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Coping with Undesirable Effects of DMA Implementation: Google Search and the Ban on Self-Preferencing

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ABSTRACT

The Digital Markets Act (DMA) accepts certain negative short-term effects on the welfare of users of core platform services in order to achieve fairness and contestability in the long run. In this paper, we illustrate and analyse the more critical case where the regulatory rigidity of the DMA leads to side effects that clearly run counter to these regulatory objectives, as the implementation of the DMA by one platform consolidates the entrenched position of another core platform service. We develop four theses in this regard: (i) such side effects are undesirable but do not justify a limited enforcement of a particular obligation; (ii) adopting specifying measures to prevent such effects would exceed the regulatory leeway granted to the Commission under Article 8(2) of the DMA; (iii) there may be indirect effects on the scope of other DMA provisions that mitigate undesirable effects; (iv) undesirable side effects need to be addressed through antitrust and other regulatory instruments. As a paradigmatic example, we analyse how the ban on self-preferencing has been implemented by Google with regard to hotel search queries. In doing so, we consider several open questions regarding the ban on self-preferencing and show how the status quo of Google's display of hotel search results (still) violates Article 6(5) of the DMA.

Keywords: Digital Markets Act; Google Search; self-preferencing; specifying procedure; implementing acts; disintermediation; Booking.com

JEL classification: K21

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I. Introduction

The Digital Markets Act (DMA)¹ is the central building block of the economic regulation of digital gatekeepers in Europe.² In its regulatory ambitions and techniques, it is a measure that is both fascinating and controversial. Its implementation is being watched globally, sometimes with benevolent interest, sometimes with deep scepticism. This high level of attention is hardly surprising: the smallest changes to the business models of the digital gatekeepers' core platform services (CPSs) can have a huge economic impact. Indeed, part of the controversy surrounding the DMA is related to the fact that short-term efficiency losses are to some extent deliberately accepted, primarily in the expectation of long-term economic benefits but also in the pursuit of non-economic goals.

In this paper, we specifically consider the more critical case where the regulatory rigidity of the DMA may lead not only to unintended (but in principle acceptable) negative short-term effects but also to consequences that clearly run counter to the DMA's regulatory objective, as implementing measures taken by one digital gatekeeper consolidate the entrenched position of the CPS of another gatekeeper. We will develop four theses in this regard. In short, undesirable effects do not justify a limited enforcement of a particular DMA provision. The Commission cannot prevent these effects by imposing implementation measures under Article 8(2) of the DMA. However, there may be indirect effects on the scope of other DMA provisions that mitigate undesirable effects. Finally, those undesired effects need to be targeted by antitrust and other regulatory instruments.

As a paradigmatic example for such trade-offs and undesirable side effects, we observe, analyse and evaluate the implementation of the ban on self-preferencing in ranking pursuant to Article 6(5) of the DMA in relation to the display of hotel search results on Google Search.³ This deserves particular attention for several reasons. Google's DMA-driven hotel adjustment was an early target of DMA critics. One of the most visible changes, perhaps, is the removal of the Google Hotels service from the display of search results. The previously integrated map took users to the separate Google Hotels interface, where hotel websites were easily visible. This enabled hotels to generate a significant amount of traffic free of charge.⁴ Critics of the DMA have pointed to this change as a prime example of the supposedly over-regulatory and welfare-damaging effects of the EU's regulation of digital gatekeepers.⁵ It has been argued that its implementation would be detrimental not only to business users such as hotels and restaurants but also to consumers. It would make it less convenient for them to search for

¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). O.J. 2022, L 265/1 ('DMA').

² The DMA applies to all European Economic Area (EEA) countries, i.e. the 27 EU Member States plus Norway, Iceland and Liechtenstein.

³ Alphabet's online search engine Google Search has been designated as a CPS in European Commission, 5.9.2023, C(2023) 6101 final ('Alphabet designation'), Article 2, point d.

⁴ See for more details below section V.1.

⁵ For example, in a presentation at a symposium at Seoul National University on 23 September 2024 on 'Global Competition Perspectives on Digital Platform Regulation', Christopher Yoo, professor at the University of Pennsylvania, highlighted the negative impact of the DMA on SMEs, noting that DMA-related changes to Google Search had reduced traffic to hotel sites by 30 per cent, with traffic going instead to OTAs such as Booking.com and Expedia.

hotels and could lead to an increase in prices. This leads to the question of the impact of the implementation of the DMA in this scenario and how this relates to the regulatory objectives on which the DMA is based.

Indeed, the way hotel search results are displayed is one of the clearest examples of Google's crucial role and impact as a key market intermediary. The way that search results are displayed has an enormous impact on the relationship between different business users and, in particular, on the distribution of economic rents between hotels and online travel agencies (OTAs). This is sensitive in the context of the DMA, as the instrument is not indifferent to this issue, at least where a DMA CPS such as Booking.com⁶ is involved: various obligations imposed on intermediary platforms are intended to facilitate the disintermediation of business users, thereby creating competitive pressure on platform fees. From the perspective of the architects of the DMA, this will promote a fairer distribution of the gains from trade between intermediation service providers, such as Booking.com, and their business users, that is, the hotels. The question is therefore how such trade-offs should be assessed and dealt with in the implementation of the DMA.

The ban on self-preferencing in ranking pursuant to Article 6(5) of the DMA is a prime example of an obligation inspired by an earlier EU antitrust case. In the light of the landmark *Google Shopping* case,⁷ public attention has been focused on the treatment of self-preferencing by digital gatekeepers. As the abuse under Article 102 TFEU was found based on the particularities of the case – the simultaneous high visibility of the then-new Google Shopping unit and the demotion of competing services in organic search – it is not easy to assess the scope of the general prohibition of self-preferencing in ranking under Article 6(5) of the DMA. The necessary adjustments to the display of hotel search results provide a good illustration of this. This raises the question of whether Google is actually acting in a way that is compliant with the DMA. In fact, in March 2024, the European Commission opened proceedings against Alphabet, Google's parent company, under Article 20(1) of the DMA for a possible infringement of Article 6(5) of the DMA by Google Search.⁸ As a forerunner, the case may thus shed light on the Commission's view of the scope of the ban on self-preferencing and it may also breathe life into the DMA's procedural and remedial provisions. On 19 March 2025, the Commission sent preliminary findings to Alphabet in which it noted, among other things, that:

Alphabet treats its own services, such as ... hotel booking ... more favourably in Google Search results than similar services offered by third parties. More specifically, Alphabet gives its own services more prominent treatment compared to others by displaying them at the top of Google search results or on dedicated spaces, with enhanced visual formats and filtering mechanisms.⁹

⁶ See the designation decision of the European Commission, 13.05.2024, Case DMA.100019, *Booking – Online intermediation services*.

⁷ European Commission, 27.06.2017, Case AT.39740 – Google Search (Shopping). An appeal against this decision was dismissed by the General Court, 10.11.2021, Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, whose judgment was upheld by the ECJ, 10.09.2024, Case C-48/22 P, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:C:2024:726.

⁸ European Commission, 25.03.2024, Case DMA.100193, *Alphabet Online Search Engine – Google Search – Article 6(5)*.

⁹ European Commission, Press Release of 19 March 2025, 'Commission sends preliminary findings to Alphabet under the Digital Markets Act'.

Against this background, we will examine and evaluate the display of Google Hotel search results. In Section II, we will describe and explain how Google displays hotel search results and how observable changes are arguably related to the DMA's ban on self-preferencing. Section III sets out the conditions under which the display of search results is unlawful under Article 6(5) DMA. Based on that, in Section IV we will analyse whether the display of hotel search results by Google in fact complies with the ban on self-preferencing in ranking. In Section V, we will look at the reported impact of the changed display of hotel search results on the traffic directed via Google Search to hotels and OTAs and discuss how these fit (or do not fit) with the DMA's regulatory objectives. Then, in Section VI, we consider options for dealing with trade-offs and unintended effects that may arise from a gatekeeper's implementation of the DMA's provisions and develop the four propositions mentioned above in this regard. Section VII concludes the article.

II. Google's DMA Implementation and the Display of Hotel Search Results

Google's search engine results page (SERP) has undergone some changes when responding to a hotel query as part of its efforts to comply with the DMA. As far as can be seen, by January 2024 Google had already started to implement the most important changes.¹⁰ To examine various layouts used by Google in different jurisdictions, we used a VPN client¹¹ to enter the same search query, 'Hotel Hamburg 15 to 16 January 2025', in most EEA jurisdictions and selected other jurisdictions. The searches were conducted on 4 December 2024 on a desktop computer, running Mozilla Firefox on Windows 11 OS.¹² The date was chosen to fall within a test period announced by Google.¹³ Our search revealed three interfaces with significant variations in the display of hotel search results: an interface for non-EEA jurisdictions, the main interface for EEA jurisdictions and one experimental interface for EEA jurisdictions.

¹⁰ See Alphabet, Google, 'EU Digital Markets Act (EU DMA) Compliance Report. Non-Confidential Summary' (March 7, 2024), p. 187, paras 59–60. Google was required to ensure that Google Search complied with the DMA as of 6 March 2024, i.e. six months following the announcement of the designation (Article 3(10) of the DMA), which occurred on 5 September 2023 (n 3). As far as we can tell, Google has not publicly announced when exactly it implemented the DMA-induced changes to the way hotel search results are displayed. Mirai, a service provider to the hotel industry, states that this happened on 19 January 2024. See Pablo Delgado (6 June 2024), 'Who are the winners and losers of Google's implementation of the DMA?' <https://www.mirai.com/blog/who-are-the-winners-and-losers-of-googles-implementation-of-the-dma/>. This is consistent with Google's announcement of 'testing' on 17 January 2024. See Oliver Bethell (Director, Legal, Google), The Keyword (17 Jan 2024), 'An update on our preparations for the DMA', <https://blog.google/around-the-globe/google-europe/an-update-on-our-preparations-for-the-dma/>.

¹¹ We used NordVPN, successfully accessing 20 EEA jurisdictions, the UK, the US and India.

¹² For the sake of simplicity, we have limited our detailed assessment to the display as it appears on desktop computers. As mobile is an important platform for hotel searches, we have included comments on relevant similarities and differences between the two ways of displaying search results where appropriate. There are few differences.

¹³ See below sub II.4.

1. The UK/pre-DMA Layout

The interface for non-EEA jurisdictions, displayed, for example, in the UK,¹⁴ is identical to Google's display in EEA jurisdictions prior to the implementation of the DMA.¹⁵

When entering a hotel-related search query in these jurisdictions, the SERP will include the elements shown on the graphic. The Property Promotion Ads carousel, shown at the top of the SERP, looks similar to the Google Shopping unit, known from the *Google Shopping* case.¹⁶



Figure 2. Property Promotion Ads carousel

The carousel is a paid-for ad space, comprised of boxes, that can be accessed by both direct suppliers such as hotels and intermediaries such as OTAs or meta-search services.¹⁷ Providers of hotel accommodation can bid for access to the boxes to display a specific hotel. The box will display an image of the hotel building with the name of the hotel room provider, which can be either a meta-search service,¹⁸ an OTA or the hotel itself. Clicking on the link will take the user to that provider's website. By comparison, when users clicked on the item in the Google Shopping unit, they were always directed to a seller's website. No traffic was directed to comparison-shopping sites.¹⁹



Figure 3. Google Text Ads

Pre-DMA/UK

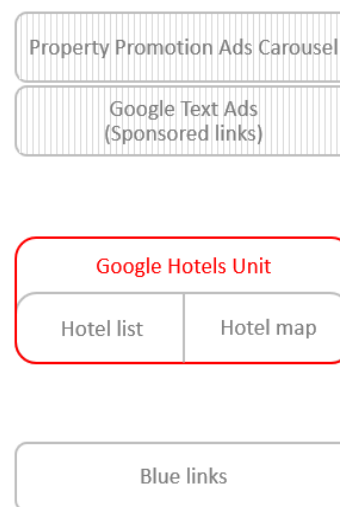


Figure 1. Layout of SERP pre-DMA/in the UK

¹⁴ This may change in the future given that the UK's Competition and Markets Authority (CMA), under the new digital markets competition regime has launched an investigation to 'assess Google's position in search and search advertising services and how this impacts consumers and businesses including advertisers, news publishers, and rival search engines'. See Press Release of 14 January 2025, 'CMA to investigate Google's search services', <https://www.gov.uk/government/news/cma-to-investigate-googles-search-services>.

