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Christoph Busch

**SMALL AND MEDIUM-SIZED
ENTERPRISES IN THE
PLATFORM ECONOMY**

More fairness for SMEs
in digital markets

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Towards fairness for SMEs
in digital markets

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PRELIMINARY REMARKS AND SUMMARY

From the perspective of small and medium-sized enterprises (SMEs), the rise of digital platforms offers both opportunities and new risks. On the one hand, internet platforms open up new sales channels and facilitate access to new customer groups; on the other, the platform operators occupy the position between suppliers and customers and act as “gatekeepers” who control access to the market. As a result, the market structure changes from a market-based model towards a “platform economy” in which the operators of digital platforms take over the customer interface and control the interplay of supply and demand through algorithm-based matching systems. In addition to the loss of the customer interface, the increasing “data power” of the platform operators and the risks of conflicts of interest in the case of vertically integrated platforms, which play a dual role as marketplace operators and suppliers, are particularly problematic from the point of view of SMEs. The situation is aggravated by unfair business practices of specific internet platforms as well as deficits regarding legal redress.

In view of this development, the selective adjustments in the field of competition law that have been discussed so far are not sufficient to guarantee fair market conditions for SMEs. Even the European Platform-to-Business Regulation (P2B Regulation), which was adopted in June 2019 and mainly contains transparency rules, can only be a first step on the path to a more comprehensive regulatory framework for the platform economy that spans all areas of law. It goes without saying that this task cannot be solved at the national level alone. What is necessary is a European regime or – better still – a coordinated approach, for example at the OECD level.

Against the backdrop of the current debate on platform regulation, this short study identifies legal policy options for complementing the regulatory framework. In this context, it is important to distinguish between two levels:

1. On the one hand, there is a need for legislative action in areas where the transparency rules provided for in the P2B Regulation are not sufficient to achieve fair market conditions for SMEs. In essence, this involves four areas in which it is necessary to adapt the legal framework independently of market power: (a) measures to ensure data access; (b) legal and technical measures to facilitate

switching between platforms, multi-homing and to avoid lock-in issues by promoting data portability; (c) clear rules for online customer reviews; (d) a ban on exclusivity clauses (e.g. best price clauses). There is also a need to strengthen enforcement and improve legal redress for platform users to ensure compliance with the substantive requirements for platform operators.

2. Another bold step would be to create a regulatory framework that considers platforms with a strategic market position as essential infrastructures and subjects them to state controls based on the model of network regulation. However, it is essential to carefully strike a balance between openness to innovation and responsibility for innovation within the platform economy.

We wish you an informative read!

DR. ROBERT PHILIPPS

Head of the Friedrich Ebert Foundation SME Work Group

1

INTRODUCTION

The rapid rise of the platform economy has been one of the most influential economic developments of recent years. Digital platforms enable SMEs in particular to expand their sales channels and gain access to new markets. For a small investment, small traders, niche providers and owner-managed hotels can address customer groups to which they would otherwise have very little access offline or via their own websites.

As digital intermediaries, the platforms occupy the position between suppliers and customers and are increasingly assuming the role of “gatekeepers”, thereby controlling market access. As a result, SMEs are losing the direct customer interface and there is a growing risk of becoming dependent on the digital platform. At the same time, there are increasing indications of unfair practices on the part of the platform operators. In a study published by the European Commission in April 2018, 46 percent of the companies surveyed complained about problems in dealing with online platform operators (European Commission 2018b: 11).

Until recently, the main focus in the legal policy debate – at least from a German perspective – has been on competition law (see, for example, Monopolies Commission 2015; Käseberg 2018; BMWi 2019). However, doubts are increasingly being expressed as to whether the instruments of competition law alone are sufficient to ensure fair conditions for SMEs within the platform economy. The laws on abuse of market power are geared towards intervention in individual cases. However, the rise of the platform economy does not affect individual cases alone, but rather represents a paradigm shift in digital markets per se (Srniczek 2018; see also the articles in Blaurock et al. 2018; Moore/Tambini 2018). Therefore, it is right to call for a regulatory policy that not only relies on the instruments of competition law which apply ex post and on a case-by-case basis, but rather formulate clear regulatory guidelines which apply ex ante to relationships between SMEs and platform operators and thus adapt the legal framework to the new market structures.

Competition law enforcement against the abuse of market power must be complemented by rules on unfair commercial practices and contract law in order to create a fair and reliable framework for SMEs. Transparency of rankings and reputation systems should be ensured by mandatory disclosure rules that

should apply independent of market power. In addition, regulatory action against unfair standard terms of digital platforms is also required. The EU Regulation on promoting fairness and transparency for business users of online intermediation services, which was adopted in June 2019 (European Commission 2018; see Busch 2018; Twigg-Flesner 2018; Wais 2019) also points into this direction. The so-called Platform-to-Business Regulation (P2B Regulation) was complemented by the introduction of additional transparency obligations regarding the relationship between platform operators and consumers as part of the so-called New Deal for Consumers (European Commission 2018a). On the other hand, the expert report on the reform of the laws on abuse of market power (Schweitzer et al. 2018), which was commissioned by the German Federal Ministry of Economics and Energy (BMWi) in August 2018, and the report “Competition Policy for the Digital Era” (Crémer et al. 2019) prepared in April 2019 for the European Commission, place more emphasis on the instruments of competition law. Interestingly, the “Commission Competition Law 4.0” set up by the BMWi, which published its final report in September 2019, recommends the introduction of a “Platform Regulation” to impose a specific code of conduct for dominant online platforms (BMWi 2019: 52 et seqq.). This approach would combine elements of competition law and sectoral regulation for Big Tech companies. A similar approach has been adopted by the authors of a draft bill for the 10th amendment of the German Competition Act (BMWi 2019a), which was published in October 2019.

A key issue in this context is the question of data access issue and data portability in order to facilitate switching between platforms and multi-homing. Given the gatekeeper role played by some of the major platform operators, there is also a discussion about whether state regulation of particularly dominant platforms following the model of regulation for network-based infrastructures (e.g. telecommunications, energy markets) is required (Nahles 2018; Rahman 2017; Rahman 2018; see also Finger/Montero 2018).

Against this background, this brief study provides an overview of the debate on the regulation of digital platforms from an SME perspective as well as pointing out several legal policy options. The study is based on three key questions, on the basis of which it is divided into three parts:

Part 1: What are the specific problems facing SMEs in the platform economy?

Part 2: Are the current regulatory initiatives sufficient to ensure fairness in the relationship between SMEs and digital platform operators?

Part 3: Which legal policy options could ensure more fairness for SMEs in the platform economy?

The primary objective of this study is not to add to the abundance of proposals for the reform of competition law rules regarding the abuse of market power. Instead, it focuses on the question of whether new rules for digital platforms that apply independently of market power are necessary to adequately protect the interests of SMEs.

2

SMEs IN THE PLATFORM ECONOMY: OPPORTUNITIES AND RISKS

Any discussion on legal policy options for creating a fair and reliable framework for SMEs must necessarily begin with an analysis of how the trading conditions on digital markets have changed as a result of the rise of the platform economy. Therefore, the first part of the study examines the economic conditions that are driving the rapid expansion of the platform economy. It then outlines the main legal and economic issues from the perspective of SMEs that offer their goods and services via digital platforms.

