Finanzplatz München Initiative

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Enforcing digital fairness!

Rules for B2P2C-Competition

Expert Opinion for Munich Financial Center Initiative

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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 B2P 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.

Table of contents

1. Research question

It is the aim of this expert opinion to make proposals for the ongoing process of platform regulation on the European level. The proposals aim at creating a framework that is open for competition and shaped by digital fairness. This requires substantial provisions for platforms and portals that act as intermediaries between companies and consumers (business-to-platform-to-consumer, B2P2C). It is also necessary to have instruments available that enable a speedy and effective enforcement.

1.1 Starting points

More and more transactions are intermediated through platforms that profit from network effects and that lead to the "tipping" of markets due to the "winner takes it all"-principle.[1] Consumers make their choices for private consumption with the help of search engines and comparison platforms – if their decision has not yet been taken by digital assistants such as Amazon's Alexa.[2] The real suppliers, i.e. the companies providing the goods and services that the consumer ultimately seeks to have, lose access to the consumer. The competition of these suppliers, traditionally seen as a central driver of the market economy, is pushed to the periphery of the platform.[3] This phenomenon was the subject of analysis in the expert opinion "Innovation, Variety & fair Choice – New Rules for the Digital Economy" for Munich Financial Center Initiative.[4] The expert opinion at hand provides impulses for the current attempts in the European Union to create a regulatory framework for digital marketplaces.

In the following part, the deficits of the existing market order and the aims for the future are presented. Chapter 2 describes the current legislative proposals. Chapter 3 contains recommendations for substantive standards for digital marketplaces. Chapter 4 names the addressees of such standards. Chapter 5, finally, presents a proposal for the enforcement of rules.

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1 European Commission, Online Platforms – Staff Working Document, 25.5.2016, SWD(2016) 172; European Commission, Final Report on the E-Commerce Sector Inquiry, 10.5.2017, COM(2017) 229, 12; Federal Ministry of Economics and Energy, Weißbuch Digitale Plattformen, 2017, p. 13 et seq.; Plattform Industrie 4.0, Industrie 4.0 – Kartellrechtliche Betrachtungen, 2018, p. 46 et seq.; Monopolkommission, Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte, 2015, p. 32 et seq.; Bundeskartellamt, Marktmacht von Plattformen und Netzwerken, 2016; Christoph Busch, Fairness und Transparenz in der Plattform-Ökonomie, IWRZ 2018, 147.

2 Cf. Karin Sein, Concluding Consumer Contracts via Smart Assistants, EuCML 2018, 179; Maurice E. Stucke/Ariel Ezrachi, How Digital Assistants Can Harm our Economy, Privacy, and Democracy, 32 Berkeley Technology Law Journal 1239 (2017).

3 Cf. Rupprecht Podszun, Innovation, Vielfalt & faire Wahlmöglichkeiten – Neue Regeln für die digitale Wirtschaft, fpmi-Gutachten 2018, p. 28.

4 See above footnote 3. The report is available at https://www.fpmi.de/de/positionen-details/items/innovation-vielfalt-faire-wahlmoeglichkeiten.html.

1.2 Deficits in the laws on competition and unfair practices

Antitrust law and the law on unfair commercial practices are the two bodies of law governing competition. Their enforcement in the platform economy is limited, so that the protection of consumers and an undistorted competition are no longer guaranteed.

1.2.1 Deficits in the enforcement of antitrust law

Antitrust law with the broad wording of central rules actually is an instrument that can be applied to many constellations. However, public enforcement through agencies with an excellent reputation, the Directorate General for Competition of the EU Commission and national agencies like the Bundeskartellamt in Germany, does not have a widespread impact. The three most important, pioneering proceedings of these companies illustrate the problems of antitrust law enforcement in the platform economy:

- The proceedings of the European Commission against Google for self-preferencing of Google's own price comparison portal in search took seven years to complete.[5] It may be doubted whether the remedies ordered by the Commission (next to the high fine) have any impact in the market. In any case they come too late.[6]
- The Bundeskartellamt's proceedings against Facebook for data harvesting on websites of third parties have not yet been concluded at the time of writing this opinion, but it is already ongoing for three years.[7] The case also meets a lot of criticism since, so the critics say, the case deals with privacy and consumer protection – issues that are not within the competence of the Bundeskartellamt.[8]
- Several competition agencies in Europe acted against most favoured nation clauses (MFN-clauses) of hotel booking platforms with very different results.[9] Up to today, some proceedings have not yet been finally settled; it remains an issue of debate whether MFN-clauses are illegal or not.[10]

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5 European Commission, 27.6.2017, Case 37940 – *Google Shopping*.

6 Cf. on remedies Bo Vesterdorf/Kyriakos Fountoukakos, An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law, JECLAP 2018, 3.

7 Cf. press releases of the Bundeskartellamt, 2.3.2016, "Bundeskartellamt eröffnet Verfahren gegen Facebook", and Bundeskartellamt, 19.12.2017, "Vorläufige Einschätzung im Facebook-Verfahren"; both available at www.bundeskartellamt.de.

8 Cf. Stefan Thomas, Wettbewerb in der digital economy: Verbraucherschutz durch AGB-Kontrolle im Kartellrecht?, NZKart 2017, 92; Tobias Jäger/Daniel Wiedmann, Bundeskartellamt gegen Facebook, Kommunikation & Recht 2016, 217.

9 Overview at Mette Alfter/Matthias Hunold, Weit, eng oder gar nicht? Unterschiedliche Entscheidungen zu den Bestpreisklauseln von Hotelportalen, WuW 2016, 525; recently Landgericht Köln [Regional Court Cologne], 16.2.2017, Case 88 O (Kart) 17/16.

10 See for instance Lisa Hamelmann/Justus Haucap/Christian Wey, Die wettbewerbsrechtliche Zulässigkeit von Meistbe-

Despite the weaknesses of these proceedings, they are landmark cases for the development of principles for competition in the platform economy. Yet, these cases are isolated cases that partly lead to a fragmented market framework in the European Union. The proceedings took a lot of time, were conceptually criticised and only deal with few constellations.[11]

For the application of the competition law-based prohibition of abuse (as regulated in Art. 102 TFEU in European law and in national laws, e.g. sections 19, 20 of the German Act against Restraints of Competition (ARC)), it is necessary to prove market power. Thus, some phenomena of the platform economy cannot be captured: The prohibition of abuses in cases of doubt only applies, once a market has been "tipped", so that only one platform operator remains. This monopolistic situation is to be avoided from a competition policy perspective. The antitrust interventions may come too late. The underlying concept of market definition no longer fits the growing convergence of markets, but this can only be alluded to here.[12] It is a completely open question how the European competition policy positions itself vis-à-vis the aspiring Chinese internet companies such as Alibaba, Tencent or Baidu.[13]

For the markets concerned, competition law enforcement does too little too late.

1.2.2 Deficits in the enforcement of the law on unfair practices

Rules on unfairness are laid down in the Unfair Commercial Practices Directive[14] as implemented in Germany in the *Gesetz gegen den unlauteren Wettbewerb* (UWG). (The UWG also contains rules on protecting competitors.) These rules are generally fit for capturing many forms of unfair commercial practices.

Yet, the wording of the rules is not made for a digital business environment. Thus, in each individual case it is necessary to make the transfer from offline to online, for instance when the principles gov-

günstigungsklauseln auf Buchungsplattformen am Beispiel von HRS, DICE Ordnungspolitische Perspektiven Nr. 72, 2015; Daniel Zimmer/Martin Blaschczok, Most-Favoured-Customer Clauses and Two-Sided Platforms, JECLAP 2014, 187; Maren Tamke, Kartellrechtliche Beurteilung der Bestpreisklauseln von Internetplattformen, WuW 2015, 594; René Galle, Bestpreisklauseln von Hotelportalen und Kartellrecht, WuW 2014, 587; Dietmar Fiebig, Internet-Vergleichsportale und Kartellrecht, WuW 2013, 812.

