

Assignment Cover and Feedback Sheet

Module code & title: _____

Registration Number

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You can find this on [LEAP](#) or [MyEssex](#)

Assessment Information

Word Count

This excludes footnotes/endnotes and bibliography.

Declaration:

- I have read and understood the University Regulations on Academic offences.
- I certify that the attached is all my own work and that the word length stated above is accurate

Marking and Feedback

Mark

Penalty

Final Mark

Reason for penalty and marks deduction:

- Please contact Bev Jackson for support with academic writing skills

First Marker _____

If in moderation sample:

Second Marker/Moderator _____

Essay Feedback: Level 6

	Upper 1 st (80+)	1 st (70-79)	2.1 (60-69)	2.2 (50-59)	3 (40-49)	Fail (under 40)
Research	Identifies an extensive range of relevant case law, statutes, academic commentary and policy documents, demonstrating substantial, systematic, in depth research beyond the set material	Identifies a wide range of relevant cases and statutes, academic commentary and policy documents, demonstrating substantial, systematic research beyond the set material.	Identifies a range of relevant cases and statutes, academic commentary and policy documents, with evidence of research beyond the set material.	Identifies essential cases, statutes, academic commentary and policy documents, though there may be minor errors or omissions; attempts research beyond the set material	Identifies some essential cases statutes, academic commentary and policy documents, but with some errors or omissions; generally does not go beyond the set material	Identifies some materials but generally non-essential and/or not authoritative
Evaluation of Sources	Sources are perceptively evaluated for credibility and relevance; weight is given according to sophisticated or critically evaluated criteria	Sources are perceptively evaluated for credibility and relevance, with the wider context presented; weight is given according to clear criteria	Sources are evaluated for credibility and relevance; weight is given according to clear criteria	Sources are evaluated for credibility and relevance, but criteria may sometimes be unclear; sources are sometimes given inappropriate weight	Sources are often evaluated for credibility and relevance, but criteria are often unclear; sources are often given inappropriate weight	Sources are often not evaluated for credibility or relevance; weight is not accorded by clear criteria
Understanding of material	Original, systematic, critical understanding of the material	Sophisticated systematic critical understanding of the material	Systematic critical understanding of the material	Understands essential frameworks and engages critically with the material, though there may be some errors	Understands the essential framework but minimal critical engagement with the material; errors of understanding	No critical engagement; understanding is defective
Argument and structure	A compelling and novel response to, or novel insights into, the question, supported by a clearly structured narrative	A persuasive, very well supported and rigorous argument in response to the question, supported by a clearly structured narrative	A persuasive response to the question, supported by a clear structure	Responds to the question, though some material may not be relevant or relevant material omitted; appropriately structured	May not respond to the question directly though addresses broad topic; some material may not be relevant or relevant material omitted; structure may lack clarity	Significant passages of the work fails to respond to the question; work lacks structure
Language and presentation	Expression is fluent and with flair in formal written English; consistently uses legal and scholarly language; free from errors	Expression is clear and fluent, in formal written English; consistently uses legal and scholarly language; free from errors	Expression is clear and fluent in formal written English; uses legal and scholarly language; occasional errors	Expression is clear and effective in formal written English; uses legal and scholarly language; some errors	Expression is sufficiently clear and effective to communicate, generally in; some use of legal and scholarly language; errors may be frequent	Lack of clarity and/or errors impede(s) communication; legal or scholarly language infrequently used; frequent errors
Referencing and bibliography	Referencing is comprehensive and accurate, in accordance with OSCOLA. Bibliography is of a high standard, with no errors.	All sources are referenced fully and consistently, in OSCOLA. Bibliography is of a high standard, with minimal and minor errors.	All sources are referenced in OSCOLA, with occasional errors. Bibliography is complete and extremely well organised.	All sources are referenced in OSCOLA, but with some errors. Bibliography is complete and well organised.	Most sources are referenced; OSCOLA is followed but with some errors. Bibliography is mostly complete and organised.	Some sources are referenced but with frequent errors in OSCOLA. Bibliography is incomplete.