¹⁵ See Alphabet, Google, 'EU Digital Markets Act (EU DMA) Compliance Report. Non-Confidential Summary' (7 March 2025), pp. 171–172; European Commission, Alphabet DMA Compliance Workshop (21 March 2024) at 14:17, https://digital-markets-act.ec.europa.eu/events-poolpage/alphabet-dma-compliance-workshop-2024-03-21_en.

¹⁶ See General Court, 10.11.2021, Case T-612/17, *Google Shopping*, EU:T:2021:763, paras 17–20.

¹⁷ Meta-search services are only partly independent. As laid down in a study on behalf of the Commission, of the most relevant four services, only Tripadvisor is independent, with Google Hotels belonging to Google, Trivago belonging to Expedia Group and Kayak belonging to Booking Holdings – both Expedia and Booking are also active on the OTA market. European Commission, Market study on the distribution of hotel accommodation in the EU – COMP/2020/OP/002, https://competition-policy.ec.europa.eu/system/files/2023-01/kd0722783enn_hotel_accomodation_market_study.pdf, p. 101.

¹⁸ Conducting many searches, we find that meta-search services are displayed in the UK version but not in the US. Whether they appeared in the pre-DMA EEA layout is unclear.

¹⁹ Strictly speaking, OTAs are comparable to shopping marketplaces and both are treated equally by Google. However, within hotel search, meta-search engines can generate traffic as well. This used to be different

Right below the Property Promotion Ads carousel, sponsored links, also known as Google Text Ads, are shown. These are no different from the links shown in any other Google SERP.

A key element in the non-EEA interface is the Google Hotels unit. This consists of a map with markers for each hotel, immediately showing prices. Next to the map, the unit contains a list of select hotels. Clicking anywhere on the unit, the user is directed to the separate 'Google Hotels' service.²⁰ Furthermore, the unit has a bar at the top where users can filter the offerings.

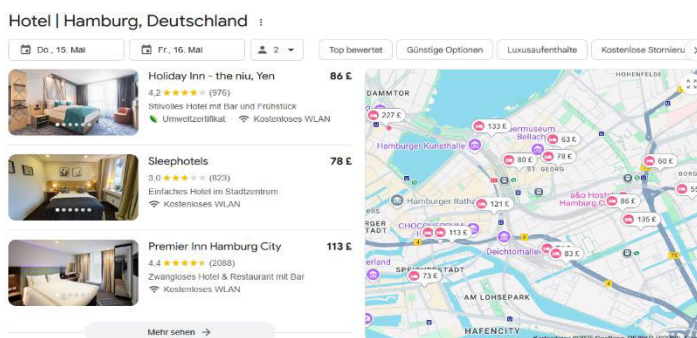


Figure 4. Google Hotels unit

Given that the display of the Google Hotels unit was combined with the functionalities of a meta-search service, and thus links to the Google Hotels service were also prominently displayed, this display appears to have been incompatible with Article 6(5) of the DMA.

Lastly, organic search results in the form of blue links are shown.

2. The Main Post-DMA Layout

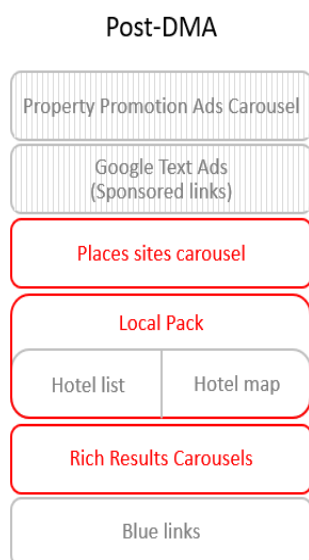


Figure 5. SERP layout in the EEA post-DMA

With the DMA in place, we observe a main layout that is significantly different from the one described above. The Property Promotion Ads carousel and the sponsored links (Google Text Ads) remain unchanged. Displayed right below the Google

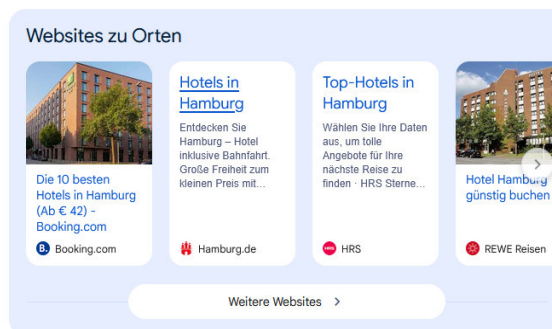


Figure 6. Places Sites carousel

Text Ads, Google has introduced the Places Sites carousel.²¹ Like the Property Promotion Ads carousel, this unit portrays different boxes. However, it is non-sponsored and only intermediaries (such as meta-search services, OTAs or comparison sites) appear within the unit. According to Alphabet, access to the unit is determined by

in product searches. In the new Products Ads unit, Google added a feature, so now comparison-shopping services (CSSs) can place product ads that lead to their own website, alongside the existing format where users are directed to the merchant's site unless they click on the CSS's name, displayed below the box. See Alphabet, EU DMA Compliance Report (2025) (n 15) pp. 172, 173, 179.

²⁰ See Alphabet DMA Compliance Workshop (n 15), at 14:17:00; Alphabet, EU DMA Compliance Report (2024) (n 10), p. 177.

²¹ Property Promotion Ads carousel, Google Text Ads and Places Sites carousel appear equally on iOS devices.

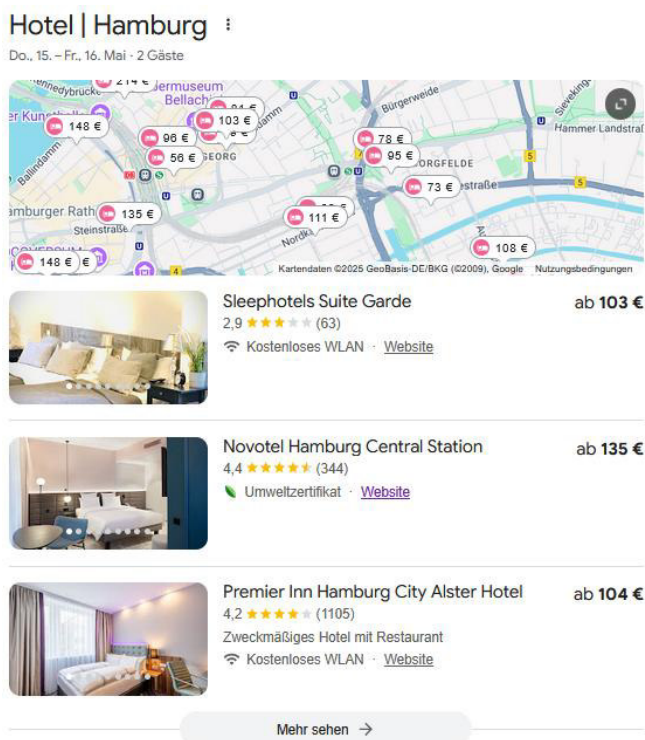


Figure 7. Local Pack

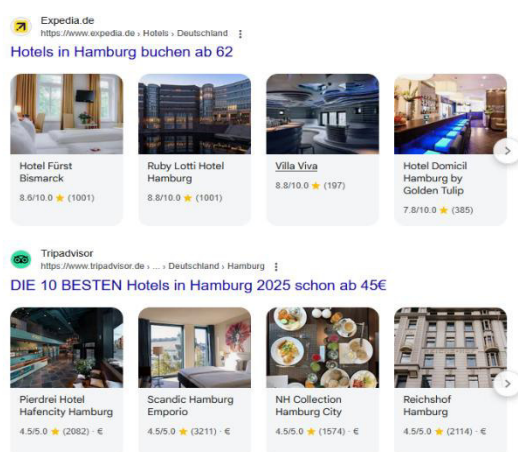


Figure 8. Rich Results carousel

the same criteria as organic search results and does not require any contractual relation with Google.²²

Furthermore, Google has revised the Google Hotels unit, now called the Local Pack.²³ While, at first glance, the display appears identical to the Google Hotels unit, it is no longer linked to Google Hotels.²⁴ Clicking on any location or destination on the map will no longer redirect users to the Google Hotels service. Clicking on a hotel marker on the map or on a hotel in the list will open the so-called Places unit, which is described below.²⁵

Furthermore, Google has introduced what it calls Rich Results carousels.²⁶

These are part of the organic, non-paid search and may include both a blue link and images of hotels displayed in the form of a carousel. Some additional information may be provided such as prices or ratings based on hotel reviews. Rich Results carousels may display offers from both intermediaries (e.g. OTAs) and direct suppliers (hotels).²⁷ In an OTA carousel, for example, the users can click either on the blue link to go to the OTA's main or overview page or they may click on an image of a particular hotel displayed and then be taken to the OTA's offers for that hotel.

²² Alphabet DMA Compliance Workshop (n 15), at 15:32:40; Alphabet, EU DMA Compliance Report (2024) (n 10), pp. 180–181; Google Search Central Blog, 'New Search experiences in EEA: Rich results, aggregator units, and refinement chips' (15 February 2024), <https://developers.google.com/search/blog/2024/02/search-experiences-in-eea>.

²³ The remarks on the Local Pack apply equally to the display on iOS with one addition. Several 'Hotel lists' with different results are displayed on the SERP, with the first being displayed alongside the 'Hotel map' and the others displayed between blue links.

²⁴ Alphabet DMA Compliance Workshop (n 15), at 14:17:00; Alphabet, EU DMA Compliance Report (2025) (n 15), p. 171.

²⁵ See below sub II.3.

²⁶ These are not displayed in a comparable way on iOS. While images are displayed, specific properties are not. Instead, it appears that where a desktop search would display such rich result, the iOS version will display another 'Hotel list'.

²⁷ Alphabet DMA Compliance Workshop (n 15), at 14:25:30; Alphabet, EU DMA Compliance Report (2025) (n 15), pp. 172–173.

Lastly, regular blue links are displayed.²⁸ Given the various special units for displaying search results, they are shifted down considerably and, therefore, are less visible. It should be noted that individual blue links to hotel pages are also displayed in a rich format; that is, in addition to the link there may be an image of the hotel or other information such as prices or a rating based on hotel reviews. The latter apparently requires that the hotel be integrated into services such as Google My Business or Google Hotels and have provided structured data accordingly.

3. The Places Unit

The Places unit (or 'search preview')²⁹ will be displayed when searching either for a specific hotel or when clicking on items within the so-called Local Pack that is displayed on the SERP in response to a general hotel search query.³⁰ We provide a screenshot as Annex I.³¹ This includes images of the respective hotel, query shortcut chips (similar to those previously displayed in the Hotels unit) and a 'quick links' section, which includes links to the hotel's website, to its phone number and to several Google Maps services. Below, the so-called 'Featured Options' item contains sponsored links with offers for stays in the particular hotel provided either by OTAs or directly by the hotels. Below, under the heading 'All Options', non-sponsored offers are shown. Access to elements with pricing options, such as the All Options section, requires registration with Google.³² Below the Featured Options and All Options units,






Gesponsert · Vorgestellte Optionen	
 Booking.com	108 € >
 trivago.de	85 € >
 CHECK24.de	108 € >
Kostenlose Stornierung bis 9. Mai	
 Expedia.de	108 € >
Alle Optionen	
 Traveluro	ab 79 € >
14 weitere anzeigen	ab 108 €

Figure 10. Featured Options and All Options

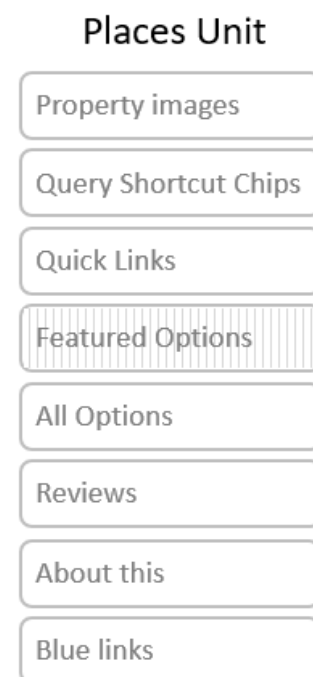


Figure 9. Places unit

reviews from different providers, including Google Maps and competing services, are displayed. Below, the 'About This' section displays relevant information about the hotel.³³ This feature is curated manually by Google authors.³⁴ Lastly, regular blue links appear.

²⁸ This is identical on iOS. Furthermore, an iOS search displays additional units, such as 'Videos' and 'Short Videos'.

²⁹ This is Alphabet's terminology. See Alphabet DMA Compliance Workshop (n 15), at 14:17:00, 14:22:20; 14:27:10. In its decision to open proceedings against Google, the Commission refers to this element as the 'page preview'. See European Commission, Case DMA.100193 (n 8), point 8 (f).