11 Also critical Stephanie Pautke/Jörg-Martin Schultze, Wettbewerbsbeschränkungen im Kontext digitaler Plattformen, 2018, WUW1279707.

12 Cf. Rupprecht Podszun, Innovation, Vielfalt & faire Wahlmöglichkeiten – Neue Regeln für die digitale Wirtschaft, fpmi-Gutachten 2018, p. 16. See also Sebastian Wismer/Arno Rasek, Market definition in multi-sided markets, OECD Paper DAF/COMP/WD(2017)33, 2017.

13 For the globalisation strategy of these companies, see Kai Jia/Martin Kenney/John Zysman, Global Competitors? Mapping the Internationalization Strategies of Chinese Digital Platform Firms, 2018, available at https://ssrn.com/abstract=3220936. For a critical assessment, see Nicolas Petit, Chinese State Capitalism and Western Antitrust Policy, 2016, available at https://ssrn.com/abstract=2798162. These platforms will not be dealt with explicitly in the following; the addressees of the proposed regulations are independent of specific companies.

14 Directive 2005/29/EC.

erning advertorials (covert advertising) are transferred from print media to online comparison portals. It may happen that a status-quo-bias sneaks in, when a way of doing things has been established online and is seen as the usual and accepted standard although it would still need a critical appraisal.[15]

In Germany, the law on unfair commercial practices is mostly enforced by competitors and private associations in private enforcement. This differs from nearly all other EU member states. Typically, this is done through written notices ("Abmahnung") and preliminary injunctions. This system is quick and efficient, yet it has its limits when the private actors are unable to detect and investigate violations of the law.[16] This happens a lot with digital business models since many platform operators use automation, data processing and algorithms that are difficult to understand from the outside. Commercial practices happen in a "black box". The difficulties of investigation hinder the effective enforcement of the law.

The cease-and-desist-orders only oblige the parties involved in the conflict. There is no broader effect for all market participants.[17] Private enforcement requires finding a party that is willing to bring the matter to court. This is a high barrier in cases of asymmetric power, strong financial means of the counterparty (as is typical for powerful platform operators such as Google) and the uncertainty of how to transfer traditional offline laws into the online world. It is a rare incident in this environment that a consumer association wins a landmark judgement as in the case of the *Amazon Dash Button*.[18]

Germany lacks a central agency that could compensate for this deficit in investigation and enforcement. Unlike in antitrust law there is no central European authority that acts on a level playing field with the globally active platform operators.

1.2.3 Danger of market failure

Being aware of the deficits in enforcement in competition law and the law on unfair commercial practices, there is a danger of market failure in such markets where intermediaries, i.e. the operators of search engines, transaction platforms or comparison portals, are in key positions.[19] These companies act as "gatekeepers" in the business-to-platform-to-consumer segment (B2P2C). They direct

[15] On the *status quo bias* William Samuelson/Richard Zeckhauser, Status Quo Bias in Decision Making, Journal of Risk and Uncertainty 1 (1988), 7.

[16] Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts?, 2018, p. 170 et seq.

[17] Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts?, 2018, p. 172.

[18] Landgericht München I [Munich Regional Court], 1.3.2018, Case 12 O 730/17.

[19] For the concept of market failure, see Michael Fritsch, Marktversagen und Wirtschaftspolitik, 10th ed. 2018, p. 76-77.

supply and demand, for example when Amazon matches suppliers of goods and consumers or when a comparison portal steers the information process of consumers before buying a service. The central operators run "digital marketplaces", and they are responsible for making these marketplaces work. It is a special responsibility for the functioning of marketplaces that stems from their central role as matchmakers and information brokers.

It needs to be stressed that many platform operators contribute in an excellent and innovative way to value creation. Yet, the digital marketplaces are particularly prone for distortion: First, the multi-sided markets are characterised by network effects.[20] This often leads to a competition for the market. Once this competition is won by one platform, competition of platform operators is gone ("winner takes it all"). Competition as a disciplining factor is lost. Secondly, the control over information and data is the central element of decision making of market participants which can be influenced. When for example a search engine favours certain offers without a relevant reason this leads to decisions by consumers based on wrong information and accordingly to the misallocation of resources in the economy. Thirdly, the lack of investigation and enforcement of violations of the law may lead to an "unfairness dividend" that may help companies that act unfairly to raise their financial power. In the medium term, consumers may lose confidence, and other companies may be drawn into violating the law.

These dangers cannot be mitigated adequately due to the deficits in competition and unfair commercial practices law. Thus, there is the danger of a creeping market failure.

1.3 Objective

Instead of spectacular cases that are very limited in their effects (like *Google Shopping*), a rule-based framework for B2P2C-transactions is necessary.[21] This framework needs to be identical and enforced within the EU. Three aims may be identified:

Firstly, it is necessary to guarantee a fair competition on the platform that is not distorted through irrelevant aspects or the self-interests of the platform operator (preservation of *on platform-competition*).

Secondly, alternatives need to be preserved in order not to perpetuate the power of the intermediaries. For this, it is necessary to keep alternative means of information or sourcing available as far as

[20] Jean-Charles Rochet/Jean Tirole, Platform Competition in Two-Sided Markets, 1(4) Journal of the European Economic Association 990 [2003]; David Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale Journal on Regulation 325 [2003].

[21] Cf. Friso Bostoen, Internet Policy Review 2018 7(1), 1, 19, available at https://ssrn.com/abstract=3161328.

possible. Only if there is some residual competition left, the intermediary is forced to act in an efficient and innovative way.

Thirdly, it is necessary to keep the role of the consumer as a well-informed referee or "umpire in the competition".[22] It is the customer's choice that determines success and failure of suppliers. This is the normative idea of "competition on the merits":[23] Undertakings shall succeed in business because of their performance to the consumer, not because of hindering competitors, violations of the law, exploitation of customers or sheer market and financial power.[24] This requires that consumers take their decisions on a correct information basis that is not distorted. Only then, the consumer keeps the role as umpire and does not lose this role to the platform operator.

2. Current legislative initiatives

The EU has already advanced considerably with initiatives for a regulatory framework for the platform economy, pursuing the aims described under 1.3.

2.1 EU plans for platform regulation

At the time of writing this opinion, negotiations take place regarding the European Commission's proposal for a Regulation of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services.[25] The draft of that regulation addresses the Platform-to-Business constellation (P2B).

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22 Cf. Olaf Sosnitza in: Münchener Kommentar, Lauterkeitsrecht, 2014, § 1 UWG para 27.

23 Cf. also Johannes Laitenberger, 10.10.2017, "EU competition law in innovation and digital markets: fairness and the consumer welfare perspective", speech at MLex/Hogan Lovells, Brüssel, p. 5, available at http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf. See also Thorsten Käseberg, Wettbewerbspolitik in dieser Legislaturperiode: 10. GWB-Novelle und Kommission Wettbewerbsrecht 4.0, NZKart 2018, 441, who, as the head of department responsible at the Federal Ministry of Economics and Technology for the upcoming ARC amendment, refers to the concept of competition on the merits.

24 Bundesverfassungsgericht [German Federal Constitutional Court], 6.2.2002, Case 1 BvR 952/90, GRUR 2002, 455. Cf. Peter Ulmer, Der Begriff "Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB und UWG-Tatbeständen, GRUR 1977, 565, 567; Bundesgerichtshof [German Federal Supreme Court], NJW 1976, 2013.

25 European Commission, 26.4.2018, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0238:FIN. For the previous discussions, see https://ec.europa.eu/digital-single-market/en/platforms-to-business-trading-practices. Unless otherwise stated, the comments here refer to this Commission proposal, since it is not foreseeable at the time of writing which adjustments will be made in the further legislative process. For the project as a whole, see Christoph Busch, Towards a "New Approach" for the Platform Ecosystem, EuCML 2017, 227 et seq.; Christoph Busch, Fairness und Transparenz in der Plattformökonomie, IWRZ 2018, 147.

