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Von Technologie getrieben und nur durch das Recht gebremst? – Wie kann Wettbewerbsschutz auf digitalen Plattformmärkten gelingen?

Jochen Glöckner* | **Sarah Legner****

Abstract: Within only two decades what once was referred to as "Internet 2.0" on one hand and high speed mobile data transfer on the other have brought about a small number of undertakings which are not only in control of particular markets, but in control of entire technological eco-systems. Their business models have in common that they build on technology-based platforms which are able to yield extreme economies of scale and profits. Market value, cash resources, but also direct influence on daily lives of consumers and businesses alike has made it a key challenge to jurisdictions worldwide to cope with these new "Leviathans". From the perspective of Competition law the primary problems are time – such undertakings develop much faster than typical elements of control are used to deal with – and the fact that these undertakings by virtue of their key assets – the ability to reap and process

Abstract: Die einst als „Internet 2.0" bezeichnete digitale Vernetzung sowie die schnelle mobile Datenübertragung haben innerhalb von nur zwei Jahrzehnten eine kleine Zahl von Unternehmen hervorgebracht, die nicht nur spezifische Märkte, sondern ganze technologische Ökosysteme beherrschen. Ihren Geschäftsmodellen ist gemeinsam, dass sie auf technologiebasierten Plattformen beruhen, die extrem skalierbare Größenvorteile und Gewinne ermöglichen. Ihr Marktwert, ihre Finanzmittel sowie ihr unmittelbarer Einfluss auf das tägliche Leben der Verbraucher und Unternehmen machen es zu einer zentralen Herausforderung für Rechtssysteme weltweit, mit diesen neuen „Leviathanen" fertig zu werden. Aus wettbewerbsrechtlicher Sicht bestehen zwei Hauptprobleme. Zum einen entwickeln sich Digitalunternehmen viel schneller, als es von herkömmlichen Regulierungsinstrumenten in der Regel erwartet wird. Zum anderen

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"big data" and the technological advance in developing and implementing artificial intelligence – are not limited to specific markets. At the same time, digital platform markets that have served both as generator of data and de facto unlimited funds to invest, have proven to be much less resilient than mainstream Competition law thinking expected. This article will first show how our perception of markets has influenced our basic understanding of Competition law, and outline its development in this respect (1). The next part will analyse typical causes of vulnerability of markets and lead to the particularities of digital platform economies (2). The main part will present how Competition law has reacted to the need of protecting vulnerable markets in general (3) and introduce some of the attempts to deal with digital platform markets in particular (4) to assess their effectiveness and efficiency in some conclusions (5).

Keywords: Competition law; platform markets; digital economy; vulnerable markets; market regulation; Digital Markets Act; Digital Services Act.

sind die Unternehmen aufgrund ihrer charakteristischen Eigenschaften – der Fähigkeit zur Gewinnung und Verarbeitung von „Big Data" und des technologischen Vorsprungs bei der Entwicklung und Anwendung künstlicher Intelligenz – marktübergreifend tätig. Gleichzeitig haben sich Plattformmärkte, die nicht nur zentrale Datenquellen sind, sondern zugleich *de facto* unbegrenzte Finanzmittel bereitstellen, als weit weniger widerstandsfähig erwiesen, als es die wettbewerbsrechtliche Expertise erwartet hatte.
Der Beitrag wird zunächst aufzeigen, wie unsere Wahrnehmung von Märkten das grundlegende Verständnis des Wettbewerbsrechts beeinflusst hat, und seine Entwicklung in dieser Hinsicht skizzieren (1). Im Anschluss daran werden typische Ursachen für die Verletzlichkeit von Märkten analysiert und die Besonderheiten der digitalen Plattformökonomie dargestellt (2). Der Beitrag wird sich anschließend damit befassen, wie das Wettbewerbsrecht der Notwendigkeit des Schutzes verletzlicher Märkte im Allgemeinen begegnet (3). Danach werden Ansätze zur Regulierung digitaler Plattformmärkte im Besonderen dargestellt (4), um abschließend in einigen Schlussfolgerungen deren Wirksamkeit und Effizienz zu bewerten (5).

Stichworte: Wettbewerbsrecht; Plattformmärkte; Digitalwirtschaft; verletzliche Märkte; Marktregulierung; Gesetz über digitale Märkte; Gesetz über digitale Dienste.

Summary: 1 The Constitution of Markets; 2 Vulnerable Markets; 2.1 Markets for Uniques and Micro Markets; 2.2 Natural Monopolies and Non-duplicable Networks; 2.3 Narrow Oligopolies; 2.4 Emerging Markets; 2.5 Digital Platform Markets; 3 How to Protect Vulnerable Markets in General? 3.1 Markets for Uniques; 3.2 Natural Monopolies and Non-duplicable Networks; 3.3 Narrow Oligopolies; 3.4 Emerging Markets; 4 How to Protect Digital Platform Markets in Particular? 4.1 Symmetric Provisions Providing for Fairness and Transparency; 4.2 Asymmetric Provisions; 4.3 Full-blown Regulation; 4.4 Self-regulation; 5 Conclusions.

1 The Constitution of Markets

The term "constitution" is ambiguous: on one hand it relates to a real-world scenario, like in "the patient's constitution is generally robust", while on the other the term has a clearly normative connotation, like in "the framers of the constitution were concerned with individual freedoms". In discussions of the constitution of markets, the ambiguity becomes very obvious as the constitution of markets in the real-world meaning is just as different as the products, territories and time, which typically define markets, while at the same time Competition law functions basically as a normative constitution for the market driven economy. What is more, there is a strong mutual correlation between both elements.

The public perception of the real-world functioning of markets has strongly influenced the mindset about the need for legal curtailing of market power. In the end of the 19th century new markets emerging fast in growing economies, and the failure of these markets gave rise to the creation of the first modern antitrust legislation: the United States Sherman Act which soon after became the Magna Charta of competition[1]. Strict rules on vertical restraints[2] and merger control[3] were soon to follow and made Antitrust law a key component of economic policy in the United States.

In the wake of World War II production capacities were abundant in the United States. Consequently, buyers' markets came into existence supplied by highly developed industries and professional market participants. Around one decade later European markets followed suit. During the 1960s and 1970s it became quite clear that the competition rules carved out for an entirely different competitive environment had become overly restrictive and burdensome for mature markets. The Chicago School of Economics and Antitrust Law and Economics as they evolved during the 1970s became the dominant school of thinking in US Antitrust law during the Reagan Administration in the 1980s. They were mainly based on the assumptions that markets are by-and-large self-healing, that there are no barriers to market entry except for over-reaching state intervention, and that whatever survives on the market despite competition deserves to be sanctioned because it has proven its merits against the eroding forces of the market[4]. The reason why such a blunt approach never was adopted in the European Union may well be found

[1] As the famous dictum of Justice MARSHALL in *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), goes.
[2] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).
[3] Clayton Antitrust Act of 1914, Pub. L. no. 63-212, 38 Stat. 730 (1914).
[4] BORK, *The Antitrust Paradox: A policy at War with Itself*, 2nd ed., 1993, pp. 81 ff.

in the fact that there was never the same amount of optimism towards the resilience of markets in Europe as in the United States, and – for a long time – markets in the European Economic Community remained scattered and heterogeneous. Following the Single European Act[5] in 1987 though, European Competition law was able to emancipate itself from the primary goal of market integration.

Only the development of platform economies with all of the well-documented features such as strong network effects leading to competition "for the market"[6], the eventual tipping of markets and the hope for "the next big thing" dulled by "killer acquisitions" have started the swingback of the pendulum. In the United States "New Brandeis Antitrust"[7] is hotly debated and new divestitures are discussed[8]. In Europe much of what has been achieved in terms of thoughtfulness about "type II errors" and effects based competition rules is about to be rolled back in an attempt to regain control of large internet companies. All of this is, of course, triggered by a public perception that markets are not necessarily self-healing, but highly vulnerable at times and hence need to be protected not unlike the newly emerging industrial markets in the late 19th century. The entire legal order in general and Competition law in particular, have reacted with many new approaches to afford this protection.

2 Vulnerable Markets

For a number of reasons, the forces of competition vary over markets depending on product, region and time. Barriers to market entry may or may not exist, product markets may be emerging or mature, market participants may be active or rather passive. Thus, the fact alone that particular markets may be less competitive than others is not really surprising. The neoclassical notion of "perfect competition" as an ideal state does not do justice to the actual circumstances. von Hayek's description of competition as a "discovery process" (*Entdeckungsverfahren*)[9] rightly stresses that structures and forms of competitive markets are neither uniform nor predictable. Consequently, a certain degree of market concentration is not necessarily an expression of non-functional competition.

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[5] Single European Act, OJ 1987 L 169/1.
[6] Duch-Brown, The Competitive Landscape of Online Platforms, *JRC Digital Economy Working Paper* 2017-04, p. 7.
[7] Khan, The New Brandeis Movement: America's Antimonopoly Debate, 9 (3) *Journal of European Competition Law and Practice* 131 [2018].
[8] Should Google Shrink to Save Itself?, *New York Times*, 02-06-2020.
[9] von Hayek, Freiburger Studien, 2nd ed. 1994, p. 250.

That being said, vulnerable markets can be identified, on which market structure and market conduct of undertakings give rise to the fear that the self-healing forces of competition do not work, or will work only to a limited extent for inherent reasons. In those markets, removal of competitive restraints is not sufficient to maintain competition. Instead, monitoring or even interference with exchange relations may become necessary. In the following, different types of structurally vulnerable markets will be described and categorized.

2.1 Markets for Uniques and Micro Markets

Arguably the term "market" encompasses markets consisting only of one original object ("uniques") as the relevant product or consisting of a limited number of objects (micro markets). Such markets are vulnerable because they lend themselves to monopolization by simply acquiring control of the particular object(s).

2.2 Natural Monopolies and Non-duplicable Networks

Control of unique objects leads to so-called natural monopolies[10], which are by no means "natural", but deemed to be natural because there is no economic or societal interest in the duplication of an infrastructure or a network such as a railway station, a harbour, an electric power grid or a landline telephone network. Not only will the duplication of the infrastructure or network add costs to the service provided over it; in many cases it is highly desirable that many service providers make efficient use of the same infrastructure in order to increase consumer choice. The more air carriers use one airport, the more destinations and connections will be offered to travellers or freight conveniently and at lower prices. That being said, it is equally well-accepted that natural monopolies call for open access, equal treatment and fair prices.

2.3 Narrow Oligopolies

It is well-established that competition on markets may be paralysed under very special circumstances, aptly exemplified by the market of car fuels: on markets characterized by narrow oligopolies with high barriers to market entry and parallel

[10] Cf. Baumol, On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry, 67 *American Economic Review* 809 [1977].

cost structures, for homogeneous products with low switching costs for buyers, and high transparency for both sides of the market, there is hardly any incentive for sellers to engage in price competition. Due to the existing retaliation mechanism no competitor will sacrifice his profit margin; on the other hand, during periods of increased demand or scarcity of supply and sufficient willingness-to-pay of buyers there will be an incentive to exploit this willingness-to-pay by simultaneous, but not concerted, price hikes. Unsurprisingly for competition lawyers, the recent attempts of the German government to mitigate price increases of car fuels caused by the Ukrainian war by reducing the mineral oil tax[11] were bound to fail miserably – and they eventually did –, as there was an overdemand of fuel caused by the reduction of oil supply, the willingness-to-pay on the side of the fuel buyers was still sufficient, and – due to the oligopolistic structure of the market – absolutely no competitive pressure made the fuel companies pass on the reduced tax load to consumers.

2.4 Emerging Markets

Though it may be just an observation, mature markets seem to be more resilient against monopolization than emerging markets. In mature markets the critical products will have achieved a certain degree of homogeneity and substitutability. The competitors will be "adult" undertakings operating on a professional level. Though there may be tendencies of concentration on mature markets, quick monopolization is very unlikely to occur and merger control is the key to avoiding artificial monopolization.

By contrast, emerging markets are much more prone to monopolization. On markets for new products with quick and large steps of innovation there may be considerable first mover advantages[12]. While it is true that in many instances the "first mover" did not take the market[13], there is plenty of anecdotal evidence that under specific circumstances the first mover advantage is a powerful factor when determining economic risks and chances[14].

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[11] Press release of 09-06-2022, German Federal Government, Wie funktioniert die Energiesteuer-Senkung?, <https://www.bundesregierung.de/breg-de/suche/faq-energiesteuersenkung-2049702>, site last visited 04-08-2022.

[12] Rahman/Bhattacharyya, First mover advantages in emerging economies: a discussion, 41 (2) *Management Decision* 141 [2003].

[13] Suarez/Lanzolla, The Half-Truth of First-Mover Advantage, *Harvard Business Review*, April 2005, <https://hbr.org/2005/04/the-half-truth-of-first-mover-advantage>, site last visited 29-07-2022.

