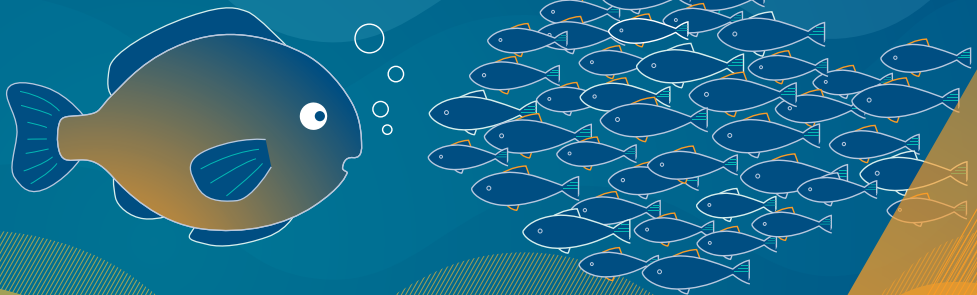


# Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement

Philip Marsden/Rupprecht Podszun



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## Imprint

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## At a Glance

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Europe is experiencing something that is unprecedented in the economy. The characteristics of the platform economy affect the entire society and merit special attention. "After years of discussion, it is now time to legislate and act" find Marsden and Podszun. Their study on behalf of the Konrad-Adenauer-Stiftung is about how to restore the balance of digital competition in Europe and was produced for the European Data Summit during the German Presidency of the Council.

There has not only been a growing feeling over the last decade, but also the reality that traditional businesses and the civil society are increasingly dependent on large online platforms without remotely comparable bargaining power. Various market participants, mostly small and medium size companies, find that their consumers are increasingly hard to reach without reliance on incumbent platforms. Innovative solutions do not always make their way to the market because these big digital platforms neutralize competitors by employing the strategy "copy, acquire or kill". With reason, some call them a "walled garden" on the web since they increasingly keep users within their sites. So how can we deal with them and with the situations that arise when the "invisible hand" is replaced by the algorithms put in place by platform operators?

The asymmetry in market power between large digital platforms and the rest of the economy is also linked to the relationships between tech giants and governments.

The traditional tools do not achieve what they should, i. e. to protect the competitive process and promote consumer welfare. There are a number of economic reasons to believe that this asymmetric market power in the hands of a few players could be sustained under the current legal and institutional framework. There are serious concerns that tomorrow's prosperity is at risk under current market and competitive conditions. These concerns were last clearly communicated in the German National Industrial Strategy 2030. The political aim to design a new framework

for the operation of a digital platform is therefore more than justified. A blueprint for how to modernize the legal framework is offered by the new German Competition Act.

While previous research, studies, and reports have come up with a lot of ideas about how to tackle the current challenges for ensuring the contestability of markets in the most effective manner, none of them has looked at the interplay between possible regulation and additional market investigation powers focused on structural competition problems in digital and other markets.

The study by Professors Marsden and Podszun draws on their deep professional experience and presents a pragmatic and implementable framework for use of the New Competition Tool by the Directorate General for Competition, as well as asymmetric ex ante regulation by the Directorate General for Communications Networks, Content and Technology of the European Commission. The design of this framework clearly sticks to the principles of the social-market economy because it reaffirms the values that should govern our vision for living in a digitized economy: free competition, fair intermediation, and sovereignty of users in decision making.

Having in mind the priorities of the German Presidency of the Council, it is offered as an academic contribution to the ongoing consultation of the European Commission. Unlike other studies that genuinely (or intentionally disingenuously) question ‘whether’ there is a problem at all, Marsden and Podszun move on to the ‘how’:

- › How do we design new tools and regulation to correct market failures in relation to digital platforms before the abuses of market power happen?
- › How do we ensure that competition based on merits prevails?
- › How do we ensure that the best product wins, not just the platform that offers it?

- › How do we re-set the balance so that genuine innovation and choice prevail, and all businesses have an equal opportunity to compete in the marketplace?
- › And how do we ensure that consumers are not digital serfs – mere inputs into the tech giants’ offerings – but instead are ‘king and queen’ of the competitive marketplace?

Effective enforcement must keep pace with market dynamics, as the authors remind us and ask for sensible and flexible rules. Marsden and Podszun present a clear view of what institutional design may guarantee it. While they do not question a move in the direction of a stronger regulatory framework, they call into attention which learnings from the GDPR-enactment must be kept in mind in order to keep the framework functional. While recommending advanced rules for platforms, they maintain a forward looking approach and explain the disadvantages when policy bases its regulatory rules on preceding competition cases.

Europe can restore digital competition if the new tools serve their purpose. This study offers clear guidelines for European policy makers on how to overcome the regulatory time lag and enable authorities to react quickly.

**Pencho Kuzev**

## Executive Summary

New regulation of digital giants and new competition tools are coming to Europe. The reasons are obvious: Some market platforms and aggregators have tipped the balance of market power among themselves, and others – particularly small businesses – and consumers. Some of the fundamentals of commerce have changed as business has moved to a digital environment. There are many benefits from this as well – in terms of increased opportunities from scale, scope and reaching new markets. Consumers have benefitted from greater choice, speed of delivery and a feeling of engagement, tailored solutions and even advertising. However, several government and academic studies and investigations have found violations of antitrust, consumer protection and privacy law, including combinations of them all. Germany has been a leader in this regard, offering inspiring studies, targeted legislative amendments and leading investigations. Nevertheless, the problems are bigger than any one nation can remedy. And in many cases even European findings of infringements have not always been able to be remedied. They have attracted enormous fines, but only after long and tortuous litigation, with many appeals. And only rarely has the actual ill-conduct been remedied, and if then, all too late or in a piece-meal and incomplete manner.

What has not yet been addressed by government action is the actual causes of these ills: asymmetric market power, not only between giant platforms and aggregators on the one hand, and small businesses and consumers on the other, but also as between the tech giants and government itself. What is needed, and indeed has been called for on many occasions is a re-setting of the balance, a levelling of the regulatory playing field if you will. This calls for new thinking to address new problems, and new competition tools and asymmetric and ex ante regulation to address the growing and troubling asymmetry of market power and its resulting inequities. The crucial task is to implement this new and necessary set of instruments without undoing or jeopardising the many benefits of the new digital environment, to do so ‘in real time’, and to do so in a way which ensures that competition law, consumer protection and

privacy guarantees are upheld and balanced. To do nothing is not an option. First, because the inequities of the imbalances of power will only worsen. Second, because this in turn would lead to political calls for vast regulatory change which could stultify what are undoubtedly exciting and vibrant markets. What is needed – we argue – are sensible rules, backed up with effective enforcement. We thus make the following proposals:

- › Relying on ex post law enforcement is insufficient: **we urgently need new rules**, and new institutional capabilities to guarantee **effective enforcement**. We distil from expert work core principles to guide these changes.
- › The new rules should be based on **three principles in particular: freedom of competition, fairness of intermediation and the sovereignty of economic actors** to take their decisions autonomously. These principles are described intentionally as having a constitutional character and importance and thus should be the foundation of any new EU regulation in this area.
- › These principles inform our new sensible rules – or ‘Do’s and Don’ts’ – which set out obligations and prohibitions relating to **Platform Openness, Neutrality, Interoperability and On-platform Competition; Non-discrimination; Fair terms; Controllability of algorithmic decisions and Access to justice; and Access to information; Respect for privacy; Choice on the use of data, and Choice for customers; Simplicity, not Forcing.**
- › **Effective enforcement** of these rules relies on three key factors:
  1. **Compliance** with these rules should be automatic, as we are re-setting the framework for market competition
  2. **Monitoring market developments** and ensuring that the rules are fit for purpose requires new institutional capabilities, and a new and strong interplay between these functions and the responsible officers (e. g. both within and between DG COMP and DG CNCT for example)

### 3. Actual enforcement of breaches of the rules must be swift and as such will also require new institutional capabilities.

- › As such we welcome enactment of a new Market Investigations Regime, as contemplated in the consultation for the New Competition Tool, implemented by DG COMP. We explore insights from the similar tool in the UK, show how it has already operated in some markets to impose interoperability and data portability remedies on platforms, accelerating innovation, technological development and competition, and make recommendations for how market investigations can be readily implemented at the EU level, including related to binding timelines, open processes, and independence of decision-making. The read-across between market investigations remedies, themselves a form of ex ante regulation, and a regulatory regime is clear. We see a need and opportunity for a strong interplay between market investigations by, DG COMP, and evolving regulation, for example, by DG CNCT.
- › We thus recommend creation of three new units to monitor markets, ensure compliance with the new rules, and resolve private disputes.
- › A new Early Alerts Unit would be formed within DG COMP to monitor market developments, particularly movements to unnatural tipping, and the consequent ramifications for application of our Sensible Rules. This unit would report particularly when conditions are arising such that the New Competition Tool should be deployed and make recommendations to that end.
- › A new Platform Compliance Unit in DG CNCT would be formed to ensure that the new regulation remains fit for purpose given such market developments reported by the Early Alert Unit, particularly where it may impact on the interpretation and scope of application of the new rules. These units would work closely together to ensure the effective application of the new regulation, including issuing guidance.

- › Finally, a new Platform Complaints Panel would be set up to deal swiftly and independently with private complaints of violations of the regulation, e. g. regarding access to data.

The question is no longer *whether* urgent regulatory reform is necessary, but *how* it should be implemented. Our paper is drafted with that in mind. We look forward to debating our proposals with officials and interested parties.

# Content

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<b>1. The Consensus: New Rules for the Platform Economy</b>	<b>13</b>
1.1 Characteristics of the Platform Economy .....	14
1.2 Deficits of Enforcement .....	17
1.3 The Analysis in Previous Reports .....	22
<b>2. Substantive Principles</b>	<b>38</b>
2.1 Freedom of Competition .....	39
2.2 Fairness of Intermediation .....	40
2.3 Sovereignty of Decision-Making .....	41
<b>3. Sensible Rules</b>	<b>43</b>
3.1 Rules for Freedom of Competition .....	43
3.2 Rules for Fairness of Intermediation .....	46
3.3 Rules for Sovereignty of Decision-Making .....	48
<b>4. Parameters of the Institutional Set-up</b>	<b>50</b>
4.1 Acting in Concert .....	52
4.2 European and national, public and private enforcement .....	54
4.3 The Limits of Existing Case Law in Designing New Rules .....	55
<b>5. Effective Enforcement: A New Institutional Design</b>	<b>60</b>
5.1 Insights from the Market Investigations Regime in the UK .....	60
5.2 Identifying the Addressees .....	71
5.3 Introduction of an EU Market Investigation Regime .....	77
5.4 Securing the Interplay .....	82
5.5 Conclusion .....	87

## 1. The Consensus: New Rules for the Platform Economy

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The European Commission's Directorate-General Competition (DG COMP) proposed a "New Competition Tool" in 2020 to address distortions of competition in the platform economy.<sup>1</sup> In parallel, two other Directorates (DG Communications Networks, Content & Technology (DG CNCT) and the DG for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW)) proposed an *ex ante*-regulatory tool for online platforms under the framework of the Digital Services Act.<sup>2</sup> These tools are meant to address the phenomena of the platform economy that are still new enough to leave us astonished, but mature enough to start thinking about a regulatory framework (1.1). The traditional tools, mainly in competition law, have not yet got to grips with these changes – despite of all the remarkable efforts of competition authorities in Europe and elsewhere (1.2). Numerous previous reports and studies on competition in the digital age have formed a consensus that the phenomena of the digitalized economy require a new approach (1.3).

The proposals of the European Commission go in the right direction: The platform economy needs new but still sensible rules and more effective enforcement. The aim of this study is to provide further guidance how the regulatory deficits in the digital economy can be remedied. It is vital to get enforcement right – companies and consumers depend on digital markets, so do European markets. The Corona pandemic gives good evidence for the further rise and contribution of digital companies. Yet, an ever-higher concentration, the online infrastructure in a few hands, and the danger of abuses may eat the many obvious benefits of digitization if the regulatory framework is not well-aligned. After years of discussion, it is now time to legislate and act.

## 1.1 Characteristics of the Platform Economy

Google, Amazon, Facebook and Apple (GAFA) are companies that have become the most powerful players in the Internet, at least for the Western hemisphere. With their incredible success they became “gate-keepers” for economic decisions taken online. If you go online with your smartphone, there are two companies in the world, Apple (on the iPhone) or Google (on Android phones), that run your activities through providing the operating system. Google handles the vast majority of all general search questions, a service that often is the entry point for using the Internet. Amazon is a giant in providing retail and cloud services, Facebook (including its subsidiaries WhatsApp and Instagram) organizes large parts of communication and social networking over the Internet.

Other platforms have developed disruptive force for traditional business as well: Take Booking.com for hotels, Uber for transport or Delivery Hero for food delivery – their business models generated enormous efficiencies and benefits and changed the affected sectors to a great extent, and within their sectors they have also become important players. The world is digitizing, and platforms are thus achieving greater prominence and power in many sectors, from online streaming of films, video calls, music to any number of new services on which consumers and businesses rely.

The key characteristic of platforms is that they act as intermediaries to several market sides. Platform operators reduce transaction costs and bring supply and demand together. This feature itself is not new, and has been analysed from an economic viewpoint by *Jean-Charles Rochet* and *Jean Tirole* already almost twenty years ago.<sup>3</sup> What is happening now is just faster and all the more encompassing. Coordination of supply and demand in platform markets is based on the use of data, algorithms and – increasingly – artificial intelligence. The discovery of the efficiencies through platforms has become a strong driver of economic trends.

With all the benefits of platforms, with their dynamics and the innovative solutions to problems, particularly the reduction of search and other transaction costs, platforms have risen to positions of quite considerable power. This is not in-itself problematic, but it demands vigilance. Ever since

*Adam Smith* market power has been seen as a risk for functioning markets. In Europe, the core idea of the market economy is to let competition drive the coordination of economic decisions of individuals. In free markets, supply and demand meet under the guidance of the “invisible hand”.<sup>4</sup>

Platforms follow a somewhat different idea – their business is often built on the idea of winning competition *for* the whole market as such. If successful, the platform runs the whole market itself, the invisible hand is replaced by the equally (or even more) invisible algorithms put in place by the platform operator. To achieve such a position, platforms can rely on network effects (direct or indirect) that make one platform more and more attractive the more users it can attract. This leads to a spiral effect: If everyone uses WhatsApp it makes no sense to use a messaging service where only some users are. Since marginal costs (i. e. the costs incurred when more users use the services of the platform) are often very low or even zero a platform may have enormous economies of scale in a very short period of time. Often, a platform that manages to employ network effects and that disincentivizes the use of multiple platforms or other sources (leading to “single-homing”) can win the whole market. This is a negative form of “tipping” of the market, and “the winner takes it all”.<sup>5</sup> Competition then is reduced to the periphery: Suppliers of goods and services need to compete for access to the *platform*, not for access to consumers since the platform operator has become a crucial gateway to reach customers.<sup>6</sup> This places the winning platforms in a position of enormous power. Their power is strengthened through their ability and incentive to collect and combine data. For economic decisions, the knowledge of information and data has become key in a digital arena, and those companies having privileged access to data (e. g. through their large networks of users) have an exponential advantage over others. This allows them better insights, and an ability to provide better services and offers to the market, but it also raises risks, and some casualties.