³⁰ Alphabet, EU DMA Compliance Report (2025) (n 15), p. 175.

³¹ The iOS layout of the Places Unit is very similar, where displayed as a search preview. If displayed as a preview, the Places unit fills the entire screen, with a button to close it in the top right corner. When searching for a specific property on iOS, the elements of the unit are embedded individually within the regular SERP and the 'About This' section is not displayed.

³² See Alphabet, EU DMA Compliance Report (2025) (n 15), p. 179; Google Comparison Shopping Services Help, 'CSS Program Requirements', https://support.google.com/css-center/answer/7524491?hl=en&ref_topic=9773666&sjid=10334849982081428495-NC.

³³ See also Alphabet's statements in the DMA Compliance Workshop (n 15) at 14:27:10 (though omitting the link to maps); Alphabet, EU DMA Compliance Report (2025) (n 15), pp. 176–177 (now including the link to maps).

³⁴ See Google Hotel Center Help, 'Frequently asked questions for hotel owners', https://support.google.com/hotelprices/answer/7219055?hl=en&ref_topic=9984364&sjid=14449105469866037091-EU.

The Places unit's compliance with the DMA appears to be a focus of the Commission's ongoing investigation against Google.³⁵

4. Dynamic Display of Search Results

According to Google, there is one main user interface for the display of search results.³⁶ This means, however, that the type of display can differ at different times or depending on the localization of the user. The following should be noted in this regard.

First, Google had publicly announced that it would run tests between 26 November 2024 and 12 December 2024. Apparently, its main idea was to demonstrate the impact of reducing search results to 'a simple blue link to a website'. The test can be seen as a response to critics who had argued that the DMA requires 'a complete ban on anything that's more sophisticated'.³⁷ As a result, Google had stated that it would display an experimental interface during the testing period, removing 'some hotel features from Google Search for users in Germany, Belgium and Estonia'.³⁸ Indeed, we observed that the experimental interface was limited to sponsored links (Google Text Ads) and blue links only.³⁹

Second, both during and after the testing period, we noticed that Google did not always display all elements of the described main interface. In particular, the Property Promotion Ads carousel was occasionally omitted.

This issue was also raised at an earlier stage by stakeholders in Alphabet's DMA compliance workshops, with the criticism that some elements included in the proposed layout were not always displayed, while other elements not included in the proposed layout were occasionally displayed.⁴⁰ Alphabet responded that the tests were only temporary and that its interface was subject to constant innovation, so it could not guarantee a static interface.⁴¹

The inconsistency and dynamics of the way search results are displayed pose challenges for observers who want to check DMA compliance. First of all, Google can choose whether or not to disclose a testing period. Certainly, even when testing varying modes of display, the company needs to be DMA-compliant. However, analysing and evaluating a display mode that is only intended for temporary testing would be inefficient for an enforcer. What is more, a lack of consistency in the display of search results over time, sometimes compliant and sometimes non-compliant, can make it much more difficult to identify infringements. This requires ongoing testing with different search queries and monitoring, archiving and analysing of the SERPs displayed.

³⁵ European Commission, European Commission, Case DMA.100193 (n 8), Article 6(5), paras 8(f) and 9.

³⁶ Alphabet DMA Compliance Workshop (n 15), at 15:19:20.; Oliver Bethell, Google, The Keyword, 'Sharing Data on our DMA Hotels Test' (12 December 2024), <https://blog.google/feed/sharing-data-on-our-dma-hotels-test/>.

³⁷ Oliver Bethell (Director, Legal, Google), 'An update on our compliance with the DMA' (26 November 2024), <https://blog.google/around-the-globe/google-europe/dma-compliance-update/>.

³⁸ Bethell (n 37).

³⁹ We were only able to reproduce results for Germany and Belgium. The (supposedly) Estonian servers appeared to have shown a British – non-compliant – version, presumably because the VPN servers were not working properly at the time. This was evidenced by the fact that prices were displayed in GBP instead of EUR.

⁴⁰ Alphabet DMA Compliance Workshop (n 15), at 15:14:45 (statement by representative of eDreams).

⁴¹ Alphabet DMA Compliance Workshop (n 15), at 15:19:20.

III. Prohibited Self-Preferencing when Displaying Search Results

Before analysing the various elements of the display of hotel search results, we will set out the conditions under which the display of search results of a CPS such as Google Search can be considered illegal self-preferencing in ranking under Article 6(5) of the DMA. The provision reads as follows:

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

Online search services and thus, first and foremost, Alphabet's search engine Google Search⁴² are the main application of this provision,⁴³ alongside online marketplaces and software application stores. The prohibition of self-preferencing is intended to prevent vertically integrated gatekeepers from exploiting their pole position as operators of a CPS to foreclose adjacent markets. A key objective of the obligation is therefore to ensure the contestability of markets adjacent to the CPS. Several conditions must be met to breach this obligation when displaying results.

1. The 'Distinct or Additional Service' Requirement

First, there must be a service that Google offers to end users through Google Search that is 'distinct or additional to the online search engine'.⁴⁴ Whether or not the latter is the case will depend on the way in which the elements displayed are 'considered or used by certain end users'.⁴⁵ The use of the qualifier 'certain' indicates that it is sufficient that a relatively small, albeit significant, number of end users consider or use the relevant service as 'distinct or additional'.

The fact that it is crucial how these end users 'consider' or 'use' a particular element that is displayed by a search engine suggests that the 'distinct or additional' criterion should, in principle, be regarded as an empirical one. Distinctness should therefore be assessed by observing the behaviour and perceptions of the end user. Objective differences in the functionalities of a results unit, or in the characteristics that affect the actual or potential use or perception of the unit by end users, may be assessed as indicating (empirically ascertainable) distinctiveness.⁴⁶

In the same vein, the various elements used in the DMA to define an online search engine⁴⁷ can be seen as providing guidance as to when a service should be regarded as 'distinct or additional to the online search engine' within the meaning of Article 6(5) and Recital 51, 4th sentence, of the DMA. Yet not every change in the technology in the engine room of a

⁴² See Alphabet designation decision (n 3), Article 1 and Article 2, point d.

⁴³ See Recital 51, 2nd and 4th sentences of the DMA

⁴⁴ Recital 51, 4th sentence of the DMA.

⁴⁵ Recital 51, 4th sentence of the DMA.

⁴⁶ This approach is similar to that required for market definition. However, note that the DMA aims to eliminate the need for market definition altogether. This is particularly relevant with regard to the gatekeeper concept. See Friso Bostoen, 'Understanding the Digital Markets Act', *The Antitrust Bulletin* 68 (2023), 263, 273.

⁴⁷ Article 2(2)(b) and (6) of the DMA in conjunction with Article 2(5) of P2B Regulation (EU) 2019/1150 ("online search engine" means a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found').

search service, and not every element in the functioning of a service that goes beyond the elements presumed in the DMA's definition of an online search engine, means that we must necessarily presume a 'distinct or additional' service for applying Article 6(5) of the DMA.

This is because the definitional elements are constructed as prerequisites to justify a designation and the imposition of DMA obligations. They are not meant to conclusively control the scope of Article 6(5) of the DMA, otherwise there would be a risk that Article 6(5) of the DMA would unnecessarily hamper the dynamic developments in the technology or functionality of CPSs. The notion of technological neutrality is reflected in the definition of 'ranking' in Article 2(22) of the DMA, which includes the phrase 'irrespective of the technological means used for such presentation, organization or communication [of search results by online search engines]'.

Thus, for example, the fact that, on the one hand, the search of websites is carried out solely by crawling and, on the other hand, it is facilitated by registration or agreements between the search engine operator and the website operators does not necessarily mean that, in the latter case, the results returned to the end users are to be considered 'distinct or additional' services. Therefore, as we argue in more detail below,⁴⁸ the fact that Google Search requires website owners to register to be included in the Places Sites carousel and the Rich Results carousel does not in itself mean that these units should be considered 'distinct or additional' services. The key question is whether, for example, the structured data that may be collected from websites in the latter case would be transformed into functionalities that would in turn have the effect of changing the use or perception of the service by the end user.

However, if, for example, the defining characteristics of an 'online intermediation service' within the meaning of the DMA are fulfilled, it can be assumed that there is a service 'distinct or additional' to the online search engine. This is because the former must, by definition, serve to 'facilitate the initiation of direct transactions'. Therefore, a unit displayed in response to a search query that fulfils this requirement will be accompanied by a 'distinct or additional' use and perception of the functionality by the end user. For the practical application of Article 6(5) of the DMA, however, this insight will probably be of little help, since both definitions require analysing the practical functionality of certain elements of the search display.

2. Service Offered through an Online Search Engine

Article 6(5) of the DMA requires that the identified distinct or additional service be offered through the search engine by being 'ranked in the results communicated'.⁴⁹ In addition to this standard case, however, for the prohibition on self-preferencing in ranking to apply it is also sufficient that this service is 'partly or entirely embedded in online search engines results, groups of results specialized in a certain topic, displayed along with the results of an online search engine'.⁵⁰ This is highly significant because it means that, if applied to an online search engine as a CPS, the scope of Article 6(5) of the DMA can cover virtually anything that is displayed following a search query.

⁴⁸ See below Section IV.

⁴⁹ Recital 51, 4th sentence of the DMA.

⁵⁰ Recital 51, 4th sentence of the DMA.

3. The Preferential Treatment Requirement

The identified ‘distinct or additional’ Google service must receive preferential ranking, related indexing or crawling in Google Search over similar third-party services.⁵¹ Thus, preferential treatment requires two elements. First, there must be similar services provided by parties other than Google. In this sense, ‘similarity’ does not require that both services can be placed in the same market according to competition law criteria. The concept is broader. It is already to be affirmed when the self-preferencing of the gatekeeper can have a negative commercial effect on the service of the other provider.⁵² This is necessary because, as we have seen, the purpose of the provision is to avoid disadvantaging actual or potential competitors in the market adjacent to the CPS to which Article 6(5) of the DMA applies. Second, Google Search must not treat the Google service offered on that adjacent market ‘more favourably’ in ranking than these similar services. According to Recital 52, 3rd sentence, of the DMA,

Ranking should in this context cover all forms of relative prominence, including display, rating, linking or voice results and should also include instances where a core platform service presents or communicates only one result to the end user.

The provision thus broadly prohibits highlighting the gatekeeper’s own offers or even displaying only its own offers to end users.

IV. Which of Google’s Various Hotel Search Display Elements Will Be Caught by the Long Arm of Article 6(5) of the DMA?

This section discusses whether the various elements of the display of hotel search results identified above comply with Article 6(5) of the DMA. As we will explain, this is not the case for the way in which the Local Pack (subsection 3) and various elements of the Places unit (subsection 5) are displayed. As regards the Places Sites carousel (subsection 2), Google may be treading a fine line but we do not see clear evidence of illegal self-preferencing. Furthermore, we do not consider that Article 6(5) of the DMA is infringed by advertising units (Google Text Ads and the Property Promotion Ads carousel) being displayed, or how they are displayed (subsection 1), or by the increased visibility of links that result from organic searches through Rich Results carousels (subsection 4).

1. The Google Search Advertising Elements: Google Text Ads and Property Promotion Ads Carousel

The fact that Google provides advertising space in the display of search results is not as such covered by Article 6(5) of the DMA. This is not to deny the fact that information displayed through ad units that appear in response to a search query is of a different quality to the end user owing to its promotional nature. It seems plausible that end users use or perceive this information, which is generated differently from organic search results and which is labelled as ‘sponsored’, differently from how they see the search results. On this basis, it could be further argued that this is indeed ‘preferential treatment’, in that Google gives space to an ad in the display of search results that benefits (only) Google.

⁵¹ Article 6(5) of the DMA.

⁵² Silke Heinz, ‘Prohibition of self-preferencing in ranking’, in Rupprecht Podszun (ed.), *Digital Markets Act* (Nomos, Baden-Baden 2024); Article 6(5) DMA, para. 88.