Problem question Feedback: Level 6

	Upper 1 st (80+)	1 st (70-79)	2.1 (60-69)	2.2 (50-59)	3 (40-49)	Fail (under 40)
Identifying legal issues within the facts	Identifies all key and minor issues; explains their significance with exceptional clarity and connection to wider context where relevant.	Identifies all key and minor issues; explains their significance and concisely with reference to wider context where relevant.	Identifies all key issues and several minor issues; explains their significance.	Identifies all key issues and may identify some minor issues, but with omissions or errors of understanding.	Identifies most key issues, but with omissions and/or problems of understanding.	Fails to identify several key issues.
Identifying and evaluating relevant law	Meticulous explanation of relevant legal framework; analyses wider legal context, areas of debate and academic literature; produces original interpretation of the law.	Meticulous explanation of relevant legal framework; analyses wider legal context and areas of debate; engages with academic literature where applicable.	Identifies relevant law well; aware of wider legal context and areas of debate; engages with academic literature where applicable.	Identifies relevant law well; aware of wider legal context and areas of debate; occasional minor errors only.	Essential relevant law identified, but with some errors of understanding.	Fails to identify most of the essential legal sources.
Applying the law to the facts	Applies law to produce detailed and highly persuasive conclusion with some originality; explains reasoning extremely well; explores alternative outcomes where applicable making reasoned choices between them.	Applies law to produce detailed and highly persuasive conclusion; explains reasoning well; explores alternative outcomes where applicable, making reasoned choices between them.	Applies law to produce persuasive and comprehensive conclusion; explains reasoning; explains alternative outcomes where applicable.	Applies law to all key issues; draws reasonable conclusions; explains reasoning; identifies alternative outcomes where applicable.	Applies law but only to key issues; some major errors or fails to fully explain reasoning.	Applies law to some key issues; some major errors or fails to provide reasoning.
Structure	Issues addressed by exemplary use of IRAC throughout; flows very well; efficient structure allows for a meticulous answer.	Issues addressed by effective use of IRAC throughout; flows well; efficient structure allows for a mostly meticulous answer.	Issues addressed by effective use of IRAC throughout; efficient structure allows for a concise and detailed answer.	Issues mostly addressed following IRAC; occasionally disorganised, unbalanced or repetitive.	Some attempt to use IRAC, but frequently disorganised, unbalanced or repetitive.	Portions of answer lack any coherent structure; no evidence of planning.
Language and presentation	Expression is fluent and with flair in formal written English; consistently uses legal and scholarly language; free from errors	Expression is clear and fluent, in formal written English; consistently uses legal and scholarly language; free from errors	Expression is clear and fluent in formal written English; uses legal and scholarly language; occasional errors	Expression is clear and effective in formal written English; uses legal and scholarly language; some errors	Expression is sufficiently clear and effective to communicate, generally in; some use of legal and scholarly language; errors may be frequent	Lack of clarity and/or errors impede(s) communication; legal or scholarly language infrequently used; frequent errors
Referencing and bibliography	Referencing is comprehensive and accurate, in accordance with OSCOLA. Bibliography is of a high standard, with no errors.	All sources are referenced fully and consistently, in OSCOLA. Bibliography is of a high standard, with minimal and minor errors.	All sources are referenced in OSCOLA, with occasional errors. Bibliography is complete and extremely well organised.	All sources are referenced in OSCOLA, but with some errors. Bibliography is complete and well organised.	Most sources are referenced; OSCOLA is followed but with some errors. Bibliography is mostly complete and organised.	Some sources are referenced but with frequent errors in OSCOLA. Bibliography is incomplete.

Please note: not all criteria are equally important when awarding a mark. These are the criteria that are used to assess the standard of your work. This guide gives you details of the different areas that are considered when your work is marked and what your work is expected to demonstrate in each degree category. This is a guide rather than a science and not all criteria have the same value.

Overall Comments and Feedback:**Chosen Question**

Please type your question in full if you had to choose one out of a list. If there was only one question, it is not necessary to repeat the question here.

1. "The General Court of CJEU (Case T-612/17) held that self-preferencing by online platforms amounts to an abuse of a dominant position. Critically discuss: a) the policy considerations in favour and against the prohibition of self-preferencing; and b) the legal test developed by the Court of Justice (Case T-612/17) for establishing the abusive conduct of self-preferencing."