The first casualty for competition is that only one platform survives and occupies and controls the customer-interface. The gateway narrows and becomes a bottleneck. Economic dependency arises and customers and consumers can find their choices limited, or controlled, leading to exclusion and/or exploitation through changing terms of trade. End-consum-



ers may well be blissfully unaware that their choices are even limited or controlled at all. An imbalance of relative power arises which – along with some admitted benefits – also raises risks of reduced choice and innovation. From here, platforms may start to use their quasi-monopolistic position to enter further markets or integrate services into their economic realm. This endangers the structure of adjacent and other markets. Companies like Google, Amazon, Facebook or Apple started to build “digital ecosystems” around their most successful platforms, trying to keep users ever longer in their economic orbit. Thereby, more data could be collected, and more offers be channeled through the ecosystem with more possibilities to profit from transactions. The “datafication”<sup>7</sup> of all sorts of persons and services in the economy made integration of markets easier. Companies and consumers that are dependent on these growing platforms may see and even value the apparent convenience of such a one-stop shop. With some undoubted benefits, however, again come risks from ceding the ability to bargain or in any way influence the overall offering – and indeed without realizing sufficiently that their data is actually helping to reduce any real influence they ever had even further.

Two business strategies that are often mentioned in this respect are “platform envelopment” and “killer acquisitions”. Platform envelopment means the integration of another platform service into a digital ecosystem so that competing platforms are no longer needed.<sup>8</sup> For instance, Google offers a flight search platform within the Google general search platform; Google’s prominence as a search platform, and its ability on the platform to rank its flight platform higher than competing flight platforms may have the result that other flight search platforms are increasingly driven out of the market, even if they are technically better offerings. As a result, platform dominance extends to other self-owned platforms, yielding them in turn dominance which has not actually been earned through superior skill, foresight or industry. In addition, other companies can be bought and integrated into the platform’s own network. This is possible due to the “deep pockets” of the largest Silicon Valley firms, i. e. their enormous financial resources. With merger strategies, undertakings traditionally enter new markets. If the acquisitions are strategically directed (e. g. with Facebook buying WhatsApp and Instagram)

this is sometimes called “killer acquisitions”.<sup>9</sup> All these developments seen together drive concentration in the markets and perpetuate the strong market position of already dominant players.

## 1.2 Deficits of Enforcement

Ever since the early days of the European project, competition law has served the aim to prohibit the abuse of market power under certain circumstances and to stop companies from colluding at the expense of consumers and others. Later, merger control was added as a third competence to stop concentration and to preserve competition. On this legal basis, laid down in Art. 101 ff. TFEU, the European Commission and national competition agencies have tried to get to grips with some of the phenomena in the digital economy in recent years.<sup>10</sup> Cases against abuses by Google, where the European Commission hit the company with record fines for abusive practices, the fight of the Bundeskartellamt with Facebook concerning the combination of user data from different sources without leaving customers a choice, or cases against Amazon for practices directed at companies using the Amazon marketplace are telling examples of these endeavours.<sup>11</sup>

Three of the landmark cases of competition law enforcement in the digital economy are telling examples of the difficulties in relying on the traditional application of competition law.

### Landmark Competition Law Cases Involving Platforms

In *Google Search (Shopping)*, it took the European Commission nearly seven years before a decision was taken on the self-preferencing of Google’s own price comparison service in search results.<sup>12</sup> While establishing self-preferencing as a potential problem in platform markets, the decision did not help some other suppliers of price comparison portals very much, simply since it took too long. The case has still not been fully reviewed by the courts. The remedy imposed by the European Commission is subject to criticism as not actually helpful.<sup>13</sup>

The *Facebook* case of the Bundeskartellamt,<sup>14</sup> where the German competition agency targeted Facebook's data collecting practices as an abuse, also took several years to complete and is still under review by the courts. The substantive theory of harm was criticized harshly which earned the Bundeskartellamt a loss in summary proceedings at the Appeal's Court, now overturned by the German Federal Court of Justice.<sup>15</sup>

The acquisition of WhatsApp by Facebook, arguably one of the most important – and expensive – deals in Silicon Valley, was not originally notifiable under EU Merger rules. When the European Commission finally got hold of the case with the help of Member States, it decided not to prohibit this acquisition of the most important messaging service.<sup>16</sup> The parties even made the Commission believe that an integration of Facebook with WhatsApp was not possible. When it later turned out that this information was wrong, Facebook had to pay a fine, but the merger itself was not challenged.<sup>17</sup>

All three cases with their formal and substantive difficulties show the ambition of competition agencies to work in the field, yet also the deficits of an effective competition control. Such “market dynamics favouring sudden and radical decreases in competition” (as the European Commission puts it in the proposal for a new tool) are of a dimension where traditional competition law tools no longer work effectively. Proceedings take a long time, developing theories of harm in individual cases is burdensome, finding the right remedies has proved very difficult in the past. Agencies are right to take care in their enforcement, and not chill innovation incentives or punish pro-competitive conduct. The current approach of the competition agencies with their traditional tools can no longer keep pace, however, with the lightning speed with which new practices are established and market structures changed.<sup>18</sup>

A new regulatory and enforcement approach is needed which – while respecting concerns for innovation incentives – moves more quickly, first, by re-setting market framework rules clearly and conscientiously,

and second by developing new methods of ensuring the rules are complied with, and evolve with technological developments to remain fit for purpose.

Apart from competition law there is no over-arching legal framework for regulating platforms, particularly with respect to structural power imbalances. Typically, in European economic law, there are specific rules for many sectors that ensure that the market economy thrives and social goals are achieved. The specific dynamics of platforms have not been made the subject of a broad-based and comprehensive regulatory regime as had been done for energy markets<sup>19</sup>, insurance companies<sup>20</sup> or telecommunication.<sup>21</sup>

Of course, companies like the GAFAs are subject to numerous rules in the EU – from the e-commerce directive to consumer protection laws, from the General Data Protection Regulation to rules on copyright or hate speech.<sup>22</sup> One of the regulatory difficulties is that some of the big platforms advance beyond one sector to be of importance in many different branches of the economy. This makes it particularly difficult to set up a framework that is even adequate to sufficiently address their scope of activities.

The European Court of Justice has even struggled with the categorization of platforms in terms of regulation. Thus, even the most basic questions are not entirely clear. For example, in considering a platform like Uber, the Court decided that the undertaking is active in transportation so that the rules on transport regulation are directly applicable to Uber.<sup>23</sup> However, for Airbnb, the Court stated that it is an information society service so that it is not directly subject to the rules for accommodation providers but enjoys the freedoms of the information society.<sup>24</sup> The difference is due to the leeway the two companies leave to the supplier of the services – Uber drivers are more closely monitored by Uber than the hosts of accommodation are by Airbnb. Even if one may agree with the distinction drawn on this case-by-case basis, the different treatment of Uber on the one hand and Airbnb on the other shows that there is not yet a framework for what they have in common – acting as intermediaries on the basis of data.<sup>25</sup>

So, a coherent platform regulation is largely missing, although platforms act according to similar patterns and need some more specific legal framework (as basically do all other economic actors operating in the European market.) One notable exception to this lack of platform-specific rules is the 2019 P2B-regulation, regulating on a European level the practices of platform vis-à-vis undertakings doing business on the platform.<sup>26</sup> Here we see a more encompassing approach, but still not remotely adequate to address the ambit of potential problems of platforms.

### The P2B-Regulation

The Platform-to-business-regulation of the European Union from 2019 is the first attempt to provide an encompassing legal framework for the relations of digital platforms and businesses. The rules require online intermediation services and online search engines to follow certain restrictions regarding their behaviour in the internal market. In particular, the P2B-regulation requires a higher degree of transparency from platforms on matters such as their terms and conditions, the ranking parameters, the differentiated treatment of their own products and products of third parties (self-preferencing), access to data, exclusivity clauses or price parity agreements. The rules primarily require transparency, but do not prohibit specific behaviour. The P2B-regulation is to be reviewed as early as 2022, after only a short period of time of implementation. This indicates that law-makers were aware that the transparency rule may not suffice for regulating P2B-relationships.

The European Commission has acknowledged in the Impact Inception Assessments published in 2020 that the current regulatory approach is too *laissez-faire* and needs revision. It highlights several aspects – from a regulatory perspective, not a purely competition-oriented one. In particular, there is the reality that traditional businesses – including many thousand small platforms themselves – are increasingly dependent on large online platforms without remotely comparable bargaining power. These businesses find that their consumers are increasingly hard to reach without reliance on gatekeeper platforms, so that innovative solutions do not

always make their way to the market. Online platforms may expand to adjacent markets, making them tip, aggravating the problems for competition and innovation. In summary, the Commission's diagnosis is this:

*“A small number of large online platforms increasingly determines the parameters for future innovations, consumer choice and competition. Consequently, Europe's estimated 10 000 online platforms are potentially hampered in scaling broadly and thereby contributing to the EU's technological sovereignty, as they are increasingly faced with incontestable online platform ecosystems. This leads to a risk of reduced benefits from social gains deriving from innovation. These outcomes of platform dynamics may result in large-scale unfair trading practices and potentially reduce the social gain from innovation. Their impact is compounded by the opacity and complexity of the large online platform ecosystems, and the significant information advantage such platforms have over regulators.”<sup>27</sup>*

In particular, transparency rules – as in the P2B-regulation – may help to tackle the “opacity”. They are not helpful, however, for companies that are in a “take-it-or-leave-it”-situation with no bargaining power. With more transparent rules they can more easily adapt, yet the rules are still set by the operator with superior bargaining power.

It may also be noteworthy at this point that power discrepancies usually disincentivize users to challenge – let alone sue – the business partner with superior market power. In case of unfair contract terms, this lack of a path for enforcement for the parties affected is overcome by collective action or representative actions by certain associations or public authorities controlling and intervening.

As the above discussion indicates, there are myriad rules, but crucial gaps – that we would argue are growing. Various recent reports have concurred and offered suggestions for reform.

### 1.3 The Analysis in Previous Reports

In the digital economy, regulatory challenges remain. It seems that – with all the good work of the competition authorities and law-makers in the past years – many problems with the legal framework for the platform economy still remain. As the Commission puts it in the proposal for a New Competition Tool, there is an urgent need to

“address... gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets.”<sup>28</sup>

This need has been confirmed by numerous reports from around the world.<sup>29</sup> The traditional ex post-competition law solutions and merger control are at their limits. The European Commission itself draws many insights from the report of three Special Advisers to Competition Commissioner Margrethe Vestager.<sup>30</sup> Reports from the United Kingdom, the so-called “Furman Report”, and Germany, the study on abuses of dominance and the report of the Commission Competition Law 4.0, confirmed that there is need for reform. Germany has already put forward its own suggestion for a revision of the national competition act.

#### Furman Report:<sup>31</sup>

In March 2019, the UK government released a report prepared for its Treasury, by the Digital Competition Experts Panel. This panel was chaired by US economist Jason Furman, and included academic experts in competition law, economics and technology, including one of the present authors. The report was entitled ‘Unlocking Digital Competition’ and it explained the many benefits of the digital economy, but raised certain concerns and pointed to regulatory failings (such as slow antitrust investigations, and too permissive merger control) and made a range of suggestions that were also selected for international application if possible (i. e. not just UK specific, although the report did include some detailed recommendations for changes to the UK competition law regime). Most relevant for our purposes in this study are the three

main ‘functions’<sup>32</sup> that the Furman Report made for any new regulation to address market power imbalances, including positive obligations or what we will call in this paper: ‘Do’s’, which would be implemented and enforced by a new Digital Markets Unit:

1. The **first function** is a **code of conduct** that would apply to companies deemed to have “strategic market status,” a designation that would be applied based on transparent criteria that would be re-evaluated every three to five years and would be focused not just on traditional criteria like market shares but also on the degree to which a platform acted as a “gateway” or a “bottleneck.” Companies with strategic market status should be subject to a code of conduct that would be developed through a multi-stakeholder process and should be enforceable. The elements of the code of conduct would be similar to existing antitrust law, including **certain important ‘Do’s’ as, for example, ensuring that business users are provided with access to designated platforms on a fair, consistent and transparent basis; provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and not unfairly restricted from, or penalised for, using alternative platforms or routes to market.** Importantly, smaller businesses and new entrants would not be subject to these rules – the goal of these rules is the establishment of a level playing field but not inhibiting innovation and choice by emerging competitors.
2. The **second function** would promote systems with **open standards and data mobility**. These steps would benefit consumers by allowing them to access and engage with a wider range of people in a simpler manner, fostering more competition and entry – including enabling consumers to multi-home by using multiple systems simultaneously or to switch more easily to alternative platforms. This step is not self-executing, you cannot just order it and expect it to happen. It will require hard work by a new Digital Markets Unit, in coordination with other arms of government, to identify relevant areas, like messaging or social networks, collaboration with companies on necessary technical standards, and careful

consideration to ensure that it is done in a manner that is compatible with other objectives like protecting privacy. Much of this is happening already, including through initiatives like the Digital Transfer Project organized by many of the major tech companies. Companies do not, however, have a fully aligned incentive to facilitate competition through open standards so further pressure can help by providing further incentive for private efforts to continue to become even more robust and/or by creating a more formal regulatory requirement.

3. The **third function is data**. Companies active in the digital economy generate and hold significant volumes of customers' personal data. This data represents an asset which enables companies to engage in data-driven innovation, helping them improve their understanding of customers' demands, habits and needs. Enabling personal data mobility may provide a consumer-led tool that will increase use of new digital services, providing companies with an easier way to compete and grow in data-driven markets<sup>33</sup>. However, in some markets, the key to effective competition may be to grant potential competitors access to privately-held data. Such efforts, however, need to be very carefully balanced against both commercial rights and concerns about privacy. Digital platforms are already making an increasing amount of data open. Continuing to encourage this is important but so is understanding additional steps that could foster more open data.

The Furman Report left it to government to decide how and where best to implement these three functions, but soon afterwards received Prime Ministerial approval for the setting up of the Digital Markets Unit to explore next steps. While the Unit itself has not yet been created, the development of the various functions has since been complemented by a Digital Markets Taskforce and further work by the CMA to help develop new approaches implementing the Furman recommendations. To that end, almost immediately the CMA opened a market study<sup>34</sup> into market power imbalances in the markets for digital advertising. While this is an important area of work, it is limited to one particular aspect of the digi-

tal economy. Nevertheless, the depth of the CMA's work on this area is worthy of significant praise and attention in our study, as it raised many points that could apply more broadly to address market power imbalances, exploitation and exclusion in the digital economy.

