International Report

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1.1 Introduction

This International Report deals in a broader sense with the role of antitrust authorities regarding the digital economy. On the basis of selected issues, it will be examined in particular to what extent the applicable competition law within the individual jurisdictions is suitable for meeting the challenges of digital markets. It is based on the National Reports from Austria, Australia, Belgium, France, Germany, Hungary, Norway, Switzerland and the UK.[1]

In a first step, this article deals in general with the challenges posed by digitalisation to competition law. In particular, general developments in the legislation of the jurisdictions examined are taken into account (1.2). Subsequently, the report deals with individual issues in detail (1.3–1.11). Finally, some fundamental results are summarised (1.1).

1.2 Background

Due to its disruptive potential, digitalisation poses substantial challenges to societies and legal systems worldwide. The digitalisation of markets has profoundly changed the way goods and services are designed, produced, marketed and sold.[2] New, often two-sided or multi-sided markets are emerging, in which the end customer's consideration is partly no longer a monetary payment, but is "paid for" with personal data or attention. The role of consumers is no longer limited to buying products; rather, they create new content themselves in many ways and exchange information about products online.[3] Digitalisation also enables companies in an unprecedented way to meet the individual needs of consumers, especially through individualised advertising or comparison portals, but also to influence consumer behaviour. Moreover, digitalisation has enabled the emergence of large, powerful platforms that benefit in particular from network effects, economies of scale and scope, access to data, are integrated into their own ecosystems, mediate the majority of transactions between commercial and end users and act as gatekeepers between them.[4] All of this comes with the risk that users will become dependent on powerful companies, that data protection regulations will be disregarded, that the degree of innovation in digital markets will decrease and that users will be treated unfairly.[5]

These developments naturally affect the legal framework of competition law in the individual jurisdictions. The competition law of all jurisdictions is, at least in the starting point, neutral with regard to the question of whether companies are active in “the digital or analogue world”. The “traditional” legal framework can therefore also be applied to online markets. In this respect, at least from the point of view of the competition authorities or the legislator, it is advantageous that especially the prohibitions of abuse in the individual jurisdictions are often formulated in general clauses. Thus, the intervention standards are sufficiently flexible to be able to react to new technical developments and permanently accompany their rapid further development.[6]

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[1] The author thanks the National Reporters for their excellent contributions from Australia: Barbora Jedličková, Brenda Marshall and Mark Burdon; Austria: Gerhard Fussenegger and Viktoria H.S.E. Robertson; Belgium: Friso Bostoen; France: Liliana Eskenazi; Germany: Mark-Oliver Mackenrodt; Hungary: Judit Firniksz and Péter Mezei; Norway: Ingrid Halvorsen Barlund, Ronny Gjendemsjø, and Eirik Østerud; Switzerland: Johana Cau; UK: Sir Christopher Bellamy. Please note that the International Report is primarily a summary of the National Reports. Verbatim quotations from the National Reports are therefore not always identified as such. Here and there the author has added his own critical comments. The National Reports are based on a questionnaire that was made available to the National Reporters. The International Report has based its systematisation and summary of the National Reports on the systematics of the questionnaire. Other special features that go beyond the questionnaire and were mentioned in the National Reports were taken into account if, in the opinion of the National Reporter, they were of general significance or of particular interest.

[2] Austrian Report, Section 1; Hungarian Report, Section 1.

[3] Hungarian Report, Section 1.

[4] Cf. Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, p. 1.

[5] UK Report, Section 1.1.

[6] Cf. for instance Austrian Report, Section 2.2; Swiss Report, Section 1.

It is, of course, obvious that the challenges posed by digitalisation for competition law cannot be overcome by resorting to traditional general clauses alone. In particular, the associated legal uncertainty is also unacceptable from the point of view of the rule of law. Moreover, it is to be feared that dangers to competition could not be recognised and, above all, not be combated sufficiently effectively. For example, the question arises to what extent the design of abuse proceedings in particular, with regard to their complexity and duration, are a sufficiently adequate means to counter abusive behaviour in a constantly and rapidly developing high-technology sector.[7] On the other hand, there would be a danger that (exclusive) recourse to the traditional legal frameworks not considering the specifics of digital markets would hinder innovation. In this respect, a quotation from the Swiss Competition Commission is convincing: "*A fight with equal arms is more useful to competition than a blind application of old rules in the face of new forms of economy. It is therefore necessary to take a critical look at existing regulation.*"[8]