Title: Self-Preferencing and Dominant Position: A Critical Analysis

Introduction:

This critical analysis analyzes the intricate system of policy concerns and the legal test that goes hand by hand with CJEU to look for and stop abusive behavior derived from self-preferencing practices.¹ People who support prohibition often emphasize the role of this policy in ensuring fair competition dynamics. The limit on self-preferencing prevents large influential platforms from using their monopolistic power to tailor the searches or favoritism toward own products and make a fertile ground for smaller competitors.² Opponents, in opposite view point it as a need for platforms to innovate and have profitable business so that they can improve their products in combination with services all aimed at benefiting the consumers. On the case T-612/17, the CJEU boiled down a legal test, which revolves around an elaborate theoretical edifice that could be utilised to review instances of self-preferencing.³ It is a more subtle judgment the dominance that platforms enjoy, whether self-preferencing leads to actual or potential anticompetitive effects and lastly, if there is any given by these platforms as objective justification for such preferential treatment. The Court's approach is associated with seeing the difficulty of finding a balance by regulating online platforms in Europe while taking into account the complexity of competition, innovation, and consumer welfare.

a) Policy Considerations: In Favor of Prohibition:

Consumer Welfare: Prohibiting Self-Preferencing for Fair Competition

Online forms that prohibit self-preferencing act as a place where consumer welfare is protected by promoting equal competition⁴. Digital markets are complicated, as sometimes strong platforms can be directly responsible for search results or preferential treatment of their own products even at their will, which is a serious issue concerning equal competition.⁵ With such platforms making the arena even, it appears that smaller competitors place themselves under a disadvantage through their own doing. If the consumer is given search results with similar products that the dominant platforms are promoting then it has a great impact on consumers. i.e., this limitation may prevent the consumers from making their way to potentially better or more innovative offerings that are available via small competitors which do not enjoy as good visibility as the big companies.⁶ It therefore undermines the standard principles of fair competition that it skews markets towards established platforms – essentially eliminating new entrants and their growth. So prohibition of self-preferencing becomes one of the brightest tools aimed at equalizing such inequality. Regulatory bodies, on the other hand, try to minimize such practices so that consumers can be able to cross a market which presents gives equal conditions with the alternatives.⁷ This will facilitate the creation of a level playing field where consumers have space to decide things wisely and smaller more

¹ Heggenes J, *The Price of Dominance? Self-Preferencing in EU Digital Markets from a Consumer Welfare Perspective*. (2021) <diva-portal.org>

² Bougette P, Budzinski O and Marty F, 'Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses' (2022) 67 *The Antitrust Bulletin* 190

³ Witt AC, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64 *The Antitrust Bulletin* 172

⁴ *Ibid* 2.

⁵ Dong Q, *New Ways to Address Competition Challenges in Digital Markets: Reflections and Enlightenment of the EU's Proposal for a New Competition Tool* (HeinOnline).

⁶ Mäihäniemi B, *Competition Law and Big Data: Imposing Access to Information in Digital Markets* (2020).

⁷ Buiten MC, *Regulating Data Giants: Between Competition Law and Data Protection Law*, vol (EALELS, volume)

innovative players can compete on merits thereby helping boost overall strength associated with being digital in future.

Innovation and Diversity: Restricting Self-Preferencing for a Dynamic Market

Limiting self-preferencing looks like one of the main aspects in the difficult relationship between innovation and market heterogeneity in the digital sphere. In the digital markets, there are a few dominant players that hold huge power over others and uncontrolled self-preferencing by these titans is rather scary not just for competition but also in relation to new entry into the market. Without limitations, these foremost platforms may result in market stagnancy and provide restricted variety since they hinder competition while deter newcomers.⁸ Self-preferencing restrict is the catalyst to competitive development since those smaller businesses are no longer subjugated by establishment giants who will always be dominant few here and there.. Establishing this sort of regulatory approach fosters an environment in which innovation can bloom the reason being that businesses are forced to try and separate themselves from the competitors in the market. This also provides an incentive to differentiate and provide new products or services that act as a driver of the market by introducing dynamism into it ensuring consumers have multiple options.⁹

The relationship between competition and innovation is symbiotic. Continued innovation drip-feeds consumer needs continually. By controlling self-preferencing, the regulator aims to build a market where not only healthy competition flourishes but also one in which constant innovation becomes a natural thing.¹⁰ In return, consumers are helped by a dynamic market space filled with the various needs that match their changing tastes and preferences. Basically, the ceiling on self-preferencing is another cornerstone for innovation and diversity development within the digital marketplace that would eventually contribute to efficiency and dynamism across all points of an ecosystem¹¹.