There is also a proposal called "New Deal for Consumers" addressing the relationship of platforms to consumers (P2C).[26] Under this label, the European Commission proposed changes of consumer protection directives including more severe sanctions for infringements.[27]

2.1.1 Draft regulation for P2B

At the heart of the P2B-Draft Regulation there are transparency obligations that need to be followed by operators of online intermediation services and search engines vis-à-vis commercial users. The Draft Regulation deals with constellation such as that of Amazon Marketplace and traders active on that marketplace or Booking.com and hotels. For such P2B-constellations, the Commission identifies certain dangers:

> "The dependence of businesses on certain online services implies that the providers of such online intermediation services have a scope to engage in a number of potentially harmful trading practices which limit business users' sales through them and risk undermining their trust."[28]

This analysis mirrors some aspects mentioned above and underlines – without reservation – the dependence of businesses on intermediaries. The Commission does not mention a market power filter as in competition law. Accordingly, the addressees of the rules are online search engines and online intermediation services according to Articles 1 and 2 of the Draft Regulation.

The Commission essentially proposes the following standards:

- Terms and conditions of the relevant undertakings need to be clear and unambiguous (Art. 3);
- suspension and termination of the contact with a commercial user of the platform need to be based on objective grounds and need to be communicated clearly (Art. 3, 4);
- the parameters of rankings that are most important for business users shall be set out, including the possibilities to influence the ranking by remuneration (Art. 5);
- differentiated treatment needs to be described in the terms and conditions (i.e. in how far the intermediary treats offers of its own subsidiaries differently from offers of other users) (Art. 6);

[26] European Commission, 11.4.2018, A New Deal for Consumers, see press release IP/18/3041, available at http://europa.eu/rapid/press-release_IP-18-3041_en.htm with further information.

[27] European Commission, 11.4.2018, Proposal for a Directive of the European Parliament of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0185. See also Carsten Föhlisch, Der "New Deal for Consumers" der Kommission, Computer & Recht 2018, 583.

[28] European Commission, 26.4.2018, COM(2018) 238, section headed "Reasons for and objectives of the proposal", available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0238:FIN.

- the intermediary shall include information regarding access to personal data, e.g. when the business user wishes to gain access to data generated from the transactions (Art. 7);
- the intermediary needs to set out clearly any restrictions to offer other conditions through different means, e.g. restrictions for users who wish to distribute goods through other distribution channels (Art. 8).

The Commission confines its proposal to transparency obligations. There are no further instructions or prohibitions for specific clauses. This approach may prevent sudden collapses in sales of individual users due to changes in the ranking or the terms and conditions, as had been reported from time to time.[29]

Articles 9-13 contain mechanisms for enforcement. These are explained in more detail in section 5.2 below.

The rules would be an important first step to secure fair competition on the platform and keep alternative means of distribution open. However, as will be shown, the proposal does not go far enough.

2.1.2 Draft directive for P2C

With the "New Deal for Consumers", the Commission aims at aligning consumer protection directives to the digital economy. To this end, there will be a new enforcement regime (see below at 5.2). In substance, as far as is relevant here, the following changes are proposed:

The prohibition of covert advertising will be reformed with regard to online search queries. In the annex to the UCP-directive[30], implemented in Germany in the annex to the UWG, it shall be made illegal not to make transparent that a trader has paid for the promotion (advertorial; paid placement or paid inclusion, Art. 1 No. 6 Draft Directive).

The Consumer Rights Directive[31], implemented in Germany primarily in the *Bürgerliches Gesetzbuch* (BGB), the German civil code, shall have a rule according to which consumers on online marketplaces need to be informed about the key parameters for the ranking of offers (Art. 2 No. 4 Draft Directive).

An explicit analogy to the rule in the proposed regulation regarding differential treatment, i.e. transparency regarding self-preferencing, is lacking.

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[29] See as an example Heise Online, 28.6.2018, "Plötzlich sinkende Downloads: Android-Entwickler fürchten um Existenzgrundlage", available at https://www.heise.de/newsticker/meldung/Ploetzlich-sinkende-Downloads-Android-Entwickler-fuerchten-um-Existenzgrundlage-4093046.html; and Wirtschaftswoche, 29.8.2017, "Wenn der Vertrieb über den Onlineriesen im Fiakso endet", available at https://www.wiwo.de/unternehmen/handel/kleinhaendler-auf-amazon-wenn-der-vertrieb-ueber-den-onlineriesen-im-fiasko-endet/20231368.html.

[30] See above footnote 14.

[31] Directive 2011/83/EU.

The rules in the Draft Directive are aiming at transparency so that consumers can take better-informed decisions. However, the draft also provides that only a minimum of information needs to be on display if the means of communication only allows for limited space and time (Art. 2 No. 6 Draft Directive). This aims at smartphone-displays for instance or voice-controlled digital assistants. The minimum information neither includes information regarding the criteria for selection or presentation of offers nor regarding remuneration to the intermediary.

This hampers the possibility of consumers to act as "umpires" in a competition on the merits.

2.2 Transparency: Necessary, yet not sufficient

Obligations for transparency, as proposed by the Commission, are necessary. Correct information enables informed decisions that are at the centre of the market coordination of supply and demand. Thus, it is welcome to clarify what is seen as essential and how information need to be presented. With a view to practical experience, it is obvious that there is urgent need for action, for example when comparison portals do not make it clear that seemingly neutral rankings were influenced by payments.[32] If such information is missing there is no room for a competition on the merits with a consumer deciding. Transparency alone does not suffice.

The transparency model requires a negotiating situation in which information asymmetries can be reduced. The information shall enable the partner to take a deliberate decision and enter into negotiations.

This model generally does not apply in two constellations: On the one hand there are many situations in the online environment where no contractual relation exists, e.g. in the case of search engines. Google, for instance, does not enter into contracts with the operators of websites. A disclosure of the Google ranking parameters therefore does not open up negotiating leeway. On the other hand, there are constellations of dependence. Without an alternative negotiations or exit strategies are simply impossible. An undertaking that is dependent upon the intermediation services of a platform to sell certain goods to consumers does not profit from its knowledge how bad or how dynamic terms and conditions are. Transparency may enable a better planning of business. Still, these companies remain in the hands of the operator of the portal. The same is true for consumers who – due to high switching costs or lock-in effects – are bound to a platform.

[32] Cf. Bundesgerichtshof [German Federal Supreme Court], 27.4.2017, Case I ZR 55/16, GRUR 2017, 1265 annotated by Philipp Eckel; Oberlandesgericht München [Higher Regional Court of Munich], 6.4.2017, Case 29 U 3139/16, MMR 2017, 703. Cf. also the report of the Bundeskartellamt on the sector inquiry into comparison portals, which was not yet public at the time of the conclusion of this report.

Promoting transparency also means to cling on to an old-fashioned model of regulation: It has been accepted that the simple provision of information does not lead to better or better informed decisions.[33] The "information overload" often leads to a higher degree of ignorance towards the masses of information and not to a more deliberate decision. Consumers in particular, but also companies, do not read and process information, e.g. in terms and conditions. Information is "clicked away".[34] This is an expression of "rational apathy"[35] since the costs of processing information are typically out of proportion. In addition, the decision in favour of ignorance may be rational because consumers are usually protected by cogent law against the most egregious disadvantages in terms and conditions. It is this second step that is lacking the Commission's regulatory toolbox. This is a structural mistake in the European drafts. Transparency can only be the first element of a multi-level model of intervention. Disclosure and the possibility to read need to be followed by an additional protection against particularly surprising or harmful clauses through cogent law. A regulatory model that provides for transparency without additional prohibitions or obligations ignores the existing knowledge about the processing of information in legal documents. It remains toothless.