Such a rather formalistic conclusion, however, would contradict a basic assumption underlying the DMA: the Regulation accepts that CPSs are financed by advertising. This is expressed in Article 2(2)(j) of the DMA, which states that online advertising services fall within the scope of the DMA only if they are ‘provided by an undertaking that provides’ a CPS. This clearly refers to (and implicitly endorses) scenarios where CPSs are funded by advertising. Therefore, the fact that elements such as Google Text Ads or the Property Promotion Ads carousel occupy special positions in the search results display that are more prominent than those of the organic search results cannot in itself constitute a violation of the self-preferencing ban in ranking under Article 6(5) of the DMA.⁵³

Furthermore, it cannot be considered contrary to Article 6(5) of the DMA for the advertising space in the display of search results to be offered exclusively through Google’s own online advertising service. The DMA accepts that, in the context of the ad-funded CPSs, the gatekeeper provides the advertising space on an exclusive basis.⁵⁴ While this is not inherent in the concept of ad-funded CPSs such as search engines, Recital 58 of the DMA endorses the concept of online advertising services being ‘fully integrated with other core platform services of the same undertaking’. While the exclusive brokerage of ad space in Google searches by Google’s advertising services is thus not affected by Article 6(5) of the DMA, the Google advertising (brokerage) services⁵⁵ are subject to a number of obligations.⁵⁶ These are designed to prevent a lack of transparency and self-preferencing in the brokerage of advertising services and to ensure fair treatment of business users.

With respect to access to ad space in the display of search results, namely the Google Text Ads and the Property Promotion Ads carousel, it should be noted that the DMA only imposes a FRAND access obligation under Article 6(12) of the DMA with respect to app stores, search engines and social networking services. In its designation decision, the Commission appears to have attributed the provision of ad space to both Google’s online advertising services and Google Search.⁵⁷ Whether the latter results in the application of Article 6(12) of the DMA to access to ad space seems uncertain, but it is not necessary to decide at this stage. In relation to Google Search and Article 6(5) of the DMA, the following seems to be important: Google could circumvent the prohibition of self-preferencing in relation to its search service by designating prominent positions in the display of search results as advertising space and then giving its own services exclusive access to it. Such conduct should therefore be covered by Article 6(5) in conjunction with Article 13(4) of the DMA. Indeed, the fact that Google had granted its own shopping service exclusive access to the Product One Box was essential in

⁵³ This result does not seem to be disputed in the literature, although the underlying reasoning varies. See, e.g., Heinz (n 52), Article 6(5) DMA, para. 96 (emphasizing that Recital 52, 5th sentence, of the DMA contains a reference to Article 5 of the P2B-Regulation 2019/1150, which allows paid rankings in its third paragraph), Jan-Fredrick Göhsl and Daniel Zimmer, ‘Verbot der Selbstbegünstigung (Art. 6 Abs. 5)’ in *Immenga and Mestmäcker. Wettbewerbsrecht*, vol 1 (CH Beck, München, 7th ed. 2025) and Article 6 of the DMA, para. 135 (arguing that sponsored content or advertising may be displayed next to search results as long as it can be clearly distinguished from the search results).

⁵⁴ See Philipp Bongartz and Alexander Kirk, ‘Article 2. Definitions’, in Rupprecht Podszun (ed.), *Digital Markets Act* (Nomos, Baden-Baden 2024), Article 2, para. 14.

⁵⁵ Alphabet designation decision (n 3), paras 204, 188–189.

⁵⁶ See Bongartz and Kirk (n 54), Article 2, para. 9 with note 19.

⁵⁷ Alphabet designation decision (n 3), paras 220–223.

Google Shopping to establish that abusive self-preferencing had taken place.⁵⁸ Furthermore, if Google were to have de facto exclusivity through the way it prices advertising space, the same would be the case. In particular, this could be assumed in the case of (very) high symmetric fees, taking into account that payments from (other) Google (Alphabet) services would only represent transfers within the group.⁵⁹ However, these issues do not seem to arise in practice for the display of hotel search results because, as far as we can see, Google's own 'Google Hotels' service does not access the Property Promotion Ads carousel or appear in Google Text Ads.

2. The Places Sites Carousel: Does It Cross the Line into 'Distinct or Additional Service'?

The Places Sites carousel, as described and depicted above,⁶⁰ is a unit structured by Google to inform end users about available hotels in their desired destination, as indicated by the search query. Its position in the search results display, the use of boxes, the coloured background and the (partial) display of images give it a particular prominence. Similar information units generated by other (competing) providers are not displayed. Therefore, the display of the unit would constitute a breach of Article 6(5) of the DMA if 'certain' end users use or consider the unit to be a service 'distinct or additional' to Google's search engine service.

However, we cannot observe that the unit crosses this line. First, the composition of the unit is based on the criteria used to generate organic search results. The fact that the display is in boxes that are separate from the 'blue links' is not in itself sufficient for a finding that the service is 'distinct or additional' as long as it is not clear that it significantly alters the way in which it is used or perceived by users.⁶¹ What technically distinguishes the unit from the display of organic search results via the 'blue links' is that Google requires meta-search providers, OTAs and comparison sites to register for inclusion in the unit.⁶² The registration requirement can contribute to ensuring a certain level of integrity and trustworthiness on the part of the listed service providers. This in turn can prevent low quality listings from appearing on the Places Sites carousel.

In addition, registration appears to be a first step towards further integration into Google's ecosystem of services. Registration allows service providers to submit certain information directly, such as contact information, hours of operation, or terms and conditions, through services such as Google My Business or Google Merchant Center. Such direct submissions can help ensure that the information displayed is accurate and up to date. While it appears

⁵⁸ ECJ, 10.09.2024, Case C-48/22 P, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:C:2024:726, paras 97–98.

⁵⁹ Martin Peitz, 'How to apply the self-preferencing prohibition in the DMA', *Journal of European Competition Law and Practice* 14 (2023), 310, 314. See also Heinz (n 52), Article 6(5) DMA, para. 96.

⁶⁰ See above Section II.2 with Figure 6.

⁶¹ See Heinz (n 52), Article 6(5), para. 94. According to the opposing view, Article 6(5) of the DMA would necessarily require Google to remove any kind of separate boxes or other special widgets when displaying organic search results. This position has indeed been taken by business user associations. See Internet Economy Foundation, Startup Verband, France Digitale, Italian Tech Alliance, Position Paper (November 2023), 'How the DMA can re-establish a neutral and fair general online search', p. 1.

⁶² Alphabet DMA Compliance Workshop (n 15), at 14:29:45.

that Google also uses such data from its own aforementioned Google services for the Places Sites carousel, businesses do not need to actively submit data to Google to be included in it.

All in all, therefore, it may well be that the registration requirement increases (to some extent) the quality of the information displayed or the extent to which the linked sites are tailored to the interests of the end user. However, it is not clear whether end users are aware of the registration requirement and its possible consequences. In particular, Google does not appear to promote the Places Sites carousel by referring to the (alleged) special quality of the information displayed and linked.

It should also be noted that the unit is based, at least in part, on structured data.⁶³ This means that inclusion in Google's Places Sites carousel requires, or at least makes it much easier, for a site to have certain information in a standardized format that makes it easier for a search engine to understand, tag, categorize and display the site's content in a rich format. Such key information may include business name, address, telephone number, website URL, opening hours, prices and promotions, location details and so on. However, the results returned are still based on a search of web pages, which is exactly the definition of an online search engine that underlies the DMA.⁶⁴

Ultimately, the key question remains whether the functionalities of the Places Sites carousel unit are significantly different from those of an online search engine from a consumer's point of view, given that they are essentially based on structured data and arguably also use data from Google services. This seems doubtful to us. For example, as far as we can see, price information is only occasionally displayed. There is no evidence of the display of information that would allow consumers to systematically compare hotel room offers. Based on our observations, the Places Sites carousel cannot be considered functionally equivalent, even approximately, to a meta-search service such as Tripadvisor.

Google may be treading a fine line here but we do not see sufficient evidence to conclude that the Places Sites carousel is being used or viewed as a service 'distinct' from or 'additional' to the search engine results from the perspective of the end user.

3. The Local Pack: Features of a Hotel (Price) Comparison Service

Unlike the Google Hotels unit displayed in non-EEA countries,⁶⁵ the Local Pack does not include a preview of the Google Hotels service.⁶⁶ From Google's perspective, this change brings the unit into compliance with the prohibition against self-referencing in ranking. The Local Pack should be seen as a user-friendly structuring of the organically generated results of the Google Search service. However, we see at least two issues that raise concerns with respect to Article 6(5) of the DMA.

First, it is noticeable that the Local Pack consistently displays price information. In particular, hotels are identified by price tags on the map. Price information of this quality cannot be

⁶³ See Google Search Central Blog, 'New Search experiences in EEA: Rich results, aggregator units, and refinement chips' (15 February 2024), <https://developers.google.com/search/blog/2024/02/search-experiences-in-eea?hl=en>.

⁶⁴ Article 2(2)(b) and (6) of the DMA in conjunction with Article 2(5) of P2B Regulation (EU) 2019/1150.

⁶⁵ See above Section II.1 with Figure 4.

⁶⁶ See above Section II.2 with Figure 7.

generated (solely) by crawling websites. Therefore, to be displayed in the Local Pack, registration and an ongoing feed of data to Google is required.⁶⁷ This difference in the way this service works compared to the way a search engine is defined in the DMA has a direct impact on the functionality for the end user. It enables a user-friendly and fast price comparison between hotels in the vicinity of the searched destination. The Local Pack must therefore be considered to constitute a ‘distinct’ or ‘additional’ service, rather than merely displaying Google’s search results. Since similar services, in particular intermediation services providing maps with hotel price information, cannot be included in the display of Google Search results in the same way, the Local Pack unit infringes Article 6(5) of the DMA.

Second, the Local Pack is linked to the Places unit: clicking on a hotel price tag on the map opens the Places unit. Since, as discussed below,⁶⁸ various elements of the Places unit must be considered ‘distinct’ or ‘additional’ services, and since similar services are not equally accessible through the maps and information displayed in the Local Pack, this linkage is in breach of Article 6(5) of the DMA.

This conclusion is reached even though we believe that the Local Pack should be considered a ‘distinct’ or ‘additional’ service to Google Search. This is because this separation does not alter the fact that the relevant information – including the self-referencing link to the Places unit – is displayed as part of the results of a search query on Google Search. Any other approach⁶⁹ would clearly undermine the protective purpose of Article 6(5) of the DMA and create loopholes for CPS providers. Our view is also consistent with the Commission’s practice of attributing certain displayed elements to more than one online service at a time: where Google AdSense for Search triggers the display of an advertisement on a third-party website, that display is attributable both to the activities of AdSense for Search and to the third-party service on which it is displayed.⁷⁰

4. The Rich Results Carousel: Enhanced Visibility of Search Links

The Rich Results carousel is predicated on a blue link, that is to say, the result of an organic search. The carousel, with its various elements,⁷¹ particularly the hotel images, has been shown to significantly increase the visibility of a particular search result. In order to benefit from a blue link search result with the Rich Results carousel, it appears that a provider must be integrated with Google services and use it to feed structured data to Google. Hotels that aspire to achieve more than a passive presence on an OTA’s Rich Results carousel have to submit structured data through Google My Business and either Google Hotels or Google Hotel Ads in order to be awarded their own Rich Results carousel.

The mechanics behind the Rich Results carousel obviously go beyond what, by definition, is at the core of a search engine: crawling websites to find results to a search query. However,

⁶⁷ See Google Hotel APIs, Integration Overview, <https://developers.google.com/hotels/hotel-prices/dev-guide/data-feeds>; referenced in Alphabet, EU DMA Compliance Report (2024) (n 10), p. 189.

⁶⁸ See below Section IV.5.

⁶⁹ Cf. Thomas Höppner, *Self-Preferencing in Online Search under Article 6(5)* (Nomos, Baden-Baden, 2024), pp. 50–56, argues that, in order to clarify the scope of Article 6(5) of the DMA, online services must be strictly delimited. A particular item displayed must either be regarded as part of an online search engine or as part of another service.

⁷⁰ Alphabet designation decision (n 3), para. 234.

⁷¹ See above Section II.2 with Figure 8.

this alone does not prove that end users use the Rich Results carousel as though it is (or consider it to be) a ‘distinct’ or ‘additional’ service within the meaning of Article 6(5) of the DMA. In fact, unlike the map with hotel prices integrated into the Local Pack, it is not clear that the Rich Results carousel could be used as a functional equivalent to meta-search services or comparison sites. For example, although an OTA Rich Results carousel displays multiple hotels at once and compares their rating scores, only a small number of hotels are directly visible at any one time, and the information that can be compared at a glance is fairly limited and, of course, relates to only one supplier: the OTA, whose regular blue link is the basis of the display. In this way, the Rich Results carousel can be considered a preview of an OTA that can be accessed through the link provided and through which the hotels that correspond to the search query can be booked.

Consequently, the Rich Results carousel should not be regarded as a service that is used or viewed as ‘distinct or additional’ to the Google Search service, such that it could be viewed as providing prohibited preference over similar services.