[14] The Apple iPhone springs to mind, cf. Gandhi, Is Apple Losing the First Mover Advantage?, QRIUS, October 2014, <https://qrius.com/apple-losing-first-mover-advantage/amp/>, site last

Maybe even more important is the relative weight of market participants' economic potential on emerging markets. To give an example: during the second half of the 19th century hundreds of manufacturers of bicycles came into existence in Germany like in the UK, France or Italy. Local craftsmen and producers of other steel-related industrial goods, often sewing machines, were attracted by the high prices paid by mostly young and affluent buyers. Over the decades most of these producers disappeared, the market was consolidated and large producers of bicycles such as Raleigh, Peugeot or Opel came into existence. This process, however, was possible only, because at the time there seemed to be no undertaking with considerably higher economic resources willing to engage in the emerging market. Today's situation with huge amounts of risk money and super-affluent corporations ready to invest into and engage in nearly any kind of emerging market is vastly different.

The third factor may be a particular susceptibility of emerging markets to business practices that we consider unfair or unlawful. Thus, it is well-documented that John D. Rockefeller and the Standard Oil Trust took the oil market that emerged in the United States during the decades following the finding of oil in Titusville/Penn. in 1859 not the least with the help of predatory pricing, exclusionary practices such as cutting off competitors' supply, margin squeeze through railroad companies controlled by Standard Oil and reportedly even physical threats against competitors[15].

2.5 Digital Platform Markets

The most recent appearance of vulnerable markets has occurred with the development of online markets for the matching of business partners or for matching needs for information with supply of information. In both cases the market participants offer platforms, or, more traditionally, market places in a narrower meaning[16]. Such platform markets are particularly prone to concentration as search

visited 29-07-2022. Online business models such as ebay, facebook or amazon likewise exploited the combination of a first mover advantage with strong network effects petrifying the advantage.

[15] Bedoya, Standard Oil: Cost Reductions and Predatory Pricing, 2013, pp. 62 ff.; McGee, Predatory Price Cutting: The Standard Oil (N. J.) Case, 1 *Journal of Law & Economis* 137 [1958].

[16] Evans/Schmalensee, The Antitrust Analysis of Multi-Sided Platform Businesses, in: Blair/Sokol (eds.), *The Oxford Handbook of International Antitrust Economics*, Vol. 1, Oxford, 2015 p. 404; Filistrucchi/Geradin/van Damme/Affeldt, Market definition in two-sided markets: Theory and practice, 10 (2) *Journal of Competition Law and Economics* 293 [2014]; Luchetta, Is the Google platform a two-sided market, 10 (1) *Journal of Competition Law and Economics* 185 [2014].

costs are greatly reduced if all offers on the market are available on one market place only, just as advertising efforts are reduced if all customers attend this one market place. Economists talk about network effects. Strong direct and indirect network effects induce markets for platforms to "tip" and thereby to create a monopolistic platform.

However, even at this stage it is worth stressing that for most platform markets like for natural monopolies it seems not only fruitless, but in fact undesirable to avoid the eventual "tipping" of certain markets, except for the improvement of the platform itself. As much as we like to see competition for new and better platform services, we need to accept the truth that most people do not like to "multi home" and be forced to do the same search on different platforms or post the same messages many times[17]. Multi homing only works if there are meta-applications bringing together different platforms and allowing for once-for-all operation[18]. At the bottom line, we might accept platform monopolists, as long as they act neutrally and only retrieve a monopoly earning based on their own genuine performance.

Yet, many undertakings offering platform services are neither neutral nor do they limit themselves to marketing their own service to both sides of the market, but instead intrude into competitive relationships. They either participate on the other side of the market competing with "active" platform users (hybrid operators) or they indirectly participate in the economic success of specific users.

3 How to Protect Vulnerable Markets in General?

3.1 Markets for Uniques

In most instances the monopolization of markets for uniques can be dealt with using well-established principles of Private law. Private autonomy is limited by the principle of *bonos mores*, making the denial of a contract unlawful if the object of the contract is crucial for the other party's life or living and cannot be sourced elsewhere. Moreover, there is hardly any perceptible effect on competition – even if anyone purchased the last remaining oil painting of a famous artist, this will hardly affect the remaining art market nor the market

[17] Evans/Schmalensee, The Industrial Organization of Markets with Two-Sided Platforms, 3 (1) *Competition Policy International* 151 [2007].

[18] E.g. "beeper" allows to track chats in various messenger systems within one app surface.

for exhibiting art, as there may be many other paintings the public would like to see.

Inasmuch as control of single objects amounts to a monopolization of (micro) markets, Competition law has reacted swiftly with the rules on unilateral conduct. Yet, it deserves stressing that control of unilateral conduct does not replace effective competition – it only gives remedies against an abuse of the dominant position.

3.2 Natural Monopolies and Non-duplicable Networks

Access to essential facilities, equal treatment and fair prices are hard to obtain from an undertaking in control of an essential facility or a non-duplicable network. US Antitrust law has reacted with the creation of the essential facilities doctrine[19], European Competition law applies the control of unilateral conduct of dominant undertakings pursuant to Article 102 TFEU[20].

In many situations it has become evident though that while the prohibitions of discrimination and unfair exclusions for dominant undertakings may help against refusals to deal, Competition law is not equally well-suited to find fair prices, and its retrospective control will not cover details of conduct that may lie in the future rather than in the past. That combined with an obvious need to lay down the basic principles of co-operation between the network operator and the service provider over an extended period of time has mandated a regulatory approach to network markets such as grid-bound energy or telecommunication[21].

3.3 Narrow Oligopolies

While economists strongly dislike parallel conduct in narrow oligopolies for good reasons, Competition law accepts it, and for equally good reasons. There is neither agreement nor concerted practice in the meaning of Article 101 (1) TFEU and the simultaneity of practices – as striking as it may appear[22] – is based upon

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[19] Areeda, Essential Facilities: An epithet in need of limiting principles, 58 *Antitrust Law Journal* 841 [1989-90].

[20] Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

[21] Cave/Genakos/Valletti, The European Framework for Regulating Telecommunications: A 25-year Appraisal, 55 *Review of Industrial Organization* 47 [2019].

[22] In its 2010 sector enquiry on car fuels the German Federal Cartel Office found out that the price setting of the "Big Five" operators of gas stations sometimes took place several times a day and all operators performed the same movements at the same time frame, German Federal Cartel Office,

the competitors' freedom to act independently which does not deprive them of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors[23]. In the same vein, even a fully simultaneous price hike will not be considered an exploitative abuse of a jointly dominant position in the meaning of Article 102 TFEU as long as there is sufficient internal competition between competitors.

Competition law thus far has been able to react by incorporating coordinated effects into the analytical framework of merger control. So, the creation of a market structure restricting competition is considered to induce a substantial lessening of competition[24] or a significant impediment of effective competition[25]. Beyond merger control, the prohibition of anti-competitive covenants is brought to bear only by means of a rather strict interpretation of the doctrine of independence, rendering unlawful any act of exchange of information facilitating such parallel conduct[26].

Where there is no exchange of information – again: as exemplified by the fuel market where market transparency is not only mandated by general rules on price indications, but centrally organized in many jurisdictions[27] – Competition law fails to address the underlying market imperfections. Even the most striking correlations of price settings as evidenced in the German Federal Cartel Office's sector inquiry of car fuels in 2010[28] could not be used to intervene from a point of view of Competition law. So far, the economic damage caused by narrow oligopolies has been limited only by the very peculiar market imperfections, most

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Sektoruntersuchung Kraftstoffe, May 2011, p. 99, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Kraftstoffe%20-%20Abschlussbericht.pdf;jsessionid=EA0417C94B550D1262158B0EB48AC006.1_cid371?__blob=publicationFile&v=5>, site last visited 29-07-2022.

[23] ECJ, 06-04-2009, C-8/08 – *T-Mobile Netherlands*, ECLI:EU:C:2009:343, para. 40.

[24] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, 19-08-2010, ch. 7.

[25] EU Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31/5, para. 22; EU Commission, Guidelines on the assessment of non-horizontal mergers, OJ 2008 C 265/6, para. 19.

[26] ECJ, 06-04-2009, C-8/08 – *T-Mobile Netherlands*, ECLI:EU:C:2009:343, para. 32; ECJ, 19-03-2015, C-286/13 P – *Dole v. Comm.*, ECLI:EU:C:2015:184, para. 119.

[27] E.g., secs. 47k ff. ARC: Market Transparency Unit for fuels at the German Federal Cartel Office.

[28] German Federal Cartel Office, Sektoruntersuchung Kraftstoffe, May 2011, p. 99, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Kraftstoffe%20-%20Abschlussbericht.pdf;jsessionid=EA0417C94B550D1262158B0EB48AC006.1_cid371?__blob=publicationFile&v=5>, site last visited 29-07-2022.

notably the full transparency of the market rendering unnecessary any kind of exchange of information and allowing for the functioning of the retaliation mechanism, that affect only very few markets[29].

As even price regulation does not seem to provide better performing markets the only way to do away with the negative effects of narrow monopolies ("oligopolistic peace") is the installation of one sufficiently strong "maverick" actor on the market, typically a state-owned, but not monopolistic, operator bound to operate on an economically viable, but not profit-maximising basis and thus to engage in price competition.

3.4 Emerging Markets

One key element making emerging markets prone to monopolization is the first mover advantage in technical matters. To give a very simple example for the long term effects of first mover advantages in combination with strong network effects: the early development of the British industry in the 18th and 19th century has led to the wide-spread use of imperial sizes in engineering which, due to the network effects – suppliers of parts and tools have adapted to the needs of engineers – has remained common until today not only in plumbery, but also in many technical goods such as bicycles (e.g. wheel sizes, chain size etc.). Such effects, as self-perpetuating as they may be, are mere consequences of successful performance on the merits and as of themselves must not be attacked. *De facto* standards[30] arising from first mover advantages may impose general restrictions arising from market dominance, but are to be treated differently from *de iure* standards set under FRAND conditions, as the line of arguments presented by the ECJ in *Huawei v. ZTE*[31] demonstrates.

On the other hand, first mover advantages also occur in respect of non-technical aspects. Even the first mover breaking the law may achieve an economic advantage over his competitors which is clearly anti-competitive and needs to be compensated for. Competition law has addressed these issues by particular provisions prohibiting

[29] The new problem of algorithmic oligopolies created by automatic price setting of crawlers searching the internet market and adapting to the price level shall not be addressed in this context, cf. Bentsen, The Strengthening of the Oligopoly Problem by Algorithmic Pricing, Department of Management, Politics and Philosophy, *CBS LAW Research paper* no. 20-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630578>, site last visited 29-07-2022.

[30] E.g. the size of CD, CD-ROM, DVD, DVD-ROM, based on the development at Philips, e.g. German Federal Supreme Court, 06-05-2009, KZR 39/06, *Wettbewerb in Recht und Praxis* 2009, pp. 858 ff.

[31] ECJ, 16-07-2015, C-170/13 – *Huawei v. ZTE*, ECLI:EU:C:2015:477.

dominant undertakings from predatory pricing and certain exclusionary practices. However, these prohibitions only kick in, once a certain amount of market power is achieved. The recent attempts of accelerating the exercise of control via Competition law are typically motivated with the goal of avoiding irreparable damage to market structure.

Other business practices reported in the Standard Oil saga, which may well serve as a blueprint of mistakes to be avoided, such as denigrating competitors or physical threats are well-covered by general rules of Criminal or Unfair Competition law.

Effective protection of competition against long-term effects of anti-competitive or otherwise unlawful conduct in the forming phase of emerging markets is fully dependent on effective and speedy enforcement. This means that enforcement needs to be reliable and quick. Not only do economic damages have to be fully compensated[32]. It is just as necessary to skim all unlawfully gained profits.

4 How to Protect Digital Platform Markets in Particular?

Digital Platform Markets are characterized by various features that sort of stack up elements of other types of vulnerable markets: social media platforms exemplify a particular separation of products catering for distinct needs of consumer users[33], making different platforms unique for their users. Very rarely do we find clear competitive relationships within markets for particular platforms. With the strong network effects on platform markets we find digital platform markets similar to non-duplicable networks. Moreover, with regard to particular features of online markets, most notably a general consumer expectance that services provided online are typically free[34] and these consumer services being cross-financed by the exploitation of the advertising value of attention or the monetisation of data, there is an oligopolistic tendency of all platform operators to refrain from competition on data protection or privacy as elements of quality-based performance[35]. Finally, digital platform markets put on display all

[32] As to the principle of full compensation cf. Article 3 Directive 2014/104/EU of the European Parliament and of the Council of 26th November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1.

[33] German Federal Cartel Office, 06-02-2019, B6-22/16 – *Facebook*.