2.3 The reform discussion in Germany

For the sake of completeness references should be made to reform proposals in Germany. The competition act ARC was amended in 2017 with the 9th amendment and first steps towards the digital economy.[36] The 10th amendment is planned.[37] For this, the Ministry of Economics and Energy commissioned several studies to explore further steps. One study deals with the question of deficits in the enforcement of the law on unfair commercial practices. It explores whether the Bundeskartellamt could step in to add to private enforcement.[38] Another study is devoted to the question how the regime on abusive practices in competition law could be further developed.[39]

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33 Omri Ben-Shahar/Carl E. Schneider, More than you wanted to know: the failure of mandated disclosure, 2014; Gert Straetmans, Misleading practices, the consumer information model and consumer protection, EuCML 2016, 199; Geraint Howells, The Potential and Limits of Consumer Empowerment by Information, Journal of Law and Society 2005, 349; see also Wolfgang Schön, Zwingendes Recht oder informierte Entscheidung - zu einer (neuen) Grundlage unserer Zivilrechtsordnung, Festschrift Canaris, 2007, p. 1191 et seq.

34 David A. Hyman/David J. Franklyn, Search Bias and the Limits of Antitrust: An Empirical Perspective on Remedies, University of San Francisco Law Research Paper No. 2013-15, 2015, available at https://ssrn.com/abstract=2260942.

35 Hans-Bernd Schäfer/Claus Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, 2005, p. 515; Horst Eidenmüller, Recht als Produkt, Juristenzeitung 2009, 641 (650); Hannes Unberath/Johannes Cziupka, Dispositives Recht welchen Inhalts?, Archiv für die civilistische Praxis 209 (2009), 37.

36 See Christian Kersting/Rupprecht Podszun, Die 9. GWB-Novelle, 2017.

37 Cf. Thorsten Käseberg, Wettbewerbspolitik in dieser Legislaturperiode: 10. GWB-Novelle und Kommission Wettbewerbsrecht 4.0, NZKart 2018, 441.

38 Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts?, 2018, available at https://www.bmwi.de/Redaktion/DE/Publikationen/Studien/behoerdliche-durchsetzung-des-verbraucherrechts.html; see also the same, GRUR 2018, 1004 et seq.

39 Heike Schweitzer/Justus Haucap/Wolfgang Kerber/Robert Welker, Modernisierung der Missbrauchsaufsicht für markt-

It is clear to German decision-makers that the relevant regulatory answer to the platform economy must be a European one. Thus, the Ministry of Economics appointed a "Commission Competition Law 4.0" that should serve as a "platform for the debate to further develop the European competition law".[40]

3. Substantive standards

The Commission's proposals should be supplemented by obligations and prohibitions that aim for the objectives identified above (preserving on-platform-competition, keep open alternative ways of distribution, enabling the umpire-function of the consumer).

3.1 Preliminary thoughts

The Commission's proposals try to explore a controversial field of regulation in a step-by-step-manner. Such regulatory self-restraint is, in general, welcome.[41] Yet, taking the test from telecommunication law[42] for answering the question when legislative intervention is prompted shows that it is adequate to intervene in the platform economy. In section 10 (2) of the German Telecommunications Act intervention is approved of for markets,

> "…with high, non-transitory entry barriers of a structural or legal nature, markets which do not tend towards effective competition within the relevant time horizon and markets in respect of which the application of competition law alone would not adequately address the market failure(s) concerned." [43]

The three criteria mentioned here are visible on platform markets: There are high entry barriers due to network effects, there is a tendency to monopolisation, competition law alone does not adequately address the problems. Consequently, a market failure is imminent. At least, we find significant evidence for such a view of platform markets, as seen under 1.2.3. With regard to the fact that the

mächtige Unternehmen, 2018, available at https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.html.

40 See the mandate of the "Kommission Wettbewerbsrecht 4.0", 2018, available at https://www.bmwi.de/Redaktion/DE/Downloads/E/einsetzung-der-kommission-wettbewerbsrecht-4-0.pdf?__blob=publicationFile.

41 Cf. Friso Bostoen, Internet Policy Review 2018 7(1), 1, 19, available at https://ssrn.com/abstract=3161328.

42 Heike Schweitzer/Thomas Fetzer/Martin Peitz, Digitale Plattformen: Bausteine für einen künftigen Ordnungsrahmen, ZEW Discussion Paper 2016, p. 56.

43 The test defined here goes back to recital 9 of the Recommendation of the European Commission of 11.2.2003, 2003/311/EC, so-called "Market Recommendation". See also Plattform Industrie 4.0, Industrie 4.0 - Kartellrechtliche Betrachtungen, 2018, p. 47; Hubertus Gersdorf in: Gerald Spindler/Fabian Schuster, Recht der elektronischen Medien, 3rd ed. 2015, § 10 TKG paras 30 et seq.; Raimund Schütz in: Martin Geppert/Raimund Schütz, Beck'scher TKG Kommentar, 4th ed. 2013, § 10 TKG paras 14 et seq.

following suggestions do not amount to a “regulation of the platform economy”, but would just give some orientation for the activities of platform operators, an intervention is justified. Competitive principles have already emerged thanks to competition authorities and courts so that there is a tested blueprint for codification. The following three recommendations have been developed from these practical experiences. They do not cause significant costs for small and medium-sized intermediaries.

3.2 Neutrality

It is recommended implementing an obligation of neutrality. This means to prohibit that intermediaries take payments into account when placing specific offers in comparison and search results which claim or give the impression of being neutral and objective. The principle of “pay to play” is thus prohibited. The practice of giving preferential treatment in search results to companies that have made a payment to the platform operator is rejected. This requirement of neutrality for the portal operator goes beyond the mere transparency obligation provided for in the Commission's drafts.[44]

3.2.1 Economic justification of the neutrality principle

Search and comparison results are intended to help the consumer decide which products or services to buy. If this is successful, the competitive situation will be improved as the consumer’s function as an umpire or referee can be fully developed. However, if the information is distorted, the consumer makes a decision poorly informed. This leads to misallocations that are harming the overall welfare.[45]

Taking into account payments to the information intermediary leads to such a distortion: The search result is no longer tailored according to neutral-objective criteria from the consumer’s point of view, i.e. to competition on the merits. Rather - from the consumer’s point of view - an irrelevant parameter influences the presentation of results.[46]

The parameter is irrelevant, since the financial remuneration to the intermediary is not a factor that could enrich the selection decision for the product actually demanded by the customer: No consumer chooses a particular car because the car dealer has paid the operator of a comparison portal. The payment refers to an upstream market, not to the actual market where the consumer has to pick her choice. On the contrary, the effect is exclusively negative, as the payment may lead to a prioritisation in the presentation of search results that are actually less favourable for the consumer.

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44 Art. 5 (1) (2) Draft Regulation and Art. 1 No. 6 Draft Directive. Also see above 2.1.

45 Michael Fritsch, Marktversagen und Wirtschaftspolitik, 10th ed. 2018, p. 249 et seq.

46 Cf. Bundesgerichtshof [German Federal Supreme Court], 27.4.2017, Case I ZR 55/16, GRUR 2017, 1265, 1267 annotated by Philipp Eckel.

It must be taken into account that a rationally investing advertiser will only make payments if an advertising effect occurs for the consumer as a result in spite of the irrelevance of the product. Instead of taking her decision on the basis of neutral-objective information, the consumer decides on the basis of information distorted by remuneration. To put it in a nutshell: If the placement in search lists and rankings has been paid for, there is inherent misleading of consumers.

In the medium term, this will shake the confidence in comparisons and search results. As a result, the economically desired provision of comparative information may disappear from the market due to a lack of consumer confidence.[47]

3.2.2 Necessity of regulation

Transparency is not a less restrictive, equally effective means against distortion through remuneration: transparency may at best activate the otherwise lacking consumer scepticism. However, as explained under 2.2, the provision of information is not enough. In the specific case of search results, it should be noted that consumers only consider a few search results anyway. In the *Google Shopping* decision, the Commission impressively confirmed this.[48] According to the Commission, users only take notice of the first three to five search results, all remaining search results are ignored to a large extent. 95 % of all clicks as a result of a search query are set to the first ten search results (see table Rank/Average click rate[49]).