### CMA digital advertising market study<sup>35</sup>

In its final report on the digital advertising market released this summer 2020, the CMA identified a number of concerns. Central to these are the CMA's findings that Facebook and Google hold strong positions on, respectively, the markets for display advertising and search advertising. While recognising that 'big' is not necessarily 'bad' in these markets, the CMA concluded that Facebook and Google's positions, combined with market characteristics that inhibit entry and expansion, mean that rivals cannot compete on equal terms. This may lead to weakened competition – reducing innovation and choice and resulting in consumers giving up more personal data than they would like. The CMA also found an adverse impact on newspapers and other publishers, whose share of digital advertising revenues could be squeezed, undermining their ability to produce content.

The CMA opined that its existing antitrust, merger control and consumer protection powers are not sufficient to address its concerns, let alone in a timely and sufficiently market-moving manner. It has therefore recommended an approach grounded in regulation – specifically, that the government establishes a “pro-competition regulatory regime for online platforms”. The proposed regulatory regime closely follows the recommendations in the Furman Report mentioned above. In particular, it adopts the Furman proposal that certain digital platforms should be designated as having “strategic market status”. While the CMA has not expanded further on the exact criteria for determining which firms will have such status (a Digital Markets Taskforce will be advising the UK Government on this point), it has reiterated the Furman Report's recommendation on how the test could be set – broadly, to include platforms that have obtained *gatekeeper positions* and have *enduring market power* over the users of their products.

The regime would then comprise two broad categories of intervention:

- › **An enforceable code of conduct** to govern the behaviour of platforms with market power. The principles within the code would aim to address the potential for exploitative and exclusionary behaviour and ensure transparency and trust for users. Each platform designated as having strategic market status would have its own tailored code.
- › **A range of “pro-competitive interventions”** designed to tackle the sources of market power by overcoming barriers to entry and expansion. In line with the Furman Report, the CMA proposes **data-related remedies**, including requiring third-party access to data and interoperability. But the CMA goes even further than the Furman recommendations, proposing two additional forms of intervention. The first would introduce **consumer choice and address the power of defaults**. The second – the power to order **separation of platforms** (either from an operational or ownership perspective) – could be far-reaching. The CMA recognises that this is a highly interventionist remedy and that there may be issues over the UK acting unilaterally in this area. That said, the CMA is one of the few antitrust authorities that has the ability to require divestment and separation as a remedy following a market investigation reference as we will discuss further below.

Both types of regulatory interventions would be implemented by the Digital Markets Unit. In enforcing the code of conduct in particular, the Unit would have powers to suspend, block and reverse decisions by platforms. It would also be able to impose “substantial” financial penalties for non-compliance.

## German Studies

Apart from the UK Furman Report, another influential source for the new ideas are the studies undertaken in Germany. The Bundeskartellamt, the national competition agency, took an active role in high-profile cases involving digital platforms early on, and it produced several working papers and reports on issues of the digital economy.<sup>36</sup>

Germany also started a legislative process (that at the time of writing has not yet been concluded) on reforming the competition act so as to make it fit for the digital economy. An initial study was written by four experts for the Ministry of Economics.

### The Study on Abuse for the German Ministry for Economic Affairs and Energy<sup>37</sup>

In 2018, the German Ministry for Economic Affairs and Energy published a study it had commissioned on the modernisation of rules on abusive practices. The study, co-authored by academics Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker, dealt with the problems in digital markets. As one of the main concerns, the authors identified the lack of tools for preventing the “tipping” of markets. Classic competition law tools require market dominance (or at least market power under section 20 of the German competition act (GWB)) before an intervention is even possible. The authors of the Study for the Ministry summarise their recommendation as follows:

*“Markets with strong positive network effects can have a tendency to “tipping”, i. e. to tip over into a monopoly. However, such a tipping is often not “natural”, but can be favored or even induced by certain practices of individual players. These practices also include unilateral **behavior** such as targeted obstruction of multi-homing. At present, such conduct can only be covered by antitrust law if the respective actor has market power relevant to antitrust law (i. e. a dominant position, Art. 102 TFEU/Sections 18, 19 GWB, or relative or superior market power pursuant to Section 20 (1) or (3) GWB). Since tipping into a monopoly – once it has happened – can hardly*



*be reversed, it is recommended that the Federal Cartel Office or the courts intervene against unilateral conduct, which favours “tipping” without being justified as a legitimate form of competition on the merits, even below this threshold. It is thus recommended to insert a new section 20a or section 20 (6) GWB, which prohibits platform providers with superior market power in relation to other (not necessarily small or medium-sized) platforms and platform providers in tight oligopolies from abusively hindering competitors, insofar as this is likely to encourage an unnatural “tipping” of the market. The obstruction of multi-homing or switching from one platform to another could be mentioned as a statutory example.”<sup>38</sup>*

The study also mentions specific problems arising from untamed power of digital platforms: information asymmetries that can easily be exploited, the abusive refusal to grant access to data, the buying up of potential competitors (our aforementioned “killer acquisitions”). Yet, these problems are follow-up issues to the build-up of quasi-monopolistic power. With a view to ex ante-regulation, the passage cited above gives a clear indication to what the authors see as the core problem.

The government also assembled a commission to prepare the agenda at the European level. This “Commission Competition Law 4.0” published a report in 2019.

#### **The German “Commission Competition Law 4.0”**

The German government installed a „Commission Competition Law 4.0” to take the debate further. In its 2019 report, the high-level Commission, composed of experts from various fields, sees the rise of platforms with a potential unnatural tipping of markets as a problem, too. It also refers to their role as a gatekeeper. The Commission acknowledges the enforcement difficulties once dominance is achieved:

*“Once a platform has attained a dominant position and benefits from large-scale positive network effects, this position of power becomes difficult to contest. The combination of dominance on the platform market with a gatekeeper position and rule-setting power gives rise to the risk of distorted competition on the platform and the expansion of market power from the platform market to neighbouring markets. In view of the strong steering effect that platforms can exert on their users’ behaviour, the often rapid pace of development on digital markets and the importance of first-mover benefits, non-intervention or late intervention against abusive behaviour typically comes at a very high price.”<sup>39</sup>*

Yet, the Commission does not advocate a lowering of thresholds for intervention. It suggested to introduce binding obligations/prohibitions (“clear rules of conduct”) with a platform regulation on the EU level, e. g. a prohibition of self-preferencing and obligations for data portability and interoperability.<sup>40</sup> These obligations should be made binding only for dominant platform operators. Platforms that are dominant in their niche, yet have a very low turnover or number of users should be exempted.<sup>41</sup>

As a follow-up to the studies and as a pioneering piece of legislation, the Ministry for Economic Affairs and Energy drafted a reform act that has been widely discussed, in particular since it contains a special rule for the GAFA companies.

#### **Legislative Proposal of the German Ministry for Economic Affairs and Energy<sup>42</sup>**

In 2020, the German Ministry for Economics and Energy published a legislative proposal for a revised German competition act (GWB). The over-arching idea of the proposal is to reform competition rules so as to make them fit for the digital economy.

Two provisions stand out that have a certain relation to the proposal of the European Commission. Firstly, the Ministry proposes

to introduce a special norm that moves competition law enforcement into the direction of ex ante-regulation for “undertakings with paramount significance for competition across markets”. In para 1 of this new rule, the Ministry describes the addressees of new obligations:

*“(1) The Bundeskartellamt may issue a decision declaring that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets. In determining the paramount significance of an undertaking for competition across markets, particular account shall be taken of:*

- 1. its dominant position on one or more markets,*
- 2. its financial strength or its access to other resources,*
- 3. its vertical integration and its activities on otherwise related markets,*
- 4. its access to data relevant for competition,*
- 5. the importance of its activities for third parties’ access to supply and sales markets and its related influence on third parties’ business activities.”*

In para 2, such companies are confronted with certain obligations, including a prohibition for self-preferencing or rules on the use of information and interoperability:

*“(2) In case of a declaratory decision pursuant to subsection 1, the Bundeskartellamt may prohibit such undertakings from*

- 1. preferring its own offers over offers by competitors when providing access to supply and sales markets;*

*2. directly or indirectly impeding competitors unfairly on a market in which the respective undertaking can rapidly expand its position even without being dominant, provided that the impediment is likely to significantly impede effective competition;*

*3. creating or raising barriers to market entry or impeding other undertakings in another way by using data relevant for competition that has been collected from the other side on a dominated market, also in combination with other data relevant for competition from sources beyond the dominated market, or demanding terms and conditions that permit such use;*

*4. making the interoperability of products or services or data portability more difficult and thereby impeding competition;*

*5. informing other companies insufficiently about the scope, the quality or the success of the performance they provide or commission, or making it difficult in other ways for them to assess the value of this performance.*

*This shall not apply in case of sentence 1 numbers 1, 3–5 the respective conduct is objectively justified. In this respect, the burden of presenting facts and the burden of proof lie with the undertaking in question. (...)”*

The rule is of interest for two reasons: Firstly, the definition of the norm addressee is an experiment to define digital “gatekeepers” in a legally valid way. Secondly, the obligations under para 2 go beyond the proposals of the two reports in identifying anti-competitive conduct. These obligations can be made binding for the companies without finding of a prior infringement, i. e. ex ante.

Another rule in the draft bill (that still has to be discussed in Parliament at the time of writing) is in section 20 (3a), a specific rule that shall provide a shield against the unnatural tipping of markets:



*“(3a) An unfair impediment within the meaning of subsection 3 sentence 1 shall also be deemed to be given where an undertaking with superior market power on a market within the meaning of Section 18(3a) impedes competitors’ independent attainment of network effects and thereby creates a serious risk of a considerable restriction of competition on the merits.”*

The rule lowers the threshold to “superior market power” and shall provide a legal basis for tackling an undefined number of practices that could lead to an unnatural tipping of markets.

Finally, the Monopolies Commission, an independent governmental advisory body, composed of professors and representatives of business, gave its opinion in 2020 on the reform process.

#### **Recommendations of the German Monopolies Commission<sup>43</sup>**

The Monopolies Commission, an advisory body to the German government in matters of competition policy, published a report in 2020 and had the opportunity to give advice in the light of the European Commission’s proposals already. The Monopolies Commission sees the value of these tools in preventing the concentration of power in digital markets or at least controlling its effects better.

*“To achieve this, abuse by digital market gatekeepers (online platform companies) should be penalised more effectively and more quickly, proceedings under competition law facilitated or expedited to this end, and, where necessary, accompanying regulatory instruments developed.”<sup>44</sup>*

So, this body sees possible additional instruments and enforcement issues as vital.

The proposition of the Monopolies Commission, closely in line with the Commission Competition Law 4.0, goes into the direction of a platform regulation with special obligations for dominant platforms:

*“a special platform regulation subjecting dominant platform companies to additional obligations and stricter supervision beyond Article 102 TFEU could be a useful supplement to the existing Merger Regulation. The Merger Regulation is an instrument that prevents mergers that may result in lasting damage to the market structure. In cases of tipped platform markets, the platform regulation could prevent the risk of dominant platform companies undermining the regeneration of competition and permanently harming consumers.”<sup>45</sup>*

Regarding the content of such a regulation, the Commission speaks of

*“a prohibition on giving preferential treatment to their own services and to stricter interoperability and portability obligations. It could also include provisions on restorative measures.”<sup>46</sup>*

The Commission also advocates a duty for the platform operators to collaborate with competition agencies, rules on the interplay of different regulatory instruments, and to collect national experiences with more far-reaching options (as in the German draft bill).

These studies and reports from various sources plus the Report of the Special Advisers all conclude that digitization poses new risks for competition, that the features of the platform economy are something that has not yet been addressed properly, and that more regulatory intervention is necessary. In particular, the role of gatekeeping platforms is seen as something that is unprecedented in the economy and that merits attention. Such platforms, so the reports concur, can heavily influence the upstream and downstream market, and thereby reduce competition in a structural manner. Tipping of markets and “the winner takes it all”-scenarios can arise from or create opportunities for exclusionary and exploitative behaviour, despite being the necessary result of network effects, natural preferences for single homing, technological lock-ins and zero marginal costs. While the reports do not in all details agree regarding whom to address new rules to, at what point to intervene and what the substance of rules could be, they all acknowledge the gaps left by

enforcement of competition law. **The necessary conclusion is to move into the direction of a stronger ex ante-regulatory framework for the platform economy.**

In the following chapter we will turn to the substantive principles of the new approach.

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- 5 *Katz/Shapiro*, 8 (2) The Journal of Economic Perspectives, 1994, 106; Bundeskartellamt, Arbeitspapier Marktmacht von Plattformen und Netzwerken, 2016; *van Gorp/Batura*, Challenges for Competition Policy in a Digitalised Economy, Study for the ECON Committee, 2015, p. 67; *Evans/Schmalensee*, 3 (1) Policy International, 2007, 164.
- 6 Cf. *Podszun*, Innovation, Variety & Fair Choice – New Rules for the Digital Economy, FPMI Expert Opinion, 2018, p. 23.
- 7 *Cukier/Mayer-Schoenberger*, Foreign Affairs, 2013, p. 28 ff.
- 8 *Eisenmann/Parker/Van Alstyne*, 32 (12) Strategic Management Journal, 2011, p. 1270 ff.
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- 12 EU Commission, 27.6.2017, AT.39740 – *Google Search (Shopping)*.

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- 42 The German version of the government draft bill of 9 September 2020 can be found here: <https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf>. We follow the English translation by D’Kart of the preceding draft of the Ministry, to be found here: <https://www.d-kart.de/blog/2020/02/21/draft-bill-the-translation/>.
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- 44 Monopolies Commission, Biennial Report XXIII, 2020, Chapter I, at para 50.
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## 2. Substantive Principles

All the reports and studies in recent years confirmed that there is a need for remedying the shortcomings of current competition law enforcement and regulation in the platform economy. Digital platforms need a legal framework that is consistent and provides reasonable rules that enable them to work efficiently, and that guarantee that consumers benefit from the reduction of costs and from innovation. The P2B-regulation is a starting point for this as are the rules laid down in the 2019-amendment to the directive on Unfair Commercial Practices (as part of the New Deal for Consumers).<sup>47</sup>

With consensus that some form of framework is necessary, we see it as vital to recall the substantive principles that should govern new rules.

Competition rules have a rather clear set of aims: protect the competitive process as the mechanism of the market economy and promote consumer welfare through this. The larger legislative framework is not confined to purely competition-oriented aims, it may entail further policy goals. For the regulation of the telecommunication sector, for instance, the aim of establishing competition is complemented by the aim to provide appropriate and adequate telecommunication services for users.

### Further political “to dos”

It should be pointed out that a legal framework as discussed in this paper is not everything. The digital economy cannot thrive if politicians do not take action in other fields, too. Actually, as broad as the legal framework suggested here appears, it really only provides a basis for doing business in the digital sphere. Using it to the full advantage of European societies means so much more is needed: from educating people how to use digital tools to investments into the technical infrastructure; from politics that encourages innovation, an entrepreneurial culture and venture capital to measures of support for those who are left behind; from digitizing

the administration and making public sector information widely available to preserving democratic values in a fragmented media world. All this is beyond the scope of this paper, but it should be borne in mind that economic regulation needs to fit into a wider vision of how we wish to live in a digitized world.