2.1 THE RISE OF THE PLATFORM ECONOMY

Arguably, digital platforms have developed into the most important players in the digital economy in recent years. Against this background, it is quite appropriate when the relevant literature refers to the rise of the platform economy or even of a “platform revolution” (Parker et al. 2016; Engert 2018: 307).

From an economic perspective, this development can be described as a consequence of the structural change in transaction costs within the digital economy (Schweitzer et al. 2018: 16). The advent of the Internet has resulted in a significant expansion of access to information, and in a considerable increase in the number of offers and transaction partners. In view of the sheer wealth of new products and services on offer, it is becoming increasingly difficult for consumers to orient themselves in the digital marketplace. This is where digital platforms, such as search engines, e-commerce platforms and price-comparison platforms as well as booking portals come into play, which act as information intermediaries and facilitate the identification and selection of suitable suppliers for the required products or services (a process known as “matching”). As matchmakers (Evans/Schmalensee 2016), they bring suppliers and consumers together and reduce search costs for both sides. Many digital platforms use matching algorithms to automate the search for suitable products and services (Hatzopoulos 2018: 11).

In addition to their function as information intermediaries, digital platforms also solve the trust issue involved in transactions between suppliers and customers. From this perspective, platforms can be described as “trust intermediaries” that

provide a secure business environment. This is a particularly important role in online marketplaces, in which the transacting parties usually do not know each other personally. Thus, there is a risk that transactions will fail to be concluded due to a lack of trust on the part of market participants. The platform operators use feedback and reputation mechanisms to overcome the existing information asymmetries. As a result, digital platforms not only reduce transaction costs in comparison with other business models, but, in some cases, also enable contracts to be concluded that would have never been concluded in the past due to prohibitively high transaction costs (Haucap 2015: 3). They can also create completely new markets in this way, which would not otherwise exist without the latest advances in technology.

The platform markets considered here are characterised by the fact that the platform operator brings together different user groups, such as potential customers and potential suppliers. Economists therefore describe platform markets as two-sided or multi-sided markets (see Rochet/Tirole 2003). Such two- or multi-sided markets are characterised by indirect network effects. This refers to the fact that the benefits of the platform for one user group increase in line with the number and appropriate composition of the participants of the other. The more customers use a given online marketplace, the more attractive it becomes to retailers wishing to offer their goods there. By the same token, the attractiveness of the platform from the customer’s perspective increases in line with the range of goods and services available there.

As a result of the self-reinforcing network effects platform markets show a tendency towards market concentration (cf. Evans/Schmalensee 2005; Demary 2016: 14). The degree of market power that this creates depends, inter alia, on whether users are able to use multiple online platforms. This in turn depends crucially on the level of switching costs: if these costs are too high, there is a risk that users will become locked into a specific platform (lock-in). In the data economy, network effects are further reinforced by so-called “data network effects” (Schweitzer et al. 2018: 21). Online platforms with a high number of subscribers have access to a particularly large data pool, which, for example, facilitates the continuous improvement of the algorithms for recommender systems, which further

enhances the attractiveness of the platform. Thus, strong network effects can push online marketplaces towards a so-called tipping point, i.e. a point at which the market transitions from a market used by several competing suppliers to a highly concentrated or even monopolistic market (Schweitzer et al. 2018: 21).

2.2 FROM MARKET ECONOMY TO PLATFORM ECONOMY?

In the relevant literature, platforms are often referred to as operators of digital marketplaces (see e.g. Engert 2018: 305). The term “marketplace” is also frequently used by operators of digital platforms themselves to describe their services. Well-known examples include the Amazon Marketplace and the Facebook Marketplace, which was launched in 2016. The term “marketplace” suggests that the digital platforms create virtual spaces in which supply meets demand and different providers compete for customers subject to the rules of unfettered market forces. However, this image does not fully reflect the reality of the platform economy. In reality, far from being a “free forum”, most online platforms are “centrally controlled and monitored environments” (Podszun 2017: 25). To put it bluntly, one could say that, rather than operating marketplaces, digital platforms replace them with algorithm-controlled matching systems. The American jurist Julie E. Cohen describes this development very accurately when she writes: “platforms do not enter or expand markets; they replace (and rematerialize) them” (Cohen 2017: 133).

This development is driven to extremes by voice-controlled digital assistants such as Amazon Echo with Alexa. If, for example, a consumer asks the digital assistant for a specific product, Alexa first proposes a product that has been selected as “Amazon’s Choice” (Carnoy 2018; Sanz Grosson 2018). Amazon does not disclose the criteria upon which this choice is made. This restriction of choice, manipulation of consumer behaviour and control of supply all remain hidden within a “black box” (cf. Pasquale 2015).

From an economic perspective, the change in the market structure described here is a very ambivalent process. On the one hand, digital platforms, as described above, reduce transaction costs and thus increase the efficiency of the exchange of goods. On the other, the platform operators coordinate supply and demand and control the interface between customers and suppliers. As critics aptly point out, this generally data-driven selection process shows some “elements of a central planning economy” (Podszun 2017: 34; see also Schirmacher 2013, who warns against a “digital planned economy” in the context of the information economy). The platform operators also assume the role of “private regulators” who determine the rules for participating in the exchange of services in this new, technologically supported, centrally controlled economy (Schweitzer 2019: 1; BMWi 2019: 50).

There is also a danger that, due to the central control by the platform operators and their position of power as a private regulator, the organisation of the exchange of goods and services will not be in the interests of the platform users, but rather will be distorted in favour of the platform operator’s own interests. The risk of such self-preferencing is particularly

high in the case of vertically integrated online platforms, i.e. those that not only act as market-organising intermediaries but also act as suppliers themselves and thus compete with the other active traders on the online platform in question (see 2.3.3).

2.3 PROBLEM AREAS FROM AN SME PERSPECTIVE

From an SME perspective, the rise of the platform economy and the resulting change in the market structure has far-reaching consequences. In particular, three structural problem areas can be identified: the loss of the customer interface, the growing data power of the platform operators and the danger of conflicts of interest in the case of vertically integrated online platforms, which play a dual role as marketplace operator and supplier. The situation is aggravated by unfair business practices of specific internet platforms as well as deficits regarding legal redress.

2.3.1 LOSS OF THE CUSTOMER INTERFACE

As digital intermediaries, the platform operators occupy the position between suppliers and customers. As a result, suppliers who use the platforms lose their direct customer interface. Access to customers is only possible via the platform, which takes on the role of a gatekeeper and controls the provider’s access to the market. For example, a growing number of customers are using the Amazon trading platform directly as a search engine for goods. In particular, this applies to consumers who are members of the Amazon Prime customer loyalty programme. Any providers wishing to access this growing customer group are forced to have an active presence on the online platform in question. A multi-homing strategy in which traders spread their products across several online platforms is no solution because of a competitive “bottleneck” problem (cf. Armstrong 2006: 669) which arises if prime customers themselves do not engage in multi-homing. If prime customers make the majority of their purchases via the Amazon website, access to this customer group is only possible via this one platform.