Innovation and Consumer Benefit: The Argument Against Prohibition

Proponents of lifting the anti-self preferencing ban argue it has a catalytic effect in terms which lends an impetus for online platforms to never remain stagnant and always develop better products or services for consumers.¹² They claim that in the long run this approach tends to be advantageous for consumers since platforms would invest more in research and development as a consequence of which there will be many innovations unlikely produced provided that environment was regulated. The argument relates to the perception that if self-preferencing is used for good, it may act as innovation catalyst and consumer orientation in the digital bazaar¹³.

⁸ FERRARI G, 'Big Tech Strategies across Markets: The Role of Self-Preferencing in Digital Antitrust' CINECA IRIS Institutional Research Information System

⁹ Kotler P, Kartajaya H and Setiawan I, 'Marketing 3.0: From Products to Customers to the Human Spirit' in Kartikeya Kompella (ed), *Marketing Wisdom* (Springer Singapore 2019)

¹⁰ Banwo Adeleke O, Du J and Onokala U, 'Symbiotic Innovative Relationships of Small and Medium Enterprises' [2015] Journal of Advanced Management Science 128 <<http://www.joams.com/index.php?m=content&c=index&a=show&catid=41&id=189>

¹¹ Almunawar MN, Anshari M and Lim SA, 'Modelling Business Ecosystem of Digital Marketplace Using Value Network' (2020) 03 Journal of Business and Economic Analysis 133.

¹² Manne GA and Wright JD, 'INNOVATION AND THE LIMITS OF ANTITRUST' (2010) 6 Journal of Competition Law and Economics 153.

¹³ Malik J and Kumar S, 'A Novel Consumer-Oriented Trust Model in E-Commerce' in Namita Gupta, Prasenjit Chatterjee and Tanupriya Choudhury (eds), *Smart and Sustainable Intelligent Systems* (1st edn, Wiley 2021)

Preservation of Business Model: Sustaining Healthy Competition

Advocates of self-preferencing insist that it is a crucial mechanism to allow online platforms to sustain their business models.¹⁴ These claim that the need for self-preferencing to grow a balanced competition environment is necessary, especially through such mechanism as allowing rewarding successful members of the markets. However, allowing platforms to provide their own products or services so that they are given the higher priority is seen as becoming a part of economic feasibility itself in order for them to be more empowered and able to leverage whatever innovations they bring in. This approach creates a merit culture competition where platforms have the incentive to keep enhancing their services so that consumers can benefit from desperately competitive and innovative commodities¹⁵. They add that if the regulators will protect its business model of self-favouritism, they can find a balance which would not necessarily in throttling out these platforms but rather making life inside them so rich with competition and topping for the customer.

b) Legal Test for Abusive Conduct: The legal test developed by the CJEU in Case T-612/17 involves assessing:

Dominant Position: Assessing Market Dominance in Self-Preferencing Regulation

Case T-612/ 17 provides a detailed analysis of the dominance of an online platform in relation to the relevant market. Arguably, this holistic evaluation includes a status check of different factors like the stake in its market share independence from competitors and customer intermediaries respectively financial wherewithal. Together, these criteria act as a litmus test that would ascertain whether or not a given platform can be labelled dominant and is an integral part of determining the reasonableness of self-preferencing practices¹⁶. Evaluating autonomy from external influences determine the ability to be independent – or in other words potential influence as regards shaping competition dynamics of the platform. Financial resources can also measure its relative strength or capacity for having significant market power on the platform. This is the most comprehensive approach there where there seems to be no room for error because it leaves space a subtle understanding of what position should take by identifying best possible course towards regulation of platforms.¹⁷

Indeed, when looking beyond that assessment to the broader economic backdrop of how different forces are influencing competitive dynamics then a much greater dimension is added. It provides regulators with the ability to identify those occasions where a platform's dominance can make fair competition skew, requiring intervention through different regulatory actions. Therefore there is a detailed model provided by the legal test in Case T612/ 7, if analysing these parts closer, it solves respects to some properties related to liquidity of digital markets and guarantees a proper scope for dominant positions and an adequate answer that protects sincerity of competition.