Even if not all legislators in the jurisdictions studied have yet enacted new competition law regulations explicitly tailored to digital markets, it can be said that the requirement to have "a critical look" at existing regulation has already been met in all jurisdictions. The current discourse on the application of competition law to digital markets can be characterised in general terms by a number of trends and features:[9]

Across all jurisdictions, there has been an increase in reports, sector inquiries and market studies, with which the competition authorities in particular are addressing the phenomenon of digitalisation and the associated challenges of competition law.[10] From an institutional point of view, the competition authorities are reacting to the challenges posed by digitalisation in part by setting up special departments that focus on the development of digital technologies. In the UK for instance, there has been created a Digital Markets Taskforce in March 2020, led by the CMA with support from other authorities. Its task is to provide advice to the government's decisions on how to promote competition in digital markets to the benefit of consumers and businesses.[11] Additionally, a Digital Markets Unit (DMU) has been established within the framework of the CMA, which is to be endowed with potentially far-reaching competences in the future.[12]

In all jurisdictions, the realisation is also coming to the fore "*that competition law is not an island, but part of a broader set of legal rules that apply to digital markets and that, ideally, should work together [...]*"[13]. In this respect, data protection law, fair trading law, telecommunications law, consumer protection law, but also general private law, in particular contract law, are addressed. The "smooth interaction" of these different areas of law requires, among other things, that different national authorities, e.g. data protection authorities and competition authorities, cooperate more closely with each other and that there is also greater international cooperation between the authorities. Just for the sake of completeness, it should be pointed out that the interlocking of the legal areas raises not only institutional, but also difficult legal-dogmatic and especially legal-theoretical problems. These aspects will be examined in more detail later on.[14]

As far as the legal framework is concerned, it is worth mentioning first of all that in some jurisdictions, in view of the challenges posed by digitalisation, legal instruments are experiencing a kind of renaissance that were not intended to regulate digital markets. In addition, some legislators have already reacted and started to enact specific legal norms tailored to digitalisation. At the EU level, the European Commission is currently reviewing its Market Definition Notice.[15] In addition, the Commission's proposal for a Digital Markets Act, which primarily addresses the challenges posed by gatekeepers, has been available since mid-December 2020.[16]

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[7] Cf. on this aspect for instance Austrian Report, Section 2.2; Belgian Report, Section 2; Hungarian Report, Section 5.6.
[8] Competition Commission annual report, 2016, p. 31; Swiss Report, Section 1.
[9] They do not necessarily apply to every single jurisdiction; cf. on the following systematisation in particular the Austrian Report, Section 1.
[10] Cf. the list in the Austrian Report, Section 1; see also the respective National Reports.
[11] UK Report, Section 1.
[12] UK Report, Section 1; see for further examples French Report, Section 1; Swiss Report, Section 1.
[13] Austrian Report, Section 1.
[14] Cf. Section 1.9 below.
[15] Cf. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-EU-competition-law-market-definition-notice-evaluation-_en.
[16] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020), 842 final (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=DE).

At the national level, for example[17], the German legislator has already repeatedly taken action to adapt the German competition law to some challenges of digitalisation. For instance, the legislator has clarified that the assumption of a market is not precluded by the fact that a service is provided free of charge.[18] The Austrian legislator is going to introduce a provision according to which data is incorporated as a relevant factor for the assessment of dominance in order to combat anti-competitive behaviour in digital markets.[19] In Switzerland, legislative amendments implementing the concept of relative market power in Swiss law will come into force at the end of 2021.[20]

The legal framework in the UK has not yet been changed. However, based on the Furman Report, the CMA's Digital Report concluded that a specific pro-competitive regime for companies distinguished as having strategic market status (SMS) is urgently needed.[21] The government has already responded to this proposal in a Government Response and shared key findings from the CMA Digital Report. In particular, the government agrees that the UK's existing competition tools are not sufficient to meet the challenges of dominant platforms in the digital advertising, general search and social media markets and that there has to be established an enforceable Code of Conduct to govern the behaviour of platforms funded by digital advertising as far as they have an SMS-status.[22]

