlüğü (*Gözden geçirilmiş genişletilmiş 5. baskı). Ankara: Bilgi Yayınevi.

**d. Yazarı Belirsiz Kitaplar:**

Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde. (Yıl). Yer: Yayınevi.

*The 1995 NEA almanac of higher education*. (1995). Washington DC: National Education Association.

**e. İki ya da Daha Fazla Ciltten Oluşan Kitaplar:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl). Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde (x. cilt). Baskı Yeri: Yayınevi.

Moran, B. (1995). *Türk romanına eleştirel bir bakış* (3. cilt). İstanbul: İletişim.

**f. Çeviri Kitaplar:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl). Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde. (Çevirmenin Adının İlk Harfleri. Çevirmenin Soyadı, Çev.) Baskı Yeri: Yayınevi.

Jones, C. I. (2001). *İktisadi büyümeye giriş.* (Ş. Ateş, İ. Tuncer, Çev.) İstanbul: Literatür Yayınları.

**g. Makaleler:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl, varsa ay). Makalenin adı yalnızca ilk kelimenin ilk harfi büyük, geri kalanlar özel isim değilse küçük şekilde. Derginin Adı İtalik ve Her Kelimenin İlk Harfi

Büyük Şekilde, Cilt İtalik Şekilde (Sayı), Sayfa Numara Aralığı. doi: xxxxxx (Varsa)

Anderson, A. K. (2005). Affective influences on the attentional dynamics supporting awareness. *Journal of Experimental Psychology: General, 154,* 258–281. doi:10.1037/0096- 3445.134.2.258

**h. Yayımlanmamış Yüksek Lisans/Doktora Tezleri:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl). Tezin adı italik olarak, yalnızca ilk kelimenin ilk harfi büyük, geri kalanlar özel isim değilse küçük şekilde (Yayımlanmamış Yüksek Lisans/Doktora Tezi). Kurumun Adı, Kurumun Yeri.

Sarı, E. (2008). *Kültür kimlik ve politika: Mardin'de kültürlerarasılık*. (Yayımlanmamış Doktora Tezi). Ankara Üniversitesi Sosyal Bilimler Enstitüsü, Ankara.

**i. Editörlü Kitapta/Derlemede Bölüm:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yıl). Yazının başlığı. İçinde Editörün adının/adlarının baş harfi. Editörün soyadı (Ed.), Kitabın adı italik ve ilk harften sonra (özel adlar dışında) bütünüyle küçük şekilde (ss. sayfa numara aralığı). Baskı Yeri: Yayınevi.

Oktar, S., & Eroğlu, N. (2015). Petrolün ilk küresel krizi: 1973 krizi. İçinde N. Eroğlu, H. İ. Aydın (Ed.), *İktisadi krizler ve Türkiye ekonomisi* (ss. 177-190). Ankara: Orion Kitabevi.

Raz, N. (2000). Aging of the brain and its impact on cognitive performance: Integration of structural and functional findings. In F. I. M. Craik, T. A. Salthouse (Eds.), *Handbook of aging and cognition* (2nd ed., pp. 1–90). Mahwah, NJ: Erlbaum.

**j. Yazarı Belli Olmayan Yayınlar, Raporlar vb.:**

OECD (2005). Competition Law and Policy in Turkey, OECD, Paris.

**k. Kongre veya Sempozyum Bildirisi:**

Leclerc, C. M., & Hess, T. M. (2005, August). *Age differences in processing of affectively primed information*. Poster session presented at the 113th Annual Convention of the American Psychological Association, Washington, DC.

**l. İnternet Kaynakları:**

Yazarın Soyadı, Yazarın Adının Baş Harfleri. (Yazının yayım tarihi). Yazının adı italik olarak, yalnızca ilk kelimenin ilk harfi büyük, geri kalanlar özel isim değilse küçük şekilde. Erişim tarihi: Gün Ay Yıl, yazının linki.

DPT. (2004). *Sekizinci beş yıllık kalkınma planı (2001–2005) 2004 yılı programı destek çalışmaları*. Erişim Tarihi: 12.02.2005, http://ekutup.dpt.gov.tr/program World Economic Forum (2012). *Quality of science and math education.* Retreived August, 13 2018 from http://www3.weforum.org/docs/FDR/2012/15_Pillar_2_Business_environment_FDR12.pdf

# PUBLICATION POLICY AND NOTES FOR CONTRIBUTORS

## 1. PUBLICATION POLICY

1. Competition Journal, which started its life in 2000, is a refereed-journal published quarterly by the Turkish Competition Authority. Competition Journal, publishes original articles, case comments and news in Turkish and English in the field of competition law, policy and industrial economics.

2. Articles submitted to the rekabetdergisi@rekabet.gov.tr address for publication in the Competition Journal must be neither previously published in nor submitted for publication to other journals. The articles sent to our journal are scanned through **İntihal.net program** and plagiarism reports are reviewed by our editors. In the review, plagiarism rate is valuated together with the content of plagiarism report. Among other works, plagiarism of the author's previous works is not accepted. Articles found negative for plagiarism are returned to the author.