Effect on Competition: Unpacking the Impact of Self-Preferencing

Finally, Case T-612/ 17 another point to be considered in the context of self-preferencing aspect that should pay much of attention during performing overall analysis as how this approach affects competition within relevant market. On the other hand scrutiny of the assessment involves whether self-preferencing practices exclude other competitors from entering to market thus set up barriers that bar fair competition. This further goes into whether such practices help in choking

¹⁴ Mahendrawati NLM and Putra IB , 'Legal Protection Model in Healthy Business Competition for Brands of Creative Economy Products' [2023] JL Pol'y & Globalization.

¹⁵ Chirita A, 'Abuse of Global Platform Dominance or Competition on the Merits?' [2021] Loy. Consumer L. Rev.

¹⁶ Ibid 1.

¹⁷ Bamberger KA and Lobel O, 'Platform Market Power' [2017] 32 Berkeley Tech. L.J. 1051.

diversity in other alternatives that are available for potential competitor products or services that have the capacity of killing off options present on an open market¹⁸. Legal test goes into the finer aspects of self-preferencing to be evenhanded and nonbinding when it is possible toward varied outcomes where a dominant platform may use such practices that give them leverage play out within this competitive space in their favour.

It is imperative to know such subtle effects if one wishes to implement effective regulatory measures. In The assessment of self-preferencing from the perspective it may imply support for innovation or, additionally, promote corrupting fair competition provides regulators with ideas on interventions that create an ideal equilibrium. This fine balance ensures that though innovation occurs relentlessly, the process holds market's equilibrium so as to be equitable and unfettered. The one sidedness of a functionality based test "single use approach" lies in the subtlety of an approach happens to focus on a potential that is effectively embraced by those who are already playing with all the rules located within today's digital phenomena It will take into account elaborate dynamics between self-preferencing and its results verses non-results or market entrance and consumer¹⁹.

Objective Justifications: Balancing User Experience Enhancement with Competitive Fairness

Case T-612/17 the legal test set adds a vital dimension by including objective justifications in the assessment of self-preferencing practices. This added consideration is that there are occasions when self-preferencing would be due to good reasons, especially those which strive at enhancing the overall user experience. The assessment progresses as a systematic review of the motives underneath the platform, leading to questioning if its self-preferencing activities are truly about improving user experience or just an anti-witchcraft approach²⁰.

If a fine balancing act is not done, respecting the elements of legitimate justifications will become difficult. It is the rightful point to develop a gap between those occasions when self-preferencing in reality makes for an enhanced user experience, providing good competition and maybe this differentiation is necessary for regulatory measures to have the required efficacy so they can be specific of abuse cases without stifling legitimate business procedures.

The fact that objective justifications are included in the legal test shows a more subtle and responsive approach. This allows regulatory interventions to avoid the one-size fits- all approach but rather take into account the individual circumstances that drive self – preferencing practices. Allowing platforms a degree of leeway in optimising the user experience, supporting innovation and competition can stop the misuse of dominance while acknowledging reasonable reasons.²¹ As such, the legal test offers a way around of self-preferencing issues by ensuring fair competition and preserving users' interests while with up all over in digital markets.

¹⁸ Motta M, 'Self-Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases' (2023) 90 International Journal of Industrial Organization 102974.

¹⁹ Van Dijk J and Hacker K, 'The Digital Divide as a Complex and Dynamic Phenomenon' (2003) 19 The Information Society 315.

²⁰ Kaperonis S, 'How Artificial Intelligence (AI) Is Transforming the User Experience in Digital Marketing': in Sandrina Teixeira and Jorge Remondes (eds), *Advances in Marketing, Customer Relationship Management, and E-Services* (IGI Global 2023).

²¹ Wallach W and Asaro P (eds), *Machine Ethics and Robot Ethics* (Routledge 2017)

Conclusion:

The CJEU's steadfast refusal for self-preferencing is only indicative of the desire to preserve equal competition in online markets. However, the never-ending argument about whether this prohibition is worth it shows that this line between innovation and anti-competitive actions should be drawn as thin as possible. Case T-612/ 17 marks a structured path with subtle alternatives when gauging self- preferencing under the umbrella of dominance in online markets. It deals with aspects such as market dominance, consequences of competition and legitimate grounds for offering a way by which regulatory policies can help balance the different problems arising from digital markets. This approach is based on the fact that online trade is a dynamic sphere, where innovation matters as much as its fair competition does have to be always protected for the purpose of healthy and vibrant marketplace. Top of Form

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