Rank	Average click rate
1.	34.35%
2.	16.96%
3.	11.42%
4.	7.73%
5.	6.19%
6.	5.05%
7.	4.02%
8.	3.47%
9.	2.85%
10. (end of the first general search results page)	2.71%
11. (beginning of the second general search results page)	1.11%
12. and beyond	<1%

The effect that other search results are widely ignored is even stronger with smaller display (e.g. smartphones). And this is particularly true for digital assistants that only offer a very small choice by audio – if at all.

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47 Cf. Heike Schweitzer/Thomas Fetzer/Martin Peitz, Digitale Plattformen: Bausteine für einen künftigen Ordnungsrahmen, ZEW Discussion Paper 2016, p. 13.

48 European Commission, 27.6.2017, Case 39740, no. 454 et seq. - *Google Shopping*.

49 European Commission, 27.6.2017, Case 39740, no. 457 - *Google Shopping*.

This result may be less significant with other comparison portals or search results as opposed to general internet search. Yet, the tendency will be comparable. This means: Transparency does not help meritorious suppliers when ranking positions 1, 4 and 5 are held thanks to payments.

On top of that, the advertising effect still remains: If the consumer does not decide instantly, it will be hard to recall after a while whether the first in a ranking had paid for that position or whether it was the actual performance that had brought it on top of the list.

The advantage of a prohibition in comparison to a disclosure of ranking parameters is that there are no legal conflicts regarding elements of the parameter disclosure. Business secrets, in particular the algorithm itself, may be preserved.[50]

3.2.3 Normative starting points

There are already starting points in the current law for a prohibition of paid placements. Covert advertising, i.e. the lack of disclosure of the underlying remuneration, is prohibited under section 5a (6) UWG or Art. 7 (2) UCP Directive. These standards aim at cases where, for example, a journal prints a contribution that looks like an editorial contribution without it being recognizable that the contribution had been paid for. Transparency must therefore be established.

If such a prohibition was put in place, the operator of a comparison portal would still be able to sell advertising space on its website. However, payment for this may not influence the ranking in any way. When using search results or comparisons, it is the performance-based compilation that the consumer is looking for. In addition, the presentation of search results is much more susceptible to deception than, for example, the layout of a magazine.

There is no justification in the necessary financing of the portal. In principle, this follows from the fact that unfair and economically harmful business models cannot enjoy the protection of the law. The portal operator can finance its business model by advertising in other parts of his website or to find other sources of finance.

Paid placement is also not comparable with the so-called “advertising cost subsidies”, fees paid by companies to retailers for being on display in stationary trade. In offline retail, this does not systematically distort the entire business model of the store: In the shop, information for a downstream transaction is not requested upstream, but it is about the goods themselves. The consumer can view

[50] Cf. Bundesverband der Deutschen Industrie [Association of the German Industry], opinion on the proposed EU Regulation on fairness and transparency for business users of online intermediation services, 18.7.2018, no. 4.

the product and check it on site. The procurement and checking of information is in the consumer's hands. This is exactly different online.

3.2.4 Recommendation

Since paid placements in rankings, search results or ratings distort the information base and offer no added value for the consumer, but are only suitable and intended to mislead her, they are *systematically* unfair. They also lead to a misallocation of resources that is alarming for overall welfare. Since transparency is not enough to offset these negative effects, a ban on paid placements is necessary.

3.3 Ban on self-preferencing

It is recommended banning the favouring of own products or services of the intermediaries in presenting the results of search queries or rankings, the so-called "self-preferencing".[51] The "gatekeepers" of digital marketplaces would thus have an obligation not to discriminate which would go further than the obligation for transparency.[52] This would counter the practice that so-called "white label" products, origin of which is not recognisable for the consumer, but which stem from the company of the operator, replace established products.

3.3.1 Economic justification of the ban on self-preferencing

The self-preferencing of intermediaries for their own offers over those of others is just as much a problem for consumers as is the distortion of the offer through paid placements.[53] Again, instead of neutral and objective information, the ranking is manipulated for reasons unrelated to the merits of the goods or services; accordingly, decisions are made on the basis of misleading information and thus misallocations occur. Consumers face the same phenomenon.

In addition, self-preferencing of platform operators may lead to a monopolisation of other markets, achieved through the leveraging of market power or the exploitation of information asymmetries. Network effects tend to lead to monopolised market structures which are problematic from an economic perspective.[54] Whoever occupies the central interface position in a multi-sided market can use

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[51] This demand for ranking in search results is also supported by the Committee on Industry, Research and Energy of the European Parliament, see opinion of 23.11.2018, 2018/0112(COD), Amendment 56. See also Paul-Jasper Dittrich, Online Platforms and How to Regulate Them, Jacques Delors Insitut Policy Paper 227, 2018, p. 10.

[52] Cf. Art. 6 Draft Regulation.

[53] See above 3.2.1.

[54] Cf. the government reasoning for section 18 (3a) no. 1 ARC, BT-Drucksache 18/10207, p. 49. Critical David S. Evans, Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies, 2017, available at https://ssrn.com/abstract=3009438. In my opinion, Evans' historically grounded analysis overlooks the recent tendency towards immunization of business models, see Ariel Ezrachi/Maurice E. Stucke, Virtual Competition, 2016, p. 145

this as the nucleus of an ecosystem. Within these ecosystems, the gatekeeper can increasingly promote its own services and products, since due to lock-in effects, high switching costs, convenience biases and the control of information, alternative offers are no longer perceived. However, the company's own products and services are not successful due to their good performance. Instead, leveraging effects are used, i.e. the use of power in one segment to favour another, and conglomerate effects, such as the exploitation of portfolio effects or coordination.[55] If the offers from competitors are systematically set aside, performance-oriented on-platform competition cannot develop. Any operator of a marketplace opening up access to third parties is obliged not to abuse its central role. The marketplace business model must then be separated from other activities.

3.3.2 Necessity of regulation

A legislative intervention is necessary. Creating transparency for consumers would be a less restrictive way of regulation. Even this is not provided for in the Commission's Draft Directive, yet – as shown above in 3.2.2 regarding paid placements – transparency would not suffice. The mere explanation of "differential treatment" to business users of online portals as is foreseen in the Draft Regulation may cure some problems. Yet, mere knowledge of discrimination does not yet open the possibility to compete on the merits.

3.3.3 Normative starting points

The prohibition of self-preferencing has been shaped in European law by the Commission's decision in *Google Shopping*.[56] The Commission formulated as a guiding principle:

> "Customers and users should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it."[57]

The case concerned the less favourable positioning of other price comparison portals in Google's search results in relation to Google's own price comparison service. The Commission proved that in several markets this self-preferencing had anticompetitive effects.[58] The Commission did not see any

et seq.

55 Cf. Ernst-Joachim Mestmäcker/Heike Schweitzer, Europäisches Wettbewerbsrecht, 3rd ed. 2014, § 19 para 35 et seq.; Torsten Körber, Die Leitlinien der Kommission zur Bewertung nicht-horizontaler Zusammenschlüsse, WuW 2008, 522, 528 with further references.

56 European Commission, 27.6.2017, Case 39740 – *Google Shopping*.

57 European Commission, 27.6.2017, Case 39740, para 339 – *Google Shopping*.

58 European Commission, 27.6.2017, Case 39740, paras 589 et seq. – *Google Shopping*.

objective justification for self-preferencing.[59] As a result, the Commission confirmed that Google had extended its own market power not on the merits, but by using its leverage, and the Commission thus created a precedent for digital markets.[60]

The Commission based its decision on Article 102 TFEU, i.e. the prohibition of the abuse of market power. However, not every portal operator that would be covered by the regulation recommended here can be qualified as having market power. This recommendation therefore extends the principles of *Google Shopping* to intermediaries in the B2P2C business in general. The normative justification for this recommendation is, on the one hand, consumer protection against market distortion and, on the other hand, the equal opportunities required for marketplaces. In addition, the self-reinforcing effects that are possible by preferring one's own content promote the "tipping" of markets. Platform operators who primarily push their own sales through the smart control of information secure their position and integrate more and more sectors into their economic ecosystem – an expansion strategy the MAGAF companies are known for.[61]

From a legal point of view, the recommendation amounts to a prohibition of discrimination. Platform operators and operators of comparison portal are subject to the obligation of equal treatment because of their activity as actors controlling markets: They establish marketplaces, provide information and coordinate supply and demand. Those who assume this role must also comply with the basic requirements for the functioning of such markets; this justifies the imposition of equal treatment obligations. Discrimination is inadmissible if there is no objective justification for it and if it is capable of placing a company at a competitive disadvantage.[62] There are no consumer-oriented substantive grounds for giving preference to one's own offers, but instead as efficient competitors are hindered. If one's own offers are more favourable for consumers or of better quality than other offers, they can assert themselves in a merit-based competition under the same competitive conditions. If they are not, there is no interest on the part of consumers in having these offers displayed preferentially to others.