The focus here is on economic goals – the guaranteeing of functioning markets. This implies three principles that underlie market theory: freedom of competition, fairness of intermediation and the sovereignty of economic actors to take their decisions autonomously.<sup>48</sup>

These principles are distilled from the reports and proposals mentioned in the preceding chapter, and mirror partly what has been suggested by the British Competition and Markets Authority (CMA) in its high-level recommendations<sup>49</sup> to government for what future legislation should include. The CMA had put forward three high-level objectives of fair trading, open choices and trust & transparency. The fair trading principles are intended to address concerns around the potential for *exploitative* behaviour on the part of the platform, the open choices principles are intended to address the potential for *exclusionary* behaviour, while the trust and transparency principles are designed to ensure that platforms provide sufficient information to users, so that they are able to make *informed* decisions.<sup>50</sup> We focus on related principles but describe them as ensuring: freedom of competition, fairness of intermediation and sovereignty of decision-making. We select these not only for their relevance, but describe them in constitutional language. Indeed, we do so, because we believe they are so fundamentally important that they should not just be fair trading or consumer protection rules. They should have a constitutional character, as befits a new EU platform framework.

### 2.1 Freedom of Competition

Freedom of competition is reduced when undertakings reach a monopolistic position. Competition is at risk in two dimensions with platforms: Firstly, when platforms attain such a market position that the market

“tips” and the competition is dependent on the gatekeeper, the platform operator: Access to one market side for the other is reduced, there is no longer the free interplay of supply and demand. Transactions are structured by the platform. Secondly, on the platform itself, if this serves as a marketplace (as on Amazon for instance) competition should not be restricted. The platform operator moves into a position of guaranteeing competition on the market it opened itself.

Freedom of competition ensures that offers by companies are selected by the customer on the merit of the offer – not due to other offers being invisible or deterred simply due to the strength and superior power of the selected company. This helps ensure that the winning offer is selected by the party demanding the goods or services at question, the customer. Such free competition also drives efficiency and innovation.

## 2.2 Fairness of Intermediation

The functioning of markets requires a minimum level of fairness among market participants.<sup>51</sup> As with competition, this has proved to be a pillar of the market economy, even though the idea of fairness is less entrenched in economic scholarship. If people no longer trust other market participants, they will not invest or consume and the economy will not flourish. Trust requires a basic level of fairness that ultimately has to be guaranteed through regulation. On the EU level, several directives deal with this, in particular the Unfair Commercial Practices directive (2005/29/EC) and the Unfair Contract Terms directive (93/13/EEC).

The principle of fairness is put to the test by the platform industry, as platform operators act as intermediaries and have a position of mediation to several market sides. On the one hand, they often claim a certain objectivity or neutrality of their mediation services, but on the other hand they are oriented towards their own profit maximisation. An information asymmetry arises between the platform operator and the users, which the platform operator can exploit. Offers of the platform operator may become unfair if this maximises the profits of the platform. Assurances by platforms that such exploitation would be contrary to their interests,

and in the digital environment would be rapidly identified and reported, leading to switching, are insufficient. Users will hardly be able to notice since they depend on the platform and information (that could uncover unfairness) is often not available for them – e. g. data of transactions or the ratio behind rankings. In most cases, the platform operator can control the transaction by presenting information, analysing the data, setting certain conditions, nudging users, etc. and use the transaction data for his own purposes.

## 2.3 Sovereignty of Decision-Making

Economic law is also based on a respect for fundamental constitutional values. One of these values is the right to self-determination in important matters of one's own life. Markets rest on this assumption, too: Market participants coordinate their decisions on the market, and this presupposes that they take their individual decisions. The “discovery procedure” of a competition-driven market economy, as once celebrated by Friedrich A. von Hayek,<sup>52</sup> is only possible if individuals express their needs and wishes in their most individual way.<sup>53</sup> The European Court of Justice has consistently held that it is a fundamental principle of competition law that each economic operator “must determine independently the policy which he intends to pursue in the common market, including the choice of persons to whom he makes offers and sells”.<sup>54</sup>

The *Bundesgerichtshof*, the German Federal Court of Justice, relied on the right to self-determination for its 2020-decision in the Facebook competition law case, and pointed at the specific right to determine what happens with a person's own data.<sup>55</sup> According to the court, platforms like Facebook have an obligation under constitutional law to give users a choice what personal data is used and integrated with other data.

Others must thus not predetermine decisions. The restriction on free and informed choice is particularly severe when the decision is taken away from the user, for example when the provider of the operating system on the smartphone has already made numerous subsequent decisions by pre-installation. In addition, digital platforms for consumers

are sometimes built in such a way that an “addictive effect” can arise.<sup>56</sup> Thanks to their data evaluation and superior information, digital platforms have numerous possibilities to control or “nudge” users or make them delegate decisions to the algorithm.

48 On these principles see *Podszun*, *Empfiehl sich eine stärkere Regulierung von Online-Plattformen und anderen Digitalunternehmen*, Gutachten für den Deutschen Juristentag 2020/2022, 2020, p. F40.

49 CMA, *Online platforms and digital advertising*, 2020, Box 1, para 125.

50 CMA, *Online platforms and digital advertising*, 2020, para 80.

51 *Fikentscher et al.*, *FairEconomy*, 2013, p. 149 f.

52 *Hayek*, *Wettbewerb als Entdeckungsverfahren*, 1968, p. 3.

53 See *Drexel*, *Wirtschaftliche Selbstbestimmung des Verbrauchers*, 1998, p. 287.

54 Settled case law since ECJ, 16.12.1975, 40/73, recital 173/174 – *Suiker Unie*; cf. *Podszun*, *Digital Ecosystems, Decision-Making, Competition and Consumers – On the Value of Autonomy for Competition*, 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3420692](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420692).

55 BGH, 23.6.2020, KVR 69/19 – *Facebook*.

56 Cf. *Eyal*, *Hooked*, 2014; *Montag*, *Homo Digitalis*, 2018, p. 25 ff.

### 3. Sensible Rules

Now, what would reasonable rules on substance mean for platforms? We start from the premise that free competition, fair intermediation, and the sovereignty for users in their decision-making need to be preserved. **The European Union could help in this endeavour with specific “Do’s and Don’ts” for platforms. We list some below, but what we mainly want to emphasise is the importance of moving more towards prophylactic rules for preventing harm in the first place, rather than the current enforcement approach of punishing only harms after they have happened. Adding a regime based on positive normative obligations is key to addressing the problems in the digital sector.** It is not enough to empower agencies to catch-up with new problems. Governments have a responsibility to their constituents to get ahead of the problems and prevent harm. Such rules would also define the possibilities for undertakings, and would thus provide legal clarity on the one hand, and a certain dam against ever further regulatory encroachments into business operations on the other hand.

We list the following as policy choices that in our opinion are a baseline for action; more will be needed, and some will need to be changed as markets develop. The list is neither definitive nor encompassing – it more or less reflects the discussion process on substance in many of the papers and studies of the past. Reasonable rules are at the heart of a new framework, yet in our view, the institutional set-up currently needs more discussion than the widely accepted rules. We will therefore turn to institutional questions later in this study.

#### 3.1 Rules for Freedom of Competition

In defining the rules for platforms to ensure freedom of competition, a couple of aspects need consideration. Undertakings with market power should not use this power to compete using their strength or position as lead platform, instead of competing on the merits. Thus, they should be



prevented from implementing exclusionary practices, foreclosing markets or exploiting customers to a degree they would not achieve under competitive conditions. We thus suggest the following rules to ensure that platforms operate not to harm the principle of freedom of competition, as being particularly apt in the digital economy:

**Openness:** Platforms must not impose undue restrictions on the ability of users of the platform (business or consumers) to use other providers that compete with the platform or to compete with the platform themselves.

This rule is aimed at exclusivity arrangements. Such arrangements can take the form of direct contractual obligations or indirect obligations having the same effect or technical restrictions that make it impossible to switch to other providers without a substantial loss.

A particular form of this affecting suppliers and customers are attempts to hinder portability of data. If customers cannot move their acquired information, contacts, etc. to another platform or service provider, competition will not be possible.

The control of exclusivity arrangements has a long tradition in competition law.

**Neutrality:** Platforms must not mislead users or unduly influence competitive processes or outcomes by employing means to self-preference their own services or products (or where the platform derives a commercial benefit) over services or products of competitors.

Such a differential treatment, for instance through rankings that are based on the profitability for the intermediary platform, may be misleading for customers, drain companies that depend on the platform and harm competition. The rationale for this rule can be found in the *Google Search (Shopping)* case, the practice is also currently under investigation in the complaint by Spotify against Apple.

**Interoperability:** Platforms must make it possible for undertakings to build products that are interoperable.

Interoperability guarantees competition, it must not be unreasonably restricted. Similarly, APIs must be open so that third party technology can be integrated and become a competitive tool. Interoperability has become key in the digital economy – where this does not work, the provider of the foreclosed technology will be able to set up technological lock-ins for suppliers and customers. Interoperability is an established feature of competition law ever since the *Microsoft case*.

**On-platform competition:** Platforms that have created marketplaces must ensure that there is free on-platform competition.

If, for instance, competitors agree on prices or discriminate against others, it is the platform operator who needs to take the first steps. This may be a matter for competition by design (taking technological precautions, for instance against the visibility of certain information for other suppliers) or a part of the liability of the organiser of a forum for what happens in that forum. Whoever makes the rules in a marketplace needs to respect the *ordre public* – including anti-trust rules.

At the same time, governments should contemplate introducing a much more competition and innovation friendly business environment for the data economy. One example is the **handling of public sector information**. Public undertakings and authorities in Europe gather huge amounts of information that may easily be used to initiate data-driven business models. The EU's recently amended legal framework, laid out in the Directive on open data and the re-use of public sector information (Open Data Directive, Directive (EU) 2019/1024) provides for some competition-friendly rules, yet practice needs to follow suit so as to establish a real open data framework.

### 3.2 Rules for Fairness of Intermediation

The fundamental rules for fairness vis-à-vis consumers are regulated in the Directive on Unfair Commercial Practices (Directive 2005/29/EC) that has already seen some first rather cautious amendments for the digital economy in 2019.<sup>57</sup> These changes do not suffice to ensure that customers trust platforms. Platforms that act as to several market sides as intermediaries have the possibility and the incentive to abuse this position. Thus, trust needs to be strengthened for all market players – suppliers and consumers alike. The following rules are suggested for discussion to ensure that platforms act fairly:

**Non-discrimination:** Platforms must not discriminate against individual suppliers seeking access to the platform, and may only base any exclusion on substantive, transparent and objective grounds.

In a scenario where one platform won the race for organising the market, competition takes place at the periphery. Suppliers of goods and services need to get access to the platform. In such a gatekeeper situation, discrimination would amount to foreclosure of the market for specific suppliers. It would no longer be the customer who acts as the referee in the market, but the platform operator. Competition on the merits would be reduced. Such kinds of discrimination are viewed critically by in competition law.

**Fair terms:** Platforms must trade on fair and reasonable contractual terms, without exploitative pricing or acts

The basic assumption of contract law is that the contractual partners meet on level playing field and thus are able to secure a win-win-situation. Where one partner has such a structural advantage that the bargaining position is completely out of balance, the law needs to step in and find remedies. This is even more the case where platforms have a gatekeeper position for consumers or businesses. In such a situation they are bound not abuse this

position and impose unfair trading conditions. Such a fairness obligation is enshrined in many rules on imbalanced bargaining positions under contract law – for instance in the Unfair Contract Terms-Directive.

**Controllability of algorithmic decisions, AI and reviews:** Platforms must be transparent and fair about the working of their algorithms – and this needs to be controllable.

Platforms may have considerable influence over the businesses of suppliers using the platform to match with customers. If such platforms change their terms & conditions, their rankings or other parameters, they may spark a domino effect for companies using the platform. The most stunning examples can be found where ranking algorithms are changed and thus companies tumble in their positions, making it virtually impossible for some to reach out to customers. According to the transparency requirements set out in Art. 5 of the P2B-regulation and the new Art. 7 paragraph 4a of the UCP-directive, platforms must disclose key parameters of ranking to their users. These requirements may be extended to further aspects of the business model so that users are enabled to understand the working mechanisms behind the generation of information they use for further transactions. The requirement to disclose ranking parameters for consumers should be extended to search engines. Users should additionally be alerted when artificial intelligence is employed. Reviews and review mechanisms must be fair. What is more, platforms also need to allow audit and scrutiny of their operation by the regulators so that the business operations remain controllable, and – just in case – companies can be held accountable. This does not amount to a duty to disclose the algorithm to regulators, but liability for what happens, must still be ascribed directly to a company.

**Access to justice:** Platforms must submit to an independent arbitration mechanism.

Market actors enjoy the right to seek redress if there are conflicts with business partners. Since the public judiciary is often too slow



and too costly for many disputes, platforms should bind themselves to an arbitration system – for disputes between the platform and users (be it commercial or consumers), but also for disputes amongst users of the platform. This arbitration system should work quickly and serve as a forum that gives quick remedies, and thus benefits of clarity to the platform and users. It is to work independently from the platform, as is partly the case in current arbitration regimes. Companies or users seeking arbitration with the platform may not be excluded or discriminated against in the operation of the platform.

### 3.3 Rules for Sovereignty of Decision-Making

Users merit a particular respect as human beings – not as simple “datafied” objects that can be easily exploited. In civil law and many other fields of the law, sovereignty is an integral part of the most basic understanding of doing business, yet it is rarely spelt out explicitly. In a digital world the sovereignty of users to take their own decisions needs some special attention and should thus be included in a platform regulation. We propose the following rules:

**Access to information:** Platforms must give access to customer and transaction data to the suppliers involved in that transaction. Platforms squeeze in between suppliers and consumers. For companies offering goods or services this means that they may lose the interface with their customers. Information and transactions are often operated by the platform in a way that does not necessarily guarantee a flow of relevant information to the supplier. This means that important business signals (such as price data) may be lost. Therefore, platforms must give access to customer and transaction data to the suppliers involved in that transaction. This idea forms part of the Amazon investigations and is also to be found in section 19a of the German draft bill.

**Respect privacy:** Platforms must offer a real choice on the use of data (which data, which application, which sources, combination of data). As the German Federal Court of Justice has argued, this is not just a matter of privacy rules, but – as in the *Facebook case* – a matter for competition and constitutional law. As a starting point, platforms need to keep the use of data in line with the principle of data minimization (only asking for the data essential for the service) unless customers had a real choice to decide otherwise.

**Give a choice:** Platforms must allow customers to take decisions. These decisions should relate to the most important economic decisions: What services to use, how to spend money. The more such decisions are taken by the operator, the more users and suppliers are driven out of their decision-making capacity (example: introduction of a payment service that has to be used mandatorily, or providing a browser with the operating system without leaving the user a real choice). As in the Microsoft browser case, offering a drop-down-menu may serve as a countermeasure.