3. Authors should provide their contact addresses, telephone and electronic mail information alongside their articles. Articles sent are first checked by editors with respect to the content and for their compliance with the rules stated under the heading "Notes for Contributors". Afterwards, they are sent anonymously to two referees who are expert on the subject. According to the reports of the referees, a decision will be made on whether to publish or reject the article or request corrections from the author, and this decision will be notified to the author as soon as possible. If deemed necessary, the opinion of a third referee may be requested.

4. Competition Authority shall pay net TL 15.000 as the copyright fee to the author of each article published in the Competition Journal. Also, 10 copies of the journal shall be sent to the author, free of charge.

**2. NOTES FOR CONTRIBUTORS**

1. The first page of the article must include the following information:

a) Title of the article in Turkish and English (in bold and capital letters),

b) Name of the author, the organization s/he works in and the author's ORCID number[1] (Author's name must be indicated directly below the title of the article, aligned right, and an asterisk must be inserted after the surname. The relevant footnote must indicate the author's title at his/her organization and his/her ORCID number in bold),

c) An abstract of maximum 200 words in Turkish and English,

d) At least five keywords in Turkish and English,

2. Articles, including the bibliography section, must be written with a 12 point Times New Roman font, double-spaced. Footnotes and tables must use 10-point fonts. Footnotes must be included in numerical order at the bottom of each page. Tables and figures must be numbered; their titles must be indicated over the figure/table and the sources below.

3. For its first instance, an abbreviated name must be used in its full form, with the abbreviation included in parenthesis.

4. Foreign terms used in the text must be in italics.

5. With the exception of "Introduction" and "Conclusion," headings within the text must be arranged as follows, without letters or Roman numerals:

[1] ORCID is the acronym for Open Researcher and Contributor ID. You can get your ORCID number by creating a free record at http://orcid.org.

**1. BOLD AND ALL CAPS**

**1.1. Bold and Only First Letters in Caps**

**1.1.1. Bold and Only First Letters in Caps**

6. Explanatory notes must be given in footnotes below each page. All sources referenced in the text must be indicated under Bibliography. Bibliography must be in alphabetical order. If more than one title by an author is referenced, titles that are more recent must be listed later. In case an author has more than one title with the same date, letters such as "a", "b", "c" must be appended to the date of publication.

Abbreviations in the bibliography and the text itself must follow the rules in the following table:

| **Explanation** | **Turkish** | **English** |
|---|---|---|
| Page | s. | p. |
| Pages | ss. | pp. |
| Edited Books | içinde | in |
| Editor | Ed. | Ed. |
| Editors | Ed. | Eds. |
| Translator | Çev. | Trans. |
| Chapter | böl. | chap. |
| Other Authors | vd. | et al. |

For references and citations, authors must follow the rules listed in the **sixth edition of the Guidelines published by the American Psychological Association (APA)**.[2] Formatting rules to follow in references and in the bibliography are listed below:

[2] For more information visit the following links:
- Basics of APA Style Tutorial; (http://flash1r.apa.org/apastyle/basics/index.htm)
- APA Formatting and Style Guide; (http://owl.english.purdue.edu/owl/resource/560/01/)
- Mini-Guide to APA 6th for Referencing, Citing, Quoting (http://library.manukau.ac.nz/pdfs/apa6thmini.pdf)

**Citiations Within the Text**

**a. Work with a Single Author:**

Within the text, the last name of the author, publication date of the work and page number for direct quotations must be given.

For general quotations (Metin 2005) or according to the Metin (2005), for direct quotations (Metin 2005, p. 44), According to the Metin (2005, p. 101)

**b. Work with Two Authors:**

When citing from a work with two authors within the text, last names of both authors must be given: (Kılıç and Akgün, 2010, p. 33) or According to Kılıç and Akgün (2010)

**c. Work with Three or More Authors:**

Last names of all of the authors are given in the first citation within the text; afterwards only the first authors name is given followed by "vd." If the language is English, "et. al." is used instead of "vd."

The first reference to the source must be in the form (Özgümüş, Adaklı & Çelenk, 2004), later references in the form (Özgümüş et. al., 2004)

**d. When There Are More Than One References on the Same Subject:**

The references must be listed by date and those with the same date must be listed alphabetically: (Karataş ve Küçükçene, 1990; Deluga, 1995; Brockner, Siegel, Daly, Tyler & Martin, 1997; Francisco, 2000; İşbaşı, 2000)

**e. Quotation from a Secondary Source:**

It is ideal to reference the primary source, but if this source cannot be accessed due to various challenges, the reference must cite the source quoted or paraphrased in the text.

- Bacanlı'nın (1992) (akt. Özden, 1996) çalışmasında...

- Seidenberg's study (1996) (as cited in Peter, 1993)

**f. Publications the Authors of Which Are Not Known:** Such as reports, etc.

For the first reference in the text:

If the page number is known, (OECD, 2017, s. 84); if the page number is unknown OECD (2017)

**g. Sources from the Internet:**

For in-text references, article title, chapter title or the name of the webpage must be given in double-quotes; if the source is a journal, book, brochure or report, the title must be italicized.

"Hacettepe University Information", 2010

**Bibliography**

**a. Books with a Single Author:**

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