

## Editorial

EMILIANO MARCHISIO

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User data is becoming an increasingly valuable asset in our information-based economy, but there is still a lack of legal regulations governing who can access and use such data and under what conditions. The newly proposed Data Act aims to further close this regulatory gap. This article examines whether the proposed regulation may achieve this goal and where there is need for improvement.

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The DMA creates a new regulatory framework allowing the European Commission to designate digital players in the EU as gatekeepers under certain circumstances. Players on the verge of being tipped into the realm of gatekeepers will likely want to explore how these factors apply to them. This article deals with selected qualitative factors in designating gatekeepers.

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**Self-preferencing and the concept of abuse of dominance: much ado about nothing?** 201

Self-preferencing is a theory of harm that has been at the centre of the antitrust debate over the last years in Europe in relation to the enforcement of art.102 TFEU in digital markets. However, competition authorities and courts still lack a coherent analytical framework to assess self-preferencing. This article attempts to provide such framework. Through an analysis of the definition, effects and application of the concept of “competition on the merits” to self-preferencing, the article concludes that there is nothing to suggest that self-preferencing should constitute an independent form of abuse and that one should not think about this debate any differently from the usual. Instead, this article finds that self-preferencing should be analysed as a constructive refusal to deal. The article then benchmarks the General Court’s judgment in *Google Shopping* against this framework. It finds that the judgment is prone to criticisms in that, instead of analysing the conduct as a constructive refusal to deal, it reiterates some of the already existing ambiguities in the refusal to deal case-law and adds further uncertainty to the analytical framework by introducing new tests and legal categories that are not necessary.

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Competition is one of the key notions in the assessment of existing legislation, as well as the development of new legal mechanisms aiming at safeguarding and promoting competition, especially in Law and Economics’ approach. The notion of competition, seemingly simple, is in fact very complex. Although the phenomenon of competition is of great importance, it is difficult to find a single, universally accepted definition. The purpose of this article is to discuss the existing approaches regarding defining competition, and to provoke a further in-depth discussion on possible developments to the current understanding of this concept, which might provide decisionmakers with tools to distil essential and foundational elements of competition, as well as precise criteria to assess whether competition, which is (or may be) subject to legal safeguards, occurs. The article proposes to analyse the notion of competition from two distinct perspectives. Two perspectives will be proposed—a procedural perspective and a structural perspective. From a procedural perspective, competition can be perceived as a process of interaction between at least two actors. From a structural perspective—it will be important to underline the market conditions under which competition (in the procedural sense) exists or, at least, can exist.

## Comment

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In *DB Station & Service AG*, the Court of Justice clarified fundamental questions on the relationship between competition law and railway regulation law. It held that national civil courts may apply art.102 TFEU to regulated charges in antitrust damages actions only after the competent regulatory body has issued its decision and that this decision must be taken into consideration. The relationship between competition law and regulatory laws has been subject to legal dispute for some time. According to the (formerly) settled case law of the German Federal Court of Justice (BGH), civil courts were competent to review the equity of regulated railway infrastructure charges as well as their compatibility with competition law regardless of a prior decision by the competent regulatory body. However, in its 2017 *CTL Logistics* ruling, the European Court of Justice (ECJ) decided that civil courts may not review the equity of such charges independently of the monitoring carried out by the regulatory body. In its 2022 decision *DB Station and Service AG*, the ECJ ruled that national courts are not precluded from applying art.102 TFEU and national competition law to regulated charges, but that they may only decide after the competent regulatory body has previously ruled on the lawfulness of the charges based upon regulatory law provisions. This article argues that the ECJ is right in principle, but falls short on entirely clarifying the relationship between competition law and regulatory laws.

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