The loss of the customer interface also weakens customer loyalty to particular suppliers. Consumers who have become accustomed to first accessing a particular online platform when searching products or services will feel more strongly bound to the online platform in question. Thus, from a customer perspective, the individual providers are degraded to suppliers of the online platform, even if, from a legal point of view, they are the customers’ direct contractual partners (cf. Busch 2018a: 7). This change in customer loyalty is exacerbated by the fact that the data generated during transactions (payment data, customer preferences and purchase history etc.) usually remains on the online platform, which enables the platform operator to further optimise their recommendation algorithms and offer customers a personalised shopping experience (see Smith/Linden 2017: 12). The platform operator can also use this data to optimise their own products and services under certain circumstances. In summary, the increasing loss of the customer interface is weakening SMEs and increasing their dependence on the platform operators.

This issue is particularly pronounced in the retail sector. Some observers are already referring to the “Amazonisation” of online trade (Stüber/Leyendecker 2018). The consequences for SMEs, which depend on online platforms as distribution channels are particularly serious. If a given supplier generates a large part of their revenues via a particular online platform, then the risk of dependency on the platform in question increases. At the same time, the structure of competition on the market is being altered. Thus, the suppliers no longer compete directly for the favour of their customers, but instead fight for access to the platform in question and for the best conditions from the platform operator (Podszun 2017: 3).

2.3.2 DATA POWER OF PLATFORM OPERATORS

As a result of their central position as gatekeepers, platform operators have privileged access to the large data sets which are generated by the intermediary services of the platforms. Such data range from transaction and payment data to customer addresses and reputational data. This data not only provides information about the preferences and purchase behaviour of individual users, but also, in aggregated form, it provides an important source for product and process innovations and thus for the competitiveness of companies. The efficiency of the value chain can be increased on the basis of data analytics, and new individualised products or marketing strategies can be developed (Schweitzer/Peitz 2018: 275).

Therefore, privileged access to data is an essential factor for the emergence of market power in the platform economy. As Peter Norvig, Director of Research at Google, summed this up as early as 2010: “We don’t have better algorithms. We just have more data” (quoted from McAfee/Brynjolfsson 2012). The German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, “GWB”), since its recent 9th revision, takes this circumstance into account and now explicitly mentions access to data relevant for competition as a criterion for assessing market power (§ 18 (3a) no. 4 GWB).

From the perspective of SMEs offering their goods and services via digital platforms, one of the main questions is: to what extent does the platform grant access to customer and transaction data? For the loss of the direct customer interface often goes hand-in-hand with a loss of access to data, which increases dependency on the online platform in question and cuts SMEs off from an important source of innovation. At the same time, the platform operator gains access to a data pool that strengthens their competitive position.

2.3.3 DUAL ROLE OF PLATFORM OPERATORS

From the point of view of commercial platform users, it is particularly problematic that some platform operators not only act as intermediaries, but also act as traders themselves (or with the help of associated companies). For example, on the Amazon.de website customers can purchase products sold by Amazon Europe S.à.r.l. as well as products sold by third parties which are offered via the Amazon Marketplace operated by Amazon Services Europe S.à.r.l. From a consumer perspective, this dual role of the platform operator is not immediately apparent, because the combination of web shop and online

marketplace appears as a uniform website under the domain name www.amazon.de. From the platform operator’s perspective, this is probably intended in order to strengthen customer loyalty to the online platform.

The dual role played by some platform operators as outlined above is ambivalent from an economic perspective. On the one hand, the vertical integration of online platforms can result in considerable efficiency gains and benefits from the users’ point of view (Schweitzer et al. 2018: 24). On the other, the dual role played by the platform operators carries the risk of conflicts of interest. For example, transaction data generated via the online marketplace can be used by the platform operator to identify customer preferences and trending products, which places the platform operator in a privileged position to decide whether to enter certain product markets as a supplier in its own right. From this perspective, the marketplace can be used as a “learning tool” to identify lucrative business models (Zhu/Liu 2018: 2636; Belleflamme/Peitz 2019: 16).

In the case of vertically integrated online platforms, there is also a risk that the platform operator may prefer their own products or those of affiliated companies by designing ranking and recommendation algorithms accordingly. Figuratively speaking, the operators of vertically integrated platforms act both as players and referees within the competition. Recent press reports about Amazon’s preferential treatment of its own products give reason to believe that these fears are not unfounded (The Guardian 2016; see also Khan 2017: 780).

In the meantime, the competition authorities have also become interested in this issue. The European Commission launched an investigation into Amazon in September 2018 for the potential abuse of a dominant position in the collection and use of transaction data (Case AT.40462, Amazon Marketplace). Parallel investigations are currently being conducted by the competition authorities in Austria and Germany (Bundeskartellamt 2018; Bundeswettbewerbsbehörde 2019).

Another example is the European Commission’s verdict in the “Google Shopping” case (Case AT.39740, Google Search (Shopping)). The question was whether Google had illegally preferred its group-owned price comparison service “Google Shopping” over competing comparison portals when displaying search results. The European Commission affirmed the abuse of a dominant market position and imposed a fine of 2.42 billion euro in its decision in June 2017. In April 2019, the operator of the comparison portal Idealo.de filed a claim for damages against Google for the competition infringement objected to by the Commission (Kolf 2019). This case also demonstrates that the question of fair conditions of competition in the platform economy concerns not only the relationship between platform operators and users, but also competition between platforms of different sizes and market power.

2.3.4 UNFAIR BUSINESS PRACTICES

In addition to structural problems within the platform economy described above (loss of the customer interface, data power, dual role of platform operators), there is increasing evidence of unfair commercial practices on the part of individual platform operators. In a study published by the European Commission in May 2017, 46 percent of the companies surveyed complained about problems in dealing with online platform operators

(European Commission 2018a: IX; see also European Commission 2018b: 11). The European Commission study identifies a number of problematic practices including:

1. The fact that changes to the online platform operators' terms and conditions are often made without prior notice or at very short notice. This presents the commercial platform users with a *fait accompli* and gives them insufficient time to make the necessary technical or economic adjustments to adapt to the changed terms of use. In some cases, changes are also applied retroactively (European Commission 2017a: 35).
2. Platform users also complain that individual goods or services are removed from the online platform without prior notice and that user accounts are suspended. Such "delisting" or suspension often occurs without further justification. The stated reasons are partly limited to a blanket reference to violations of the terms of use of the platform (European Commission 2017a: 40f.).
3. The lack of transparency in relation to product rankings on online platforms is also frequently criticised (European Commission 2017a: 37 et seqq.). The platform operators usually provide only very generic information on ranking criteria. For example, the hotel booking platform Booking.com merely refers to the fact that the standardised ranking is "created by a complex ever changing and evolving automatic system" which considers a "multitude of criteria", including "the popularity of a provider among their customers, the prices, the customer service record, certain booking data, the commission percentage and the on-time payment of commission" (Booking.com 2019). Improved rankings are also possible on many Internet platforms for an additional fee (paid prominence). This is not always sufficiently transparent to consumers.
4. The unequal treatment of users on many online platforms is another criticism. For example, apps from specific suppliers receive preferential treatment in app stores (European Commission 2017a: 39). Among other things, this concerns ranking and access to certain functions of the app stores in question. The fact that some platforms not only act as marketplace operators, but also offer their own products and treat them more favourably than products from third-party providers is particularly problematic.
5. The fact that data access is restricted by the platform operators is another point of criticism (European Commission 2017a: 28f.). This applies both to access to customer data and to other transaction-related data. Data-supported analysis and development of their respective business models is thus made more difficult for commercial users of the online platforms in question. In addition, it is often the case that the data access restrictions are not explained with sufficient clarity in the terms of use of the online platforms.