[34] Bamberger/Egelman/Han/Bar On/Reyes, Can You Pay for Privacy? Consumer Expectations and the Behavior of Free and Paid Apps, 35 *Berkeley Technology Law Journal* 327 [2020].

[35] Only very few operators are active on consumer markets with at-cost rates. Some messenger services supposedly offering better data protection standards are available for modest fees. Quality media are

elements of emerging markets with their stunning speed of innovation and rapid development of technology. Some market actors have made it a virtue to break rules on their way[36]. At the bottom line, vulnerability of digital platform markets is a result of a toxic combination of multiple features of otherwise vulnerable markets.

At the same time digital platform markets are vastly more important for the entire free market economy than the markets identified as vulnerable before. They are not limited to particular products or market conditions such as natural monopolies, narrow oligopolies or a short phase of emergence. Digital platform markets may and do extend over all elements of the economic and social life and their growth and expansion offers unlimited opportunities and risks.

Attempts are currently being made to curb these risks with various legal instruments. Fortunately, the insight that digital platform markets combine features inducing vulnerability from various other vulnerable markets makes the consequence self-evident that also well-proven elements of protection of other vulnerable markets may be transferred to digital platform markets.

Depending on which area of law they originate from, they focus on different risks. This article excludes societal concerns that may arise from the point of view of the functioning of democratic institutions or cohesion within societies, but exclusively deals with economic and market-related issues. This does not ignore the fact that market-oriented and societal issues regarding digital platform markets may become interrelated: if consumers feel that their needs are being ignored in the marketplace, this may strengthen populist movements not shying away from the use of "fake news" or the use of antitrust enforcement in a manner that does not take separation of powers seriously[37]. For this reason, competition lawyers,

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struggling to install flat rates for their use. Apple may advertise their own approach to privacy; yet independent analyses show that protection of privacy granted is limited and does not include privacy via Apple's own economic activity, SCHUMAN, Apple is sneaking around its own privacy policy – and will regret it, *Computerworld*, Jan 7, 2022, <https://www.computerworld.com/article/3646190/apple-is-sneaking-around-its-own-privacy-policy-and-will-regret-it.html>, site last visited 29-07-2022.

[36] Mark Zuckerberg's motto „move fast and break things" has become the epithet of the new digital economy, cf. TAPLIN, Move Fast and Break Things: How Facebook, Google and Amazon Have Cornered Culture and Undermined Democracy, 2018.

[37] An example might be found in the strict focus on antitrust enforcement in the press sector under the previous United States' administration, cf. BITTON/KISER, U.S. Antitrust Enforcement in the Trump Administration, *Tijdschrift Mededingingsrecht in de Praktijk*, 2021 <https://awards.concurrences.com/en/awards/2022/business-articles/u-s-antitrust-enforcement-in-the-trump-administration>, site last visited 23-08-2022.

especially, but not only in the United States, have recently been increasingly concerned with the impact of growing populism on Competition law[38]. And yet, since both issues are addressed with different legal approaches as well as in separate legal acts in the European Union, it seems appropriate to focus on the market-related problems in this article. As a consequence, the European Union's Digital Services Act will be discussed mainly for two purposes. On one hand, its stipulations, in particular control of general terms and conditions, have effects on market-related issues. On the other hand, some of its regulatory approaches, in particular the elements of self-regulation, are examined for their suitability to mitigate competition-related problems as well.

In line with different perspectives on digital platform markets, various regulatory instruments have been discussed and developed during the last years. The following part will provide an overview of instruments mainly in the European Union, in the United States, in the United Kingdom and in Germany. It will show which dangers they are suitable for countering, but also which risks remain unaddressed. Although the legal instruments follow different approaches, the dogmatic division created by various fields of law sometimes seems artificial or random as the issues they try to tackle overlap. That is why the following part will first and foremost distinguish between symmetric (1) and asymmetric (2) regulatory approaches, including various Competition law instruments and finally address the possibilities of full-blown regulation (3) as well as self-regulation (4) of platform markets.

4.1 Symmetric Provisions Providing for Fairness and Transparency

Symmetric regulation is regulation that affects market conduct of any and all market participants. It may appear in the guise of (Consumer) Contract law, in particular by means of control of unfair terms, of Unfair Competition law, inasmuch as vertical aggressive commercial practices may also be covered in business-to-business relations and horizontal exclusionary practices make part of classical Unfair Competition law, or even in sectoral rules. Symmetrical regulation mirrors historic experience. Consumer Contract law or Unfair Competition law as codified represents the coagulated state of cultural evolution in terms of societal needs.

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[38] Bernatt, Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law, Cambridge, 2022; Shapiro, Antitrust in A Time of Populism, 61 *International Journal of Industrial Organization* 714 [2018].

The greatest advantage of symmetric rules is the lack of distinction as regards personal jurisdiction, which, at the same time, may be considered its greatest disadvantage: the general scope of application may cause over-protection on one hand – acting for non-commercial purposes the attorney-at-law with a million Euro yearly income is afforded the same protection as a poorly informed consumer living on food stamps – and an excessive burden to some market participants on the other – data protection requirements set out in the European Union by the General Data Protection Regulation have to be fulfilled by a small football club in the same way as by *facebook*.

4.1.1 Control of unfair terms

4.1.1.1 Consumer contracts

Superior bargaining power of platform operators clearly shows the limits of private autonomy as an instrument to ensure well-balanced exchange contracts. When consumers conclude contracts of use with a platform operator, the latter dictates the terms. European law controlling unfair terms, in particular the 1993 Directive on unfair terms in consumer contracts[39] (hereinafter: Unfair Terms Directive), ties in with imbalances in negotiating power. While the ratio of control of contract terms typically is to be found in the structural supremacy of the user of the terms, control only kicks in with a particular degree of unfairness, a disbalance of contractual rights and duties as they are attributed by the terms of the contract.

While the control of unfair terms has been very successful at times – sometimes by very unspectacular means[40], sometime more under the eyes of the public[41] –, its thrust on platform operators is limited. Taking German case law as an example,

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[39] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

[40] E.g. the Regional Court of Berlin, 28-11-2014, 15 O 601/12, ECLI:DE:LGBE:2014:1128.15O601.12.0A, declared invalid several of the terms of the AppleCare Protection Plan, in which Apple tried to basically replace the compulsory liability for material defects under the Directive for the Sale of Consumer Goods by its own regime.

[41] E.g. Amazon's choice-of-law clause rendering Luxembourg Contract law applicable to all sales contracts concluded via "amazon.de" was found to be possibly invalid by the ECJ, due to the lack of transparency caused by the failure of Amazon to inform consumers of mandatory statutory provisions unaffected by the choice-of-law, ECJ, 28-07-2016, C-191/15 – *Verein für Konsumenteninformation v. Amazon EU Sàrl*, ECLI:EU:C:2016:612.

the German Federal Supreme Court (*Bundesgerichtshof*) has deemed it legitimate for social network providers to establish their own communication rules[42]. Accordingly, platform operators in principle are in a position to prohibit statements that neither violate criminal laws[43] nor infringe personal rights[44]. Thus, social network providers have "virtual domiciliary rights"[45].

Notwithstanding that, German case law has not let the users' right to freedom of expression go unprotected. In two judgments of July 2021, the German Federal Supreme Court reviewed *facebook*'s general terms and conditions[46]. In both cases *facebook* had deleted comments by users. The platform operator also imposed time-limited restrictions on the use of accounts. *Facebook* based its action on Part III no. 12 of its Community Standards, according to which statements defined there as "hate speech" were not allowed and *facebook* had the right to respond according to their policy. In both proceedings, the Federal Supreme Court found that *facebook*'s general terms and conditions did not withstand a review of their content pursuant to Article 3 Unfair Terms Directive[47] due to the lack of procedural regulations that ensured that the affected users were heard.

It goes with general clauses such as Article 3 Unfair Terms Directive (a contractual term is deemed unfair, if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer) that the limits they set for valid general terms and conditions are not always clear. In particular, for the use of platforms, which are generally qualified as sui generis contracts, there are no concepts of fairness that might be drawn from statutory law serving as a point of reference for contracts[48].

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[42] German Federal Supreme Court, 01-03-2016, VI ZR 34/15, ECLI:DE:BGH:2016:010316UVIZR34.15.0.

[43] Friehe, Löschen und Sperren in sozialen Netzwerken, *Neue Juristische Wochenschrift* 2020, pp. 1697, 1697 ff.

[44] Mörsdorf, Beitragslöschungen und Kontensperrungen nach den „Hausregeln" sozialer Netzwerke, *Neue Juristische Wochenschrift* 2021, pp. 3158, 3159.

[45] Alexander, Anwendungsbereich, Regelungstechnik und einzelne Transparenzvorgaben der P2B-Verordnung, *Wettbewerb in Recht und Praxis* 2020, p. 945.

[46] German Federal Supreme Court, 29-07-2021, III ZR 179/20, ECLI:DE:BGH:2021:290721UIIIZR179.20.0; German Federal Supreme Court, 29-07-2021, III ZR 192/20, ECLI:DE:BGH:2021:290721UIIIZR192.20.0.

[47] German Federal Supreme Court, 29-07-2021, III ZR 179/20, ECLI:DE:BGH:2021:290721UIIIZR179.20.0; German Federal Supreme Court, 29-07-2021, III ZR 192/20, ECLI:DE:BGH:2021:290721UIIIZR192.20.0.

[48] Higher Regional Court of Munich, 17.7.2018, 18 W 858/18, ECLI:DE:OLGMUEN:2018:0717.18W858.18.0A, para. 20.

With the intent to set tighter limits, France enacted the *Loi Avia*[49] in May 2020, which required social media providers to delete "obviously illegal" content, and to do so within just one hour. However, the law was declared unconstitutional only one month later[50].

It is well possible that the European Union's Digital Services Act[51] will contribute to concretizing guiding principles at the European level[52]. The regulation aims to address risks for societies posed by hate speech and disinformation. Even though consumer protection is not one of the explicitly stated objectives of the regulation, the legislative process has taken into account the impact on consumer interests[53]. The Digital Services Act provides for specific behavioural obligations for digital service providers. It introduces a tailored programme of duties based on the size of the platforms. However, it has not been conclusively clarified whether the obligations are only of public law nature or also have private law significance[54].

4.1.1.2 Business contracts

As a result of their gatekeeper position, platforms are also superior in terms of negotiating power with respect to their business users. The 2019 EU Regulation on promoting fairness and transparency for business users of online intermediation service (hereinafter: Platform-to-Business Regulation; P2B Reg.)[55] might be a kind of harbinger to a broader insight of the European lawmaker that the dualism between

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[49] Loi n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet, JORF n°0156 du 25 juin 2020.

[50] Conseil Constitutionnel, 18-06-2020, no. 2020-801 DC, ECLI:FR:CC:2020:2020.801.DC. See Gielen/Uphues, Digital Markets Act und Digital Services Act Regulierung von Markt- und Meinungsmacht durch die Europäische Union, *Europäische Zeitschrift für Wirtschaftsrecht* 2021, pp. 627, 632.

[51] Digital Services Act. European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD))), P9_TA(2022)0269.

[52] Mendelsohn, Die „normative Macht" der Plattformen – Gegenstand der zukünftigen Digitalregulierung?, *MMR. Zeitschrift für IT-Recht und Recht der Digitalisierung* 2021, pp. 857, 860.

[53] Busch/Mak, Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation, *Journal of European Consumer and Market Law (EuCML)* 2021, pp. 109, 110.

[54] Spindler, Der Vorschlag für ein neues Haftungsregime für Internetprovider – der EU-Digital Services Act, *Zeitschrift für gewerblichen Rechtsschutz und Urheberrecht* 2021, pp. 653, 657.

[55] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 L 186/57.

inferior consumer parties in need of protection and entrepreneurial parties with sufficient bargaining power to safeguard their own economic interests is not convincing in the long term, at least in the context of business models of the digital economy[56]. Undertakings, too, at least if they are small or medium-sized enterprises, need complimentary protection in their negotiating power vis-à-vis digital platforms.

The Platform-to-Business Regulation applies to intermediary services and search engines and thus to platforms on which business users offer products to consumers. The main goal of the Platform-to-Business Regulation is to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities, Article 1 (1) P2B Reg. The requirements for contract terms and conditions of online intermediation service providers, even though carefully avoiding the terms "fair" or "unfair", extend in part beyond those set out in the Unfair Terms Directive for consumer contracts. A breach of the requirements set out in Article 3 (1) P2B Reg. leads to absolute invalidity of the clause. According to Article 3 (1) (a) P2B Reg., these include comprehensibility and availability. Terms and conditions must be drafted in plain and intelligible language. In addition, providers of online intermediation services must communicate when they reserve the right to delete or block user accounts, cf. Article 3 (1) (c) P2B Reg.