5. The Places Unit: Self-preferencing Display of Various Google Services

Various elements of the Places unit, as we have observed them,⁷² violate Article 6(5) of the DMA: the curated property images and the ‘About This’ section; the query shortcut chips, as they redirect the users to Google Maps; and the All Options section. Below, we explain that these sections of the Places unit are to be regarded as ‘distinct’ or ‘additional’ services to Google’s search service and that their display constitutes preferential treatment (subsection a).

The fact that the display of the Places unit is the result of a query to Google Search and, therefore, subject to Article 6(5) of the DMA is obvious when search queries are directed to a specific hotel (e.g. ‘IC Hotel Mannheim’). In this case, the Places unit is immediately displayed alongside other search results. However, in our view, Article 6(5) of the DMA may also apply where the Places unit is only an indirect result of a search query and the connecting service itself is displayed in breach of Article 6(5) of the DMA. We will discuss this in more detail below (subsection b).

a) Elements of a self-preferred, distinct or additional service

When an online service provides content by aggregating information from other online sources and organizing or summarizing it according to certain criteria, and especially when individually generated content is included, it goes well beyond the standard functionality of a search engine. It is only natural that certain users will perceive such a service as ‘distinct’ or ‘additional’ and use it differently.

Google’s Places unit contains curated content in the ‘About This’ section. Here, certain features of a hotel are summarized in texts written by Google authors, and also through pictograms. Google also curates the images displayed at the top of the unit. These elements constitute a service distinct from the provision of search results, which Google reserves to itself. This means that there is self-preferencing within the meaning of Article 6(5) of the DMA.

⁷² See above Section II.3 and Annex I.

Preferential treatment for a Google service can also be seen in the ‘query shortcut chips’, which are displayed as a bar below the property images and the hotel name. This bar includes a button labelled ‘Directions’ (in German: ‘Route’), which takes the user to Google Maps for directions to the hotel.

The Featured Options are a form of advertising that monetizes Google’s search service. Like the Google Text Ads or the Property Promotion Ads carousel, they fall a priori outside the scope of Article 6(5) of the DMA.⁷³

In evaluating the All Options section, the issues that need to be considered are similar to those in relation to the Rich Results carousel discussed in the previous section. However, unlike the latter, there are features that indicate that this section is considered and used by a sufficient number of end users as a ‘distinct or additional’ service, and therefore that it crosses the line into a self-preferencing Google service. If the hotel featured in the Places unit, or an OTA through which rooms can be booked at that hotel, wishes to be displayed in this section, it must integrate with Google services and use them to provide structured data to Google. This will allow Google to display additional information, such as price or cancellation options, alongside the link (which will not be coloured blue). We have noticed that the All Options section tends to show only a few offers, and sometimes it is just one, but in most cases there is a box that, when clicked, shows a significant number of other offers with prices and sometimes cancellation terms. Given the layout and parallel pricing information, this section gives the impression of a price comparison service, albeit a rudimentary one, that Google Search favours over similar services.

In the ‘Review’ section, reviews about the hotel featured in the Places unit are aggregated from various meta-search services, with the first snippet from each review displayed. The user can access the website of the respective meta-search service by clicking on the snippet. Whether this can already be seen as a ‘distinct or additional’ service to Google Search from an end user’s point of view seems uncertain to us. The functionality of a meta-search service is not even close to being achieved. Therefore, the display of the ‘Review’ section can arguably still be interpreted as a user-friendly presentation of relevant results to a search query. In any case, since the section is not limited to collecting Google Hotel reviews, the section does not favour this Google service over competing meta-search services.

b) The Places unit as a paradigm of (also) indirect self-preferencing

It follows from the above analysis that several elements of the Places unit infringe Article 6(5) of the DMA. This is undoubtedly the case when the unit is displayed directly with the Google Search results, namely for queries relating to a specific hotel.

However, users of Google Search may also be redirected to the Places unit through the Local Pack, if the latter is displayed in response to a (general) hotel search query – for example, for a specific destination – and the user clicks on a hotel displayed as part of the Local Pack. In this scenario, the Places unit does not appear to be an (immediate) part of the display of the

⁷³ See above Section IV.1.

results of a search query. The application of Article 6(5) of the DMA, which is tied to the designation of Google Search as a CPS, therefore appears doubtful.

However, since – at least according to our analysis⁷⁴ – the display of the Local Pack that includes the link to the Places unit must already be regarded as illegal self-preferencing, this scenario of an indirect self-preferential display of the Places unit should also be captured by Article 6(5) of the DMA. This is because it is here that the risk that Article 6(5) of the DMA is intended to prevent will ultimately materialize: that Google will use its special position as a search engine to exclude competitors from adjacent markets. Therefore, Article 6(5) of the DMA must also be applicable where the Places unit is only an indirect result of a search query and the connecting service itself is displayed in breach of Article 6(5) of the DMA.

To take the (hypothetical) counterexample, if there were only a blue link from organic search to the Local Pack, then the fact that the Places unit would be given preferential treatment within the Local Pack (and/or that the ‘About This’ section etc. would be given preferential treatment within the Places section) would not in any event create the risk addressed by the designation of Google Search as a CPS and the resulting prohibition on self-preferencing in Article 6(5) of the DMA.

V. Google as a Key Market Intermediary: The Impact of the Way Search Results Are Displayed on Hotels and OTAs, and Why It May Matter

1. Hotels vs. OTAs: On the Effects of Google’s Adjusted Hotel Search Display

During 2024, following Google’s DMA-driven adjustments to how hotel search results were displayed, the hotel industry and related service providers found the changes detrimental to hotels’ business interests. Two effects were reported by the hotel industry.⁷⁵

First, the visibility of hotel websites when non-sponsored results are displayed on Google Search, and therefore the number of direct sales generated, decreased. In other words, to achieve the same visibility on Google Search, hotels would have to spend more on advertising.

Second, changes in the way search results are displayed decreased traffic via Google Hotels to hotel websites and increased the visibility of OTAs such as Booking.com or Expedia and meta-search engines such as Kayak, Trivago or Tripadvisor. As a result, a greater proportion of online hotel bookings were made through these intermediaries, increasing distribution costs for hotels.

This has been confirmed by Google. In a blog post of 12 December 2024, the company’s Oliver Bethell stated that:

To comply with the DMA, we have already made significant changes that have already diverted traffic from hotels to intermediaries.⁷⁶

Little reliable information has been reported about the strength of this effect. Mirai, a service provider for the hotel industry, reported on an analysis of hotel reservations made in the eight

⁷⁴ See above Section IV.3.

⁷⁵ IHA Hotelverband Deutschland, *Hotelmarkt Deutschland 2024*, p. 308.

⁷⁶ Bethell (n 36).

months before and after Google's 19 January 2024 implementation of its DMA changes.⁷⁷ Mirai found that the share of Google Hotels within the EU as a 'source of reservation' sank from 13.4 to 8.9 per cent. Of this 4.5 percentage point difference, however, 3.5 percentage points were replaced by other Google placements, namely 1.5 percentage points through increased paid traffic (mostly Google Ads) and 2.0 percentage points through reservations via organic search. Mirai also found an increase of 0.2 percentage points in the number of bookings made through other meta-search services. On this basis, the company calculated a net effect in 'direct reservations for the hotels', which can be understood as reservations that are not made through OTAs, of -0.8 percentage points. This would be the share of additional OTA bookings. To indicate the causality of the DMA implementation, the author points out that a different development can be observed in non-European markets. The share of the Google ecosystem in brokered hotel bookings has hardly changed (-0.29 per cent), whereas the share of paid traffic has increased significantly.⁷⁸

The accuracy of these results should be treated with caution. The causality of the DMA implementation for the observed effects is not implausible but apparently cannot be strictly proven either. Moreover, the display of search results is subject to constant adaptations. Hotels, OTAs and meta-search engines are also responding, adapting their distribution policies and business models. All in all, the online distribution of hotel accommodation is a highly dynamic development, driven by a wide range of factors and a complex interaction of various market participants.

Nonetheless, looking at the changes that Google has made to the way it displays hotel search results as part of the implementation of the DMA, it seems plausible that the effects claimed by the hotel industry are real, although we have no way of assessing their magnitude.

First, Google Hotels is no longer linked in the search results. Hotels can use this service to generate relatively inexpensive traffic to their own website, and thus bookings. For example, a hotel's placement on the Google Hotels map is partly based on the organic search results generated by Google Maps. So hotels do not necessarily have to pay to appear on the map. However, they can increase their visibility on the map and in the search results by using Google Hotel Ads. When a user clicks on a hotel marker on the map, information about the hotel is displayed, including a 'website' button. When a user clicks on this button, they are taken directly to the hotel's website. This traffic is free of charge if the hotel is not using Google Hotel Ads. Even when using Google Hotel Ads, the bookings generated appear to be significantly cheaper for hotels than bookings made through OTAs.

Second, the new, prominently displayed advertising tool of the Property Promotion Ads carousel could lead to OTAs having higher visibility. Although access to this tool is formally the same, it seems plausible that OTAs are more willing to pay owing to a higher conversion rate and are therefore more strongly represented there.

⁷⁷ As noted above (n 10), Google has not publicly disclosed the exact date it began implementing changes to comply with the DMA. According to Mirai's observations, this was on 19 January 2024.

⁷⁸ Pablo Delgado, 14.10.2024, 'DMA impact on hotels: 0.8% loss of direct reservations', <https://www.mirai.com/blog/dma-impact-on-hotels-0-8-loss-of-direct-reservations/>.

Third, the new (non-sponsored) Places Sites unit creates visibility for OTAs only. The unit is placed prominently within the search results. Based on our observations, this unit is usually, if not always, displayed right below the sponsored results. It is likely to be noticed owing to the display with various boxes and in particular the hotel images.

The Local Pack, on the other hand, gives special visibility to some organically displayed hotels. It should be noted, however, that the map with hotel markers shown here has a special prominence. Clicking on the hotel markers will not take you to the hotel websites but to the Google Places unit, which in turn will make hotels as well as OTAs and meta-search services visible.

Fourth, there is the Rich Results carousel, which gives a prominent position to certain organic search results. Although, formally, the same access rules apply to hotels and OTAs, our observations suggest that OTAs are much more strongly represented here. This may be due to the higher click-through rate for OTA sites than for hotel sites, which can lead to a higher ranking in organic search. In addition, the increased technical effort required to access the Rich Results carousel must also be taken into account. This is because integration with Google services is required, which enables Google to be fed with structured data. The relative effort of doing this is likely to be significantly higher for individual hotels than for OTAs.

All in all, it seems plausible to us that the implementation of changes to the hotel search results display with the DMA adjustment has resulted in less free traffic and resulting direct hotel bookings, as well as less paid traffic and bookings through Google Hotels, compared to the status quo ante. In contrast, the relative visibility of OTAs has increased and it is therefore reasonable to assume that there has been a shift in bookings to OTAs.

2. The Hotels vs. OTAs Debate from the Perspective of the DMA's Regulatory Objectives: It's Booking.com that Matters

Assuming that the observation is essentially correct that the measures to implement the DMA's prohibition of self-preferencing in Google Search have led to 'increased traffic to a small number of successful intermediary services and significantly less engagement with a wide range of businesses like ... hotels',⁷⁹ how does this fit with the DMA's regulatory objectives?

The strengthening of the market position of competing intermediation services is indeed an expected effect. The fact that, at least in the short term, business users of these intermediation services are disadvantaged as a result is not intended but it is in principle acceptable from the DMA's point of view (subsection a below). However, an unintended side effect occurs if the position of an intermediation service designated as a CPS – namely, Booking.com in this case – is strengthened as a result (subsection b below).

a) *Expected effects of Article 6(5) of the DMA: strengthening of the market position of competing intermediary services*

The main objective of Article 6(5) of the DMA is to prevent leveraging by vertically integrated digital platforms. Google Search is therefore not allowed to favour its own (distinct or additional)

⁷⁹ Adam Cohen (Google, Director, Economic Policy), 'New competition rules come with trade-offs' (5 April 2024), <https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/>.

services when displaying search results. In terms of hotel search results, this means Google must not exploit its gatekeeper position in the search market to become the dominant provider of hotel price comparison services, meta-search services, OTA services and so on. In this sense, it is consistent that Google has been forced to decouple its Google Hotels service from the display of hotel search results and, in our view, will have to adapt displays that functionally correspond to a price comparison service such as the Local Pack⁸⁰ and the All Options section of the Places unit.⁸¹

By its very nature, and unsurprisingly, these steps to implement Article 6(5) of the DMA remove some of the competitive pressure that Google's services exert on competing services, in particular intermediary services such as OTAs and meta-search services. But if Google's services in this area are a welcome corrective in this market from the point of view of business users (i.e. hotels), and if this corrective is weakened by the implementation of the DMA, is this not counterintentional, since the DMA is supposed to protect competition in the neighbouring market?