**Keep it simple:** Platforms must give users the service they ask for, but not impose mandatory extensions of service. Again, this follows from the line of reasoning set out by the German Federal Court of Justice in the *Facebook case*. Providing all sorts of services, usually aiming at making the customer more dependent or incentivise her to stay for longer in the digital ecosystem, resembles the problem of illegal tying: Competition on the merits is again replaced by the use of leverage effects. Remedies include a fair design of default modes so that informed customer choice is really facilitated.

57 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.

## 4. Parameters of the Institutional Set-up

While possible reasonable rules have been widely discussed by a range of studies, the necessary institutional set-up and the effective enforcement of a potential new European framework has received less attention. We believe that the effective enforcement of these rules must be considered and implemented as soon as possible. We present core ideas of the institutional design in part 5 of this paper, but we first wish to explain the parameters that we see as vital.

Enforcement works well if it is strong and unequivocal, is quick and makes use of the regulatory toolbox so as to give adapted specific answers to the problems arising. To this end, new obligations on platforms must be clear, and readily enforceable. It is key to avoid yearlong proceedings that drag on without impact in the markets. Power imbalances between different actors in the market need special attention since they may unduly influence the ability to complain and to seek legal help. For the business world, it is essential to have clear-cut rules so that investments are safe. At the same time, it is also vital to keep the interpretation and enforcement of the new rules flexible so that enforcement agencies are able to react to new developments.

It would mean achieving the impossible to get all these aims right. Thus, policy choices have to be made. In setting out the parameters of an institutional set-up, we focus on three specific issues that are relevant to the European institutional framework in particular – the internal Commission distribution of powers, the balancing of national and European institutions, and the creation of rules from competition enforcement.

In doing so, we wish to avoid the mistakes that had been made with another enormous regulatory project of the European Union, namely the General Data Protection Regulation (GDPR). The endeavour to find a new framework for platforms has been likened to protecting privacy with the GDPR. The director for the Digital Single Market in DG CNCT has recently

been quoted as speaking about the Digital Services Act as a “world standard” similar to the EU’s General Data Protection Regulation”.<sup>58</sup> This underlines the heavy responsibility on EU regulators to get the institutional design right, but at the same time, in our view we need to learn the lessons from GDPR regulation and improve on it. Without undermining the great success of the GDPR, there is always room for improvement.

### Learnings from the GDPR-enactment

Reactions to the GDPR have been in parts critical:<sup>59</sup> Companies complained that bureaucratic costs for compliance are too high, in particular for smaller and medium sized enterprises. The big players that had already been able to collect a lot of the data were privileged in comparison to start-ups who had to adhere to stricter rules as of enactment of the GDPR. The principle of consent, underlying the GDPR, is often seen as useless in practice if companies can easily lure consumers into consenting – or force them to. When the GDPR came into force after years of negotiations and implementation procedures, some of the rules already looked outdated, and new privacy issues were not integrated. At the same time, any quick adaptation of the GDPR is out of reach due to the burdensome procedures of EU law-making. Thus, it is to be feared that the shortcomings of this regulation are petrified for a while. Finally, enforcement is left to national institutions, the Data Protection Agencies, with some coordination at the European Data Protection Board. This means that enforcement may differ considerably from country to country and often is not really able to take account of the cross-border effects.

We will learn from these mistakes:

- › Compliance costs, in particular for smaller and medium sized companies and for start-ups need to be low.
- › Established players should not have a competitive advantage over those who – upon enactment – have to adhere to new rules from the beginning.

- › Rules on consent may not suffice if bargaining power is imbalanced.
- › The new regulations should have a quick adaptation mechanism so that new developments can be integrated.
- › Enforcement in the digital single market needs stronger emphasis on a European solution.

The first aspect of the parameters for the set-up relates to the specific situation of the platform competences at the European Commission with several DGs working together, all with their different backgrounds.

#### 4.1 Acting in Concert

Observers who are not familiar with the traditional doctrinal concepts of different fields of the law and the intricacies of the European Commission's institutional set-up will probably wonder why two different proposals for regulating platforms are published on the same day with different Directorates of the Commission in the lead: The Directorate-General for Competition published the Inception Impact Assessment for a "New Competition Tool", the Directorates CNCT and GROW put forward the Inception Impact Assessment for the Digital Services Act. Competition law usually works with *ex post*-orders against violations of competition law. Its yardstick is purely competition-oriented. The Digital Services Act has the broader aim of "organising" the digital economy. As part of the field of regulatory law, rules are usually set *ex ante* and require specific obligations from all companies in the sector. It is our view that these two proposals hail from the same political concerns and they must not weaken or conflict with one another, nor duplicate each other's activities, as to do either would thwart their goals.

At the same time, **we propose a much stronger interplay between, in particular, DG COMP and DG CNCT in enforcing the new rules effectively.** We do not want the new rules to be enforced through a dead

hand of regulation, particularly in the digital sector, and so their application and interpretation must remain flexible and dynamic, and informed by market developments. This would necessitate much stronger collaboration between COMP and CNCT, utilising their respective strengths on rulemaking and interpretation on the one hand and evidence-based attention to market developments on the other.

The interplay between the two DGs in the effective enforcement of rules must be carefully managed, and this is best applied through the expertise of the administrative functions of the Commission, and not overly reliant on external views, particularly given strong incentives by platforms to delay or divert these regulatory initiatives.

Taken from a positive side, the internal "competition" within the European Commission may be efficient and innovative in the contest for good ideas. In practice, it will be essential to align the different mechanisms and to have an integral enforcement mechanism that combines competition law tools and regulatory law tools. The ideas of a coherent regulation of digital platforms, ensuring functioning markets, should not be torn apart between different DGs with their own path dependencies or doctrinal differences between antitrust and regulatory law that are outdated. Equally though, if it is decided to create a new enforcer for these tools and rules, then this must not be delayed or bogged down in internecine battles within the Commission, or left wide open to endless lobbying from those to be regulated. The Commission must be firm, and while adhering to its obligations to consult and be transparent, must find the best regulatory mechanism without delay.

Making the DGs act much more in concert means to look at their specific qualities: DG COMP is the only body in the European Commission having a vast experience in direct contacts with undertakings. Officials there are used to leading investigations, interpreting data, defining remedies and sanctions, sometimes battling with parties. Direct enforcement should rest with this body. DG CNCT and DG GROW are strong policy-making departments that have a broader view on economic and social needs in the EU. They can assure that the legal framework for platforms is not out of touch with two essential aims of this Commission: Building the digi-

tal single market and unleashing the power of digital innovation. They also have a view on the social costs that may come with certain platform behaviour as well as with regulation. It is important to connect their policy-making power with the competition principles that are primarily pursued by DG COMP.

## 4.2 European and national, public and private enforcement

Enforcement strategies in the European Union have the strength and weakness of happening in a multi-level-system with different enforcement traditions at different levels. Enforcement can be on the European level as well as on the national level. It can be executed by a public body or can rest on private enforcement. Public and private enforcement may take very different forms: State agencies can work with fines or with a more consensual approach. Private enforcement may rely on individual competitors or on collective actions. And these are just examples for the wide array of features in enforcement.

In our view, it is essential to get the balance right: The EU Commission itself would be overburdened if it had to do everything alone. It needs national support. The cooperation with national agencies established in competition law enforcement is not free from tension, but it is a working mechanism to build on. In the platform economy, European solutions (not national ones) will mostly be important, yet national enforcement also serves as a pace-maker. Thus, coordination should be stronger than in traditional competition law, yet national enforcers should still have their say.

Public enforcement is the decisive pillar of enforcement if the platform in question has already gained considerable market power. In such situations, the imbalance of powers makes private enforcement for most – usually precarious – platform users impossible. Accordingly, public powers need to be strong and leading. Private enforcement has the advantage of direct market insights by the players and possible negotiated solutions. It takes public intervention out of the market. For the time being, however, private enforcement of obligations by individual actors

against platforms with a strategic status would most probably not be efficient. The Commission may however contemplate to introduce collective action by associations of consumers (as specified in Directive 2009/22/EC on injunctions for the protection of consumers' interests) or associations of undertakings (possibly only upon registration) and a rule making Commission findings binding for a follow-on civil law claim for damages as in competition matters. In our model, private complaints would mostly initiate public enforcement. This should serve as a good interim step before further private enforcement is feasible.

The mix of different enforcement regimes sometimes brings about very different experiences: In the competition cases on price parity clauses in the hotel business different national actors in different Member States found very different solutions.<sup>60</sup> The enforcement of the laws implementing the UCP-directive rests on private enforcement in Germany, while most other Member States have public enforcement, including fines. Some call this a welcome competition of ideas, others see it as a patchwork of laws that hinders integration.

In our view, the aim of creating a digital single market and the experiences of the past years on which one can build now, prompt a better aligned European system. This is also the way paved by the recently amended CPC regulation on cooperation in consumer protection rules. Here, the latest regulation tends to strengthen a uniform application of the rules and a coherent EU wide approach while enforcement still rests largely with national authorities.<sup>61</sup>

## 4.3 The Limits of Existing Case Law in Designing New Rules

When looking at the provisions we suggest as reasonable and sensible rules for platform operators it is striking to see that these largely flow from past competition law cases where the ideas had been at the core of investigations. *Google Search (Shopping)* for instance provided the blueprint for the prohibition of self-preferencing, an idea that up to that point had been largely unknown as a regulatory principle for dominant companies. With the careful examination of the principle in the Commission case, it became a concern that became a standard feature of regulatory proposals.

Similarly, the abuse of information provided or generated by suppliers to the platform (or in transactions of the supplier with customers on the platform) by the platform operator for its very own profit purposes – and possibly without a feedback effect to the supplier – has come into the spotlight. Seeing this as a problem only became popular after the European Commission had introduced an investigation against Amazon on these grounds. Different from the *Google Search (Shopping)* case, this case has not yet been finalised so that the content of a substantive rule is far less determined.

There is a significant benefit if regulation can profit from competition law enforcement in this way: Such principles that flow from enforcement practice have been looked at by officials in competition agencies, practitioners from the affected parties and academics. Those principles “surviving” this “vetting” procedure can justifiably so be seen as “tried and tested”.

Yet, three significant disadvantages come with a policy that bases its regulatory rules on preceding competition cases:

- › Firstly, it may take too much time to wait for a substantive assessment and complete examination of certain conduct by a competition agency. Conduct in digital markets is dynamic and large actors have the power to adapt quickly or to roll out new programmes at a quick pace. The fast scaling of business models or commercial practices is in the DNA of Internet firms. Competition proceedings with authorities usually take several years, in particular if new theories of harm are at play. **If the do’s and don’ts in a new tool are based on past experiences, the new tool may miss its point:** New developments that may create the same dangers for tipping markets could possibly not be addressed but in a full-fledged antitrust procedure. The point of ex ante regulation, however, would be to overcome the regulatory time lag and to enable an authority to react quickly.

Interim measures by competition agencies may help to qualify this concern. Yet, interim measures have not been applied in practice very often so far, particularly on the EU level. Only in 2019, the EU Commission for the first time in nearly 20 years imposed an interim

measure against Broadcom.<sup>62</sup> Such remedies are only feasible it seems (as in *Broadcom*) when the market and the company are very well known to the competition authority and the problematic practice is beyond doubt. This is not exactly what the situation is like when a new theory of harm in a digital market is in question.

- › A second, yet minor problem with taking competition law proceedings as precedent is that rule-makers would stay on the path laid out by the competition agency. They would probably not make use of their own normative value judgments in the same way as if they were free to decide. From the perspective of competition-oriented academics this would be welcome, yet **regulation of platforms is not necessarily bound to the very economics-driven approach of competition policy** but could include more far-reaching political ambitions.
- › Thirdly, the “tried-and-tested” may have its boundaries, too. **What works in one situation (as tested in the competition arena) may not work for other companies.** Before taking a rule from a competition case against one individual platform it would be necessary to check whether the rule makes sense in other scenarios with other parties involved, too.

Accordingly, it is vital to design an instrument that is flexible enough to integrate new ideas for substantive obligations without abandoning the high-quality standard of such a “vetting” process and with giving the parties sufficient rights to let their opinion be known.

**If a list of Dos and Don’ts is only taken from case experience it will petrify in a short period of time and will not be able to present a solution to the ongoing efforts of platform operators.**

These are the three main concerns for devising a European institutional set-up for the platform economy: Get the different Directorates to act in concert, involve national enforcers and private actors in a meaningful way, and keep the instrument flexible so as to be able to integrate new concerns in the changing business environment. In the next section, we propose a structure for this.

Before doing so, one aspect should be highlighted: The rights of the parties affected. At the policy stage, those actors potentially affected by new rules do not necessarily need to be in the boat – policy choices have to be made by politicians, and while they need to have an eye on the feasibility and the interests of all market actors concerned, it is also right that it ultimately remains a matter of policy. Yet, when it comes to enforcement of rules, it is of course essential to safeguard the rights of the parties affected.

### Procedural Rights for Parties

It is not in question that undertakings affected by new rules and enforcement need to have their procedural rights respected. They need to be heard, they need to have fair and unbiased investigations, due process, they need to have the right to seek effective judicial redress. Proceedings may need an update in this regard, too: The European Commission in competition matters acts as investigator, judge, jury and executioner<sup>63</sup> at once, a concern that has often been criticised, albeit with many internal checks and balances, and of course, the potential for judicial review. We do not advocate here to change that system completely, yet the current structures have their weaknesses. Going to court often takes too long, hearings could be made more meaningful. The handling of information and processes in general could be streamlined so as to ease the burden of investigations for companies (in particular if they are subjected to a sector inquiry or market investigation without previous findings of suspicious conduct). “Participative” forms of regulation such as self-regulation, co-regulation or “participative antitrust” should be further explored. This is not to permit a tea-party discussion to delay real implementation, but instead to inform and make better targeted the obligations we recommend.<sup>64</sup> We want to see rules such as ours laid out, and interpreted, not preceded by years of delay trying to identify the ‘perfect’ definition of ‘gatekeeper’ or ‘self-preferencing’, which, given the nature of business models, will not exist.

- 58 MLex, Big Tech to see ‘world standard’ for platform rules with EU’s Digital Services Act, official says, 2.9.2020.
- 59 Cf. *Gal/Aviv*, The Competitive Effects of the GDPR, *Journal of Competition Law and Economics* (2020), forthcoming; *Veil*, The GDPR: The Emperor’s New Clothes, *Neue Zeitschrift für Verwaltungsrecht* 2018, 686, available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3305056](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3305056); *Koops*, The trouble with European data protection law, (2014) *International Data Privacy Law* 4(4), 250.
- 60 Cf. ECN, Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016, 2017, available at [https://ec.europa.eu/competition/ecn/hotel\\_monitoring\\_report\\_en.pdf](https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf).
- 61 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Cf. *Podszun*, Verbraucherrechtsdurchsetzung im Mix aus öffentlichem Recht und Zivilrecht: Die reformierte CPC-Verordnung, in: *Festschrift Harte-Bavendamm*, 2020, p. 417.
- 62 EU Commission, Press Release, 16.10.2019, AT.40608 – *Broadcom*.
- 63 See *Marsden*, Checks and balances: EU competition law and the rule of law, 22 *Loy. Consumer Law Review* 62, 2009.
- 64 It is beyond the scope of this paper, however, to go into details regarding this very important aspect of the discussion.