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59 European Commission, 27.6.2017, Case 39740, paras 653 et seq. – *Google Shopping*.

60 Cf. Thomas Höppner, Google Search (Shopping): Etablierte Missbrauchskriterien für digitalen Präzedenzfall, WuW 2017, 421.

61 Cf. Jürgen Kühling/Nicolas Gauß, Expansionslust von Google als Herausforderung für das Kartellrecht, MMR 2007, 751. See also the analysis of the European Commission´s decision, 23.2.2016, Case M.7813 – *Sanofi/Google* in Rupprecht Podszun, Dismembering Producers from Customers, Competition Policy International Antitrust Chronicle, 2/2018, 50.

62 Cf. ECJ, 19.4.2018, Case C-525/16 – MEO; Bundesgerichtshof [German Federal Supreme Court], 12.4.2016, Case KZR 30/14 – NetCologne.

3.3.4 Recommendation

Self-preferencing in the presentation of search query results makes it more difficult for the consumer to take a well-informed decision. So far, not even a transparency regime towards consumers has been envisaged. Even if this was the case, the consumer's decision would still be distorted. In particular, discrimination against other offers leads to a strengthening of the already existing tendencies towards monopolisation and expansion of platforms. Other companies start from a less favourable position, even if they are as efficient competitors. Therefore, it is recommended that the operators of digital marketplaces and information intermediaries be obliged to equal treatment of all suppliers in the marketplace, including themselves.

3.4 Ban on exclusivity clauses

In addition to the obligation of transparency[63], it is recommended banning restrictions imposed by intermediaries on undertakings for the provision of their services by other means.[64] Such restrictions include in particular exclusivity clauses, best price clauses (often called "most-favoured nation"-clauses (MFN) or "across platform parity agreements-clauses" (APPA)) or non-compete obligations. For example, companies must in principle be allowed to offer their services on competing platforms or on their own websites at more favourable conditions.

The prohibition of unilateral implementation of such conditions by the portal or platform operator does not deprive the supplier of the possibility to distribute goods under the same conditions through different distribution channels – as long as this happens on its own initiative. It leaves the decision-making autonomy to the supplier and thus also offers an incentive for price reductions if the resulting volume effects can be realised through its own means of distribution.

3.4.1 Economic justification of the ban on exclusivity clauses

Exclusivity arrangements restrict consumer choice and the freedom of suppliers of goods and services. In particular, there may be foreclosure of the market.[65] Exclusivity favours the strongest platform and the strongest portal operator in each case, so that the danger of "tipping" increases with the problematic reduction of competitive pressure. The remaining competition is systematically restricted by a tendency towards uniformity of the offers, since alternative distribution channels can

[63] Cf. Art. 8 (1) Draft Regulation.

[64] This is supported by the Committee on Industry, Research and Energy of the European Parliament, see Opinion of 23.11.2018, 2018/0112(COD), Amendment 67.

[65] Cf. Daniel Zimmer in: Ulrich Immenga/Ernst-Joachim Mestmäcker, Wettbewerbsrecht, 5th ed. 2014, § 1 paras 342 et seq.; Herbert Hovenkamp, Principles of Antitrust, 2017, Ch. 10.8.

only win a competitive edge if they are willing to sacrifice their profits.[66] The incentive for consumers to test alternative distribution channels will be reduced, and the same goes for the incentive for service providers to commit to new portals. This makes market entry more difficult. Competition for innovation is restricted as new offers face more difficulties when trying to win market shares.

In some cases, however, exclusivity obligations also lead to efficiencies: search costs for consumers can be reduced. Investments are amortised because the free-rider problem is solved (e.g. the search is carried out on a particularly innovative platform, but the booking is then made on the provider's website). For this reason, antitrust law applies a differentiated regime to such restrictions balancing the efficiencies in a case-by-case approach.[67] However, the classic efficiency gains in exclusive arrangements are tailored to a vertical supplier-distributor relationship. The differences to the B2P2C constellation are significant.[68]

The negative effects of consumer harm and market foreclosure currently seem to outweigh theoretically conceivable efficiency gains. Therefore, it seems preferable from a welfare perspective to keep markets open for alternative distribution channels as a regulatory concept instead of permitting a regulatory patchwork.

3.4.2 Necessity of regulation

Less restrictive means are not apparent. The simple transparency regime provided for in the Draft Regulation does not bring about any significant improvements;[69] antitrust rules do not suffice, as described above.

3.4.3 Normative starting points

Normative starting points for such a prohibition come above all from competition law, where such clauses have repeatedly come under scrutiny in various constellations, both under Art. 101 TFEU and Art. 102 TFEU.[70]

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66 It is assumed that only the internally calculated price is subject to a commitment.

67 Cf. Daniel Zimmer in: Ulrich Immenga/Ernst-Joachim Mestmäcker, Wettbewerbsrecht, 5th ed. 2014, § 1 GWB paras 342 et seq. with further references; Herbert Hovenkamp, Principles of Antitrust, 2017, Ch. 10.8d.

68 Cf. the examples at Herbert Hovenkamp, Principles of Antitrust, 2017, Ch. 10.8d, and in European Commisssion, Guidelines for Vertical Restrictions, 2010/C 130/01, no. 128 et seq.

69 See above 2.2.

70 Cf. Bundeskartellamt, 4.12.2017, Case B6-132/14-2 – *CTS Eventim*; Georg-Klaus de Bronett in: Gerhard Wiedemann, Handbuch des Kartellrechts, 3rd ed. 2016, § 22 paras 104 et seq.; Daniel Zimmer in: Ulrich Immenga/Ernst-Joachim Mestmäcker, Wettbewerbsrecht, 5th ed. 2014, § 1 GWB paras 342 et seq. with further references; Herbert Hovenkamp, Principles of Antitrust, 2017, Ch. 10.8d.

In addition to the case law on best price clauses, the European Commission's *Google Android* decision must also be mentioned for the digital sector. The Commission prohibited that Google perpetuates its own strength in various markets by imposing various restrictions on the use of the Android operating system.[71] This, too, was a case of barring alternative ways for reaching consumers without Google.

3.4.4 Recommendation

Restrictions on alternative paths of distribution automatically give rise to restrictive effects on competition. This affects consumer choice and competition for innovation in particular. The fact that these are offset in the online sector by efficiencies is not evident. It is therefore recommended designing the rule in Art. 8 of the Draft Regulation not as a rule for transparency but as a standard prohibition.

3.5 Perspectives

Some rules recommended here are already in the law at present in certain constellations. Other problems continue to be addressed by antitrust proceedings, as manifested in the initiation of proceedings against Amazon in 2018 by the European Commission (for the handling of data) and the Bundeskartellamt (for business terms and conditions).[72] The rules recommended here represent a first regulatory step for digital marketplaces and information intermediaries – no more and no less. This makes it easier for all participating market actors in terms of legal certainty. The steps envisaged here do not lead to an inhibition of innovation. Instead, they guarantee that good-value offers reach the consumer and that the consumer may decide accordingly.

In Art. 14 of the Draft Regulation, the Commission itself provides for a review of the provisions every three years. This is intended to ensure that any over-regulation or shortcomings can be quickly identified and remedied.

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[71] European Commission, 18.7.2018, Case 40099 – *Google Android* (not yet published).