In fact, it is certainly not the aim of the DMA that the hotels, as the business users of both Google Search and the Google-competing OTAs and meta-search services, are disadvantaged in their business interests by the implementation of the DMA. However, from the perspective of the DMA's regulatory objective and approach, this appears to be a question of the time horizon: in the short term, the weakening of Google's competitive pressure may be detrimental to hotels. In the long term, however, according to the DMA's reasoning, Article 6(5) of the DMA will prevent Google from enveloping the adjacent markets so that hotels would then face Google as a (quasi-)monopolist for OTA services and meta-search services.

It does, therefore, not contradict the regulatory objective of the DMA that Google Search is subject to the restrictions of Article 6(5) DMA but otherwise free to design its search service. Google will design the display of hotel search results in a way that maximizes its profits, which is not trivial for a two-sided platform aimed at consumers and different types of business users (hotels, OTAs, meta-search services etc.) and monetized mainly through advertising.⁸² Ensuring the competitive pressure on the OTA and meta-search market, including in the interests of hotels and their customers, will remain the role of competition law and possibly complementary pro-competitive regulation.

Therefore, from the perspective of the DMA's regulatory objective, a (short-term) weakening of competitiveness in the OTA or meta-search services markets resulting from restrictions imposed on Google Search under Article 6(5) of the DMA should be considered an unintended but – in principle – acceptable side effect.

⁸⁰ See above Section IV.3.

⁸¹ See above Section IV.5.a).

⁸² Prohibiting self-preferencing may lead to increased monetization through advertising. This could undermine the intended economic effects of the DMA obligation. See Jens-Uwe Franck and Martin Peitz, 'The Digital Markets Act and the whack-a-mole challenge', CMLRev 61 (2024), 299, 312, 330–331, 340–341.

b) *Facilitating disintermediation: why the DMA is not indifferent to a (short-term) weakening of competition in the OTA market*

Where the implementation of Article 6(5) of the DMA weakens competitive pressure on another designated CPS, which can thus further strengthen its gatekeeper position, the analysis and explanation of a weakening of competition in adjacent markets from a DMA perspective as described in the previous section reaches its limits. From the perspective of the regulatory challenges addressed by the DMA, this is then not only unintentional but actually undesirable and counterproductive. There is a real regulatory trade-off from the perspective of the DMA's objectives.

This is partly the case here because Booking.com has been designated as a CPS, namely the intermediation of various travel services, including hotel rooms.⁸³ To the extent that Google Search's implementation of Article 6(5) of the DMA helps to entrench Booking.com's gatekeeper status, as seems likely based on our analysis above,⁸⁴ this is contrary to the purpose of the DMA.

This is a good illustration that the best way to ensure competitive pressure on a CPS is often to have another digital gatekeeper behind it, but – and here is the crux of the matter – not through the exploitation of its own CPS, as is the case with Google Search.

In the case of Booking.com's relationship with hotels, however, there is a more specific story to be told: by facilitating disintermediation, the DMA aims to limit the platform's intermediation power and to make its gatekeeper position contestable. At the same time, it should also work towards a fairer distribution of the gains from trade between the hotels and the OTA.

This mechanism is crucial where an intermediation service has a gatekeeper position in a particular industry and has therefore been designated as a CPS under the DMA. In this context, there is little hope that competitive pressure from competing intermediation platforms will protect the interests of business users and prevent excessive fees and other unfair conditions. The best hope for a competitive correction lies in the direct sales channel. This mechanism must therefore be protected from gatekeepers' restrictions.

Paradigmatic for the strategy to achieve the DMA's regulatory goals through creating space for disintermediation is the prohibition even of imposing (only) narrow (price) parity clauses on sellers pursuant to Article 5(3) of the DMA, that is, of clauses that stipulate that sellers must not offer a lower price in the direct sales channel but are allowed to set lower prices on other platforms.⁸⁵ The same applies to the prohibition of so-called anti-steering measures by gatekeepers under Article 5(4) of the DMA.⁸⁶ The gatekeeper must allow the sellers to communicate freely with the consumers they have acquired and to advertise the transactions through the direct sales channel.

⁸³ European Commission, 13.05.2024, Case DMA.100019, *Booking – Online intermediation services*.

⁸⁴ See above Section V.1.

⁸⁵ See Recital 39, 4th sentence, of the DMA ('To ensure that business users of online intermediation services of gatekeepers can freely choose ... direct online sales channels'). See Franck and Peitz (n 82), 314.

⁸⁶ See Recital 40, 1st sentence, of the DMA ('To prevent further reinforcing their dependence on the core platform services of gatekeepers').

With this in mind, it is indeed significant, though not surprising, that at the EU Commission's compliance workshop for Booking.com the bulk of the debate between representatives of the hotel industry and Booking.com focused on the effective implementation of these two provisions.⁸⁷ This confirms that, from the point of view of the hotel industry, as the main group of business users of Booking.com, the contestability of its position and the fairness of its supply of intermediation services depend to a large extent on whether the direct distribution channel remains open to the hotels.

However – and this is where the challenge lies – visibility on Google services is crucial for the hotels if they want to use their leeway, particularly protected by Article 5(3) and (4), to evade Booking.com or to put pressure on the fees and conditions there. Thus, the underlying regulatory mechanism of protecting fairness and contestability by facilitating disintermediation will be hampered if, in particular, the visibility of the hotels in Google Search is reduced and the brokerage of hotel rooms through Google Hotels, and thus without the participation of OTAs, is made practically more difficult. This explains the sensitivity of the European hotel industry to what may be considered a modest decline in the ranking of hotel searches, if this is coupled with a relative improvement in the visibility of Booking.com.⁸⁸

It is clear from the foregoing that, if Google Search's implementation of Article 6(5) of the DMA further weakens competition in hotel intermediation services and the direct hotel distribution channel, this is an undesirable effect in the light of the DMA's gist and regulatory objectives and policies, with respect to Booking.com as a designated CPS.

This raises the question, addressed in the following section, of whether and how such unintended consequences can and should play a role in the enforcement of Article 6(5) of the DMA.

VI. How to Cope with Trade-Offs and Undesirable Consequences of DMA Implementation

Through the way it displays hotel search results and implements the DMA's ban on self-preferencing, Google can determine the visibility of hotels' direct sales channels versus OTAs. It can thus alter the distribution of economic rents between these two types of player. As we have learned, the DMA's regulatory approach is not indifferent in this regard, as it seeks to facilitate disintermediation in order to generate competitive pressure on transaction platforms such as Booking.com that are designated as CPSs. Assuming that Google's implementation of Article 6(5) of the DMA does indeed result in the loss of visibility of hotels' direct sales channels vis-à-vis Booking.com and thus their ability to exert competitive pressure on the platform's terms and conditions, the regulatory objective of the DMA could not be fully achieved. In the following section, four theses are put forward on how to deal with these undesirable consequences:

⁸⁷ European Commission, Booking DMA compliance workshop (25 November 2024), https://digital-markets-act.ec.europa.eu/events-poolpage/booking-dma-compliance-workshop-2024-11-25_en.

⁸⁸ See above Section V.1.

- First, this finding does not justify any restrictive or delayed enforcement of Article 6(5) of the DMA against Google Search. Such deviation is not provided for in the regulatory approach of the DMA, which deliberately does not recognize any form of efficiency defence.
- Second, the Commission has no power under Article 8(2) of the DMA to impose a specific implementing measure (among several possible implementing measures compatible with Article 6(5) of the DMA) in order to avoid undesirable side effects. Only informal agreements are possible.
- Third, Google’s implementation of Article 6(5) of the DMA may have an indirect effect on the scope of other provisions of the DMA, such as Article 5(3). Such an effect may thus mitigate any undesirable effects of the first implementation.
- Fourth, undesirable side effects of DMA implementation such as an increased imbalance in the relationship between OTAs and hotels can (and indeed need to) be addressed through antitrust and other regulatory tools.

1. No Limited or Delayed Enforcement of a DMA Obligation

The first idea that comes to mind when considering the prospect of undesirable effects of a DMA implementation is a restrictive application of the provision in question. The main objective of the DMA is to protect the openness of digital markets and, thus, the welfare of business users and end users of CPSs.⁸⁹ Therefore, when considering Article 6(5) of the DMA and its implementation by Google in the display of hotel search results, it stands to reason that the primary concern is the welfare of hotels, of intermediaries such as OTAs and meta-search services, and of end users who wish to use hotel services.

Assuming, for the sake of argument, that it could be demonstrated that the net effect of strict enforcement of Article 6(5) of the DMA would be negative for the welfare of all these market participants, should strict enforcement not be waived in individual cases, in line with the regulatory objectives of the DMA? Given the DMA’s regulatory approach, this can be clearly rejected. There are two main reasons for this: the deliberate rejection of case-by-case welfare analysis and the precautionary protection against platform envelopment strategies.

a) The DMA’s deliberate rejection of individual welfare analysis

Individual exemptions from the list of obligations under Articles 5, 6 and 7 of the DMA are only provided for reasons of public health and security,⁹⁰ or where the gatekeeper can demonstrate that ‘compliance ... would endanger, due to exceptional circumstances beyond the gatekeeper’s control, the economic viability of its operation in the Union’.⁹¹

⁸⁹ See Recital 7 of the DMA.

⁹⁰ Article 10 of the DMA.

⁹¹ Article 9(1) of the DMA.

The DMA does not provide for an efficiency defence.⁹² Suggestions to the contrary⁹³ were not taken up during the legislative process. This is the result of a deliberate decision to keep complexity and implementation costs down. This was done to avoid what the EU legislators considered to be an undue obstacle to the effective and efficient enforcement of competition law against digital gatekeepers.⁹⁴ Indeed, one of the key conceptual challenges for antitrust enforcement against two-sided platforms is that their practices may lead to diverging welfare effects for their different user groups. However, antitrust enforcement typically seeks to avoid getting involved in the business of netting off countervailing welfare effects, which poses measurement challenges and also requires normative judgements about distributional effects.⁹⁵ The DMA's regulatory technique of drafting specific dos and don'ts and denying the possibility of individual welfare or efficiency analysis is supposed to 'solve' these challenges of incommensurability.⁹⁶ To consider the restrictive application or enforcement of an obligation such as Article 6(5) of the DMA to be possible in the light of a case-specific welfare analysis would undermine this fundamental regulatory choice.⁹⁷ This would lead to the very challenges that the legislator wanted to avoid: measuring and balancing the welfare effects on different user groups.

b) The DMA's precautionary protection against platform envelopment strategies

The DMA is designed not only to protect the different categories of users of CPSs but also to ensure the contestability of digital markets. In this sense, as we have already noted, the prohibition of self-preferencing in ranking under Article 6(5) of the DMA is intended to prevent platform envelopment strategies. In any case, a restrictive case-by-case application would have to take account of dynamic effects. The reasoning would be that, while Google's competitive pressure on OTAs and other intermediaries in hotel distribution may be beneficial to hotels and consumers in the short term, in the long term there is a risk that Google will also take over these intermediary markets, thereby worsening market and competitive conditions for these user groups.

Therefore, in addition to the balancing of welfare effects on different user groups discussed in the previous section, it would also have to be taken into account that there is no need for intervention for a certain period of time. In our specific case this would mean that one would

⁹² Bostoen (n 46), *The Antitrust Bulletin*, 68 (2023), 263, 286–288; Eckart Bueren and Marcel Zober, 'Efficiency considerations in DMA procedures', *Journal of Antitrust Enforcement* 10 (2025), <https://doi.org/10.1093/jaenfo/jnaf010>; Rupprecht Podszun and Andreas Schwab, 'Article 5(1). Obligations for gatekeepers', in Rupprecht Podszun (ed.), *Digital Markets Act* (Nomos, Baden-Baden 2024), Article 5(1), para. 9.

⁹³ See Alexandre de Streel et al., 'The European proposal for a Digital Markets Act: A first assessment' (CERRE, January 2021), 22–23; Monopolkommission, 'Empfehlungen für einen effektiven und effizienten Digital Markets Act', *Sondergutachten* 82 (2021), paras 130–167; Daniel Zimmer and Jan-Frederick Göhsl, 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper', *Zeitschrift für Wettbewerbsrecht* 19 (2021), 29, 54–56.

⁹⁴ Recital 5 of the DMA. See European Commission, 19.3.2025, DMA.100203 – Apple – Operating Systems – iOS – Article 6(7) – SP, paras 65–66.