## 5. Effective Enforcement: A New Institutional Design

In this final part of the paper we propose an institutional design for the enforcement of new rules and the interplay of the different actors. We draw inspiration from the Market Investigation regime in the UK, including a case study, for the enforcement structure of the new European tools (5.1). Starting from there, we highlight three features of effective enforcement: Identifying the right addressees with a sophisticated pattern of enforcement and sanctions (5.2); discussing the introduction of a market investigation regime with an encompassing approach and a wide array of remedies (5.3); and suggesting an institutional set-up for a new platform framework (5.4).

### 5.1 Insights from the Market Investigations Regime in the UK

In contemplating the institutional design for the enforcement regime, we wish to examine in particular an interesting hybrid form of enforcement and regulation from the UK. This is the Market Investigations regime, which has developed a system of engaging with market-wide problems, and which goes beyond antitrust enforcement. It is arguably quicker<sup>65</sup> than traditional antitrust enforcement itself, and which also results in a form of ex ante regulatory changes for markets. Most recently, one such inquiry introduced the kinds of duties on data portability and interoperability which the German proposals above recommend. The UK's Market Investigations Regime sits alongside the usual competition tools of merger control, studies and antitrust enforcement, as a complement, and a step further. It is implemented by the UK competition authority itself but involves different processes, allows for deeper insights into market structure and behaviour, and wider and deeper remedies. The processes are still investigatory, but not focussed on identifying infringements of the law. Indeed, the primary focus of the market investigations regime is most directly aligned with the aim of the UK competition regime as a whole, namely, to 'make markets work well for consumers,

businesses and the economy'.<sup>66</sup> As such, the market investigation regime looks at markets that have been identified as likely not working well, for whatever reason, whether it be due to the nature of the market itself (its structure for example), whether it be in behaviour of firms (that may well not even infringe competition law), whether the problem is due to regulatory issues (such as barriers to entry for example) or any combination of structure, behaviour or regulation. As such the corrective interventions that the competition authority can require are not findings of competition law infringements, or related fines, but instead orders to firms to change their behaviour in the market, to order structural changes to companies, including divestment, and/or recommendations to government for regulatory reform.

The test for judging whether a market is ripe for some form of corrective intervention through a 'market investigation reference' is different from that of antitrust law enforcement or merger control. In the UK regime the CMA should only consider launching a market investigation where (i) the scale of the suspected problem, in terms of its *adverse effect on competition*, is such that a reference would be an appropriate response; and (ii) 'there is a reasonable chance that appropriate remedies will be available'.<sup>67</sup>

The substantive test is clearly not a test of whether corporate behaviour or consolidation 'substantially lessens competition' or creates or maintains a 'significant impediment to effective competition'. Nor, given the more intrusive powers permitted under the market investigation regime, is it a more onerous test for the authority, such as a finding that some market or regulatory factor 'unduly lessens competition' as in some regimes. In fact, the test is a much more amorphous one of assessing whether the market structure, behaviour and/or regulation creates an 'adverse effect on competition'. That said, such a market investigation cannot be initiated unless there are strong grounds to believe there is such a problem and that it is reasonable to expect there will be remedies to 'fix' it. Those are the threshold tests for launching a market investigation reference. Only when the market investigation has begun does the authority definitively examine whether there is actually an adverse effect on competition, and *imposes* private remedies on companies or *proposes* remedies to government.

A tool akin to market investigations under the UK regime appears to align well with the European Commission's intention to broaden its powers to considering problems in markets that are not already covered by antitrust enforcement or merger control, but which nevertheless cause problems for competition and consumers, namely through some form of oligopolistic situation short of dominance, which may include some form of existing imbalance of market power or a likely unnatural tipping<sup>68</sup> situation.

The substantive test of an 'adverse effect on competition' may seem amorphous to some.<sup>69</sup> But in our view, the test has to be relevant to the potential problems that are being investigated and the relevant policy choices of the government, or in this case the European institutions. It may be that the Commission and Parliament wish to take a prophylactic approach, and thus err on the side of intervening in markets. In that case a test such as the adverse effect on competition may well be appropriate as it allows greater latitude than stricter tests may do. Or it may be that the European Institutions favour something less intrusive in which case a more strict substantive test may be appropriate (although our current read of the regulatory zeitgeist around digital competition does not lead in this direction). Either way, however, what is important in our minds is not so much the substantive test for intervention (since the available tests are all less than definitive and none is amenable to mathematical certainty). What is more relevant to us and indeed to investigations as a whole are the processes of investigation and inquiry, their thoroughness, and indeed their evidence-base. Here the UK market investigation regime commends itself on a number of counts (perhaps due to its 'amorphous' substantive test.)

**First, we recommend that any new European market investigation regime have tight timetables.** The UK market investigation regime has statutory (i. e. binding) time limits. These mandate a relatively tight time line for investigation and finding of an adverse effect on competition, as well as proposing remedies. All this must be accomplished in eighteen months (with a six month extension only in exceptional circumstances). To those who say this essentially freezes a sector for an over-long period, we would note that

a year and a half is actually an extremely short period compared to existing antitrust investigation time lines for abuse of dominance cases, and even, we would note, for the easiest and most clear object cartel offences. Of course, merger and other activity may continue.<sup>70</sup> Other enforcement action by DG COMP would not be stayed or otherwise delayed during this period; but obviously if remedies come to light in either markets or antitrust/mergers function, then these would be considered pragmatically in terms of how they impact on one another, and ideally remedy market problems efficiently and effectively.

**Second, we recommend that an EU market investigation regime have, as in the UK, a process that is transparent to the public and the parties.** In the UK, investigated companies and third parties have ample opportunities for meetings and hearings with staff and decision makers, and summaries of these are made public in a timely manner, and form an important part of the evidence base that goes into the report. This again compares very favourably to the existing confidential (if not quite 'black box') nature of antitrust investigations.

**Thirdly, we insist on independence of decision-making in any new EU markets regime.** In the UK, market investigation regime great emphasis is placed on the role of the decision making panel which is comprised of independent competition and business experts, who run the proceedings, make all decisions, and are ultimately responsible for the report that the competition authority produces, albeit supported by legal, economist and remedies officials from the authority. There are various reasons for this independence, mainly related to procedural fairness, and the avoidance of confirmation bias or a sense of an authority being complainant, investigator, judge and 'executioner'. The current system evolved from an historical separation of roles between the first-phase investigatory authority (the Office of Fair Trading) and the market investigation regime authority, the Competition Commission. The market investigation is a new independent investigation which looks at the market with a "fresh pair of eyes".<sup>71</sup> This



separation of roles and independence is maintained in the unified Competition and Markets Authority, with the relevant independence being provided through the appointment of panel members for the market investigation, who are appointed by the relevant business and industry minister, but assigned to the specific market investigations through the governance of the authority itself.

If the market investigations regime were a model for a new European regime, we submit that great care should be taken to ensure the necessary independence for decision making about intervening in markets in such a fashion. If a panel system is adopted, as in the UK, we could foresee membership of such panel members coming from independent national experts, whether from competition authorities, regulators, academy or industry, all appointed for the term of the inquiry by, say, the College of Commissioners. We therefore suggest that the decision on a market investigation is taken by the Commission, yet the actual investigation itself should be undertaken by an independent panel with support of the Commission. Alternatively, if a market investigation decision-making panel was to be chaired by or contain European Commission staff then they would have to truly be a *'fresh pair of eyes'*. There are many ways of achieving this of course and competition authorities are set up differently in this regard. Perhaps the separate 'decision divisions' model could be adopted to a similar purpose, so long as panels deciding on the investigation are independent, having no prior involvement in the issue at hand, and have the time to devote to the market investigation. Actual working staff from DG COMP would of course support the investigation, as occurs in the UK, containing markets, legal, economics and remedies expertise, and we would recommend secondments from DGs relevant to the sector being investigated. While we do not believe that independence and adherence to due process, particularly in the hearings, requires judicial supervision, we would open the chairing of panels to those with similar experience in Member States or other EU proceedings, or retired judges.

There is no direct parallel to the market investigations regime in European Commission proceedings, but that is neither an insuperable obstacle in itself, nor need it be necessarily implemented through an independent panel member system of appointments. There are many other ways of ensuring a 'fresh pair of eyes' and fair and open hearings, and indeed the development of such an approach in the EU competition law firmament may well build on existing procedures relating to oral hearings, and perhaps even offer room for much needed improvement of these existing procedures.

Another benefit to raise concerns remedies. The Commission's New Competition Tool is not intended to result in findings of competition law infringements or fines. This aligns well, again, with the UK market investigation regime, which makes no such findings either. The remedies available in the UK however, are significant and can range from ordering changes to company behaviour, or even to their structure indeed extremely rarely including break-ups/divestments, as well as recommendations to government for regulatory change to, usually, lower barriers to entry. For most of the history of the market investigation regime remedies have been largely behavioural, focussing for example on ordering companies to provide better or more information to consumers. This could even include ordering the creation of a price comparison website in some cases. Much has been made of the market investigation powers to order break-ups, but this has been used only extremely rarely, most famously in ordering the sole owner of several large airports to sell off some of its holdings to thus allow competition and a resulting improvement of services offered. Structural remedies have been extremely rare though. The more usual route is a combination of orders to companies to change their behaviour and recommendations to government.

### **Fixing market problems, without blame – but with real remedies on companies**

We do not underestimate the philosophical change required at the EU level to implement a market investigations regime, as considered by the New Competition Tool consultation. We agree though that such a tool is necessary, particularly because of the market structure problems we have identified and the likelihood of harm occurring. The fact that a

market investigations regime already exists in other jurisdictions shows that the concept is not new. We also note that the market investigations power is not used to make life easier for the competition authority, when it cannot meet a particular legal standard to find an infringement, or when it loses a slew of cases in court, but still thinks market change is desirable. That is not the point of the markets tool at all. Indeed, quite the opposite, a market investigation is viewed as appropriate precisely because a competition problem exists despite there being no behaviour infringing the law and thus no usual competition law remedy available. Indeed, in the UK a market investigation should only address problems that might be within the scope of its conventional competition law tools where (a) it has *'reasonable grounds to suspect'* that there are *'features'* of a market distorting competition – as opposed to infringing behaviour of undertakings, and (b) where action under its conventional competition tools would neither be appropriate nor *likely to be effective*.<sup>72</sup> We appreciate that developing such a market investigations tool at the EU level will mark a considerable change from existing approaches, but note that it is a policy choice to add a new tool, that is different from law enforcement, but which of course complements law enforcement, by addressing more systemic market problems, industry-wide market features or multi-firm conduct.

**A set of screens:** We do think it sensible that the EU institutions not be given a blank warrant to investigate whatever they wish, but instead are permitted to initiate the process of requesting – and receiving approval to open – a market investigation, only in particular circumstances involving tipping markets with strong evidence of **structural imbalances of power, gatekeeper features, and contributing problematic practices** – as identified in the various reports above and our proposed rules – which lead the Commission to have **reasonable grounds to suspect** some form of **adverse effect on competition** and with **plausible remedies** able to be identified.

Finally, market investigation findings (as well as the above initial decision to even refer a market to investigation) are subject to judicial review, which is an important and indeed crucial discipline on the processes of coming to substantive findings and remedies. This would doubtless

apply also to the procedures of the European Commission in applying any version of the New Competition Tool. We would only add that judicial review is a sufficient discipline over such an independent, public and fact-intensive inquiry in the UK, and a full-merits appeal thus not necessary (particularly given the lack of any findings of infringement of any law or any fining power). We accept that orders to break up companies or applying price controls are serious interventions, and note that some will argue that there is all the more reasons for market investigation decisions and orders to be subject to full merits appeal. We merely note that to do so would largely require duplicating the entire market investigation period, in a purely judicial setting, which would seriously delay well-evidenced reasons for market change. That is why in the UK, judicial review suffices for such independent inquiries. We merely note that the Commission must consider carefully the rationales for the level of judicial review, and consider the trade-offs in terms of effective use of the new market investigations tool, timing and due process. In addition, in some cases the application and supervision of the remedies is passed over to an expert regulator. We will examine elements of this in the following case study of the market investigation of most relevance to the Commission's deliberations on the New Competition Tool.

**Case study: Opening up platforms, making them work harder for customers, increasing choice and service for consumers – The UK Retail banking market investigation and orders for Open APIs, standards and data portability<sup>73</sup>**

The most relevant market investigation to consider, in discussing tech platforms generally, the types of remedies that were judged helpful, and which may guide the application of the New Competition Tool is that of the UK Retail Banking Market Investigation, in which one of the authors was Deputy Chair.

The CMA market investigation identified a range of long-standing, systemic shortcomings of competition among particular financial platforms, namely retail banks, and in the markets for current accounts for personal customers and for banking services to small businesses.

The CMA found some positive developments such as entry by new banks with some entrants adopting new business models, offering specialist products and exploiting opportunities offered by new technologies, such as digital-only banks. Many problems remained however. Essentially, the older and larger banks, which still accounted for the large majority of the retail banking market, did not have to work hard enough to win and retain customers and it was difficult for new and smaller providers to attract customers. These failings were having a pronounced effect on certain groups of customers, particularly overdraft users and smaller businesses. Customer switching was either made difficult, or where easy and relatively frictionless, was not taken up due to consumer inertia, concerns about cashflow, or a view that all of the providers were equally dissatisfactory so rational laziness/pragmatism meant that even easy and instant switching was “not worth the bother”. Knowing that switching wasn’t a credible threat, banks did little innovation. As such, the CMA found that the sector is still “not as innovative or competitive as it needs to be”.

- › **The CMA put in place a wide range of measures to target the problems. In particular, it required banks to allow their customers to share their own bank data securely with third parties using an open banking standard.** This change would help customers to find and access better value services and enable them to take more control of their finances. This would also enable new entrants and smaller providers to compete on a more level playing field and increase the opportunities for new business models to develop.
- › **The CMA remedies were designed to ensure customers get real benefits quickly from the potential provided by technological change. In particular, new opportunities afforded by the timely introduction of open data standards would enable change that is potentially very wide reaching.**

The CMA recognised that its remedies would have significant implementation costs, in particular for banks, but it found that

the benefits to bank customers would significantly outweigh these costs. Putting personal and small business customers in control of their banking arrangements is at the heart of how the CMA planned to make these markets work better.