6. Finally, parity clauses (also known as best price clauses), which are widespread especially among hotel booking platforms, have also been identified as being problematic (European Commission 2017a: 43 et seqq.). Depending on the extent of the parity obligation, a distinction can be made between different types of best price clauses: for example, so-called "wide best price clauses" prohibit hotels from offering more favourable booking or cancellation conditions. By contrast, so-called "narrow best price clauses" do allow more favourable offers on other platforms, but stipulate that the conditions on the hotel's own website may not be more favourable than on the platform in question.

The German law on unfair standard terms (§§ 307 et seq. of the German Civil Code ("BGB")) does not provide an effective remedy against the problematic practices described above. Frequently, commercial users of online platforms cannot rely on the protection granted under §§ 307 et seq. BGB because platform operators often include in their user agreements choice-of-law clauses in order to avoid the application of German law. The Amazon Marketplace terms of use for third-party sellers, for example, contain a choice-of-law clause in favour of Luxembourg law. The hotel booking portal Booking.com chooses Dutch law in its general terms and conditions.

2.3.5 LACK OF LEGAL REDRESS

The structural problems of the platform economy and the effects of the problematic business practices outlined in this paper are exacerbated by deficits regarding legal redress in the relationship between SMEs and platform operators. According to the findings of the European Commission, many online platforms lack effective complaint management systems (European Commission 2017a; 42 et seqq.; European Commission 2018b: 18). This can result, for example, in an inability to clarify potential misunderstandings pertaining to the discontinuation of goods or the suspension of user accounts within a reasonable period of time. Delays of this kind can lead to significant losses in turnover for SMEs.

The legal protection granted by the courts is also deficient in some areas. On the one hand, any unacceptable discrimination against a platform user is not eliminated quickly enough due to the time it takes to complete the court proceedings. In addition, commercial platform users often do not pursue their claims before the courts for fear of retaliatory measures by the platform operators (European Commission 2018b: 18). This phenomenon is widespread in distribution chains characterised by dependency and power differentials. However, given the particularly strong dependency between SMEs and platform operators, this problem is particularly pronounced in the platform economy.

3

RECENT DEVELOPMENTS OF THE REGULATORY FRAMEWORK

At both European and national level, there are currently various initiatives aimed at adapting the legal framework to the changing economic conditions of competition in the platform economy. These will be briefly presented below and assessed in terms of the extent to which they take account of the interests of SMEs and are apt to create more fairness for SMEs in the platform economy.

3.1 PERSPECTIVES FOR REFORM IN GERMANY

3.1.1 THE REGULATORY STATUS QUO

In Germany, competition law continues to be the focus of the debate on adapting the existing legal framework to the changing market structures of the digital economy. The first concrete steps towards adapting German competition law to the new conditions of the digital economy were enacted in the 9th amendment to Competition Act, which came into force on the 9th of June 2017 (see Kersting/Podszun 2017). Among other things, Section 18 (2a) of the Competition Act clarified that a market may also exist in the case of “free” services – for example, the use of a hotel booking platform that is free of charge for the consumer. This was a controversial issue in German case law for a long time (Podszun/Franz 2015). In addition, the new Section 18 (3a) of the Competition Act lists several criteria for determining market power in multi-sided markets and networks: (1) direct and indirect network effects, (2) the parallel use of services from different providers and the switching costs for users, (3) economies of scale in connection with network effects, (4) access to data relevant for competition and (5) innovation-driven competitive pressure. These criteria accurately reflect the current status of the debate in economic literature regarding concentration trends in multi-sided markets and networks. In addition, there have been changes regarding merger control, which are intended to better address takeovers of start-ups and scale-ups in particularly dynamic and innovative markets (Schweitzer et al. 2018: 37).

The new regulations mentioned above in the context of the 9th amendment to the Competition Act are to be welcomed.

However, it should be noted that the criteria listed in Section 18 (3a) of the Competition Act are less easily measurable than the market power indicators that have been used in the past (Haucap/Heimeshoff 2017). In addition, current economic research regarding the underlying causes of platform power is by no means settled. Therefore, it remains to be seen how the competition authorities will interpret the new criteria.

Further legislative options were discussed in the Green Paper (BMW 2016) and the White Paper (BMW 2017) on digital platforms published by the Federal Ministry for Economic Affairs and Energy (BMW). In these two papers, other instruments that might complement a reform of competition law are also being discussed (e.g. rules on transparency, rules on unfair standard terms and rules on data portability). However, concrete proposals for the legal implementation of these considerations were lacking until recently.

3.1.2 REFORM OF THE LAW ON ABUSE OF MARKET POWER

The coalition agreement of March 2018 calls for further adaptations of competition law to the conditions of the digital economy in addition to the amendments introduced in the context of the 9th amendment to the Competition Act. It states literally: “We need to modernise antitrust legislation with regard to the digitisation and globalisation of the business world. We want to supplement the competition legislation for digital business models. We want to significantly speed up the procedures involved in general competition legislation, without curtailing constitutional guarantees. One important step should be to strengthen the instruments of provisional measures. It should be made easier for the competition authority to take provisional measures before the main proceedings have been concluded in order to effectively prevent irreparable damage to competition. What is required is more competent and active systematic market observation in addition to general competition law. The competition authority must have the ability to remedy abuse of market power quickly and effectively, especially in rapidly changing markets. To this end, we will further develop the supervisory powers of the competition authority, especially with regard to abuses by platform operators” (CDU, CSU and SPD 2018: 63).

Some of these considerations were addressed in a study published in September 2018 on behalf of the BMWi on the reform of the law on abuse of market power (Schweitzer et al. 2018). Among other things, the study opposes a general lowering of the intervention threshold for regulatory action against abuse of market power. Instead, it is recommended that the Competition Act be adapted to the new conditions of the platform economy in order to address specific case patterns. For example, platform operators in markets that tend towards a tipping point (i.e. to tip over into a monopoly) should be prevented from abusively restricting competitors by restricting platform switching (Schweitzer et al. 2018: 207). Furthermore, the study suggests to introduce a new category of “intermediation power” (in addition to supply and demand power) that shall be considered when determining market power in order to better reflect the central role of digital platforms as intermediaries (Schweitzer et al. 2018: 98).

The draft bill for the 10th amendment of the Competition Act (BMWi 2019a), which was published in October 2019, incorporates a number of the proposals suggested in the study by Schweitzer et al. (2018). For example, § 18(3b) of the draft bill introduces the concept of “intermediation power” as a criterion for assessing the market power of enterprises that are active as intermediaries on a multi-sided market. More interestingly, the draft bill also introduces the new category of “undertakings with paramount significance across markets” (“UPSCAM”) in § 19a of the Competition Act. This new category seems to bear some resemblance to the concept of undertakings with “strategic market status” referred to (but not clearly defined) in the Furman Report (Furman et al. 2019: 57 et seqq.). The German draft bill apparently targets Big Tech companies that operate “digital ecosystems” and that create the danger of locking customers and suppliers into their business model (Podszun 2019). If a company has been categorised as an UPSCAM, the Federal Cartel Office may prohibit certain market behaviours, e.g. self-preferencing, use of data for making market entry more difficult, making portability of data more difficult. If the draft bill becomes law, this will mean that the rules of competition law would not only be tightened but rather complemented with something similar to sectoral regulatory rules for Big Tech companies.