However, it seems questionable whether the requirements of the Platform-to-Business Regulation will significantly reduce the market power of platform operators. The Platform-to-Business Regulation does not offer a general prohibition of unfair practices and the burden of litigation remains with the business users. Article 15 P2B Reg. only states that, in the event of infringements, measures must be taken that are "effective, proportionate and dissuasive." The Platform-to-Business Regulation does not require platforms to provide comprehensive transparency. In any case, they do not have to disclose any trade secrets[57].

4.1.2 Information requirements

Information requirements have long been used as a regulatory tool to mitigate imbalances in bargaining power in consumer contracts by empowering consumers.

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[56] Iamiceli, Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity, 15 (4) *European Review of Contract Law* 392, 401 ff. [2019].

[57] Busch, Mehr Fairness und Transparenz in der Plattformökonomie? Die neue P2B-Verordnung im Überblick, *Zeitschrift für gewerblichen Rechtsschutz und Urheberrecht* 2019, pp. 788, 793.

Since 2000 Article 5 of the Directive on electronic commerce[58] (hereinafter: E-Commerce Directive) has stipulated information requirements for online services. Among other things, service providers must make their contact data available to users easily, directly and permanently.

At times though, it is unclear which platform services fall within the scope of the regulations[59]. The European Court of Justice has ruled that the mediation service offered by *Uber* does not constitute an "information society service" within the meaning of the E-Commerce Directive[60]. Since the platform had a decisive influence on the content of the transport contracts concluded between the users, the platform service was to be classified as a transport service itself[61]. The Court ruled differently with regard to the business model of *Airbnb*[62]. The Court held that, in contrast to *Uber,* the service of *Airbnb* was not an accommodation service[63]. Thus, the scope of application of information requirements is subject to some remaining legal uncertainty. The dispute over the qualification of platform services shows that adherence to a bilateral contract model in platform markets is unsatisfactory. To fully consider bargaining power of platform operators in the context of contract law, it might be necessary to develop multi-sided contract models[64].

The Consumer Rights Directive of 2011[65] supplements general pre-contractual information duties for all consumer contracts (Article 5 Consumer Rights Directive) and particular pre-contractual information duties when concluding a distance or off-premises contract (Article 6 Consumer Rights Directive). With the so-called

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[58] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ 2000 L 178/1.

[59] Wendehorst, Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive, *Journal of European Consumer and Market Law (EuCML)* 2016, p. 30.

[60] ECJ, 20-12-2017, C-434/15 – *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

[61] ECJ, 20-12-2017, C-434/15 – *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981, para. 39.

[62] ECJ, 19-12-2019, C-390/18 – *Airbnb Ireland UC*, ECLI:EU:C:2019:1112.

[63] ECJ, 19-12-2019, C-390/18 – *Airbnb Ireland UC*, ECLI:EU:C:2019:1112, paras. 53-55.

[64] *Research group on the Law of Digital Services*, Discussion Draft of a Directive on Online Intermediary Platforms, *Journal of European Consumer and Market Law (EuCML)* 2016, p. 164.

[65] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

Omnibus Directive of 2019[66], the European legislator has reformed the Consumer Rights Directive. The implementation period has ended on May 28, 2022. There are now specific information duties for operators of online marketplaces pursuant to Article 6a Consumer Rights Directive. In particular, platforms must disclose to consumers whether the third party offering the goods, services or digital content is a trader or not, and the parameters of their ranking. Most notably, companies can be fined for legal violations with union-wide relevance up to a maximum amount of EUR 2 million or 4 % of their annual turnover. This is intended to contribute to the effectiveness of consumer protection provisions and act as a deterrent.

The aforementioned Platform-to-Business Regulation extends information requirements for the protection of business users. The transparency requirement in Article 9 P2B Reg. requires platform operators to state whether and to what extent business users have access to the data collected. However, they do not have a right of access. According to Article 5 P2B Reg., the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters must be set out.

The European legislator's trigger happiness about information duties tends to neglect two fundamental shortcomings of information as an effective instrument of protection: (1) "information overload" is a key problem; more information does not necessarily lead to better protection[67]. Even if there is a basic willingness to process available information, the capacity required to do so may not be available. (2) Information requirements will help only uninformed consumers, not consumers without a choice. To make things worse: in cases of dependency of consumers it is by no means obvious whether consumers waiving their rights do not care about these rights from the outset or simply have resigned because they have to decide to either accept the waiver or refrain from the use of the service offered[68].

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[66] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ 2019 L 328/7.

[67] Chen/Shang/Kao, The effects of information overload on consumers' subjective state towards buying decision in the internet shopping environment, 8(1) *Electronic Commerce Research and Applications* 48 [2009]; Jacoby, Perspectives on Information Overload, 10(4) *Journal of Consumer Research* 432 [1984].

[68] This was a major issue in the German *facebook* cases: while the Higher Regional Court of Duesseldorf found that consumers accepting that facebook made use of their data had no interest in data protection, Higher Regional Court of Duesseldorf, 04-06-2019, Kart 2/16 (V), ECLI:DE:OLGD:2019:0604.KART2.16V.0A., the Federal Supreme Court when overturning the judgement found that this acceptance was due only to the customers' dependence on the service, German Federal Supreme Court, 23-06-2020, KVR 69/19 – *Facebook*, ECLI:DE:BGH:2020:230620BKVR69.19.0 df.

4.1.3 Privacy

Protection of personal data is afforded in the European Union by the General Data Protection Regulation[69] (hereinafter: GDPR). According to Article 4 (1) GDPR personal data is any information relating to an identified or identifiable natural person. In platform markets, data is a source of market power. Data are mostly non-rivalrous. Yet, not all companies are able to collect and analyse data to the same extent[70]. Technical possibilities of collecting and processing data automatically correspond with considerable competitive opportunities. For example, thanks to more customer data a provider of ticket distribution services may be able to offer targeted and better promotion to event organizers. From the point of view of the event organizer, this increases the benefit of the ticket sales services compared to competing ticket sales offerings and conveys a competitive advantage[71]. Thus, a significant lead over competitors in available data may promote market power.

The processing of personal data depends on the consent of consumers, cf. Article 6 (1) (a) GDPR[72]. However, it is unclear what is required for effective consent. "Squeezed" consent, i.e. consent given but for the lack of alternatives, may be insufficient. In addition, there are far-reaching exceptions to the consent requirement, particularly in the context of platform business models. According to Article 6 (1) (b) GDPR, consent is not required if the processing is necessary for the performance of a contract or for the performance of pre-contractual measures.

On the one hand, the symmetrical regulatory approach of the General Data Protection Regulation produces risks of over-enforcement. It applies to any processing of personal data by automated means and does restrict small entrepreneurs and non-governmental organizations considerably, and maybe even more severely so than large internet corporations. On the other hand, the General Data Protection

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[69] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ 2016 L 119/1.

[70] Dittrich, Online Platforms and how to regulate them: an EU overview, *Bertelsmann Stiftung policy paper* no. 227, 14-06-2018, p. 11, <https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/EZ_JDI_OnlinePlatforms_Dittrich_2018_ENG.pdf>, site last visited 29-12-2021.

[71] Higher Regional Court of Duesseldorf, 05-12-2018, VI-Kart 3/18 (V), ECLI:DE:OLGD:2018:1205.KART3.18V.00.

[72] Wendehorst/Graf von Westphalen, Das Verhältnis zwischen Datenschutz-Grundverordnung und AGB-Recht, *Neue Juristische Wochenschrift* 2016, p. 3745.

Regulation does not at all address the competitive threats associated with data. Data protection law as enshrined in the General Data Protection Regulation serves to protect the individual from infringing use of personal information, cf. Article 1 (2) GDPR. The competitive relevance of data, by contrast, requires resolving questions of their legal qualification and attribution independent of their confidentiality[73]. Initial approaches to get to grips with this particular problem can be found in digital contract law. The scope of the Directive on certain aspects concerning contracts for the supply of digital content and digital services[74] includes consumer contracts in which consumers do not pay a monetary fee, but make data available.

4.1.4 Ensuring fair competition

Within the EU the 2005 Directive on Unfair Commercial Practices[75] (UCP Directive) has led to a total harmonisation of the rules relating to business-to-consumer commercial practices. Misleading or aggressive practices are prohibited. Only in the last round of modernisation in 2019 new information duties for operators of online marketplaces were introduced (see supra). Most notably, providing search results without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results, are now declared unfair in all circumstances, Article 5 (4), ann. I no. 11a UCP Directive.

By contrast, rules on fair trading in business-to-business relationships are determined by European law only in certain areas: as early as 1997 the Directive on comparative advertising[76] was enacted. The provisions have remained largely unaltered – despite an attempt of modernisation[77] – during the last round of

[73] Iamiceli, Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity, 15 (4) *European Review of Contract Law* 392, 394 ff. [2019].
[74] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ 2019 L 136/1.
[75] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005 L 149/22.
[76] Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ 1997 L 290/18.
[77] European Commission, 27-11-2012, Communication to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Protecting businesses against misleading marketing practices and ensuring effective enforcement – Review of Directive 2006/114/EC concerning misleading and comparative advertising, COM [2012] 702 final.

European legislation in the field of Consumer law[78]. Denigration and badmouthing are covered, if they are committed within comparative advertisements.

Since 2016 the protection of trade secrets has been harmonized within the EU[79]. The main problem though is created by the fact that platform providers typically either "know by design" or at least have their business users' consent to learn of the secret information.

The general legal framework at the European level is therefore not well-suited to encounter dangers evolving from unfair commercial practices of platform operators for business users. In part, the gap has been closed by the Platform-to-Business Regulation (see supra), in part the Member States have jumped in, typically by applying rules designed to prevent unfair competition also to vertical business-to-business relationships. To give an example: although the scope of application of Articles 5 (4), 8, 9 UCP Directive is limited to business-to-consumer relationships, the German legislator chose to extend the scope of the prohibition of aggressive commercial practices versus businesses.

In its judgment *Adblocker II*[80] the German Federal Supreme Court dealt with the question whether or not Unfair Competition law protects advertising-financed business models of attention-grabbing platforms from competing business models. The Court ruled that the offer of an adblocker software does not constitute an aggressive commercial practice within the meaning of sec. 4a (1) of the German Act against Unfair Competition towards companies interested in placing advertisements.

While the symmetric provisions of unfair competition law generally do not presuppose any market power, the prohibition of aggressive commercial practices – in line with Articles 8, 2 let. i UCP Directive – links undue influence to a "position of power" of the undertaking, cf. sec. 4a (1) (3) of the German Act against Unfair Competition. For the question of whether the platform operator acted aggressively, the court explored whether or not market participants willing to advertise were significantly restricted in their ability to make an informed decision by undue influence[81],

[78] Directive 2006/114/EC of the European Parliament and od the Council of 12 December 2006 concerning misleading and comparative advertising, OJ 2016 L 376/21.

[79] Directive (EU) 2016/943 the European Parliament and od the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ 2016 L 157/1.

[80] German Federal Supreme Court, 19-04-2018, I ZR 154/16, ECLI:DE:BGH:2018:190418 UIZR154.16.0.

[81] German Federal Supreme Court, 19-04-2018, I ZR 154/16, ECLI:DE:BGH:2018:19041 8UIZR154.16.0, para. 70.

and denied this: companies willing to advertise were not induced to act against their rational choice, but considered the available options in the course of economic decision making, and weighed them up[82]. In addition, the court ruled that the software offer did not constitute an unfair horizontal obstruction of competitors, cf. sec. 4 no. 4 of the German Act against Unfair Competition (as for a solution within Competition law see infra)[83]. Thus, the core of Unfair Competition law is not aimed at comprehensively countering the gatekeeper position of platforms.

4.2 Asymmetric Provisions

The pros and cons of asymmetric regulation counter-match those of symmetric regulation: asymmetric regulation permits to address only situations in which serious societal concerns exist. On the other hand, the more targeted asymmetric regulation becomes, the more it will be exposed to the criticism of being disguised individual and concrete measures to the detriment of particular undertakings. In the platform economy all of the large operators active in Europe are US based internet corporations, at times simply referred to as "GAFAM" (acronym for Google [Alphabet], Amazon, Facebook [Meta Platforms], Apple and Microsoft). It is no surprise that focused attempts of curbing their economic power have caused protest in the United States[84].

The classic approach of European Competition law is asymmetrical as well, as only undertakings with a dominant position on particular markets have a special responsibility[85] for this market and, hence, may be hindered from business conduct open to their non-dominant competitors. Given that there is a clear economic theory underlying this approach – any kind of monopoly will yield a deadweight loss of society as a whole – a focus on particular undertakings may occur as a consequence, but asymmetric regulation by general Competition law is still open enough to address undertakings from any part of the world, not the least national and local champions.

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[82] German Federal Supreme Court, 19-04-2018, I ZR 154/16, ECLI:DE:BGH:2018:190418UIZR154.16.0, para. 71.