Finally, it should be noted that in all jurisdictions, even in those in which the legislator has not yet explicitly reacted to the competition law challenges of digitalisation, there are a large number of official decisions, especially in the areas of merger and abuse, which deal with digital markets. The most prominent decision so far is probably the Facebook decision of the German Bundeskartellamt, which is currently also being dealt with by the CJEU within the framework of a referral procedure according to Art. 267 TFEU. We will return to this decision later.[23]

1.3 Defining the term “platform”

1.3.1 Legal framework

It is clear from all National Reports that online platforms pose considerable challenges to the law, especially antitrust law, and that the regulation of digital platforms is a top priority from the perspective of the national competition authorities. In particular, the focus is on questions of market definition and the determination of market power as well as the possibilities of digital platforms in particular to abuse their (potential) market power due to their huge data stock. In this respect, the necessity arises to answer the question of what is meant by a digital platform in the first place. To that extent, it is clear that most legislation does not contain legal provisions that define or address platforms explicitly. Conclusions can insofar only be drawn from initial decisions of the authorities and courts, reports or case studies. In this context, the already mentioned advantage of the relatively vague definitions of antitrust norms within the individual jurisdictions becomes apparent once again, as they allow to also get a grip on digital platforms.

Since 2017 German competition law explicitly addresses platforms, even though the relevant section of the German Cartel Act[24] does not use the term "platform" but speaks of "multilateral markets". In spite of this first regulatory approach, the German legislator has however deliberately refrained from a specific definition of the term platform, since this term had not yet been used uniformly in law and a uniform definition would only emerge over time.[25] Primarily the Bundeskartellamt and the courts will thus drive the exact definition of the term platform forward in Germany. The German legislator's approach is interesting in that it represents a kind of a compromise between the basic options of either deciding against specific digitalisation-related regulations in the interest of the flexibility of antitrust law or enacting specific norms tailored to digitalisation in the interest of legal certainty.

French law also has a legal definition for online platform providers, although this is not regulated in antitrust law, but in the French Consumer Code and in particular provides for information obligations of platform providers

[17] The following examples are not exhaustive. For further details on changes to national law, see the National Reports.
[18] Section 18 (2a) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.
[19] Kartell- und Wettbewerbsrechtsänderungsgesetz 2021 (KaWeRÄG 2021), 114/ME XXVII. GP (Ministerialentwurf), introducing a new § 28a KartG.
[20] Swiss Report, Section 2.5.
[21] UK Report, Section 3.
[22] UK Report, Section 3.1.1.; cf. as well Section 1.6.5 below.
[23] Cf. Section 1.9.3. below.
[24] Section 18 (3a) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.
[25] Legislative reasons, Official Gazette 18/10207, p. 47.

towards consumers. According to the relevant section[26] an online platform provider is any natural or legal person offering, on a professional basis, including for free, an online communication service to the public that is based on (1) ranking or referencing contents, goods or services offered or uploaded by third parties by using computerised algorithms; (2) allowing several parties to get in contact with one another for the sale of goods, the provision of services or the exchange or sharing of content, goods or services.

1.3.2 Characteristics

As far as the National Reports explicitly deal with the term platform there seems to be agreement that platforms are characterised by their multi-sidedness: The platform operator is an intermediary connecting two or more distinct but interdependent groups of users and enables a direct interaction between different user groups for the provision of goods, services, digital content and information online.[27] The activity of the platform operator is limited to enabling contact between the different user groups, using the platform for different reasons.[28] Digital platforms are e.g. e-commerce platforms, peer-to-peer platforms, social media networks and search engines.[29]

It is typical for digital platforms to collect and use a variety of data in order to provide their services.[30] The UK report emphasises that the integration of different services is also a key concept in the business model of online platforms.[31] Because as soon as the platform operator has won customers, especially by offering them a service "for free", they demand money from the platform users on the other side of the market. For example, Amazon earns money from the fact that retailers on the Amazon Market Place have to pay a commission to Amazon, while Google provides its search service to customers for free in order to generate advertising revenue on the other side of the market.[32]

The German report highlights the importance of indirect network effects regarding to digital platforms. They occur when the benefit that the platform has for one user group is influenced by the number of users of another user group. According to the German Bundeskartellamt, indirect network effects can also be negative, for example if an additional "advertising unit" has no benefit for the user, but only a disadvantage, e.g. in the form of a time loss. The criterion of indirect network effects is in any case qualified in German public authority practice and science as a sufficiently concrete characteristic to distinguish platforms from networks.[33] These facilities or products enable users to establish exchange relationships among themselves. Such networks result in *direct* network effects, since the benefit associated with the facility for the individual user also increases as the number of users on the same market side growths.[34]

1.3.3 Different types of digital platforms

In some jurisdictions, several types of platforms are differentiated.