A similar approach has been taken by the “Commission Competition Law 4.0” set up by the BMWi, which published its final report in September 2019. Among other things, the report recommends the introduction of a European “Platform Regulation” to impose a specific code of conduct for dominant online platforms (BMWi 2019: 52 et seqq.). It remains to be seen whether the new European Commission will take up these proposals.

3.2 PLATFORM REGULATION AT EU LEVEL

After initially pursuing a strategy of regulatory reluctance with regard to online platforms, the European legislator has recently enacted a series of legislative instruments to adapt the EU legal framework for the digital economy as part of its “Strategy for the Digital Single Market” (European Commission 2017). From the point of view of SMEs, the Regulation (EU) 2019/1150 on promoting fairness and transparency for

business users of online intermediation services, the so-called Platform-to-Business Regulation (P2B Regulation), is of key importance, as it lays down rules for the relationship between platforms and businesses. The regulation will come into force on 12 July 2020.

The P2B Regulation was accompanied by the introduction of additional transparency obligations with respect to the relationship between platform operators and consumers within the framework of the so-called New Deal for Consumers (European Commission 2018a). The Regulation (EU) 2018/1807 on the free flow of non-personal data, adopted in November 2018, could also contribute to fairer access to data for SMEs.

3.2.1 THE P2B REGULATION

The P2B Regulation formulates a series of fairness and transparency rules to be observed by operators of online intermediation services and search engines vis-à-vis their business users. The regulation has a very broad scope and applies to the relationship between the operators of online marketplaces (e.g. Amazon, eBay) and merchants offering their goods there among other things. Hotel booking platforms (e.g. Booking, HRS), search engines (e.g. Google, Bing) and comparison platforms (e.g. Skyscanner, TripAdvisor) are also covered. The P2B Regulation applies to these types of platforms independently of any market power threshold.

In substance, the P2B Regulation concerns three main areas: (1) the prohibition of certain unfair practices (e.g. unannounced blocking of user accounts, amendment of general terms and conditions without prior notice); (2) transparency with regard to rankings and certain business practices (e.g. data collection and data usage, self-preferencing, parity clauses); (3) effective dispute resolution measures (e.g. complaint-handling systems, mediation). In order to ensure effective enforcement, the P2B Regulation grants organisations or associations that represent business users of platforms the right to sue platform operators for injunctive relief in the event of violations of the P2B Regulation by way of collective legal enforcement. This is intended to counter the problem that commercial platform users often forgo individual lawsuits against platform operators for fear of retaliatory measures.

The Commission’s original draft of the P2B Regulation of April 2018 (European Commission 2018) was essentially limited to a number of transparency requirements, including the platform’s terms and conditions, the parameters for rankings, access to data and information on any binding exclusivity agreement (see Busch 2018; Twigg-Flesner 2018). The European Parliament proposed a number of amendments during the trilogue negotiations, which were aimed at a tighter regulation of online platforms. Among other things, a Europe-wide ban on so-called best price clauses and a right to access data generated on the platform were proposed. By contrast, the Council called for a further weakening of parts of the Commission’s proposal.

The dispute concerning the title of the regulation was a telling symbol of the different policy approaches. Whilst the two terms “fairness” and “transparency” are given equal weighting in the Commission’s proposed title, the Council proposed to change the wording to “fairness by means of transparency” (Council of the European Union 2018). The title

proposed by the Commission was ultimately retained. However, the dispute over the name of the P2B Regulation, aptly illustrates the area of tensions in which the regulation is situated (for more on this, see Busch 2019).

In many respects, the P2B Regulation represents a compromise between transparency and fairness. For example, it does not prohibit self-preferencing by vertically integrated platforms, but merely requires that any preferential treatment of their own products by the platform operators must be disclosed. The P2B Regulation also limits itself to stipulating transparency requirements about best price clauses and the particularly important issue of data access. Therefore, the regulation merely represents a first but important step towards more fairness for SMEs in platform markets.

The legal policy debate on transparency and fairness in the platform economy may be expected to continue under the new European Commission that has taken office in December 2019. Article 18 of the P2B Regulation requires the Commission to submit an evaluation report of the Regulation already by 13 January 2022. According to Article 18 (4) of the P2B Regulation, the evaluation shall take into account inter alia the report of the group of experts set up by the European Commission in September 2018 (i.e. even before the P2B Regulation was adopted) and which is part of the "Observatory on the Online Platform Economy" which is to identify new developments in the platform economy in real time. This approach of linking a European legislative act to a monitoring and review mechanism before it comes into force to take account of the dynamics of the digital economy is a rather novel approach and could serve as a model for other legislative projects in the digital economy.

3.2.2. NEW DEAL FOR CONSUMERS

The P2B Regulation is complemented by Directive (EU) 2019/2161 which amends a number of consumer law directives in the context of the New Deal for Consumers. However, the new Directive contains only a few specific provisions concerning online platforms, e.g. transparency obligations regarding rankings and the contractual role of the parties (see also Busch 2018a). Furthermore, the Commission's proposal (cf. European Commission 2018a) was supplemented during the trilogue procedure by several transparency provisions for online reputation systems (cf. Council of the European Union 2019) (see 4.3).

4

LEGAL POLICY OPTIONS

Several legal policy options for supplementing the current regulatory framework will be presented in the concluding part of this study. The main focus is on problem areas that have not yet been sufficiently addressed at the national and European level. In this context, it is important to distinguish between two levels: on the one hand, there is a need for legislative action with regard to problems arising from the structure of digital platform markets and requiring regulation independent of market power (see 4.1), and on the other, the question arises as to whether regulation is needed for platforms with significant market power which constitute essential infrastructures. Such regulation could be modelled on existing network regulation (see 4.2).

4.1 STRENGTHENING THE REGULATORY FRAMEWORK FOR THE PLATFORM ECONOMY

The European legislator has taken an important first step towards greater fairness and transparency in platform markets with the P2B Regulation. The regulation offers compelling solutions to several problematic market practices. This applies in particular to unannounced delistings and account suspensions as well as changes at short notice to the terms and conditions of digital platforms. However, the P2B Regulation falls short of expectations in other areas. There is a need for legislative action in four areas in particular: (a) measures to ensure data access; (b) legal and technical measures to facilitate switching between platforms and multi-homing and to avoid lock-in problems by promoting data portability; (c) clear rules for online customer reviews; (d) a ban on exclusive arrangements through so-called best price clauses. There is also a need to facilitate enforcement and improve legal redress for platform users to ensure compliance with the substantive requirements for platform operators.

4.1.1 RIGHT OF ACCESS TO DATA

Considering the growing “data power” of digital platforms, the question of data access rights is increasingly coming into focus in the policy debate about the regulatory framework for the digital economy (see, for example, Kerber 2016; Drexel 2017; Schweitzer/Peitz 2018). As underlined by Schweitzer et al. (2018: 159) access to relevant data sets can play a key role in determining the innovation and competitive opportunities of individual companies and an entire economy.

However, the question of whether and under what conditions a right of access to data is to be granted cannot be answered in the abstract, but only with regard to specific cases and data categories. For example, it makes a difference whether a platform user wants access to the address data of customers registered with the platform operator, or whether it is a question of ensuring broad access to large data sets to be used as training data for AI applications (see 4.2.3).