[72] Cf. Competition Policy International, 19.9.2018, report "EU: Vestager opens probe into Amazon", available at https://www.competitionpolicyinternational.com/eu-vestager-opens-probe-into-amazon-use-of-data-about-merchants; Bundeskartellamt, 29.11.2018, press release "Einleitung eines Missbrauchsverfahrens gegen Amazon", available at www.bundeskartellamt.de.

4. Addressees of the rules

The recommendations made here are intended to apply to B2P2C-platforms and B2P2C-portal operators in markets where there is a risk of tipping due to network effects. The rules would address precisely those operators of portals, platforms and search engines that occupy the interface between consumers and suppliers, that control the flow of information and that can potentially monopolise this interface.

The rules laid down in the Draft Directive of the Commission[73] address all undertakings equally. However, specific information obligations are foreseen for "online marketplaces". An online marketplace is defined as a "service provider which allows consumers to conclude online contracts with traders and consumers on the online marketplace's online interface" (Art. 2 (1) No. 19 Draft Directive).

The Commission's Draft Regulation is aimed at "online intermediation services and online search engines" (Art. 1 (2) Draft Regulation). According to Art. 2 (2) Draft Regulation, online intermediation services are transaction platforms which enable companies to enter into transactions with consumers. According to Art. 2 (5) Draft Regulation, online search engines are classified as such if they "allow users to perform searches of, in principle, all websites".

4.1 B2P2C

It is recommended that, in principle, the addressees of the Directive and the Regulation be adhered to. It should be made clear that the scope of application is broad and includes both comparison portals and social networks, even if contracts are not concluded directly.[74] Obligations laid down in the Directive should not be linked to a transaction, so that other providers (search engines, comparison portals) which have a particular influence on the consumer's choice are also covered.

If this proposal is followed, a framework will emerge that is fully geared to hold such platforms responsible that control the interface between consumers and suppliers. The companies addressed by the mandatory standards are potential "gatekeepers". Since such a position presupposes a multi-sided market, the regulations cover such constellations in which network effects play a role.[75] With network effects at play, there is always a risk that competition for the market will arise, leaving only one platform at the end. A further distinction between different types of platforms is not neces-

[73] See above 2.1.
[74] Cf. Christoph Busch, Fairness und Transparenz in der Plattformökonomie, IWRZ 2018, 147, 148.
[75] Cf. Jean-Charles Rochet/Jean Tirole, Platform Competition in Two-Sided Markets, 1(4) Journal of the European Economic Association, 2003, 990 et seq.

sary.[76] The phenomenon of network effects is typical for multi-sided markets. In addition, the rules recommended here are tailored to those types of behaviour that typically lead to consumer harm and restrictions of competition. The rules therefore do not represent an overregulation.

4.2 Referencing "intermediation power "

The starting point for the obligations recommended here is that some companies can significantly control the decisions of other market participants through the distribution of information and the centralised coordination of supply and demand. This applies – to varying degrees, but essentially identically – to the operators of platforms, comparison portals, search engines and even more so to the operators of economic "ecosystems". They all offer an infrastructure for the economic decision-making of other market participants. They have "intermediation power".[77]

This term is also a central element in the study for the German Federal Ministry of Economic Affairs and Energy by *Schweitzer/Haucap/Kerber/Welker*, who propose to include "intermediation power" as a starting point for market dominance in antitrust law.[78] This proposal is welcome since it clarifies that economic power does not only derive from strength in supply or demand but also from intermediation services.

At present, competition law, which in principle covers situations of market power, is not sufficient for stating this special responsibility of intermediaries, since it presupposes market dominance or dependency for the application of sections 19, 20 of the German ARC or Art. 102 TFEU.

Proving dominance is always very difficult and can only be achieved in individual cases. The problem is that the current approach of defining markets and determining market power hardly adequately reflects the economic role of platforms.[79]

In turn, proving dependency often presupposes that dependent companies stand up against those actors on whom they are dependent, which makes enforcement considerably more difficult. Victims of dependency will hardly name and shame their superiors.[80]

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[76] Cf. Andreas Engert, Digitale Plattformen, Archiv für civilistische Praxis 218 (2018), 304, 305 et seq.

[77] For the increasing use of the intermediary as the responsible person in other areas of law see Boris Paal, Vielfaltssicherung bei Intermediären, MMR 2018, 567 (media law); Gerhard Wagner in: Münchener Kommentar zum BGB, 7th ed. 2017, § 823 BGB paras 733 et seq. (tort law); Ansgar Ohly, Die Verantwortlichkeit von Intermediären, Zeitschrift für Urheber- und Medienrecht 2015, 308 (intellectual property rights).

[78] Heike Schweitzer/Justus Haucap/Wolfgang Kerber/Robert Welker, Modernisierung der Missbrauchsaufsicht, 2018, p. 66 et seq.

[79] Cf. Andrea Lohse, Marktmachtmissbrauch bei Plattformen?, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 2018, 321; Maren Tamke, Marktmacht in digitalen Märkten nach der 9. GWB-Novelle, NZKart 2018, 503; Bundeskartellamt, Marktmacht von Plattformen und Netzwerken, 2016.

[80] Cf. Bundeskartellamt, 3.7.2014, Case B2-58/09, paras 86 – *Edeka*.

In view of these shortcomings, the model proposed here is preferable: it sets minimum standards for all digital marketplaces and information portals irrespective of the specific position of the intermediary.

4.3 Recommendation

The decisive factor in intermediation is the infrastructural, centrally coordinating character of this service of brokering information or transactions, so that a gatekeeper position is automatically given. Intermediaries in the B2P2C-business can control both the supply decision of suppliers of goods and services and the demand decision of consumers. It is adequate to assign a "special responsibility" for the functioning of the markets within the meaning of the case law of the European Court of Justice to companies with such a power at this key point.[81]

5. Enforcement issues

The substantive standards require effective enforcement. In addition to existing proposals, it is recommended that a European supervisory authority be set up at the EU Commission's Directorate-General for Competition.

5.1 Requirements

In the platform economy, competition agencies (and, outside Germany, also consumer protection agencies) are currently working on cases as are private plaintiffs (e.g. consumer associations). However, the proceedings initiated in this way do not achieve comprehensive legal protection:

- The investigation of infringements of consumer protection laws is often not possible for private parties.[82] It may be possible with powers of a public authority, yet at present there are no competent public agencies in Germany (and at central level in the EU) that enforce the rules on economic consumer protection.
- The proceedings do not have a widespread effect for other platform and portal operators, as civil court rulings only have an *inter partes* effect and decisions of the competition authorities only bind individual companies.[83]

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81 Settled case law since ECJ, 9.11.1983, Case 322/81, para 57 – *Michelin*. See Andreas Fuchs/Wernhard Möschel in Immenga/Mestmäcker, EU-Wettbewerbsrecht, 5th ed. 2012, Art. 102 AEUV para 130.

82 Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts, 2018, p. 170 et seq.

83 Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts, 2018,

- For individual consumers, but also for associations, there is often no incentive to take action against infringements of the law because the financial loss is scattered damage or because the risks of litigation are too high, especially with opponents with "deep pockets".[84]
- The approach in the EU is nationally fragmented. In the MFN-clauses cases with hotel booking platforms, for example, there were several divergent decisions in different EU member states.[85]
- Antitrust proceedings achieve their effects too late because they take too long and remedies are difficult to develop.[86]

The cases so far have provided important guidance for shaping a competitive framework. At the same time, it became clear that protracted individual cases do not provide legal certainty or create a general framework for digital marketplaces and information fora. As a result, some market participants can benefit almost limitlessly from infringements, since neither substantive standards exist nor an effective enforcement framework. When setting standards, it is vital to also establish a comprehensive enforcement framework for digital marketplaces at the European level.

5.2 Current initiatives

In the Draft Regulation, the European Commission relies on an improvement of the internal complaints management of the platform operator, mediation between the platform and companies, collective action by associations before national courts and self-regulation through codes of conduct (Articles 9-13 Draft Regulation). In addition, an observatory for the online platform industry is set up ("Observatory").[87] There are no plans for public enforcement of transparency obligations.