[83] German Federal Supreme Court, 19-04-2018, I ZR 154/16, ECLI:DE:BGH:2018:190418UIZR154.16.0. Cf. Glöckner, Lauterkeitsrechtlicher Schutz von Geschäftsmodellen auf mehrseitigen Märkten – zugleich Anmerkung zu BGH, Urt. v. 19.4.2018 – I ZR 154/16 – *Werbeblocker II* (ZUM 2018, 881), *Zeitschrift für Urheber- und Medienrecht* 2018, p. 844.

[84] Stolton, US pushes to change EU's digital gatekeeper rules. Washington officials worry that the Digital Markets Act could target American firms, *politico* 31-01-2022, <https://www.politico.eu/article/us-government-in-bid-to-change-eu-digital-markets-act/>, site last visited 21-07-2022.

[85] ECJ, 09-11-1983, 322/81 – *Michelin*, [1983] ECR 3461, para. 57.

This is different for asymmetric regulation of platform markets going beyond Competition law: at times, it is hard to ascertain any particular ratio, and its express goal is to catch just very few platform operators. The tool box of general Competition law and options to beef it up will be will be presented first, before current attempts of specific asymmetric regulation of platform markets will be dealt with.

4.2.1 General Competition law and its possible reinforcement

4.2.1.1 Substantive adequacy and procedural shortcomings

The European Commission as well as many other Member States' competition authorities have repeatedly countered anti-competitive behaviour by platforms with the prohibition of abuse of a dominant position in Art. 102 TFEU or Member States' parallel provisions. The control of abusive conduct of dominant undertakings afforded by general Competition law has proven to be sufficiently flexible to counter new competitive threats posed by digital business models.

In its 2017 decision in the "Google Search (Shopping)" case, the European Commission imposed a fine of EUR 2.42 billion on Google[86]. The General Court[87] upheld the decision in essence, finding that the search engine operator had abused its dominant position by favouring its price comparison service, thereby gaining unlawful competitive advantages. The case is now pending at the ECJ[88].

As early as 2018, but three years after the opening of the case, the European Commission found in the "Google Android" case the group's practice to make licensing the Android operating system to manufacturers of Android devices conditional to their pre-installation of Google apps to constitute an anticompetitive practice to strengthen the dominant position of the Google search engine, and record-fined Google EUR 4.34 billion[89]. Yet, the Commission is struggling as Google for a long time failed to live up to the prohibitions contained in the decision, allowing Google to continue to generate profits and collect data from unlawful conduct. Only recently Google's appeal was rejected for the largest part by the General Court[90].

The almost identical prohibition of abuse under German antitrust law, cf. sec. 19 Act against Restraints of Competition (ARC), has proven to be just as

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[86] European Commission, 27-06-2017, AT.39740 – *Google Search (Shopping)*.
[87] GCEU, 10-11-2021, T-612/17 – *Google Shopping*, ECLI:EU:T:2021:763.
[88] ECJ, C-48/22 P – *Google Shopping*.
[89] European Commission, 18-07-2018, AT.40099 – *Google Android*.
[90] GCEU, 14-09-2022, T-604/18 – *Google Android*, ECLI:EU:T:2022:541.

flexible, and its application just as slow. In the proceedings against *facebook*, the German Federal Cartel Office affirmed an abuse of conditions by making the private use of the network conditional to consent to the collection and aggregation of data collected during the use of other group-owned services and third-party websites ("off facebook")[91]. This violated the General Data Protection Regulation and at the same time constituted an abuse of a dominant market position. Again, it took almost three years from the opening of the proceedings in March 2016 to the final decision in February 2019, even though the Federal Cartel Office argued that administrative proceedings leading to a mere prohibition allowed for speedier proceedings than proceedings leading to administrative fines[92].

To sum up: while Competition law offers the appropriate legal concept to get to grips with the potential threats to markets posed by digital platforms, and is flexible enough to cover them, the enforcement structures make general Competition law just too slow to afford timely and effective protection of markets. This provokes the questions why Competition law enforcement is so slow, and, beyond that, whether Competition law enforcement can be sped up sufficiently.

4.2.1.2 Competition law enforcement and delay

The two primary reasons of the time delay of Competition law enforcement is the duration of the competition authorities' own proceedings until their final decisions and the time period lapsing in the course of subsequent judicial review. Under EU law an appeal against decisions of the Commission does not have suspensive effect, i.e. the decision can be enforced in principle, unless the appeal is combined with a motion to suspend the operation of the measure adopted by the Commission pursuant to Article 156 (1) of the Rules of Procedure of the General Court[93] and such motion is granted. However, if a decision of the Commission is enforced, but subsequently quashed by the General Court or the Court of Justice, state liability of the EU pursuant to Articles 268, 340 (2) TFEU may be imposed[94].

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[91] German Federal Cartel Office, 06-02-2019, B6-22/16 – *Facebook*.

[92] German Federal Cartel Office, Hintergrundinformationen zum Facebook-Verfahren des Bundeskartellamtes, 19-12-2017, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=5"> site last visited 01-08-2022.

[93] Rules of Procedure of the General Court, OJ 2015 L 105/1.

[94] E.g. GCEU, 23-02-2022, T-834/17 – *UPS v. Comm.*, ECLI:EU:T:2022:84 (damages for unlawful blocking of a merger; in casu the causal nexus between the serious breaches of EU law and the damages claimed was denied.).

In Germany the complaint against decisions suspends enforcement only in particular cases, sec. 66 (1) ARC. In all other cases motions to grant interim legal protection can be filed. Like in the European Union, state liability is always a risk[95].

Decisions of competition authorities are subject to full judicial review[96]. High standards of evidence, in particular as regards market effects, have to be met. In the past, Commission decisions have repeatedly been overturned by the European courts on the grounds of insufficient evidence. This line of cases has started with the infamous series of merger prohibitions that were quashed in 2002[97], and it spans from the assessment of conglomerate mergers[98] to the treatment of loyalty rebates[99]. In the recent prohibition decision on the "Hutchison 3G UK/Telefonica UK" merger, the General Court considered the Commission's prognosis that a significant impediment to effective competition could be expected to be insufficiently proven[100].

As an obvious consequence, competition authorities do everything to avoid defeat in court and go long ways to make their fact-finding bullet-proof. This again makes Competition law proceedings often extremely lengthy, even in cases in which outsiders might find the outcome obvious. Yet, the fact remains that prohibition decisions will hardly be issued in time to adequately counter the competitive risks on platform markets.

In addition, the relative novelty of digital platform markets and the special structures with the intermediary role of platforms create particular legal uncertainties. Contradictory decisions are not uncommon. One example is delivered by the German *facebook* saga: *facebook*'s motion for interim protection against the Federal Cartel Office's prohibition of 2019 was supported by the Higher Regional Court of Duesseldorf[101]. The Higher Regional Court argued that it was not discernible

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[95] E.g. Higher Regional Court of Duesseldorf, 26-03-2014, VI U (Kart) 43/13 – *GN Store Nord*, *Neue Zeitschrift für Kartellrecht* 2014, 185.

[96] ECJ, 15-02-2005, C-12/03 P – *Tetra Laval*, ECLI:EU:C:2005:87, para. 39; ECJ, 08-12-2011, C-386/10 P – *Chalkor*, ECLI:EU:C:2011:815, para. 62; ECJ, 08-12-2011, C-272/09 P – *KME*, ECLI:EU:C:2011:810, para. 94.

[97] CFI, 06-06-2002, T-342/99 – *Airtours*, ECLI:EU:T:2002:146; CFI, 22-10-2002, T-310/01 – *Schneider Electric*, ECLI:EU:T:2002:254; CFI, 25-10-2002, T-5/02 – *Tetra Laval*, ECLI:EU:T:2002:264.

[98] ECJ, 15-02-2005, C-12/03 P – *Tetra Laval*, ECLI:EU:C:2005:87, para. 39.

[99] ECJ, 06-09-2017, C-413/14 P – *Intel v. Comm.*, ECLI:EU:C:2017:632.

[100] GCEU, 28-05-2020, T-399/16 – *CK Telecoms UK Investments v. Commission*, ECLI:EU:T:2020:217.

[101] Higher Regional Court of Duesseldorf, 26-08-2019, VI-Kart 1/19 (V), ECLI:DE:OLGD:2019:0826.VIKART1.19V.0A.

to what extent the infringement of data protection provisions also constituted competitive damage. The German Federal Supreme Court, in turn, supported the decision of the Federal Cartel Office and restored enforceability[102].

Courts also have assessed best-price clauses differently: while the German Federal Cartel Office initially considered both narrow[103] and broad[104] best-price clauses to be in violation of Competition law, the Higher Regional Court of Duesseldorf deemed narrow best-price clauses to be lawful[105] as valid ancillary agreements to the user contract, which in turn was neutral under Competition law. On appeal, the Federal Supreme Court ruled to the contrary and supported the Federal Cartel Office: a narrow best price clause was not required for the platform agreement to be implemented[106].

4.2.1.3 Speeding up enforcement

4.2.1.3.1 "Roll back" of judicial control?

Against this backdrop, the obvious solution of the time problem appears to be a reduction of judicial control. Yet, this idea has not gained any political clout, even though some competition authorities, such as the EU Commission's DG COMP or the German Federal Cartel Office are politically independent and have great expertise[107]. The Commission hammers out general clauses through notices[108] and guidelines[109], and although these acts, in principle, are binding only for the

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[102] German Federal Supreme Court, 23-06-2020, KVR 69/19 – *Facebook*, ECLI:DE:BGH:2020:230620BKVR69.19.0 df.

[103] German Federal Cartel Office, 22-12-2015, B9-121/13.

[104] German Federal Cartel Office, 20-12-2013, B9-66/10.

[105] Higher Regional Court of Duesseldorf, 04-06-2019, Kart 2/16 (V), ECLI:DE:OLGD:2019:0604.KART2.16V.0A.

[106] German Federal Supreme Court, 18-05-2021, KVR 54/20 – *Booking.com*, ECLI:DE:BGH:2021:180521BKVR54.20.0.

[107] Steinke, „Leaving the Cowboy Hat at Home"? Die Neuausrichtung der europäischen Wettbewerbspolitik als Politiktransfer aus den USA, 2011, <http://nbn-resolving.org/urn:nbn:de:bvb:29-opus-25022>, site last visited 23-08-2022, pp. 88 ff.

[108] Commission Notice on the definition of relevant market for the purposes of Community competition law, 97/C 372 /03, OJ 1997 C 372/5; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, 2014/C 291/01, OJ 2014 C 291/1.

[109] Guidelines on Vertical Restraints, OJ 2022 C 248/1; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11/1.

Commission[110], they at least *de facto* also have shaped the interpretation of European Competition law to a considerable extent. It was only the effects-based analysis that has characterized the development of EU Competition law over the past fifteen years and has led to more case-by-case orientation[111].

However, an increase of the scope of the authority's discretion that is shielded from judicial control could generate political pressure. In the recent discussion on the introduction of a type of ministerial authorization in European merger control, fears were uttered that the competition authorities could be targeted in political debates[112]. This could be detrimental to the authority of their decisions. In addition, national competition rules are subject to regular amendments. In order to "test" new rules and investigate their suitability for curbing the market power of platforms, it seems necessary to allow for a comprehensive judicial review of regulatory decisions of lawmakers. This also applies at the EU level, even though in the past the ECJ never cared to doublecheck block exemption regulations, let alone Reg. no. 1/2003[113], against primary EU law including fundamental rights. As a starting point, the 2022 Vertical Block Exemption Regulation[114] for the first time explicitly considers the intermediary role of platforms in rec. 10 ff., Articles 1 (1) (d), (e), 2 (6), 5 (1) (d).

Above all, full judicial review of Commission decisions is central to the compatibility of the procedure with fundamental rights requirements, in particular those constituted by Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or Article 47 of the Charter of Fundamental Rights. In its decision in the "Menarini" case, the European Court of Human Rights commented on the compatibility of the Italian antitrust proceedings

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[110] Cf. ECJ, 13-12-2012, C-226/11 – *Expedia*, ECLI:EU:C:2012:795, para. 29; Kallmayer, Die Bindungswirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht – Mehr Rechtssicherheit durch Soft Law?, in: Calliess (ed.), *Herausforderungen an Staat und Verfassung: Völkerrecht – Europarecht – Menschenrechte, Liber Amicorum für Torsten Stein zum 70. Geburtstag*, Baden-Baden, 2015, pp. 662, 674 ff. Leaning toward a binding effect via the duty to sincere cooperation AG Kokott, conclusions, C-226/11 – *Expedia*, ECLI:EU:C:2012:544, paras. 35 ff., 38.