Article 9 of the P2B Regulation takes account of the increasing importance of data access as a central factor for business success (not only) in e-commerce. According to this provision, platform operators must explain in their general terms and conditions the extent to which they grant or do not grant commercial platform users access to customer data or other data generated on the platform. The provision is limited to a mere transparency requirement and does not grant platform users a “right of access to data”.

It is doubtful whether the transparency requirement provided for in Article 9 of the P2B Regulation is sufficient to guarantee fair competition. An appropriate regime would be preferable which grants commercial platform users a right of access to the data obtained by the platform operator on the basis of the transactions of the user in question. The European Parliament had also called for a corresponding addition to the proposed regulation in the triologue procedure.¹ However, it has not been included in the final version of the regulation.

To cater to the interests of SMEs offering their goods and services via digital platforms, a more far-reaching regulation

¹ See Opinion of the European Parliament’s Committee on Transport and Tourism, 23.11.2018, Amendment 58.

would be useful. By using online platforms, retailers and hotel operators lose direct access to the customer interface. For example, the contact details of customers are often not passed on to the providers. As a consequence, commercial platform users often have no possibility of contracting their customers directly. For example, a hotel that does not have the e-mail addresses of its customers because the addresses are not forwarded by the booking platform will not be able to notify customers of special offers by e-mail without the support of the online platform. The platform operator can also restrict the possibilities for the statistical evaluation of customer data.

One possible solution would be to impose a mandatory obligation on the platform operators to forward customer contact data to the commercial platform users, provided that the customer does not object to such a transfer.² This example also shows that there is a certain tension between commercial platform users' need for data access and the requirements of data protection legislation (Schmidt 2018: 549). If an obligation to disclose contact data is deemed unacceptable for data protection reasons, an obligation to disclose anonymised or aggregated customer data should be included in an amended version of the P2B Regulation as a data protection-friendly alternative. Although this would not enable commercial platform users to contact customers directly, it would at least allow transaction data to be evaluated for business analytics purposes.

Interestingly, § 19 (2) No. 4 of draft bill for the 10th amendment of the German introduces a specific provision concerning the abusive refusal of access to data (BMW i 2019a). This basically aims at extending the essential facilities concept explicitly to data. However, it does not provide a solution for follow-on problems such as the interplay with data privacy law or remuneration for access to data.

4.1.2 EXTENSION OF THE RIGHT TO DATA PORTABILITY

Closely linked to data access rights is the question of data portability from one digital platform to another, competing platform. Such an inter-platform data portability right is necessary to facilitate switching between different platform providers. An important step in this direction is Article 20 GDPR, which came into force in May 2018 and establishes the right to data portability. Under this provision users of a digital platform have the right to receive personal data relating to them in a structured, commonly used and machine-readable format and to transfer this data to another platform. The aim of this rule is to prevent the technical lock-in of data by the platform operator in order to reduce switching costs and to avoid anti-competitive lock-in effects.

Whether the portability rule will have the desired effects in practice remains to be seen. Possible factors that could prevent customers from switching platform providers include strong network effects or a status quo bias on the part of customers, i.e. a preference for the continuation of the existing situation (see Samuelson/Zeckhauser 1988). The use of subtle instruments by the platform operators, who are interested in binding

their customers to the platform, could have a reinforcing effect (Podszun 2017: 21). In addition, the right to data transfer according to Article 20 GDPR is subject to technical feasibility. For the portability rule to be effective in practice, technical standards need to be developed which would facilitate the direct transfer of data (service-to-service portability). The first voluntary initiatives in this direction are already up and running and include the Data Transfer Project, in which Facebook, Google, Microsoft and Twitter, among others, are involved (see also Furman et al. 2019: 69).

In addition to the aforementioned difficulties involved in the practical implementation of a right to data portability, there are three structural deficits of the rule in Article 20 GDPR in terms of factual, personal and temporal factors that require legislative action:

1. One reason for criticism is the fact that the scope of the rule is too narrow. The portability rule only applies to data which the data subject has "provided" to the data controller (e.g. the platform operator). Other categories of data whose portability is also required to prevent lock-in effects are not included. For example, the right to data transfer does not apply to online customer reviews posted on the platform by third parties. The legislator should remedy this situation by introducing a supplementary portability rule for reputation data. The GDPR would not stand in the way of such a proposal, as this data category is not covered by Article 20 (1) GDPR and therefore does not fall under any pre-emptive effect of EU law (Busch 2018a: 12).
2. The personal scope of application of the right to data portability under Article 20 GDPR is also too narrow from a SME perspective. According to Article 1 (1) GDPR, the portability rule only applies to the personal data of natural persons, but not legal persons. This corresponds to the regulatory approach of the data protection law, which essentially serves to protect personal rights of natural persons. However, from the perspective of competition economics, the distinction between natural and legal persons is irrelevant to the question of the right to data portability. For the transferability of customer ratings, for example, it makes no difference whether the reputation data refers to a natural person or a legal entity such as a limited liability company operating a hotel (Busch 2018b: 167). It is doubtful whether a solution under competition law, which only intervenes if the restriction of portability in individual cases constitutes an abuse of market power (e.g. Schweitzer et al. 2016: 26), will be sufficient to address such cases. Antitrust proceedings take too long, cover only a few individual cases and do not have a broad impact.
3. From a temporal perspective, Article 20 GDPR aims to facilitate a one-off data transfer, for example when there is a final switch from a given online platform to another competing platform. However, a number of innovative business models require a continuous flow of data between different market actors. This applies, for example, to so-called aggregator apps that merge data from different

² See Opinion of the European Parliament's Committee on Transport and Tourism, 23.11.2018, Amendment 59.

online platforms (Furman et al. 2019: 69). One example are multi-banking apps that enable bank customers to merge account data from different banks and use additional services (Jestaedt 2018: 446). The second EU Payment Services Directive (PSD II) requires banks to provide non-discriminatory access to the necessary banking information to the providers of such account information services via an Application Programming Interface (API). Several technical and legal aspects of the new data access rules still need to be finalised. This applies in particular to questions of data protection and data security. Regardless of the need for clarification that still exists in this context, the new rules on “Open Banking” (§§ 50, 51 ZAG, German Payment Services Supervision Act) could serve as a model for a cross-sector regulation of data access rights through the mandatory introduction of relevant software interfaces (regulation by API).

4.1.3 CLEAR RULES FOR CUSTOMER REVIEWS

Reputation systems, i.e. technical systems for collecting, processing and publishing customer ratings, are a central element in the market design of most digital platforms. Reputation systems collect information about the behaviour of platform users in the form of positive and negative feedback and make it available to other potential transaction partners. This creates incentives to behave in a trustworthy manner on the platform (Greiner et al. 2018: 62). In this way, reputation systems play a key role in creating trust between platform users, which is necessary for the conclusion of contracts. At the same time, they serve as an instrument of sanction for rule violations (reputational enforcement). Repeated violations may even lead to an exclusion from the platform. Conversely, trusted users who receive positive ratings collect “reputational capital” which will facilitate future transactions (Luca 2016).