According to this model, the enforcement of the standards remains solely in the hands of the companies involved. If the platform operators refuse to comply with their obligations, it depends on the means of the parties concerned whether they can enforce compliance. This is doubtful, especially for the problematic constellations of dependency.

p. 172-173.

84 Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Behördliche Durchsetzung des Verbraucherrechts, 2018, p. 176-177.

85 Mette Alfter/Matthias Hunold, Weit, eng oder gar nicht? Unterschiedliche Entscheidungen zu den Bestpreisklauseln von Hotelportalen, WuW 2016, 525.

86 Cf. Monopolkommission, Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte, 2015, no. 504; Nicholas Economides/Ioannis Lianos, A Critical Appraisal of Remedies in the E.U. Microsoft Cases, Columbia Business Law Review 2 (2010), 346.

87 Commission, Resolution of 26.4.2018, C(2018) 2393.

The European Commission's Directive goes further than this. As far as the Directive on Unfair Commercial Practices (Directive 2005/29/EC) is concerned, which is of particular interest here and enforcement of which is currently left to the Member States, it calls for:

- individual consumer rights aimed at the termination of a contract or the assertion of damages (Art. 1 No. 4 Draft Directive);
- effective sanctions which may be imposed by public authorities or courts, including the possibility of fines of up to 4 % of the company's annual turnover in the case of widespread infringements (Art. 1 (5) Draft Directive).

Corresponding fines are also provided for infringements of other directives; the 4 %-model is based on Art. 83 GDPR. In the German Unfair Competition Act (UWG) there are currently no such powers (apart from section 20 UWG, dealing with cold calling).

Individual remedies for consumers are to be welcomed, as they are an expression of the "umpire" function and allow the termination of contracts that have come about through violations of the law. However, the impact of this possibility will remain limited in practice, given the limited incentives for consumers to sue.

In Germany, collective instruments of legal redress were strengthened with the introduction of a specific form of class action ("Musterfeststellungsklage").[88] However, this instrument is probably not suitable to remedy the infringements addressed here.

But for minor exceptions, there is currently no public enforcement of unfair competition laws in Germany. As a competition-oriented authority, the Bundeskartellamt as the national competition agency in Germany would certainly be fit to step in.[89] The Bundeskartellamt was given the power to investigate (yet not sanction) infringements of consumer law in the 9th amendment to the ARC (section 32e (5) ARC). The Office since then initiated sector inquiries into comparison portals as well as the handling of data by smart TV providers.[90] The proposal to set up a "digital agency" as a national regulatory body for the Internet is not convincing.[91] This could probably lead to regulatory hubris and become dangerous for competition.

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88 Sections 606 et seq. Zivilprozessordnung (Civil Procedure Act). Cf. Erich Waclawik, Die Musterfeststellungsklage, NJW 2018, 2921.

89 Cf. Rupprecht Podszun/Christoph Busch/Frauke Henning-Bodewig, Die Durchsetzung des Verbraucherrechts: Das BKartA als UWG-Behörde?, GRUR 2018, 1004.

90 Cf. Bundeskartellamt, press release of 12.6.2017 on the sector inquiry on comparison portals, and Bundeskartellamt, press release of 13.12.2017 on data use smart-TVs. Cf. Rupprecht Podszun/Gregor Schmieder in: Christian Kersting/Rupprecht Podszun, Die 9. GWB-Novelle, 2017, p. 85 et seq.

91 Bundesministerium für Wirtschaft und Energie, Weißbuch Digitale Plattformen, 2017, p. 101; cf. Ingo Brinker, Verbraucherschutz im GWB, NZKart 2017, 141.

5.3 European Task Force in the Competition Directorate

Effective law enforcement today relies on a "mix" of different enforcement instruments.[92] Individual consumer remedies are used alongside collective redress via associations, supplemented by antitrust and consumer protection authorities, self-regulation and low-threshold conflict resolution mechanisms, such as mediation.

For the problems dealt with in this opinion, the Commission's proposals indicate that the toolbox will be enriched by a number of tools. That is to be welcomed. However, one element is still missing: a central European law enforcement body. To this end, a European task force should be set up to monitor compliance with the rules and to introduce rapid enforcement.[93]

The business models of large portal operators rolled out on a global level require an institutional response from the European Union as a whole. While national fragmentation promotes regulatory competition for the best solution, it can also mean that different standards, conflicting decisions and obstacles in law enforcement arise. This was illustrated by the disputes over best price clauses of hotel booking platforms.

It would be appropriate to set up a task force within the Directorate-General for Competition to deal with cases of EU-wide importance and to take decisions that could give guidance to other authorities. In doing so, the Task Force should address cases which are either of particular economic importance or where there is uncertainty about the legal assessment. A test for EU-wide significance could be aligned with the corresponding test in merger control law. Pursuant to Art. 1 of the Merger Regulation[94] European law is applicable when the undertakings concerned reach certain turnover thresholds. This criterion is useful because it is purely formal and can be easily determined (unlike, for example, a market share threshold).

The Task Force should be given powers of investigation and sanction similar to those in antitrust law. Articles 1 (5), 2 (4), (3) and (4) of the Directive require that member states take care of appropriate sanctions for violations in B2C dealings. A further idea of possible "minimum powers" may be taken from Art. 9 of the revised CPC Regulation.[95]

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92 Cf. Lothar Michael in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle, Grundlagen des Verwaltungsrechts, Volume 2, 2012, § 41; Robert Baldwin/Martin Cave/Martin Lodge, Understanding Regulation, 2011, Ch. 7; Annetje Ottow, Market & Competition Authorities, 2015, p. 162 et seq.

93 Similar Alexandre de Streel, Online Intermediation Platforms and Fairness, Université de Namur, 2018, p. 24, available at https://ssrn.com/abstract=3248723.

94 Regulation (EC) No 139/2004.

95 Regulation (EU) No 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

The Directorate-General for Competition in the European Commission is the most suitable institution for this purpose. Thanks to its antitrust experience, it is familiar with the investigation of infringements, with conducting proceedings, and it is experienced in dealing with large companies. It is also characterised by a strong pro-competition orientation and economic analysis, so that innovative, competition-enhancing business activities should not be stifled.

The problem of the long duration of proceedings known from antitrust proceedings will probably not arise in the same way for such an enforcement of “digital fairness”: The rules proposed here are clear-cut and leave less room to argue.

Such a task force could organise digital marketplaces in a way that competition on the merits has a fair chance.

List of abbreviations

APPA	Across Platform Parity Agreements
ARC	Act against Restraints of Competition (German Gesetz gegen Wettbewerbsbeschränkungen)
Art.	Article
B2P	business to platform
B2P2C	business to platform to consumer
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	compare
Ch.	Chapter
CPC	Consumer Protection Cooperation
e.g.	for example
ECJ	European Court of Justice
ed.	edition
et seq.	and what follows
EU	European Union
EuCML	Journal for European Consumer and Market Law
GDPR	General Data Protection Regulation
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (German law journal)
i.a.	inter alia
i.e.	that is
IWRZ	Zeitschrift für Internationales Wirtschaftsrecht (German law journal)
JECLAP	Journal of European Competition Law and Practice
MAGAF	Microsoft Apple Google Amazon Facebook
MFN	Most Favoured Nation
MMR	Multimedia und Recht (German law journal)
NJW	Neue Juristische Wochenschrift (German law journal)
NZKart	Neue Zeitschrift für Kartellrecht (German law journal)
OECD	Organisation for Economic Co-operation and Development
p.	page(s)
P2B	platform to business
P2C	platform to consumer
para	Paragraph
TFEU	Treaty on the Functioning of the European Union
TKG	Telekommunikationsgesetz (German Telecommunications Act)
UCP	Unfair commercial practices
UWG	Gesetz gegen unlauteren Wettbewerb (German unfair competition act)
WuW	Wirtschaft und Wettbewerb (German law journal)

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