[111] Budzinski, Wettbewerbsfreiheit und More Economic Approach: wohin steuert die Europäische Wettbewerbspolitik?, *Marburger Volkswirtschaftliche Beiträge*, no. 2007, 13, pp. 7 ff.

[112] Legner, Die Relevanz eines Geschlechteraspekts für das Kartellrecht, *Journal of Competition Law* 2020, pp. 289, 309 ff.

[113] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

[114] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2022 L 134/4.

with the fair trial requirements of Article 6 ECHR[115]. In doing so, the Court emphasized that decisions by authorities imposing fines based on infringements of Competition law must be subject to full judicial review. This was confirmed by the European Court of Justice in subsequent decisions[116] and recently emphasized by the General Court in its judgment in "CK Telecoms UK Investments". The General Court held that two tiers of instances were necessary for cases the resolution of which required a detailed examination of complex facts in order to improve the legal protection of individuals and to maintain the quality of legal protection[117].

4.2.1.3.2 Interim measures

The only way to speed up competition authorities' decision making seems to be to resort to interim measures as foreseen in Article 8 Reg. no. 1/2003 for the European Commission[118] or sec. 32a ARC for German competition authorities. As an attempt to make this almost forgotten instrument a handy tool the German legislator has reduced the standard for interim orders in 2021.

4.2.1.4 Extension of Scope

4.2.1.4.1 Unilateral Conduct

Competition laws of some EU Member States, including Germany[119], France[120], Belgium[121] and Greece[122], address undertakings with relative market power below the threshold of market dominance, and can do so even when trade between Member States is affected, based on Article 3 (2) 2 Reg. no. 1/2003. With regard to platform markets, such prohibitions may facilitate and accelerate the determination

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[115] ECHR, 28-09-2011, 43509/08 – *A. Menarini Diagnostics S.R.L./Italy*.
[116] ECJ, 08-12-2011, C-386/10 P – *Chalkor*, ECLI:EU:C:2011:815, para. 62; ECJ, 08-12-2011, C-272/09 P – *KME*, ECLI:EU:C:2011:810, para. 102.
[117] GCEU, 28-05-2020, T-399/16 – *CK Telecoms UK Investments v. Commission*, ECLI:EU:T:2020:217, para. 72.
[118] The Commission has made use of the instrument very sparingly. Its recent use in the case AT.40608 – *Broadcom* was highlighted by a press release, press release of 16-10-2019, Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets, IP/19/6109.
[119] Sec. 20 ARC.
[120] Article L. 420-2 Code de commerce.
[121] Article IV.2/1 Code de droit économique.
[122] Article 2a Nomos 703/77 peri elenchou monopolion kai oligopolion kai prostasias tou eleftherou antagonismou.

of addressee status. The EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain[123] (hereinafter: UTP Directive) is linked to relative market power as well. In order to protect suppliers from the superior bargaining power of their customers in the agricultural and food supply chain, specific unfair trading practices are prohibited in Article 3 UTP Directive[124]. In Article 1 (2) UTP Directive, its scope of application is defined by a relative size ratio between the annual turnovers of suppliers and buyers. This eliminates the need for complex checks on market structures and market shares of the companies[125].

However, in platform markets, determining market power is not necessarily the biggest challenge, even though – as described above – it may be time-consuming and tedious. Due to the way multi-sided markets function and the comparatively new business models, the focus is instead on the question of whether the behaviour is compatible with free competition. In this respect, extending the prohibitions of European Competition law to companies with relative market power would not necessarily make things easier.

Following a 16-month bipartisan investigation by the US House of Representatives Antitrust Subcommittee, the House Judiciary Committee voted on 24 June 2021 to pass the Ending Platform Monopolies Act[126]. It is designed to eliminate conflicts of interest by making it unlawful for a dominant online platform – such as Google, Apple, Amazon, and Facebook – to simultaneously own another line of business[127]. Companies in violation could have to divest lines of business where their gatekeeper power allows them to favour their own services or disadvantage rivals. Such strict separation of function would clearly go beyond the general prohibitions of

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[123] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ 2019 L 111/59.

[124] Glöckner, Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung, *Wettbewerb in Recht und Praxis* 2019, p. 824; Legner, Die Umsetzung der Richtlinie über unlautere Handelspraktiken in das Kartellrecht?, *Europäische Zeitschrift für Wirtschaftsrecht* 2020, p. 85.

[125] Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, Baden-Baden, 2018, p. 50.

[126] As for the state of legislation cf. <https://www.congress.gov/bill/117th-congress/house-bill/3825>, site last visited 22-07-2022.

[127] Cicilline et al., House Lawmakers Release Anti-Monopoly Agenda for „A Stronger Online Economy: Opportunity, Innovation, Choice, 11-06-2021, <https://cicilline.house.gov/press-re-lease/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity>, site last visited 29-07-2022.

discrimination or even of self-preferencing. From a substantive law perspective a divestiture seems over-reaching for effective protection.

4.2.1.4.2 Merger Control

4.2.1.4.2.1 Thresholds

Based on the US Antitrust law size of transaction-test in sec. 7A Clayton Act[128], the German legislator has introduced a new threshold for merger control in sec. 35 (1a) ARC based on the value of the transaction exceeding EUR 400 million. One of the reasons for this amendment was the *Facebook/WhatsApp*-merger in 2014[129]. It did not fall under German merger control since the target company *WhatsApp* did not generate sufficient sales in Germany. Nevertheless, *Facebook* was willing to pay a significant purchase price (US$ 19 billion). It is assumed that the high selling price reflects competitive potential. Austrian merger control law, too, has introduced a value-of-the-transaction related threshold, cf. sec. 9 (4) Austrian Cartel Act[130]. An enlargement of scope of merger could help avoid "tipping" of platform markets.

The joint guidance of the German and Austrian competition authorities on the determination of the transaction value explains the calculation[131]. However, difficulties might remain in determining the value of the consideration. Particular difficulties will arise in the case of exchange of stock[132]. In such a case, the value of the consideration cannot be derived directly from the purchase agreement. In addition, no market price can be determined. In a system of preventative merger control, legal uncertainty is particularly problematic. Instead, it would be possible to provide for an obligation to notify on the part of the companies with subsequent power to intervene[133]. Finally, there is a risk that the transaction value is manipulated in order to escape merger control. So far, there is no comparable threshold in European merger control.

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[128] 15 U.S.C. § 18a.
[129] German Bundestag Printed Paper 18/10207, p. 71.
[130] Austrian Federal Law Gazette I no. 56/2017.
[131] German Federal Cartel Office/Austrian Federal Competition Authority, Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG), 2018.
[132] Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, *GWB*, 4th ed., Munich, 2020, sec. 35 para. 59.
[133] Immenga/Mestmäcker/Thomas, *GWB*, 6th ed., Munich, 2020, sec. 35 para. 71.

4.2.1.4.2.2 Substantive test

Even the special value-of-the-transaction threshold only makes sure competition authorities get a chance to scrutinize merger transactions, but do not allow for a largely discretionary prohibition (as for the standard of evidence see supra). Hence, attempts are being made to adapt the European SIEC test for platform markets as well. As a result of the fear that the acquisition of small start-ups with low sales at the time of the acquisition could harm competition on platform markets in the long run ("killer acquisitions"), reform proposals have been discussed[134]. Replies to the public consultation on evaluation of procedural and jurisdictional aspects of EU merger control show that the rules governing the referral of concentrations from the Commission to Member States in Article 22 Merger Reg[135]. are considered by many to be sufficient[136]. In Germany discussion has been revitalised by the recent background paper of the Federal Cartel Office[137].

In the United States a further reaching legislative project is under way, the Platform Competition and Opportunity Act (PCOA). It is supposed to give rise to a straightforward prohibition of operators of covered platforms from acquiring the stock or other share capital or the assets of another person engaged in commerce or in any activity affecting commerce. These "covered platforms" are online platforms that (1) have at least 50 million U.S.-based monthly active users or at least 100,000 US-based monthly active business users, (2) are owned or controlled by a person with net annual sales or a market capitalization greater than $ 600 billion, and (3) are critical trading partners for the sale or provision of any product or service offered on or directly related to the platform. The Federal Trade Commission or the Department of Justice must designate whether an entity is a covered platform,

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[134] European Commission, Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, 2017, p. 4.

[135] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24/1.

[136] The General Court upheld the decisions of the Commission accepting a referral request from France, asking it to assess the proposed acquisition of Grail by Illumina, GCEU, 13-07-2022, T-227/21 – *Illumina/Grail*, ECLI:EU:T:2022:447, while the German Federal Cartel Office does not support this understanding of Article 22 Merger Reg.

[137] German Federal Cartel Office, Fusionskontrolle im digitalen Zeitalter - Herausforderungen und Entwicklungsperspektiven, 2022, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2022_Hintergrundpapier.pdf?__blob=publicationFile&v=3>, site last visited 09-10-2022.

and both must carry out enforcement activities. The bill also provides for any person (other than a foreign state and any instrumentality thereof) who is injured by an activity forbidden under the bill to recover triple damages[138]. Again, while the substantive test for pro-competitive mergers – or at least the onus of argument as for the anti-competitive effects – might be shifted, a plain prohibition without any exception should be considered an excessive intrusion into economic freedom as a fundamental right[139].

4.2.1.5 "Very special" responsibility of platform-based eco-system operators, sec. 19a ARC

Platform operators may go beyond simply matching market participants, but, depending on market structures, become true gatekeepers in a position to set the standards on particular markets. For this case, the German legislator introduced a specific abuse provision in sec. 19a ARC with the 10th amendment in 2020 which entered into force on 19 January 2021. It addresses undertakings of paramount significance for competition across markets and, similar to the Digital Markets Act, aims at platforms with particularly high market power.

Unlike the Digital Markets Act though, sec. 19a ARC is based on a fully competition-based approach. The addressees are not determined on a basis of simple revenue thresholds, but following a market analysis. This, however, is not done based on the definition of markets defined by product, territory and time as under sec. 18 ARC, but instead on a cross-market perspective in order to take account of the way in which multilateral markets operate[140]. Correspondingly, sec. 19a (2) ARC contains an enumerative list of offenses that are linked by their cross-market dimension. However, the prohibitions tend to be broader than those of the Digital Markets Act. In addition, due to their clear focus on the protection of free competition, they can be specified more reliably[141]. Another difference is

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[138] As for the state of legislation cf. <https://www.congress.gov/bill/117th-congress/house-bill/3826/text>, site last visited 22-07-2022.

[139] Article 18 (2) DMA for good reasons allows for a temporary, but general ban on mergers only as a kind of ultima ratio after conducting a market investigation into systematic violations. For gatekeepers acting in compliance with the rules Article 14 DMA only provides for an obligation to inform about concentrations.

[140] German Bundestag Printed Paper 19/23492, p. 73.

[141] German Federal Cartel Office, Digital Markets Act: Perspektiven des (inter)nationalen Wettbewerbsrechts, 2021, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2021_Hintergrundpapier.pdf;jsessionid=592D8501212E6A

that the undertakings addressed are given a comprehensive defence to justify their actions[142]

One might be tempted to criticize that the original time problem might surface in the need for the Federal Cartel Office to take a decision declaring that an undertaking which is active to a significant extent on multi-sided markets and networks is of paramount significance for competition across markets pursuant to sec. 19a (1) ARC. However, the first eighteen months of the new law in action have shown though that the Federal Cartel Office has made ample use of its new jurisdiction: Alphabet/Google was determined to be of paramount significance across markets not even one year after the entry into force of the new provisions in January 2022[143]. Meta (formerly Facebook) followed in May[144], and Amazon in July 2022[145]. As regards Apple proceedings were initiated in June 2022[146].

Following, but not necessarily after, the decision on the position of paramount significance across markets the Federal Cartel Office has to establish in a second step, whether a prohibited conduct exists. Undertakings have comprehensive legal redress. They can challenge the declaratory ruling. In order to save time, the complaint is heard directly by the Federal Supreme Court.

The regulatory approach of sec. 19a ARC is convincing. While the provision retains a clear focus on competition it singles out an element underexposed

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BBAC21107A660F9DF0.1_cid378?__blob=publicationFile&v=3>, site last visited 23-08-2022, p. 32.

[142] For a comprehensive comparison cf. Paal/Kiess, Digitale Plattformen im DSA-E, DMA-E und § 19a GWB, *Zeitschrift für Digitalisierung und Recht (ZfDR)* 2022, 1.

[143] Press release of 05-01-2022, German Federal Cartel Office, Alphabet/Google subject to new abuse control applicable to large digital companies – Bundeskartellamt determines "paramount significance across markets, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.pdf?__blob=publicationFile&v=2, site last visited on 21-07-2022. Alphabet (Google) has not filed a complaint against this decision.

[144] German Federal Cartel Office 02-05-2022, B6–27/21 – Meta (formerly Facebook), case report, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B6-27-21.pdf?__blob=publicationFile&v=2, site last visited 21-07-2022. Meta has refrained from filing a complaint against the decision.