However, the trust-building and market-stabilising function of customer reviews presupposes that the reputation system functions reliably and in a largely manipulation-free manner (cf. Edlmann 2017; Busch 2016). From the point of view of SMEs offering their products on platforms, it is particularly important that effective means are available to defend themselves against counterfeit negative ratings. Also, in other cases where disputes arise over the authenticity of a customer rating, the platform must provide an effective complaint-handling system which enables SMEs to defend themselves against degrading or unjustified individual ratings. The German courts have already dealt with these questions in numerous cases (see Federal Supreme Court, Judgment of 1 March 2016, Case no. VI ZR 34/15; District Court Lübeck, Judgment of 13 June 2018, Case no. 9 O 59/17; District Court Brunswick, Judgment of 28 November 2018, Case no. 9 O 2616/17), and in the meantime a relatively robust body of case law can be identified, which essentially amounts to a “proceduralisation” of platform responsibility (Hofmann 2017; see also Busch 2018a: 12). Thus, in the event of a complaint against a review, the platform operator must check the review and request the review author(s) to provide evidence that the customer contact has actually taken place.

In view of this case law and of the increasing importance of customer reviews for companies in the platform industry,

it is surprising that the P2B Regulation does not address this issue (see also Busch 2019). Nor did the proposal for a directive under the New Deal (European Commission 2018a) contain any provisions relating to reputation systems. However, during the trilogue procedure a few provisions regarding online reviews have been added (see Council of the European Union 2019). For example, consumers shall be informed about whether and how the platform operator ensures that online reviews originate from customers who have actually purchased or used the rated product.

This is certainly a step in the right direction, given the large number of reports on fake reviews. However, the pointillistic rules now provided for by the Modernisation Directive do not go far enough: a broader regulatory approach would be preferable, which not only addresses individual aspects of reputation systems, but also stipulates minimum legal requirements for the collection, processing and publication of the relevant data. Care should be taken to ensure that the requirements are formulated in as technology-neutral a manner as possible and continue to leave sufficient scope for competition between online platforms that use different reputation systems. This requirement would best be met by a general rule according to which the reputation systems must meet the requirements of “professional diligence” (cf. Article 2 (h) Unfair Commercial Practices Directive 2005/29/EC). The necessary concretisation in legal and technical terms could be provided by a voluntary European standard which would be drawn up under the auspices of the European Committee for Standardization (CEN). The ISO standard 20488:2018 (Online Consumer Reviews) published in June 2018, which sets out requirements for online reputation systems could serve as a model. A proposal for how a European rule on reputation systems could be worded has recently been elaborated by a group of European researchers (Research Group on the Law of Digital Services 2016). The proposal serves as the basis for a Working Group of the European Law Institute (ELI) that is currently elaborating “ELI Model Rules on Online Platforms” which will be published in February 2020 (see Busch 2018b).

4.1.4 PROHIBITION OF EXCLUSIVITY CLAUSES

There is also a need for legislative action with regard to exclusivity clauses which would make it more difficult for business users to use several platforms simultaneously (multi-homing) (see also Cremer et al. 2019: 55 et seq.). In recent years, competition authorities in several European countries have initiated proceedings, in particular against hotel booking platforms, for so-called best price clauses (parity clauses). The cases decided so far by competition authorities and courts have concerned various variants of parity clauses and have led to different results (see Hamelmann et al. 2015; Alfter/Hunold 2016; Augenhöfer/Schwarzkopf 2017). In some cases, a final judicial clarification is still pending. In the meantime, several European countries (including Austria, Belgium, France and Italy) have prohibited the use of certain parity clauses by law. As a result, the digital single market presents itself as a regulatory patchwork when it comes to the admissibility of parity clauses.

The P2B Regulation will not significantly improve this situation. Article 10 of the Regulation (i.e. Article 8 of the Commission’s

proposal) merely provides for a transparency rule. Under this provision the operators of online intermediation services are obliged to disclose any exclusivity clauses in their general terms and conditions and to make these easily available to the public. The main economic, commercial or legal reasons for the restrictions must also be stated. At the same time, the P2B Regulation stresses that the new transparency requirement does not affect any stricter member state regulations aimed at banning exclusivity clauses. As a result, the harmonisation effect of the Regulation will therefore be minimal. Existing legal differences between Member States will largely be maintained.

From an economic perspective, the competitive effects of parity clauses are not entirely clear. In most cases, the justification given for the use of parity clauses is that they serve to prevent free-riding effects (Haucap/Heimeshoff 2017: 33). Without them, providers could exploit the wide reach of the platforms for marketing purposes. Customers first become aware of the provider via the online platform, but then switch to the provider's own website with the view of concluding a contract at a lower price. However, there is insufficient evidence for such a free-rider issue. Yet there is no dispute about the fact that parity clauses reduce competitive pressure on online platforms as they restrict competition between different distribution channels. This applies in particular to wide best price clauses that prevent competition between different online platforms.

Considering the fact that the economic effects of parity clauses on competition have not yet been conclusively clarified, the legislator, as is often the case, is faced with uncertainty before taking a regulatory decision (cf. Spiecker genannt Döhmann 2019). One option would be to rely on the principle of "case law as a discovery procedure" (Podszun 2014: 132 et seqq.). This would mean leaving the legal assessment of parity clauses to the competition authorities and the courts, which would assess the competitive effects on a case-by-case basis (Haucap/Heimeshoff 2017: 33). However, the fact that anti-trust proceedings take too long, cover only a few individual cases and have no broad impact speaks against this approach. This is exacerbated by the fact that different rules at the member state level would lead to further fragmentation of the regulatory framework in the digital single market. Therefore, from a competition policy perspective it seems preferable to give priority to a regulatory approach which keeps alternative distribution channels open and to replace the transparency requirement in Article 10 of the P2B Regulation with a Europe-wide ban on parity clauses (cf. Podszun 2018: 27).

4.1.5 BETTER ENFORCEMENT AND EFFECTIVE LEGAL REDRESS FOR PLATFORM USERS

Strengthening the regulatory framework for the platform economy must go hand in hand with better enforcement and more effective legal redress for platform users. So far, business users of online platforms have often been afraid of retaliation by platform operators, which has forced them to shy away from pursuing their rights in the courts. Therefore, the introduction of a collective right of action for associations of online platform users provided for by Article 14 of the P2B Regulation makes an important contribution to improving law enforcement.

In addition to such a strengthening of private enforcement, public enforcement of the law could be useful as a complementary measure. This applies in particular to cases in which it is not possible for private plaintiffs to identify violations of the law, for example in relation to manipulated search algorithms or algorithm-based rankings. In such cases, investigative powers of public authorities would allow access to the "black box". The necessary competences could be given either to existing authorities (e.g. in Germany the Federal Cartel Office or the Federal Network Agency) or to a new digital agency (see also 4.2.1). The competent authority could also facilitate the resolution of disputes between platform operators and platform users following the model of the Consumer Conciliation Body for Telecommunications at the German Federal Network Agency.

4.2 INFRASTRUCTURE REGULATION FOR DOMINANT PLATFORMS?

In view of the key function of online platforms in the digital economy, the question arises whether the significant economic and social power of some online platforms requires a more far-reaching market regulation and supervision in addition to the existing competition law rules and fairness and transparency requirements recently introduced by the P2B Regulation (Nahles 2018; Rahman 2017; Rahman 2018; see also Finger/Montero 2018). The regulation of network infrastructures (e.g. telecommunications, energy markets) could serve as a model for such an approach.