⁹⁵ Jens-Uwe Franck and Martin Peitz, 'Digital platforms and the new 19a tool in the German Competition Act', *JECLAP* 12 (2021), 513, 523.

⁹⁶ Franck and Peitz (n 82), 310.

⁹⁷ Cf. Anne C. Witt, 'The Digital Markets Act – Regulating the Wild West', *CMLR* 60 (2023), 625, 653–654; Witt recognizes that 'it would defy the very purpose of the DMA if the Commission were to start the assessing the effects of business conduct in each individual case', yet still accepts the idea of selective enforcement as a last resort in order to avoid false positives.

have to argue that, given that a CPS, Booking.com, is active in the neighbouring OTA and meta-search engine market, there is no risk of Google successfully conquering and monopolizing the adjacent hotel intermediation market, at least in the short to medium term.

Given the regulatory approach of the DMA, neither the Commission nor the courts are entitled to carry out such an assessment and balancing. This is, first of all, because of the implementation difficulties already highlighted in the previous section. For what period of time in the future should it be predicted, and with what degree of precision, that self-preferencing in ranking is acceptable? These application uncertainties are deliberately excluded from the enforcement of the DMA obligations.

Moreover, the protection against platform envelopment strategies, as expressed in Article 6(5) of the DMA, is the result of a precautionary measure, a deliberate regulatory decision to prevent the risks of conquest of adjacent markets and their tipping in favour of digital gatekeepers.⁹⁸ The fact that this (in some cases) early intervention, which is not to be changed by individual case analysis, may lead to static efficiency losses, for example by preventing vertical integration, must be seen as an effect that the legislator has accepted in order to (rigorously) prevent long-term damage to the contestability of digital markets. This should be understood as the result of an error-cost analysis: the drafters of the DMA assumed that the long-term costs of a false negative – that is, of wrongly denying the risk of a successful platform envelopment strategy and the tipping of a neighbouring market – were so high that a strict precautionary principle was appropriate.⁹⁹ Therefore, this strict regulation would no longer apply only if Google Search were no longer to be regarded as a DMA CPS, and thus as a source of such risks.

2. The Commission May Not Avoid the Undesirable Side Effects by Imposing a Specific Measure under Article 8(2) of the DMA

If the implementation of the DMA threatens to have undesirable effects, one might ask whether the Commission could not impose on the gatekeeper a particular way of implementing the DMA that would avoid such side effects. Could the Commission, for example, prohibit Google from implementing its ‘experimental interface’, displayed in three EU jurisdictions in November 2024,¹⁰⁰ that was limited to blue links and text ads? We see no reason to doubt that this type of display would be compliant with Article 6(5) of the DMA. However, if we are to believe Google’s statements about the data collected during this experimental period, this interface would be even more damaging to hotels’ direct sales channels, both in absolute terms and even more so in relation to OTAs.¹⁰¹ Or should the Commission even be allowed to require Google to display results in a way that increases the relative visibility of hotels compared to the status quo?

⁹⁸ See Recitals 26 and 27 of the DMA.

⁹⁹ This is linked to the need for speedy intervention, which competition law enforcement was unable to provide in digital gatekeeper cases. See Bostoen (n 46), 263, 268–270.

¹⁰⁰ See above Section II.4.

¹⁰¹ See Bethell (n 36) (‘Hotels lost the most traffic (more than 10%), affecting hundreds of thousands of European hotels. Traffic to intermediary sites largely stayed flat’).

We believe that such an intervention would be beyond the mandate of the Commission. Article 8(2) of the DMA does not provide a basis for such a measure. However, we see that such an idea is not implausible, especially since Article 8(7) of the DMA states that:

[i]n specifying the measures under [Article 8] paragraph 2, the Commission shall ensure that the measures are effective in achieving the objectives of the Regulation *and* the relevant obligation.¹⁰²

This rhetorical duality between the achievement of the DMA's 'objectives' on the one hand and of its 'obligations' on the other is also reflected in Article 8(1) of the DMA. It seems to suggest not only that gatekeepers have a duty to comply with each of the DMA's obligations but, beyond that, that they have to find a way of doing so that is consistent with the DMA's regulatory objective.¹⁰³ Taking this further, it would seem possible to conclude that the gatekeeper must avoid implementing an obligation such as Article 6(5) of the DMA in a way that, without breaching any other obligation, weakens the effectiveness of the DMA in achieving its objectives, such as promoting disintermediation, as underlying Article 5(3) and (4) of the DMA. And, if this is correct, then the Commission should be able to order Google, for example on the basis of Article 8(2) of the DMA, that when it implements Article 6(5) of the DMA it does so in a way that does not worsen the relative visibility of hotels compared to Booking.com, as this would undermine the regulatory objective of the DMA as enshrined, for example, in Article 5(3) and (4) of the DMA.

To avoid the undesirable side effects noted, for example in the implementation of the ban on self-preferencing and to do justice to the DMA's regulatory objectives, it must be presumed that the Commission has regulatory leeway with regard to both procedural and substantial elements when imposing specifying measures under Article 8(2) of the DMA. This may mean that digital gatekeepers may be forced to fulfil their obligations under Articles 6 and 7 of the DMA in a specific way, even though other implementation options that are also compatible with these obligations exist. In our opinion, although in principle Article 8(2) DMA presupposes such leeway (subsection a below), it does not extend far enough to avoid the undesirable side effects relevant here because this would effectively amount to an extension of the obligation to be implemented at the expense of the gatekeeper (subsection b below).

a) Article 8(2) of the DMA presupposes a certain regulatory leeway for the Commission

The basic idea behind the power conferred by Article 8(2) of the DMA is that the Commission can define the scope of obligations under Articles 6 and 7 of the DMA with regard to specific CPSs, and potentially only in relation to specific scenarios. This is indicated by the wording of Recital 29 of the DMA, which states: 'it should be possible for the Commission to impose implementing measures on *the gatekeeper* by decision. Those implementing measure should be designed in an effective manner, having regard to the *features of core platform services*.'¹⁰⁴

¹⁰² Emphasis added.

¹⁰³ See Juliane Mendelsohn, Artikel 8 DMA. Einhaltung der Verpflichtungen durch Torwächter, in Tobias Mast, Matthias C. Kettemann, Stephan Dreyer and Wolfgang Schulz (eds), *Digital Services Act, Digital Markets Act* (C.H. Beck, München 2024), Artikel 8 DMA, para. 30 (arguing that this statement in Article 8(1) and (7) of the DMA could be understood as meaning that the overall objective of the DMA 'is not limited to compliance with the obligations [laid down in Articles 5, 6, and 7 of the DMA], but goes beyond that and aims to bring about a systematic change in digital services and markets towards greater fairness and ... contestability').

¹⁰⁴ Emphasis added.

Furthermore, Recital 65 of the DMA states that ‘such further specification should be possible where the implementation of an obligation ... can be affected by *variations of services within a single category of core platform services*’.¹⁰⁵ The underlying concept of a case-specific assessment is also evident from Article 8(7) of the DMA, which states that measures must be ‘proportionate in the specific circumstances of the gatekeeper and the relevant service’. The case-specific nature of specifying measures under Article 8(2) of the DMA distinguishes it from the competence under Article 12(2)(c) of the DMA to specify ‘the manner in which the obligations laid down in Article 5 and 6 [of the DMA] are to be performed by gatekeepers’ through delegated acts. The latter competence can be used to produce rules with *erga omnes* effect. However, this also involves higher hurdles, notably the need for a market investigation.¹⁰⁶

As a matter of principle, the Commission must also have a certain degree of regulatory discretion with regard to the substantive aspects of the implementation of particular obligations when acting specifying measures under Article 8(2) of the DMA, given the regulatory nature and intention of this competence. Article 8(2) does not require that there be a breach of a DMA obligation. Specifying measures must therefore be distinguished from (behavioural) remedies based, for example, on Article 7(1) of Regulation 1/2003: The limit of proportionality in the case of remedies means that they must not go beyond what is necessary to end the infringement (or, in addition, possibly also to eliminate continuing anticompetitive effects¹⁰⁷). In contrast, the case-specific specifications provided for in Article 8(2) of the DMA, which are independent of any infringement, presuppose, by their very nature, that the gatekeeper’s scope for implementation under Articles 6 and 7 of the DMA can be restricted. If the Commission were only permitted to impose measures where this was the sole DMA-compliant implementation – in other words, if the Commission had to demonstrate that no alternative DMA-compliant implementation was feasible – the threshold would be so high that a key objective of Article 8(2) of the DMA, namely to provide gatekeepers and third parties with legal certainty,¹⁰⁸ would effectively be rendered meaningless. Therefore, contrary to Apple’s submission in the iOS case concerning interoperability, the measures set out in Article 8(2) of the DMA are not confined to non-substantive matters.¹⁰⁹ However, the Commission’s regulatory leeway is also subject to limitations, which will be discussed in the next section.

¹⁰⁵ Emphasis added.

¹⁰⁶ Article 12(1) of the DMA.

¹⁰⁷ See Jens-Uwe Franck, ‘Competition enforcement versus regulation as market opening tools: An application to banking and payment systems’, *Journal of Antitrust Enforcement* 12 (2024), 148, 153–155.

¹⁰⁸ See Richard Feasey and Giorgio Monti, ‘DMA process and compliance’ in Alexandre de Streel (Coord.), *Implementing the DMA: Substantive and Procedural Principles* (Cerre, January 2024), 93, 101 (stressing that ‘the only way for a gatekeeper to obtain a formal statement that its conduct complies with the DMA is through a specification decision’). See also Boris Paal and Fabian Kieß in Boris Paal and Hubertus Gersdorf (eds), *Beck’scher Online-Kommentar Informations- und Medienrecht* (CH Beck, München, 47th Edition 01.02.2025), Article 8 DMA, para. 52 (asserting that the purpose of Article 8(2) to (9) of the DMA is to enhance the efficiency of enforcement by establishing legal certainty quickly).

¹⁰⁹ See European Commission, 19.3.2025, DMA.100203 – Apple – Operating Systems – iOS – Article 6(7) – SP – Features for Connected Physical Devices, paras 116–118.

b) *Considering the limitations of the Commission's leeway under Article 8(2) of the DMA: a mandate to specify obligations but not to extend them*

Article 8(2) of the DMA allows the Commission to require the gatekeeper to implement a specific obligation relating to a CPS, even when there are multiple DMA-compliant options available. Article 8(2) of the DMA gives the Commission a mandate to specify obligations but not to extend them. This is clear from the outset, as the specification procedure is intended to support effective compliance 'with the obligations laid down in Articles 6 and 7' of the DMA, as well as with Article 13 in conjunction with Articles 5, 6 and 7 of the DMA. As already emphasized, this is to be achieved through case-by-case individualization.¹¹⁰ By contrast, Article 12 of the DMA provides the Commission with the competence to extend obligations through delegated acts, albeit in a moderate way. Accordingly, the requirement set out in Article 8(7) of the DMA – that measures pursuant to Article 8(2) of the DMA must be 'proportionate to the specific circumstances of the gatekeeper and the relevant service' – must be interpreted as applying to a specific obligation in a particular case, rather than to the DMA and its objectives in general.

'Specification', as opposed to 'extension', presupposes that the rationality of a particular obligation is what determines a specifying measure. This is certainly the case where the Commission defines procedures¹¹¹ or technical standards¹¹² for the implementation of an obligation. Moreover, as laid out above, this may also include substantive clarifications, for example where the Commission extrapolates the rationale behind an obligation in order to determine when a circumvention prohibited under Article 13(4) of the DMA exists.

However, the boundary of mere specification would be crossed if a measure to specify a provision were not based on the desire to ensure compliance with, and guarantee the effectiveness of, that provision, given its rationale, but if the measure would be aimed at avoiding undesirable side effects in relation to other provisions (without that provision actually being violated) and if this would be justified on the grounds that it serves the DMA's overall objectives. Specification would then be no longer just a matter of ensuring compliance with, for example, Article 6(5) of the DMA with regard to Google Search. Rather, an obligation such as Article 6(5) of the DMA would effectively only be used as a bridge to tighten the DMA as such.¹¹³

Thus, the Commission has no power under Article 8(2) of the DMA to prevent the implementation of one DMA obligation from having the effect of undermining the effectiveness

¹¹⁰ See Article 8(7) and Recital 29 of the DMA.

¹¹¹ See European Commission, 19.3.2025, DMA.100204 – Apple – Operating Systems – iOS – Article 6(7) – SP – Process.

¹¹² See European Commission, 19.3.2025, DMA.100203 – Apple – Operating Systems – iOS – Article 6(7) – SP – Features for Connected Physical Devices.