[145] German Federal Cartel Office, 06-07-2022, B2-55/21 – Amazon.com Inc., case report, <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B2-55-21.pdf?__blob=publicationFile&v=4 >, site last visited 21-07-2022.

[146] German Federal Cartel Office, 21-06-2022, Press release, Proceeding against Apple based on new rules for large digital companies (Section 19a(1) GWB) – Bundeskartellamt examines Apple's significance for competition across markets, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/21_06_2021_Apple.pdf?__blob=publicationFile&v=4, site last visited 25-07-2022.

until today, namely that a particular position across markets may pose serious threats to competition. The implementation of this regulatory approach may not be ideal in every respect, but it eliminates legal uncertainty by expanding the prohibition of abuse for cross-market conduct in the context of the digital economy and by making it more concrete by specific prohibitions. The goal of legal certainty is specially highlighted by the facts that the provision requires express decisions by one single authority, there is no direct effect nor private enforcement. Undertakings are protected against the far-reaching scope of the new provisions not only by a broad efficiency defence and the full judicial review of both decisions, but also by the exclusion of administrative fines for infringements of sec. 19a (2) ARC prior to an order issued by the Federal Cartel Office.

4.2.2 Digital Markets Act

Only very recently the so-called Digital Markets Act (DMA)[147] has entered into force in the EU. It is designed as a self-executing and *ex-ante* regulatory approach for platform markets. Its declared aim is to ensure that markets are and remain contestable and fair even though there may be gatekeepers present, cf. rec. 7 DMA.

Similar to sec. 19a ARC the Digital Markets Act establishes a two-layered structure of control: while the scope of application encompasses all core platform services, Article 1 (2) DMA, the special obligations laid down in Article 5 DMA have to be complied with only by "gatekeepers" that have been designated by the European Commission pursuant to Article 3 (1) DMA. Gatekeeper status depends primarily on specific revenue thresholds. Platform services with a minimum annual revenue of EUR 7.5 billion over three years or a market value of EUR 75 billion are covered. In addition, they must host at least 45 million active end users and 10,000 commercial users. If these conditions are met, the gatekeeper status is presumed pursuant to Article 3 (2) DMA with very limited possibilities of rebuttal ("sufficiently substantiated arguments", cf. Article 3 (5) DMA).

The catalogue of directly applicable prohibitions in Articles 5, 6, 7 DMA covers a wide range of conduct. Though some of the cases of self-preferential treatment mentioned in Article 6 DMA have already been the subject of antitrust

[147] 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), OJ 2022L 265/1.

investigations on the basis of Article 102 TFEU[148], the Digital Markets Act goes beyond in terms of content: Article 6 (5) DMA provides for a comprehensive prohibition of self-preference by platform operators if they exercise a dual role as mediators and market participants. Likewise, cases of tying practices that have already been found covered by Article 102 TFEU[149], are addressed in Article 5 (8) DMA and Article 6 (4) DMA.

Of course, this overlap begs the question why the European legislator has resorted to such seemingly redundant provisions. While there may be some gain of legal certainty as regards the abusive conduct, the main advantage can be seen in the anticipated market analysis. In "normal" antitrust proceedings market definition and assessment just take up too much time during which irreparable damage may be done. Under the Digital Markets Act all of this work is performed in the first stage of designation as gatekeeper. The designation takes place in a simple and short notification procedure pursuant to Article 3 (3), (4) DMA if the presumption requirements are met.

The regulation is based on the internal market jurisdiction of Article 114 TFEU instead of the Competition law jurisdiction laid down in Article 103 TFEU, and, indeed, it does not pursue an original Competition law approach. The connection between the focused revenue figures and monthly active end users critical for the assumption and market power is at best indirect. Recital 5 DMA emphasizes that "[...] gatekeepers [...] are not necessarily dominant in competition-law terms." Nevertheless, it can be assumed that gatekeepers are usually undertakings that are also dominant on specific markets[150]. Their behaviour therefore potentially poses risks to competition on platform markets. The practices prohibited by the regulation are those that pose risks to the freedom of competition.

So, while it may be possible to separate the Digital Markets Act technically from the ambit of Competition law, it is hard to identify the independent substantive regulatory idea of the Digital Markets Act[151]. The express goal of the Digital

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[148] GCEU, 10-11-2021, T-612/17 – *Google Shopping*, ECLI:EU:T:2021:763; European Commission, 27-06-2017, AT.39740 – *Google Search (Shopping)*.

[149] European Commission, 18-07-2018, AT.40099 – *Google Android*.

[150] Lamadrid/Fernández, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, *JECLP Advance Article*, 05-08-2021, p. 12; Schweitzer, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, *Zeitschrift für Europäisches Privatrecht* 2021, pp. 503, 523.

[151] Podszun/Bongartz/Langenstein, The Digital Markets Act, Journal of European Consumer and Market Law (EuCML) 2021, pp. 60, 65: "[...] more of a competition law reform through the backdoor than being a unique piece of legislation with a regulatory idea".

Markets Act is to achieve "contestability and fairness for the markets in the digital sector", cf. rec. 7 DMA. It remains unclear though, which overriding principles are being pursued. Economic theory, too, points out that contestability is difficult to measure when it comes to competition "for the market"[152].

As just one consequence, there is also a lack of a general clause for the prohibited conduct. The enumerated individual offenses are incoherent. An internal system is not recognizable[153]. While Articles 5, 6, 7 DMA standardize various duties of conduct, Article 14 provides for duties of information in the case of mergers. Article 15 DMA provides for information requirements with regard to "profiling of consumers". Since no independent approach is discernible, the interpretation of the limited justification options for gatekeepers is also likely to be problematic. This also applies to the scope of the prohibited conduct. Legal terms such as "fair [...] conditions" in Article 6 (5) DMA or "in competition" in Article 6 (2) DMA appear vague[154]. There is a risk that the prohibitions will be disproportionate as there is no general efficiency defense[155].

Furthermore, it is questionable whether the *ex-ante* regulatory approach really will allow for the kind of timely intervention the legislator had in mind. The determination of a gatekeeper status can be costly if either the company does not meet the presumption thresholds or succeeds in rebutting the presumption. The Commission may initiate a market investigation for this purpose, which must be

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[152] Crémer/Crawford/Dinielli/Fletcher/Heidhues/Schnitzer/Scott-Morton/Seim, Fairness and Contestability in the Digital Markets Act, *Digital Regulation Project – Policy Discussion Paper* no. 3, 2021, p. 20.

[153] de la Mano/Meunier/Stenimachitis/Hegyesi, The Digital Markets Act – Back to the "form-based" future?, May 2021, <https://www.compasslexecon.com/wp-content/uploads/2021/06/The-DMA-Back-to-the-Form-Based-Future.pdf>, site last visited 23-08-2022, para. 4.57; Petit, The Proposed Digital Markets Act, *Journal of European Competition Law & Practice (JECLP)* Advance Article, 31-07-2021, p. 7; Körber, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, *Neue Zeitschrift für Kartellrecht* 2021, pp. 436, 437.

[154] German Federal Cartel Office, Digital Markets Act: Perspektiven des (inter)nationalen Wettbewerbsrechts, 2021, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2021_Hintergrundpapier.pdf;jsessionid=592D8501212E6ABBAC21107A660F9DF0.1_cid378?__blob=publicationFile&v=3>, site last visited 23-08-2022, pp. 35 ff.

[155] de la Mano/Meunier/Stenimachitis/Hegyesi, The Digital Markets Act – Back to the "form-based" future?, May 2021, <https://www.compasslexecon.com/wp-content/uploads/2021/06/The-DMA-Back-to-the-Form-Based-Future.pdf>, site last visited 23-08-2022, para. 4.89; Lamadrid/Fernández, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, *Journal of European Competition Law & Practice (JECLP)* Advance Article, 05-08-2021, p. 11; Zimmer/Göhsl, Vom New Competition Tool zum Digital Markets Act, *Journal of Competition Law* 2021, pp. 29, 53.

completed within 12 months, cf. Article 16 DMA. Markets might tip even before the Commission has completed its market investigation[156]. The enforcement of the conduct obligations could also be protracted. The modalities of the conduct obligations under Articles 6, 7 DMA may have to be specified by the Commission in the context of a regulatory dialogue. This requires compliance with the procedural rules from Article 8 DMA. Furthermore, the sustainability of the list of duties can be doubted. Article 19 DMA combines the possibility of updating the obligations with the performance of a market investigation, which can take up to 18 months. The power to adopt delegated acts that is conferred on the Commission pursuant to Articles 12, 49 DMA might even violate Article 290 TFEU[157]. Accordingly, the delegation of power to adopt non-legislative acts may only relate to non-essential elements of the legislative act. However, Article 12 DMA enables the Commission to change essential parts of the key provisions in Articles 5, 6, 7 DMA by adopting delegated acts.

4.3 Full-blown Regulation

4.3.1 Regulation as special Competition law or as an aliud?

From the outset it should be clarified whether regulation serves only to make good for market imperfections, but limits itself to organize certain markets in a competition-like manner, or whether there are different additional or even contradicting goals that have to be pursued. In the case of regulation of natural monopolies quality and size of the infrastructure (railroad or power line networks) comes to mind, in the case of telecommunication the existence of universal services. Other elements – like the security of energy supply as a public interest or the alimentation of farmers as a group interest at the core of the UTP Directive – may add to the picture.

Indeed, the point can be made that a regulator may be best suited to balance disparate interests and complex challenges. A railroad agency may be best suited to assess the public interest in the creation and maintenance of a railroad network and its most efficient use as regards consumer prices, quality of service and ecological goals.

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[156] Zimmer/Göhsl, Vom New Competition Tool zum Digital Markets Act, *Journal of Competition Law* 2021, pp. 29, 45.

[157] Achleitner, Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden, *Neue Zeitschrift für Kartellrecht* 2022, pp. 359, 361; Podszun/Bongartz/Langenstein, The Digital Markets Act, *Journal of European Consumer and Market Law (EuCML)* 2021, pp. 60, 65.

As regards platform markets the various societal challenges are quite markedly separated. For social media platforms there may be issues relating to media legislation, but these issues can well be kept distinct and remain in the realm of audio-visual media law[158]. Apart from that there is no particular public or group interest that needs to be balanced and evaluated by any regulator. From this point of view regulation of the digital platform market can and should be limited to compensating for the specific imperfections of the digital platform market, but otherwise stick to the principles of Competition law.

4.3.2 Agency as regulator

Some of the economic sectors presented as vulnerable markets above have become subject to a full-blown regulation (e.g. grid-bound energy, telecommunication, railroad). Statutory regulations are largely intended to achieve a market performance that the legislator classifies as "competition-appropriate." The imperfection of the market caused by a natural monopoly or a non-duplicable network is overcome by regulating as close to hypothetical competition as possible[159].

Unlike Competition law, full-blown regulation is not limited to removing obstacles to free competition. Instead, it actively shapes market structures. In regulated sectors, public authorities take on the task of monitoring and steering competition. In Germany, the Federal Network Agency (*Bundesnetzagentur*) is responsible for maintaining competition in energy, telecommunications, postal and railroad markets. In France, the Telecommunications Regulatory Authority (*Autorité de Régulation des Télécommunications*) performs similar tasks.

With regard to platform markets, in Germany, the introduction of a new "digital authority" has been discussed[160]. There are hints of this in the Digital Services Act. Pursuant to Article 49 (2) DSA Member States shall designate one of the competent authorities as their Digital Services Coordinator, who shall be responsible for all matters relating to application and enforcement of the regulation. As an accompanying measure a European Digital Services Board pursuant to Article 61 DSA shall be

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[158] Cf. Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive, OJ 2020 C 223/3.

[159] That being said: even in the areas mentioned public policy goals such as universal services may be pursued and go beyond the would-be results of competition.

[160] Körber, Konzeptionelle Erfassung digitaler Plattformen und adäquate Regulierungsstrategien, *Zeitschrift für Urheber- und Medienrecht* 2017, pp. 93-101.

installed to assess systemic risks and other measures[161]. Among other things, it shall assist the Digital Services Coordinators and the Commission in the supervision of very large online platforms. However, unlike classic regulatory authorities, the main task of the Digital Services Coordinator is to enforce the obligations that the Digital Services Act imposes on providers. The new authorities provided for in the Digital Services Act are to be regarded as enforcement authorities. Their tasks are not the same as those of real regulatory authorities.

A different route seems to be taken in the United Kingdom: the Digital Markets Unit (DMU) has been established within the Competition and Markets Authority (CMA) as the United Kingdom's central competition authority. While the DMU's core objective is to promote competition in digital markets for the benefit of consumers, it is not only supposed to specialize in digital markets and implement general rules of Competition law to digital markets. Much rather, the DMU's activity will be targeted at a small number of firms with substantial and entrenched market power, which gives them a strategic position ('Strategic Market Status') in one or more activities. A (high) minimum revenue threshold is supposed to create a wide safe haven.