The starting point for these considerations is the observation that some "super platforms" (Ezrachi/Stucke 2016: 149) have developed into basic infrastructures of the digital economy that have become indispensable for other businesses and consumers. As the Wall Street Journal aptly explains: "Anyone building a brand, for example, can't ignore Facebook's highly engaged daily audience of 1 billion. Anyone starting a business needs to make sure they can be found on Google. Anyone with goods to sell wants Amazon to carry them." (Clark/McMillan 2015; see also Podszun 2017: 12).

Some even call for the unbundling of certain vertically integrated platforms, whether in the form of legal unbundling or even ownership unbundling (see Wu 2018: 132; critical Schweitzer et al. 2018: 149; see also Budzinski/Köhler 2015: 282). For example, the American Senator Elizabeth Warren recently called for the unbundling of large digital corporations such as Amazon and Google (Warren 2019). The proposal is essentially directed against the double role that companies such as Amazon play as a provider of an online marketplace and at the same time as a retailer. Such far-reaching interventions in the market, however, are likely to overshoot the mark, as unbundling would at the same time deprive consumers of the benefits of vertically integrated platforms. A regulatory approach that ensures a balance between openness to innovation and responsibility for innovation seems preferable as a milder option.

4.2.1 ESTABLISHING A DIGITAL AGENCY

The establishment of a regulatory authority for infrastructure-like platforms could be based on ideas expressed in the BMWi's White Paper on Digital Platforms. The paper proposes the establishment of a digital agency, which could complement the existing competencies of the Federal Network Agency and the Federal Cartel Office in assuming tasks of market monitoring and law enforcement within the platform economy (BMWi 2017: 97 et seq.; see also Fetzner 2017). The coalition agreement of March 2018 also calls for exploring the need for a digital agency that could assume tasks such as "platform regulation or market monitoring" (CDU, CSU and SPD 2018: 61).

More recently, these ideas have been taken up by the "Commission Competition Law 4.0" set up by the German Ministry of Economic Affairs and Energy. In its final report, published in September 2019, the commission recommends to introduce a European "Platform Regulation" in order "to impose a specific code of conduct on dominant online platforms with a minimum level of revenues or a minimum number of users" (BMWi 2019: 53). Although the report does not recommend the establishment of a "digital agency" with new executive powers, it does suggest improving the linkage of existing administrative and supervisory structures through a new "Digital Markets Board" at the European Commission and a "Digital Markets Transformation Agency" (BMWi 2019: 82-84).

Similar but slightly different considerations are also found in the "Furman Report" commissioned by the British government and published in March 2019 (Furman et al. 2019). Among other things, it proposes the establishment of a "Digital Markets Unit" to ensure fair and pro-competitive behaviour by companies with "strategic market status". The Digital Markets Unit shall essentially take over three functions (Furman et al. 2019: 57 et seq.):

1. Together with industry representatives, the Digital Markets Unit shall develop a code of conduct for companies with "strategic market status". One of the objectives is to stipulate that vertically integrated online marketplaces should not favour their own products in rankings. A possible ban on best price clauses is also being considered (Furman et al. 2019: 61). Compliance with the code is to be monitored by the Digital Markets Unit and fines are to be imposed for violations. Unlike antitrust enforcement, which reacts only ex post to specific cases, this approach would have the benefit that the rules of conduct laid down ex ante would contribute to greater legal certainty for all market actors.
2. Furthermore, the Digital Markets Unit shall ensure the portability of personal data between platforms and support the development of open standards. Use cases could include, for example, the transfer of the booking and purchasing history of e-commerce platforms and hotel booking platforms as well as the transfer of playlists from streaming platforms for music and films (Furman et al. 2019: 66).
3. In certain cases, the Digital Markets Unit shall also ensure that third parties are granted access rights to the data

of pools of major digital conglomerates. In the spirit of "Data Openness", the market entry barriers resulting from the exclusive access of platform operators to extensive databases shall be removed in this way. This regime would apply to non-personal data or anonymised data. These considerations are somewhat similar to the proposal for mandatory data sharing under a "Data-For-All-Act" (see 4.2.3). However, the Furman report remains quite vague about the detailed prerequisites for such a right to data openness. In this context, reference is also made to voluntary initiatives by some platform operators, such as the provision of anonymised mobility data as part of the "Uber Movement" initiative (Furman 2019: 74).

4.2.2 NEUTRALITY OBLIGATIONS AND PROHIBITION OF SELF-PREFERENCING

A general principle of neutrality could be derived from the classification of certain platforms as essential infrastructures of the digital economy. For quite some time now, such a neutrality obligation has been referred to as "search neutrality" with a view to the search engine Google, which plays a central role in the "opinion market" (Pasquale 2008, 276 et seq.; Crane 2012; Paal 2015; Peitz/Schweitzer 2016; critical Schweitzer et al. 2018: 149). Such a neutrality obligation for particularly dominant online trading platforms such as the Amazon Marketplace has been receiving increasing support in recent times (Khan 2017: 798; Rahman 2018: 1675). Therefore, any unequal treatment of platform users would not only have to be disclosed, as required by the P2B Regulation, but would also be prohibited in the case of infrastructure-like platforms. In the case of vertically integrated platforms, the neutrality obligation would also lead to a general ban on self-preferencing. Thus, preferring their own products and services, for example in search result lists and rankings, would be prohibited (see also Podszun 2018: 23). A similar approach has been taken by the "Commission Competition Law 4.0" set up by the German Ministry of Economic Affairs and Energy. In its final report, published in September 2019, the commission recommends that dominant platforms shall "be prohibited from favouring their own services in relation to third-party providers unless such preferencing is objectively justified" (BMWi 2019: 54).

4.2.3 MANDATORY DATA SHARING

Another question that merits consideration is whether digital platforms with a particularly strong market position and other 'data-rich' enterprises with large datasets should be obliged to share their data with other 'data-poor' companies. In this perspective, Mayer-Schönberger and Ramge (2017: 195 et seq.) proposed the introduction of a "progressive data sharing obligation". Under this model, a company which exceeds a certain market share would be obliged to share feedback data required for the further development of AI systems with its competitors. This proposal was recently taken up by Andrea Nahles, the former leader of the German Social Democratic Party, who spoke out in favour of introducing a "Data-For-All-Act" (Nahles 2018, 2019). According to this proposal, companies with significant market power should be subject to a data sharing obligation. Non-personal data should be shared without

alteration, but personal data only after complete anonymisation. Exceptions should apply to any data which is subject to statutory confidentiality requirements, such as protected trade secrets (Nahles 2019). The practical arrangements for such a data sharing regime raise a number of questions which remain to be clarified, e.g. the format in which the data should be made available and whether access should be granted in real time via an Application Programming Interface (API). It would also be necessary to specify the conditions under which access to the data is to be granted, whether or not in return for payment. In this respect, it seems appropriate to distinguish between data sets generated on the basis of a considerable investment and those that have been generated as a by-product without much effort (also Schweitzer et al. 2018: 186). Notwithstanding these open questions, the idea of a data sharing obligation based on significant market share merits further consideration (see also BMWi 2019: 36 et seqq.).

List of abbreviations

API	Application Programming Interface
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BMWi	Bundesministerium für Wirtschaft und Energie (Federal Ministry for Economic Affairs and Energy)
GTC	General Terms and Conditions
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition, ARC)
P2B	Platform to Business
P2C	Platform to Consumer
SME	small and medium-sized enterprise(s)

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