¹¹³ This does not contradict the Commission's statement that it may 'specify any measures that fall within the scope of Article 6(7) [of the DMA] and ensure effective compliance with the objectives of these provisions and of *that Regulation as a whole*.' European Commission, 19.3.2025, DMA.100203 – Apple – Operating Systems – iOS – Article 6(7) – SP – Features for Connected Physical Devices, para. 117 (emphasis added). In accordance with Article 8(7) of the DMA, the latter wording merely indicates that the overall regulatory goals of the DMA must be considered to correctly understand the scope of an obligation. This does not imply that the Commission would claim the authority to 'specify' a particular obligation in a way that better serves the overall regulatory objectives, when this specification is not necessary in view of the rationale behind this obligation.

of another DMA obligation (but without constituting an infringement of the latter obligation). In such a scenario, its only option is to try to work informally¹¹⁴ with the gatekeeper to achieve an implementation that avoids undesirable side effects.

3. Repercussions on Other DMA Provisions and Mitigating Undesirable Consequences of DMA Implementation

The above analysis means that certain effects of the implementation of a DMA obligation cannot be addressed under the DMA simply because they are undesirable in light of the regulatory objectives of the DMA. They can only be addressed if they actually result in a breach of another DMA obligation. Remarkably, such repercussions are indeed possible. This can be illustrated by the example of Google's implementation of Article 6(5) of the DMA and its potential impact on the scope of Article 5(3) of the DMA: if the implementation of Article 6(5) in the display of hotel search results by Google weakens the direct sales channel of hotels vis-à-vis Booking.com, this strengthens the argument that Booking.com's so-called 'undercutting' policy must be considered prohibited under Article 5(3) in conjunction with Article 13(4) of the DMA.

'Undercutting' occurs where a platform operator, at its own expense, reduces the price at which its business users offer a product on the platform, in order to match a lower price at which the product is available elsewhere, by accepting a lower margin.¹¹⁵ Booking.com can implement such a policy based on its general terms and conditions, which allow the platform to 'give an incentive with respect to the room price at its own cost'.¹¹⁶ It should suffice to note here¹¹⁷ that this policy corresponds to the implementation of a price matching clause and can have equivalent effects to an across-platform parity obligation. As the latter is prohibited for Booking.com under Article 5(3) of the DMA, this suggests that this policy could be considered an illegal circumvention of the prohibition of parity policies pursuant to Article 13(4) of the DMA. Given that the anti-circumvention provision should be applied on the basis of an effects-based analysis, consideration should be given to the possibility that direct sales may exert strong competitive pressure on the platform's fees, so that neither business users (that is, the hotels) nor end users suffer the detriment that Article 5(3) of the DMA is intended to prevent. However, the latter consideration is irrelevant if the hotels' direct distribution channel is weak and cannot exert sufficient competitive pressure on Booking.com's fees.¹¹⁸ This illustrates the potential impact of Google Search's implementation of the DMA: if this (further) weakens the direct distribution channels of hotels, it could be argued that Booking.com's 'undercutting' policy is prohibited under Article 13(4) of the DMA, which could strengthen the position of hotels vis-à-vis Booking.com.

The general insight is that the actual impact of the implementation of one DMA obligation will form the (new) framework within which other DMA obligations will have to be interpreted. Thus, the correct implementation of one DMA obligation (such as Article 6(5) of the DMA in the case

¹¹⁴ The adoption of implementing acts making commitments offered by the gatekeeper binding (Article 25 of the DMA) is only foreseen in case of systematic non-compliance (Article 18 of the DMA).

¹¹⁵ See Franck and Peitz (n 82), 325.

¹¹⁶ Booking.com, General Delivery Terms (as of Dec. 2024), sub 2.1.5 (on file with the authors).

¹¹⁷ For a more detailed discussion, see Franck and Peitz (n 82), 326–330.

¹¹⁸ Franck and Peitz (n 82), 326, 329.

of Google Search) with undesirable consequences (having regard to the objectives of the DMA), may lead to an extended scope of application of another DMA obligation (such as Article 5(3) with Article 13(4) of the DMA in the case of Booking.com), thereby avoiding or at least mitigating the undesirable consequences of the first implementation.

4. Antitrust and Other Instruments to Address Undesirable Side Effects of DMA Implementation

Finally, the factual and legal implications of the DMA cannot be analysed and assessed in isolation. If the correct implementation of a provision of the DMA – such as Article 6(5) by Google Search – leads to consequences that are undesirable in terms of the spirit and regulatory objective of the DMA but without violating any other provision of the DMA, those consequences may be addressed by other means, notably antitrust enforcement and other forms of regulatory intervention. These also apply alongside the DMA, albeit within the limits of Article 1(5) and (6) of the DMA as far as the laws of the Member States are concerned.

The relationship between OTAs and hotels is a clear example of this. The imposition of a parity policy by Booking.com and other OTAs has been the subject of antitrust proceedings in various European jurisdictions.¹¹⁹ In fact, the Bundeskartellamt's prohibition of the use of also narrow (price) parity clauses by Booking.com laid the groundwork for the strict ban on parity policies in Article 5(3) of the DMA.¹²⁰ In 2024, the Spanish competition authority considered Booking.com's use of narrow (price) policy clauses combined with a policy of 'undercutting' (as well as other conditions imposed on hotels) to be an exploitative abuse.¹²¹ This decision shows that, even after Booking.com's designation as a DMA gatekeeper, national antitrust authorities are willing to use antitrust law to scrutinize the fairness of the terms and conditions imposed on hotels. Under German antitrust law, the abuse regime under section 19a of the German Competition Act could be applied to this effect.¹²² Although Booking.com has not yet been designated under this provision, the platform operator could be next on the list.¹²³

Unfair terms imposed on hotels by OTAs such as Booking.com can also be addressed by Member State instruments other than antitrust law. For example, the majority of the EU Member States protect businesses from unfair contract terms, typically through judicial review

¹¹⁹ For an overview see Jens-Uwe Franck and Nils Stock, 'What is "competition law"? – Measuring EU Member States' leeway to regulate platform-to-business agreements', *Yearbook of European Law* 39 (2020), 320, 358–362.

¹²⁰ Bundeskartellamt, 22 December 2015, B9-121/13, Booking.com. The decision was initially successfully challenged by Booking before the Düsseldorf Higher Regional Court (4 June 2018, Kart 2/16(V)) but was ultimately upheld by the Bundesgerichtshof, the Federal Court of Justice (19 May 2021, KVR 54/20). Note that, in 2015, the Swedish, French and Italian competition authorities had accepted Booking.com's commitment to reduce its wide parity clause to a narrow parity clause. In Sweden, private litigation against Booking's use of narrow parity clauses was also ultimately unsuccessful. See Franck and Stock (n 119), 320, 359–360 (text accompanying notes 149–151 and 160–161).

¹²¹ See Comisión Nacional de los Mercados y la Competencia, 29 July 2024, S/0005/21, Booking, para. 498.

¹²² For the instrument's applicability alongside the DMA, with the restrictions of Article 1(6)(b) of the DMA, see Jens-Uwe Franck, 'Implementing and enforcing the EU's Digital Gatekeeper Regulation: A German perspective on the role of national authorities', Discussion Paper Series – CRC TR 224, DP No. 673 (March 2025), sub 2.2.3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5207146.

¹²³ For Booking.com as a possible candidate for designation under section 19a of the Competition Act, see Jens-Uwe Franck and Martin Peitz, 'Digital platforms and the new 19a tool in the German Competition Act', *JECLAP* 12 (2021), 513, 518.

of standard terms.¹²⁴ In addition, targeted legislation is also conceivable. Notably, the use of parity clauses by OTAs is subject to specific domestic legislation in four Member States.¹²⁵ However, for designated DMA gatekeepers such as Booking.com, such national regulation can only (continue to) apply under the conditions set out in Article 1(5) of the DMA.¹²⁶

VII. Concluding Remarks

The DMA deliberately comes with a significant degree of regulatory rigidity. This is based on the belief that the long-term risks to the contestability and fairness of digital markets posed by designated CPSs need to be addressed through rigorous intervention. This approach is put to the test if the implementation of the DMA in respect of one CPS results in the entrenched position of another CPS being further consolidated, thereby partially undermining the regulatory objectives of the DMA: if the implementation of Article 6(5) of the DMA by Google Search increases the dependence of hotels on Booking.com,¹²⁷ this would be directly contrary to the regulatory objectives of the DMA.¹²⁸

In this article, we have outlined four theses for dealing with such a scenario. First, while such adverse side effects are undesirable in terms of the regulatory objective of the DMA, they do not justify a limited enforcement of a particular obligation, such as Article 6(5) of the DMA.¹²⁹ Second, adopting specifying measures to prevent such effects would exceed the regulatory leeway granted to the Commission under Article 8(2) of the DMA.¹³⁰ Third, there may, however, be indirect effects on the scope of other DMA provisions that mitigate such undesirable side effects. For example, the weakening of the hotels' direct sales channel through the implementation of Article 6(5) of the DMA in Google Search may lead to a more rigorous application of Article 5(3) of the DMA against Booking.com.¹³¹ Fourth and finally, undesirable side effects need to be addressed through antitrust and other regulatory tools. Indeed, the relationship between hotels and OTAs such as Booking.com has been and will continue to be subject to antitrust scrutiny.¹³²

In illustrating and developing these propositions, a number of observations have been made in relation to Article 6(5) of the DMA and, in particular, its implementation by Google Search. The prohibition of self-preferencing must not unnecessarily hamper the dynamic developments in the technology and functionality of CPSs. Therefore, the determination of whether a service is 'distinct or additional' to an online search service must not be made formally based on the

¹²⁴ In 2018, the Commission noted that only seven Member States do not provide for any form of protection against unfair terms in business-to-business contracts. See Commission Staff Working Document, Impact Assessment, Annexes, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (26 April 2018), SWD(2018) 138 final, Part 2/2, 91.

¹²⁵ For an overview of these legislative interventions and their motivation see Franck and Stock (n 119), 362–370.

¹²⁶ For an overview of the uncertainties regarding the interpretation of this provision, see Thorsten Käseberg and Sophie Gappa, 'Article 1 DMA. Subject Matter and Scope', in Rupprecht Podszun (ed.), *Digital Markets Act* (Nomos, Baden-Baden 2024), Article 1, paras 15–19.

¹²⁷ See above Sections V.1 and V.2.a).

¹²⁸ See above Section V.2.b).

¹²⁹ See above Section VI.1.

¹³⁰ See above Section VI.2.

¹³¹ See above Section VI.3.

¹³² See above Section VI.4.

DMA's definition of an online search engine. What matters is the behaviour and perception of the end user.¹³³ For example, while Google may be treading a fine line, the display of the Places Sites carousel in response to hotel search queries does not appear to be in breach of Article 6(5) of the DMA.¹³⁴ Elsewhere, however, we do see such a violation in the display of hotel search results, namely in the way in which the Local Pack¹³⁵ and various elements of the Places unit¹³⁶ are displayed. Regarding the latter, it should be noted that Article 6(5) of the DMA also covers cases of indirect self-preferencing, that is, scenarios where an illegally self-preferencing display of search results contains a link to a site with self-preferencing content.¹³⁷ Finally, it should be emphasized that the DMA accepts that CPSs are ad-funded. Consistent with this, the gatekeeper alone can make the decision, for example in the display of search results, to offer advertising services that then are exclusively brokered by the gatekeeper. However, the question of access to this advertising space is not entirely unaffected by Article 6(5) of the DMA, as (quasi-)exclusive access could amount to an illegal circumvention of the ban on self-preferencing in relation to the search service.¹³⁸

¹³³ See above Section III.1.

¹³⁴ See above Section IV.2.

¹³⁵ See above Section IV.3.

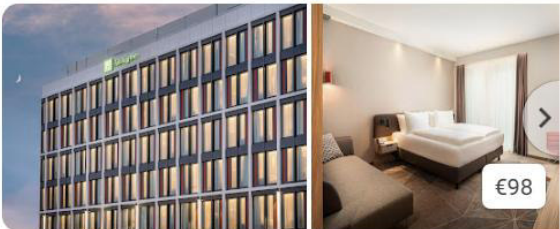
¹³⁶ See above Section IV.5.

¹³⁷ See above Section IV.5.b).

¹³⁸ See above Section IV.1.

VIII. Annex

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I am a Platinum Elite member of IHG. This hotel used to be cool to stay at. Easy check in, clean rooms, good service. I stayed both for family and business... [More](#)

Review from Google
5/5 · 4 days ago **NEW**
Very nice hotel with good location
Parking is nearby but chargeable.... [More](#)

Review from Tripadvisor
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