It is quite surprising that the United Kingdom is not overly concerned about the legal basis for the instruments in the hands of the DMU. To the contrary, once a firm is designated with Strategic Market Status, the DMU will set out how it is expected to behave through conduct requirements. The DMU will be allowed to determine the precise conduct requirements for each firm with Strategic Market Status. The DMU will also be provided with broad discretion to design and implement remedies[162].

4.3.3 Access to the network

The primary goal of regulation is to allow for competition on the market for services that are rendered through a natural monopoly or a non-duplicable network.

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[161] Spindler, Der Vorschlag für ein neues Haftungsregime für Internetprovider – der EU-Digital Services Act, *Zeitschrift für gewerblichen Rechtsschutz und Urheberrecht* 2021, pp. 653, 661.

[162] United Kingdom, Department for Business, Energy & Industrial Strategy, Department for Digital, Culture, Media & Sport, Consultation outcome. A new pro-competition regime for digital markets – government response to consultation, Updated 6 May 2022, presented to Parliament by the Secretary of State for Digital, Culture, Media and Sport and the Secretary of State for Business, Energy and Industrial Strategy by Command of Her Majesty on 6 May 2022, <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation>, site last visited on 22-07-2022.

The undertaking in control of the network should not monopolize the adjacent service market. The essential facilities doctrine or, more generally, control of dominant undertakings, allow for the use of general Competition law as a door-opener; yet, the particular circumstances of access, most notably the adequate remuneration, are hard to be found after-the-fact by the courts.

4.3.4 Price control

In fact, setting of fair prices for access to natural monopolies or non-duplicable networks is the domain of regulators. The regulatory authority attempts to regulate prices in a way most likely to correspond with those that would result from effective competition. Determination of prices analogous to those in a competitive market is a daunting task. In the telecommunications sector, for example, internal cost documents, international rate comparisons and analytical cost models are used for this purpose.

In addition to all of the difficulties typically associated with price regulation, platform markets have special features that make price control near impossible: business models in the digital economy are characterized by asymmetric price structures: while private users are granted access to the platform without payment, commercial users regularly have to pay a fee. European digital contract law also considers the provision of data by private users as consideration. The Digital Content and Services Directive[163] recognizes the provision of personal data as consideration, as consumers appear equally worthy of protection if they give away personal data in lieu of monetary consideration. As a central economic factor, the availability of data contributes to the fact that advertising companies regard attention platforms, such as *facebook*, as particularly lucrative places to advertise. As a consequence, price control on platform markets would also have to include and evaluate contractual conditions other than direct remuneration.

In addition, platform operators do not only determine the terms of user contracts. They usually also have a significant influence on contracts concluded between users of transaction platforms[164]. It would therefore have to be clarified

[163] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ 2019 L 136/1.

[164] Research group on the Law of Digital Services, Discussion Draft of a Directive on Online Intermediary Platforms, *Journal of European Consumer and Market Law (EuCML)* 2016, pp. 164, 168.

whether price control would also have to extend to the terms of contracts between users. However, this appears to be conflict-prone with regard to the users' freedom of contract. Thus, price control on platform markets seems to be a hardly feasible approach.

4.3.5 Control of conduct

Probably the greatest difficulty for a full-blown regulatory framework for the digital economy is brought about by the heterogeneity of business models as compared to traditional regulated sectors[165]. Finding a regulatory approach embracing all conceivable services is challenging. Necessary openness and flexibility would conflict with legal certainty and protection of fundamental rights.

Approaches to behavioural controls in the legal systems of Member States only relate to particular goals of protection. In France, the High Authority for the distribution of works and the protection of rights on the Internet (*Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet*) is responsible for copyright protection on the Internet. In addition, the Supreme Council for Audiovisual Media (*Conseil supérieur de l'audiovisuel*) takes action in regulating copyright infringements. It decides which excerpts of sporting events may be shown on the Internet, cf. Articles 1-9 Loi visant à renforcer l'éthique du sport et les droits des sportifs[166]. Since October 2021, there has been a new authority for digital audiovisual communication (*Autorité de régulation de la communication audiovisuelle*), with more far-reaching regulatory powers[167].

Full-blown regulation could result in authorities coming into the focus of political debate. Their currently independent position could be endangered. Political objectives could influence the exercise of regulatory powers. In this context it is worth noting that the Digital Services Coordinators, as foreseen in the Digital Services Act, must act with complete independence to effectively fulfil the delegated tasks, cf. Article 50 (2) DSA. Above all, control of conduct could have an anti-competitive effect. There is a risk that *ex ante* permission of standard terms

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[165] German Federal Cartel Office, Digital Markets Act: Perspektiven des (inter)nationalen Wettbewerbsrechts, 2021, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2021_Hintergrundpapier.pdf;jsessionid=592D8501212E6ABBAC21107A660F9DF0.1_cid378?__blob=publicationFile&v=3>, site last visited 23-08-2022, p. 23.

[166] Loi n°2012-158 du 1er février 2012 visant à renforcer l'éthique du sport et les droits des sportifs, JORF n°0028 du 2 février 2012.

[167] Loi n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique, JORF n°0250 du 26 octobre 2021.

perpetuates existing market structures. Progress and development could thus be impeded[168]. It seems doubtful that a full-blown regulatory regime could keep pace with the development of platform markets.

4.4 Self-regulation

The Digital Services Act contains approaches to a self-regulatory regime. The European Commission shall encourage the development of voluntary industry standards and codes of conducts, cf. Articles 45-47 DSA. Codes of conduct also exist at the national level. Examples are the French *Charte de lutte contre la contrefaçon sur Internet entre titulaires de droits de propriété industrielle et plateformes de petites annonces*[169], the Dutch *Notice-and-Take-Down Gedragscode*[170], and the British *IPO Code of Practice on Search and Copyright*[171]. Some argue that self-regulation will be "the future main mode of governance of the platform economy"[172]. Self-regulation is said to strengthen the commitment of companies[173]. An advantage is also seen in the effect of promoting innovation. Whereas state regulatory measures might contribute to the perpetuation of market structures, a self-regulatory regime can prove to be more flexible[174]. Companies themselves know best about their business models and associated risks[175].

However, it is questionable whether self-regulation can ensure the protection of public interests, such as freedom of competition or protection of consumers[176]. In addition, the consequences of violating codes of conduct must be clarified in

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[168] Wahyuningtyas, Self-regulation of online platform and competition policy challenges: A case study on Go-Jek, 20(1) *Competition and Regulation in Network Industries* 33 [2019].
[169] https://www.economie.gouv.fr/files/charte_lutte_contrefacon_internet_petitesannonces.pdf, site last visited 01-08-2022.
[170] https://noticeandtakedowncode.nl, site last visited 01-08-2022.
[171] https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement, site last visited 01-08-2022.
[172] Dittrich, Online Platforms and how to regulate them: an EU overview, *Bertelsmann Stiftung policy paper* no. 227, 14-06-2018, p. 7, <https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/EZ_JDI_OnlinePlatforms_Dittrich_2018_ENG.pdf>, site last visited 29-12-2021.
[173] Bartle/Vass, A theory of government regulation and self-regulation: A survey of policy and practice., 17 *CRI Research Report* 1 [2005].
[174] Wahyuningtyas, Self-regulation of online platform and competition policy challenges: A case study on Go-Jek, 20(1) *Competition and Regulation in Network Industries* 33, 49 [2019].
[175] Cusumano/Gawer/Yoffie, Can Self-Regulation Save Digital Platforms?, 30 (5) *Industrial and Corporate Change* 1259, 1262 [2021].
[176] Wahyuningtyas, Self-regulation of online platform and competition policy challenges: A case study on Go-Jek, 20 (1) *Competition and Regulation in Network Industries* 33, 37 [2019].

order to add external pressure as an incentive. Authorities and courts might be needed when legal consequences are attached to infringements of codes of conducts. Article 6 UCP Directive offers an example: a commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound. In rec. 104 (5), (6) DSA, too, the Commission states that participation in codes of conduct can be classified as a risk management measure for particularly large platforms. The refusal of online platforms to participate may play a role in assessing whether a company has violated the obligations.

All-in-all, self-regulation might be helpful where platform operators have a certain interest in maintaining their own neutrality between different user-groups (e.g. liability of business sellers vs. protection of consumer-buyers) or even users (e.g. protection of intellectual property rights of some business users vs. commercial interests of other business users). Self-regulation as the only instrument of regulation seems naïve, however, once genuine economic interests of the platform operators themselves are at stake.

Thus, pure self-regulation would not be able to counter the dangers posed by platform markets. Soft law should only be used as a supplementary tool for threats to the fairness of competition and to interests of consumers. Uncertainties still exist as to how self-regulatory measures and sovereign regulation can effectively coexist[177]. The Digital Services Act does not aim to counter competitive dangers with instruments of self-regulation either, but rather makes use of the imposition of legal rules to curb the systemic risks on society and democracy, such as disinformation or manipulative and abusive activities (rec. 104 DSA).

5 Conclusions

Currently, not only European law and the law of the Member States, but jurisdictions worldwide are responding to the generally perceived vulnerability of technology driven platform markets with a variety of legislative approaches. This is understandable given the multi-faceted nature of the risks posed by the market power of platforms to competition, consumers, and democracies. At the same time this

[177] Verbruggen, Private regulation in EU better regulation: Past performance and future promises, 19 *European Journal of Law Reform* 121 [2017].

variety of approaches gives us a fascinating opportunity to watch the systems in competition and allows us to get a better understanding of the core problems and instruments to overcome them. Only time will tell which approach will prevail, be it for its inherent superiority or for its apparent attraction, and which will have worked best. Some results may be summarized at this point of time.

i. None of the jurisdictions that went into this very brief overview has resorted to singling out digital platform markets and making them object of full regulation encompassing not only market effects, but also societal and political concerns, even though the call for a holistic regulatory approach has long been heard[178], and there is much to suggest that legislators should be bold and move away from traditional guiding principles, such as focus on price reference or bilateral treaty models. On the other hand, the market effects may well be separated from other societal concerns and treated in independent provisions.

ii. While a case can be made for a regulatory approach to digital platform markets, this regulation should focus on the goal of protecting competition and restrict itself to the compensation of the imperfections and failures of digital platform markets. Hence, there is no need nor justification for an agency endowed with market-shaping jurisdiction and discretion shielded from judicial review. Any authority in charge of digital markets is supposed to protect – and, if necessary, simulate – competition, but not there to shape markets.

iii. It is not convincing to keep regulation of digital platform markets apart from Competition law. If digital platform markets are to be regulated, the focus will always be on competition. Other justification or societal goals for regulation may exist, but do not necessarily correspond with the need to regulate markets. Regulation of markets typically is a special tool to protect competition. Regulatory goals should be substantiated – and this should happen much clearer than in the Digital Markets Act. The relationship between general Competition law and special regulation of digital platform markets should be clarified.

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[178] Alexander, Anwendungsbereich, Regelungstechnik und einzelne Transparenzvorgaben der P2B-Verordnung, *Wettbewerb in Recht und Praxis* 2020, p. 945; Busch/Mak, Putting the Digital Services Act in Context, *Journal of European Consumer and Market Law (EuCML)* 2021, pp. 109, 110; Spiecker gen. Döhmann, Digitale Mobilität: Plattform Governance IT-sicherheits- und datenschutzrechtliche Implikationen, *Zeitschrift für gewerblichen Rechtsschutz und Urheberrecht* 2019, pp. 341, 351.

iv. Society as a whole is helped if theories of harm are found that align various special duties imposed on digital market platform operators. Only abstract and convincing theories of harm are able to counter the criticism of regulation of individual cases. This might require further (economic) research into the market effects of digital platforms. Cross-market effects of platform operators controlling an entire eco-system are such an over-arching theory of harm lending themselves to identifying particular platform operators much better than turnover thresholds or numbers of daily/monthly active users.

v. The main problem of applying well-established rules of Competition law to the conduct of digital platform operators is the time lost prior to effective intervention. Interim orders of competition authorities need to be made use of and to be shielded from state liability. The consequences of uncertainty have to be borne by the undertaking engaging in potentially harmful conduct. Factual uncertainty itself is rather the reason to shield authorities from liability instead of a defence of undertakings against measures.

vi. The mediate consequences of unlawful conduct need to be avoided by effective enforcement of adjacent rules stemming from symmetrical regulation, e.g. data protection, access to data, control of unfair terms, prohibition of unfair competition or infringements of Administrative law. Effective enforcement includes speedy enforcement. Many of the negative consequences of the lapse of time can be avoided by prompt reaction and immediate sanctions leading to full compensation of harms and skimming of all ill-gained profits.