- › **The CMA noted that Application Programming Interfaces (APIs) are key to the digital services** used on smartphones and computers. They make life simpler by enabling users to share information, for example location data. They are the hidden technological drivers behind digital applications such as Facebook, Google Maps and Uber.
- › **The CMA found that open APIs can transform the financial services sector, noting the very active and growing FinTech community which has been developing and introducing new products using existing digital technology. Requiring the main banks to adopt and maintain a common open standard will accelerate the pace of this change.** Without the CMA intervention, given the oligopolistic inertia of incumbent banks, the process of developing open APIs could not be guaranteed and could take a long time, with the effect of denying customers the early benefits of these new services. It was therefore also imposing a challenging, but realistic, timeframe on banks for this process.
- › **The development and implementation of an open API standard for banking – the CMA’s main foundation remedy – would permit authorised intermediaries to access information about bank services, prices and service quality and customer usage.** This would enable new services to be delivered by intermediaries and entrants that would be tailored to customers’ specific needs. This in turn would provide more choice to consumers, as well as add a considerable spur to incumbent banks to finally evolve their own offerings, and work harder for their existing customers.

The CMA recognised that it could not accomplish the implementation of all of these changes under its market investigation regime powers and so it created an Open Banking Implementation Entity funded by the main banks to force them to implement the changes. In addition, other regulators such as the Financial Conduct Authority were engaged to create the necessary digital sandbox for testing open data remedies on the obviously very sensitive financial data, as well as testing out various behavioural prompts and other remedies the CMA required.

One can readily see from the above case study that the UK market investigation regime was more than adequate to the task for transforming a relatively oligopolistic platform industry with technological and other remedies that accelerated innovation and consumer benefits. The read-across to other platform issues is not direct, of course, but it shows how a market investigation regime can help make markets work for businesses (e.g. the financial intermediaries, directly, and the incumbent banks and small and medium sized business customers) as well as consumers. In a digital context, the wide range of remedies available and as the Banking market investigation shows, their flexibility, may be especially useful, given the complex set of positives and negatives faced in such markets. As such, as with the Banking market investigation, remedies under a New Competition Tool could be as wide-ranging as requiring data access, data portability, interoperability, enhanced consumer control (including rules around consumer nudges and defaults that currently act to extend market power), or thinking more pro-actively even measures to enhance algorithmic fairness. Not all platforms are alike however, whether they facilitate commerce or communications, primarily, for example. As such, there will be nuances to the problems they create, and thus a need for targeted remedies. Nevertheless, as we argue later, there are certain base line principles to guarantee, for example, competition and fairness, that could be used to enshrine broad rules for 'Do's and Don'ts' in ex ante regulation, for example, with the NCT used to implement the detail in remedies in particular market investigations.

## 5.2 Identifying the Addressees

A key question for the new tools to be implemented is to whom these rules are applicable. Usually, commercial laws do not distinguish undertakings according to size or strategic role on the market. They are universally applicable to everyone in the trade. For platform regulation, however, there is a tendency to have "asymmetric regulation": This means that regulatory provisions do not necessarily target all firms of a certain trade but that some companies are subject to tougher rules than others. New entrants to markets or small-and-medium-sized enterprises could be favoured under such an approach. Regarding the analysis of markets, all undertakings – and consumers – affected should have their say. Rules on proportionality need to make sure that undertakings are not overburdened with bureaucratic requests for information in such an exercise. Yet, the Market Investigation regime in the UK shows that only an encompassing approach, trying to throw light on all the different complexities of business, can guarantee substantial rewards on the second stage of remedies. Such an encompassing approach (as in competition law sector inquiries) also overcomes the many shortcomings of classic market definition in antitrust.

On the remedies stage however it is necessary to identify who can be targeted by orders and rules.

- › The P2B-regulation applies to all online intermediation services and online search engines without further distinguishing. But then, the P2B-regulation, in most of its provisions, only requires transparency.
- › In its 2020-proposals, the European Commission often refers to "gatekeepers", a term that has not yet been defined in the law, but evokes an illustrative metaphor of controlling access to market entry. Others have spoken of "super-platforms".<sup>74</sup>
- › In the German legislative proposal, section 19a is addressed to "undertakings with paramount significance for competition across markets" – a term that is to be further defined and ultimately be decided by the competition authority (and the courts). The wording has been interpreted as being designed for the GAFA companies.

- › The Furman Report introduced the idea of undertakings with a “strategic market status”. A Digital Market Unit would be installed to define which companies have strategic market status. This definition may include companies that have a disruptive force on one sector only (while the German definition may be read as stricter and requires some sort of infrastructural service for the Internet at large).

**We advocate that the platform regulation should generally be applicable to all platforms in its basic form.** The problems that have been diagnosed for competition, fairness and user sovereignty are not necessarily linked to a specific role of a platform, but stem from the characteristics that unite all digital platforms: All platforms provide intermediation services, they work with data, and may attain network effects. The rules suggested here should also be self-evident for all companies: All companies should compete on the merits, in a competitive environment, with fair dealings, leaving users their sovereignty to decide. Enforcement may, however, differ according to size or relevance of the platform. Just as an example: If a platform operator gives preference to its own products over others in rankings, this may be seen as misleading customers if not adequately made clear. Even if it is made clear, however, or disclosed in some way, if the platform is particularly influential, self-preferencing could also unduly influence dynamic competition, harming businesses dependent on the platform, in particular, and in turn, consumers. It is for that reason that regulatory initiatives we have mentioned above seek to ban this practice.<sup>75</sup> There is no reason to distinguish the unfairness of misleading self-preferencing, **however**, depending on whether Amazon or Google does it or an unknown, smaller platform operator.

So long as misleading practices are eliminated, there may be some scope for legitimate self-preferencing in some cases. Also, one can conceive of situations where what appears to be self-preferencing is actually just a form of legitimate product development which benefits consumers. As such, the quick arbitration mechanisms we identify below, could be usefully employed to filter and identify such situations, and either make a finding of no improper self-preferencing in the first place, or an adequate objective justification, on a case-by-case basis, with guidance following on a regular basis.

Exemptions may be made for **new and independent market entrants**. Otherwise, compliance costs for start-ups and the risk of litigation could possibly disincentivise their market entry. After a period of one or two years, such companies should however be able to comply with the requirements as set by the law, particularly since we propose them to be constitutional conditions for participation in the marketplace. (Obviously, the relevant institutions would be open to evidence-based submissions that particular commitments are overly onerous given the size of the undertaking.)

A second exemption should be made for the **Industrial Internet of Things**. Here, the analysis has not yet gone far enough to specify what is necessary in the context of industrial B2B-partnerships. B2B-platforms as part of the Industrial Internet of Things should not be submitted to these rules for now. This line of business has not been in the regulatory spotlight so far, and it is only developing now. In this area, there are no end consumers to be protected. It may be supposed that professional industrial users of platforms are more vigilant regarding their own position than consumers that are drawn on platforms with “free” services.

So, with a general applicability across all companies but for newcomers and B2B-platforms, the platform regulation would establish an encompassing legal framework. The “special responsibility” of “gatekeepers” or “undertakings with strategic market status” should still be taken into account. Yet, this should be a matter for enforcement, not substance.



We propose that the rules identified above (and if need be further such rules) have to be followed by all platforms and search engines but for the ones mentioned above as exempted. Enforcement however should distinguish according to the relevance of the platform for the markets concerned. If the platform is a gatekeeping platform, enforcement needs to be more severe than if the platform is competing with other platforms and distribution channels. In the latter case, enforcement may consist of cease-and-desist orders only. Such cease-and-desist orders would come with the threat of a fine in case of future breach.

If, however, the platform acts as a gatekeeper, enforcement needs to be stricter and may include a fine and further obligations/remedies from the outset.

To take up **the example of interoperability**: The general rule on substance should be that platforms need to ensure interoperability with their products. For a platform that is not particularly powerful it may suffice to require interoperability after a while and to issue a cease-and-desist order if the platform does not react. For a dominant platform operator or a platform with strategic market status, such an order may come with a fine or other remedies, such as more exact structural or behavioural obligations that the enforcer prescribes. Obviously, there would need to be a competence and a clear-cut distinction for this in the rules. Defences based on objective justifications would be available.

Ideally, the pattern of enforcement, depending on the power of the platform, would be made available in guidance or a code of conduct published by the relevant authorities. This would make enforcement more targeted. Such an enforcement pattern could look like this:

## Interoperability

<b>Status of platform</b>  <b>Level of enforcement</b> 	<b>A:</b> Independent new-comer (first two years)	<b>B:</b> Platform with competitors who genuinely act as a constraint	<b>C:</b> Platform with strategic market status	<b>D:</b> Platform is dominant, but not across markets
<b>1: Transparency</b>	+	+	+	+
<b>2: Obligation to ensure interoperability</b>	-	+	+	+
<b>3: Cease-and-desist order possible, but justification possible</b>	-	+	+	+
<b>4: Fine possible</b>	-	-	+	+
<b>5: Further structural/behavioural remedies</b>	-	-	+ / +	- / +

The categories would need to be further elaborated. In particular, it seems vital to identify such platforms that do not have market power in the relevant market, yet have such a paramount importance across markets that a level 3-measure may seem appropriate already. It would be the task of the European Commission's bodies to specify this list in a document that provides legal clarity to platform operators.

Whether the definition in the law goes into the direction of "dominance", "super-platform", "gatekeeper", "strategic market status", "paramount significance for competition across markets" or similar may need further debate.



- › Dominance is a concept established in competition law, based on market shares and plus-factors.
- › Super-platform, a term coined by academics Ariel Ezrachi and Maurice Stucke, takes particular note of the data power and the non-contestability of markets due to the power of the company operating the platform.
- › A gatekeeper is a company that controls access to up- and downstream markets.
- › Strategic market status similarly is defined in the Furman Report as reserved for companies “in a position to exercise market power over a gateway or bottleneck in a digital market, where they control others’ market access”.<sup>76</sup>
- › Paramount significance for competition across markets is defined in section 19a (1) of the German draft bill.

All these terms point to a danger for the market structure. We consider the important element of all definitions that they aim at operators who pose a risk to the market structure and are in a superior, imbalanced bargaining position vis-à-vis users and other businesses. Instead of haggling for the right terminology to no avail it is more important to determine who is able to designate such a status to a company. This competence should lie with the competition authorities on an EU and national level: They are best placed to assess the market structure and the economic role of a company. So, while the platform regulation should entail specific reasonable rules for all platforms, sanctions, consequences and enforcement may differ as in a matrix. Competition authorities should have the competence to say *ex ante* which undertakings fall under the more severe rules of enforcement. The EU Commission could reserve the right to assign status D to a platform while national competition authorities could work on status A to C.

The identification of telecommunication companies that are subject to regulation could serve as an example: Under the German Telecommunications Act the national regulator *Bundesnetzagentur* undertakes a market analysis and identifies markets that may be regulated (cf. sections 10–13 of the German Telecommunications Act (*Telekommunikationsgesetz*)). On these markets, it analyses the competitive situation and designates the undertakings that may fall under regulation due to their market power. The result of this investigation is shared and consolidated with the European Commission. The results of the market analysis need to be revised every three years, but may also be lifted earlier.

Obviously, undertakings being proposed to be submitted to a more severe regime need the right to be heard and a right to have such a decision judicially reviewed before they are subjected to tougher rules.

### 5.3 Introduction of an EU Market Investigation Regime

Essentially, we suggest introducing a tool (the New Competition Tool) that is oriented towards the Market Investigation Regime in the United Kingdom. The strength of this is the encompassing approach (not restricted to violations of competition law rules) and the focus on diverse remedies at the second stage, ranging – as described above – from behavioural remedies to divestiture or even breaking up of undertakings in extreme cases.

There are two notable differences from competition law: Firstly, the focus is on the market, not on isolated infringements of individual players. Secondly, the remedies do not only address private undertakings but also regulatory aspects, e. g. entry barriers through government actions.

Regarding platforms, behavioural and structural remedies may be helpful. It is up to the investigation to describe such remedies in more detail and also to weigh the interests of the parties affected. As mentioned earlier, we could imagine like the following coming from an investigation of the platform economy:

- › Interoperability
- › Data portability
- › Access to data
- › Open APIs
- › Transparency regarding nudges or algorithmic patterns
- › Prohibition of certain dark patterns
- › Standards for consumer choice
- › Code of conduct for the use of default menus or drop-down menus
- › Ranking parameters
- › Digital sandboxes for innovative activities
- › Opening up of Public Sector Information

All these remedies need further specification on a case-by-case basis and this is something that a special body could look into.

These distinguishing features of such an investigation – encompassing market analysis, wide array of remedies – make such investigations much more helpful, yet it also makes public intervention a much more considered issue.

Adding new rules and tools to an enforcer's armoury is always likely to attract some resistance, particularly by those most likely to be investigated. We will not summarise here the already and continued vociferous complaints by industry and many legal advisors to the potential addition of the New Competition Tool. Broadly speaking though they have ranged from the new tool being unnecessary cost on business, to it allowing forum-shopping (e. g., the Commission might be tempted to

use the less onerous new tool when usual enforcement methods are just too difficult); to the new tool having insufficient checks and balances, including a lack of independence (as mentioned a key aspect of the UK market investigation regime is that the investigation is undertaken by independent panel members, although staff of the authority are heavily involved). To us most criticisms of the New Competition Tool miss the point of the consultation exercise, or raise procedural safeguard points that will be well-addressed in the design of the tool.

We take the need for the New Competition Tool as read, and the means by which it is implemented to be in the most procedurally-fair and outcome-neutral manner – the test must be the same one by which the UK market investigation regime is judged: does it assist assessing market problems, coming to results that are evidence-based and procedurally fair, and does it help in crafting remedies (if such are needed) that make markets work well for business and consumers, and doing so in the most fair and proportionate means possible, including with due consideration for likely market developments as well as the need for government regulation to change?

### **Market Investigations as an opportunity for industry – not an interventionist tool for market design by public bodies**

We have considered this balancing act of effective remedies and over-interventionist involvement with care, not least since we are sceptical of “market design” as advocated by some. We do not believe that a panel set up, for instance, by the European Commission can really ‘design’ effective markets. Instead, we believe in the “discovery procedure” (as Friedrich von Hayek put it), driven by the sovereign decisions of market actors. Yet, we also notice the lack of an instrument that systematically allows a competition-minded body to look at the regulatory and private failures of markets that do not serve the customer as good as they could. Apart from some regulated sectors (for which the German Monopolies Commission issues encompassing reports on a statutory basis) markets are largely left without a systematic monitoring. This is good since the freedom of market developments is crucial, yet it also may mean that market failures and imbalances can only be reme-



died if they come to the attention of competition authorities – with the difficulties associated with that.

We wish to make it clear at this point that market investigations and far-reaching remedies shall definitely not lead into a stronger involvement of public authorities. Instead, we understand market investigations as a tool to check the competitive impact of current regulation and the role of certain private “infrastructures”, that may otherwise remain undetected.

Several safeguards shall secure that the institutions operate with a fresh pair of eyes and due process: the composition of the panels investigating, the independence of these bodies, the extensive right to be heard for parties affected, the full transparency to the public, the judicial remedies available and the evidence-based high-quality standard of investigations.

