

Prof. Dr. Rupprecht Podszun: Enforcing digital fairness! Rules for B2P2C-Competition

Executive Summary

1. The objective of this expert opinion is to suggest key rules for regulating third-party intermediation platforms with strong network effects, i.e. for gatekeepers in Business-to-Platform-to-Consumer-constellations (B2P2C). A regulatory framework for such platforms (and ecosystems) should be built on fairness as a guiding principle and on the aim of ensuring competition for all market participants. In particular, it is necessary to target information biases, exclusivity and lock-in effects to the benefit of choice and variety for customers and businesses alike.
2. The rules envisaged here should apply to all B2P2C platforms with a tendency of “tipping”, i.e. operating with strong network effects where platforms tend to gain monopoly positions at the interface of businesses and consumers.
3. The proposals build on the author’s expert opinion “Innovation, Variety & Fair Choice: New Rules for the Digital Economy” (fpmi, 2017). In that opinion, the focus was on the shift in competition where competition is pushed to the periphery, in particular through competition for the market (with the tendency to monopoly); the emergence of ecosystems favouring vertically integrated products; the loss of the customer-interface to platforms with a high potential of abuse; and the emergence of data power. In such “tipping” or “tipped” markets it is essential to ensure innovation, variety and fair choice for consumers. In the 2017 opinion high level principles were suggested, i.a. strengthening of merger control, interoperability obligations and data access rules.
4. Competition law alone is not sufficient to capture the potential harm to competition and fairness. Cases on abuse of market power by dominant platforms and merger control cases serve as important landmark decisions to develop competitive principles for the digital economy. Such sporadic, lengthy proceedings however do “too little too late” for the markets. The European law on unfair commercial practices lacks a central enforcement agency that can keep up with so-called super platforms. National enforcement mechanisms, notably the private enforcement regime in Germany, cannot make up for this deficit. Some market actors thus can profit limitlessly from the violations of the law.
5. The current European Commission’s initiatives for regulating online intermediation services are an important first step to increase transparency in e-commerce and online search. Minimum standards that need to be established in this framework are (i) the obligation to make criteria of

displaying search results transparent; (ii) the obligation to disclose payments for the display of search results; (iii) the obligation to disclose self-preferencing (i.e. the privileging of own services of the platform); (iv) the disclosure of practices limiting the freedom of businesses to offer better conditions outside the platform; and (v) a compensation mechanism for consumers in the form of a right to withdraw and seek damages.

6. A mere transparency regime with fragmented enforcement powers will not prevent such platforms that are in a gatekeeping position from defining the “rules of the game”. Transparency is a too weak remedy if players are not at arm’s length. On the P2C side it does not capture the digital reality in which consumers simply “click away” and accept information, terms and conditions.
7. The EU should thus stipulate clear market conduct and competition rules for B2P2C platforms embracing the following principles:
 - a. ban of nudging consumers by pretending to deliver neutral comparisons while rankings are effectively influenced by remuneration received (neutrality);
 - b. the obligation to provide upfront transparency on criteria for listings including regular updates plus a ban on self-preferencing (ban on self-preferencing);
 - c. the limitation of exclusivity clauses and best price regimes (MFN clauses) in P2B contracts for identical distribution channels, in order to keep up competition across distribution channels, portals and services (ban on exclusivity).
8. The EU should establish a supervisory authority at EU level with enforcement powers for such platform conduct rules, potentially including the power to hand down fines. Such powers should be vested with the EU Commission’s Directorate General for Competition. This body is an experienced and renowned authority with a clear understanding of markets and competition and with the necessary experience for procedures to handle cross-border cases.

The complete opinion can be viewed and downloaded at www.fpmi.de.