It may be worth adding that the market investigation regime in the UK operates reasonably well without any of the failings that are suggested by critics of the Commission’s New Competition Tool. Indeed, while we would not go so far to say that a potential market investigation is ever welcomed by any sector of UK industry, it nevertheless is still engaged with seriously by all relevant players, and their advisors. One could be facetious and say that this is due to the severe potential remedy of break-up or price-control, which of course focusses the mind of any industry subject to such a market investigation. But in our view, this is not the real reason for industry and advisors’ assiduous engagement with any market investigation. Such severe remedies have only rarely ever been imposed, and so are not really a credible inducement for engagement in and of itself. Instead, in our view, the engagement (which is – admittedly – legally required) is due to the fact that the market investigation regime actually allows for a full analysis of an industry, with all aspects being considered including innovations, efficiencies, regulatory issues and market dynamics.

**In the market investigation regime, there is considerable emphasis placed on hearing industry’s views about the market and regulatory structure, so that a correct assessment of an adverse effects on competition is made, but more importantly, so that any remedies,**

**if judged needed, are proportionate and do not ‘freeze’ a market in aspic for any period of time, but instead go with the grain of technological and regulatory developments.** This is far more welcome to industry than another rationale for having this, sitting with a competition-oriented, strongly economics-based institution such as the DG COMP: If DG COMP does not take up issues, others may do so who do not have the same understanding of the importance of well-functioning markets and the benefits of undistorted competition. **Market investigations are often viewed as a crucial pressure-valve that addresses calls for blunter regulation or even structural break-ups and ensures that evidence-based analysis determines what remedies are needed, rather than voices that may be lobbying for much greater change, often of a snapshot, one-shot, variety, which may well chill innovation for years to come.** This is not to deny that most remedies that come from a market investigation are in the nature of ex ante regulation, they certainly are. But they are usually multiple and tailored to a degree unimaginable in usual regulations. There has never been a case where an industry has not felt ‘heard’ in a market investigation, no matter what result it may have been seeking, or how much it begrudged its being in the regulatory spotlight. As such, remedies are less likely to be ignored or flouted, or appeals from market investigations to arise.

In addition, one must not lose sight of the market investigations regime power to recommend public remedies, ie. to government as well. While only a recommendation, as opposed to an order, this does allow scope for the market investigation to identify problems that exist through government regulation and make recommendations to lower barriers to entry, for example, or other initiatives to foster competition. We foresee much opportunity here regarding government’s holding of for example, public service information.

Drawing from the analysis above, and the consideration of the various reports, recommendations and regimes, we now turn to our recommendations that shall secure the interplay of different tools – the ex ante obligations of reasonable rules as proposed above with a new market investigation tool.

## 5.4 Securing the Interplay

What both the COMP and CNCT/GROW initiatives have in common is that they aim at redressing power imbalances, “taming” those companies that have moved into the role of “gatekeepers” thus remedying problems of market structures that come with platforms squeezing into the supplier-customer relationship, catering to both market sides. The focus of enforcement and the interplay of different institutions needs to rest on certain structural aspects of markets: Is the basic framework for functioning markets intact? Can markets work properly in coordinating supply and demand, based on the individual decisions of market actors? If the basic requirements for this are in place, monitoring of the practices of platform operators can be reduced to a minimum and largely be left to other market participants.

Clearly, we support the introduction of a tool on the European level that is close to the Market Investigation tool in the United Kingdom (see above). Equally clearly, while we view market investigations as a valuable addition to the Commission’s competition toolkit, they are unlikely to provide a complete solution to competition concerns in digital platforms. As such, the Commission’s proposed new *ex ante* regulatory instrument for large digital platforms is necessary. We support both of these initiatives. At the same time, we note that the Commission’s primary structural focus as stated in the consultation has been on tipping markets. We have already stated our view that tipping itself is not problematic without evidence of actual harm to competition. Nevertheless, tipping is the primary manner in which digital markets become structurally problematic – in which market power imbalances or gatekeeper features arise. As such, we relegate the factor of tipping to one of an early warning screen, or *prima facie* rationales for further investigation.

As such, and to assist both of its competition and regulatory initiatives, we recommend that the Commission establish two new units. First, at DG CNCT, a Platform Compliance Unit for new and specific regulatory obligations. And second, within DG COMP an Early Alert Unit relating to tipping markets.

### The Platform Compliance Unit at DG CNCT

At DG CNCT, a new “Platform Compliance Unit” would be formed that is competent for the *ex ante* regulation of platforms, monitoring platforms and issuing compliance orders, as well as forward-looking guidance. To this end, the P2B-regulation would have to be amended and turned into a regulation that provides a framework for digital platforms in the European Union.

In order to retain flexibility, the regulation should foresee two special features: Firstly, there should be a possibility to subject certain undertakings and sectors to a special rule (asymmetric regulation), as described in more detail above. Secondly, and more importantly, the Platform Compliance Unit would need some flexibility in defining new rules without going through the burdensome procedure of an amendment of an EU regulation. This speaks in favour of a more flexible legal provision that can be amended in an easier fashion. Such a rule could take the form of a delegated act, provided that the essential features of rules on remedying structural imbalances in markets are set forth in the basic regulation. New rules should be based on the outcome of a market investigation.

The Platform Compliance Unit would also be in a position to exempt certain platforms from some or all of the obligations. This will be particularly helpful for new market entrants or platforms with less deep pockets so that concentration processes of the large companies (e.g. Google, Apple, Amazon, Facebook) may have a counterweight in the market. Before declaring these obligations binding, the parties would of course be heard and the Early Alert Unit at DG COMP (discussed next) consulted.

### The Early Alert Unit at DG COMP

Within DG COMP, an Early Alert Unit would investigate where a tipping of markets is suspected of developing. To this aim, the Early Alert Unit should regularly monitor markets where it is likely that a platform may change the market structure in the near future. Such an investigation would not be as elaborate as a sector inquiry

or a market investigation, but simply amount to a monitoring and largely be fuelled by publicly available information and voluntary information provided from market players.

If the Early Alert Unit has indications that a competition for the market is going to take place and a “tipping” is likely in the near future, based on scenarios experienced so far, it could suggest that the set of substantive rules (as set out above) are made binding for the relevant platform and be complied with. This would require early communication and concurring decision-making with the Platform Compliance Unit at DG CNCT. This is not to hamstring a nascently successful platform, or impede it from growing swiftly to a position of genuine success, or what we call natural tipping. But that growth must not be through anti-competitive acts or features for example, through exclusionary acts, banning multi-homing, self-preferencing, or non-transparent practices or misuse of data, nor must the tipping itself jeopardise the effective functioning of markets, through, for example, exclusionary or exploitative behaviour.

In addition to this engagement with DG CNCT, the Early Alert Unit would be responsible for assessing the need for a recommendation by the Competition Commissioner to the College of Commissioners for a full market investigation. The College would be the competent body to order opening the investigation and would appoint an independent panel to investigate and determine remedies. The panel would be composed of independent experts, assisted by officials from different DGs and NCAs, coordinated by DG COMP.

We foresee the Early Alert Unit as having the ability to identify the causes of tipping markets, engage with platforms and others to identify the extent to which a further market investigation is warranted, and throughout be able to engage with the Platform Compliance Unit in DG CNCT, to ensure that reasonable rules have been complied with during the platform’s growth. The role of the Early Alert Unit could thus be described as

that of an investigatory arm of DG CNCT’s Platform Compliance Unit. The Early Alert Unit’s function extends to recommending a market investigation (in line with the New Tool proposed above). If it appears that behaviour is occurring that involves a violation of our rules, and this is contributing to the platform’s growth and a potential unnatural tipping of the market, then the solution is not to await another two years of further market investigation. The first act instead is to communicate with the Platform Compliance Unit and get the rules obeyed, and the platform in compliance. This may avoid the rationale for a market investigation and its attendant delay for worthwhile remedies. The operating principle throughout should always be to remedy problems as expeditiously as possible, ideally through mandating compliance with our ex ante rules. To enable quick measures, an appeal against such a compliance order would not have suspensive effect unless otherwise ordered by the courts.

The Early Alert Unit would also be able to propose new substantive rules for the platform regulation to the Platform Compliance Unit at DG CNCT. The proposal would also be vetted by DG COMP’s Chief Economist Team and the Legal Service before being made to CNCT. CNCT would have an obligation to consider and reply substantively to the proposal within a set period of time.

The Early Alert Unit should closely cooperate with national competition agencies and could delegate some of its market monitoring powers to these authorities depending on usual principles of effectiveness. In this regard a more active engagement of the European Competition Network is viewed as useful, as well as proportionate.

### Securing compliance with an interplay of public and private enforcement

Finally, we propose an enforcement mechanism to oversee the compliance of the new rules, and address breaches swiftly.

It would probably overburden the Platform Compliance Unit if it had to oversee compliance with the rules in all instances. Thus, sanctioning mechanisms should come into play that are efficient and decentralised. In our model, we propose a mix of public and private enforcement.

Public enforcement should be similar to the rules in place for the sanctioning of violations of consumer protection rules. Here, the Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (Regulation (EU) 2017/2394, the so-called CPC-regulation) may serve as a model. Each Member State would have to assign a national authority for the enforcement of rules from the platform regulation. Enforcement measures for national authorities would include requests for information, inspections, fines etc. The Platform Compliance Unit would act as central hub for information and coordination of the endeavours.

Additionally, a private enforcement system should be available for users of the platform (consumers, suppliers and competitors): Such a body is necessary since public enforcement in competition law often comes too late, yet private enforcement is difficult in situations where parties with little market power need to sue in public courts for remedies or need to address adjudication bodies set up by the platform operator itself. Ex ante rules and compliance with them can be monitored by the Platform Compliance Unit, akin to a supervisory function, but there needs to be an actual enforcement mechanism to handle disputes, as well as build up precedent.

#### The Platform Complaints Panel

We suggest introducing a Platform Complaints Panel that works like an arbitration mechanism or an ombudsperson for platforms. It should draw on independent adjudicators, potentially with experience in the sectors affected, and offer a rapid remedy to violations that are observed by market participants. The system would thus give a quick remedy to those who wish to stop certain practices by the operator at fast pace. Instead of leaving this to the public judiciary or the Platform Compliance Unit that may be easily overburdened or to an arbitration mechanism set up by the platform operator (as others argue), it would be best to have an independent panel to regulate the claims. Upon direction by the Platform Compliance Unit, certain platforms of a particular status

would be subjected to submitting to such a panel. In this regard we recommend a standing panel of independent adjudicators, supported by staff from CNCT, and with powers to decide on complaints brought by private parties where an allegation of a breach of the rules is made. This Platform Complaints Panel would operate swiftly, relying on a paper-based adjudication mechanism with strict timelines, with the only operating principle being to identify whether a platform is in violation of the rules, identify any objective justifications, and order corrective measures if necessary to restore competition. Appeals may be on the merits, but would necessarily be swift, given the adjudicative approach intended.

The panel would be competent to deal with individual concerns and complaints relating to conflicts of users with the platform, but also users on the platform with each other. A typical example may be that a supplier of goods on a marketplace complains that the platform does not disclose transaction data as required in a possible ex ante rule. The Platform Complaints Panel would look at the case and order a quick remedy for the parties.

Experiences with such rapid adjudication have been positive in different branches of the economy in many European countries. The system would need to align with Art. 11–13 of the P2B regulation that foresee a system of internal complaints handling and mediation. The current system in the P2B regulation, however, is too dependent on the platform operator and does not include consumers.

## 5.5 Conclusion

The ambition of this paper was to go from the consensus that has been formed in public on the necessity of further regulation for platforms to a palpable framework that contains some ex ante rules and an enforcement mechanism, driven by the need to see the competitive impact of platforms and of regulation, aiming at remedies.

In our view, it is necessary to define the principles first that should govern our vision of living in a digitized economy. We stick to the principles of free competition, fair intermediation and sovereignty of users in decision-making. This leads to sensible rules that have to be respected by platforms due to the unique characteristics of digital platforms (operating with network effects and large amounts of data). These rules, often coming from individual competition cases, should go into an ex ante-rulebook for platforms.

The second pillar we see as vital for setting up a framework is the institution of a market investigation regime, modelled according to the experiences in the United Kingdom. The advantage of such a regime is that it enables the body to look into the whole market without biases or pre-determination. It also makes sure to come up with tailored remedies that at a next stage could go into the rulebook as ex ante rules. Obviously, certain safeguards for this regime are vital. In particular, we advocate to make the panel conducting a market investigation largely independent from other institutions and to have external experts on board.

The third pillar of effective enforcement is a regime that is tailored to the deficits with competition cases in the platform economy. Since competition law enforcement proved to take too long, we advocate an interplay of DG CNCT overseeing the reasonable ex ante rules and DG COMP as the strong enforcement body of the Commission. We wish to secure their interplay combining their strengths. An Early Alert Unit is to be set up at DG COMP to step in where a platform is about to gain a “winner takes it all”-position. A Platform Compliance Unit is to be set up at DG CNCT dealing with policy and the ex ante rules for platforms. Both bodies need a close cooperation mechanism. Finally, enforcement should foresee a Platform Complaints Panel that resolves the issues of compliance with the help of market participants in a swift manner. These three bodies strictly address only situations where there is a structural imbalance of powers.

The ideas sketched in this paper are just that – ideas. They do not represent a final conclusion, but are an invitation to discuss with public and private stakeholders how the institutional set-up could be further developed to be fit for the platform economy.

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- 65 The CMA must conclude a market investigation within 18 months from the date that the reference is made (extendable by six months only exceptionally). See 3.5 and 3.6 of Market Studies and Market Investigations: Supplemental guidance on the CMA's approach January 2014 (revised July 2017).
  - 66 Vision, values and strategy for the CMA, January 2014.
  - 67 OFT, Guidance on Market Investigation References, 2006 (original text adopted unamended by the CMA).
  - 68 To be clear: a tipping or tipped market is not, in our view, sufficient rationale for a regulatory intervention; what is needed is some proof of, for example, a consequent adverse effect on competition, or other similar competition-related test, with evidence of exclusionary or exploitative behaviour contributing to or resulting from the tipping.
  - 69 Although this is a matter of some debate, as the usual ‘SLC’ or similar test for other competition interventions is not a bastion of clarity either.
  - 70 Of course, the time line compares far less favourably with merger control proceedings, but in our view the two situations are not remotely comparable, due to inter alia the deal-specific focus of merger review.
  - 71 See Competition Commission, Guidelines for market investigations: Their role, procedures, assessment and remedies, 2013, para. 22. The original text has been retained unamended by the CMA board.
  - 72 OFT, Guidance on Market Investigation References, 2006, (the original text has been adopted unamended by the CMA).
  - 73 The full documentation of the Market Investigation is accessible here: <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>.
  - 74 *Ezrachi/Stucke*, Virtual Competition, 2016, p. 145 ff.
  - 75 Commission Competition Law 4.0, A new competition framework for the digital economy, 2019, p. 50 ff.
  - 76 *Furman/Coyle/Fletcher/McAuley/Marsden*, Unlocking digital competition, 2019, p. 55.