The Australian ACCC, in line with the Australian Digital Platforms Inquiry (DPI), distinguishes between search engines, social media platforms and digital content aggregation platforms.[35] It is noteworthy that other digital platforms, as for instance shopping platforms like Amazon, were not included in the DPI.[36]

The UK report states that online market places such as Amazon as well as comparison portals offer consumers the benefit of conducting a specialist search.[37] These specialised search engines are to be distinguished from general search engines from the consumer's point of view.[38] General search engines help consumers with a wider range of queries including many that are not served by specialised providers, while specialised search provides functionality

[26] Article L. 111-7 Code de la Consommation.
[27] Cf. the definition by the Bundeskartellamt, Decision of 8 September – B6-126/14, para 121; see also Bundeskartellamt, Working Paper, Marktmacht von Plattformen und Netzwerken, 2016, p. 14; Australien Report, Section 2; Belgian Report, Section 3.1; French Report, Section 2.1 (structuring platform); German Report, Section 3; Hungarian Report, Section 3.1 with reference to the Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, section 5.2.1;. UK Report, Section 2.1.
[28] Cf. Australian Report, Section 2.
[29] Cf. Australian Report, Section 2; UK Report, Section 2.1.
[30] UK Report, Section 2.1.
[31] UK Report, Section 2.1.
[32] UK Report, Section 2.1.
[33] *Fuchs*, In: Immenga/Mestmäcker (ed.), Wettbewerbsrecht, 6th Ed., Beck 2020, § 18 RWB para 71.
[34] *Fuchs*, In: Immenga/Mestmäcker (ed.), Wettbewerbsrecht, 6th Ed., Beck 2020, § 18 RWB para 71.
[35] Australian Report, Section 2.
[36] Australian Report, Section 2.
[37] UK Report, Section 2.1.
[38] UK Report, Section 2.1.

that allows consumers to compare listed products across multiple dimensions.[39] However, the report emphasises that it is unlikely that there will be a formal approach distinguishing between different types of platforms, or different functions within platform. On the contrary, each situation will be judged on its own facts.[40]

The Belgian and German reports agree in their starting point to differentiate between two types of platforms, namely matching platforms and advertising platforms:[41]

Matching platforms as for instance Amazon Marketplace and the App Store tend to achieve a best possible matchmaking between users from different groups. The interaction can lead to an actual transaction, especially a purchase, but this is not mandatory, as the example of dating platforms shows.[42] In addition, platforms often maintain an uneven prize structure in the sense that one side of the user does not have to pay a price for the services. Platforms that aim to bring about an actual transaction are referred to as transaction platforms.[43] These form a subgroup of matching platforms.

The German report classifies advertising platforms additionally as a subset of so-called attending platforms, which are to be differentiated from matching platforms.[44] On such platforms, offering a service to one group of users does not necessarily require the existence of another market side. Rather, it is a strategic decision to place advertisements in order to finance the other market side. One example is Spotify, a platform that offers its users the possibility to stream music titles on the basis of licences. If users opt for the free variant, the service is financed by the insertion of advertising. In this case, the advertisers are a second user group. However, customers can also choose a paid variant in which no advertisements are shown. In this case, there is no second user group, so in the view of the Bundeskartellamt, Spotify does not function as a platform.[45]

1.3.4 Market definition

With regard to the different platform services and the different market sides, the question of market definition arises. For example, on the online sales platform Amazon, goods are sold both by Amazon itself and by third-party sellers via the Amazon Marketplace, without users being able to see a sufficient distinction between Amazon's own products and those of third-party sellers. In view of the fact that platforms always have at least two user groups, it would be conceivable that the platform services for both market sides each represent independent products and markets. In consideration of the indirect network effects which are typical for platforms and the resulting interrelationships, it would also be conceivable to consider the platform as a whole to be a single market.

The German and the Belgian Reports clarify that the national authorities form Germany and Belgium follow a nuanced approach in this respect: If the platform is a matching platform or a transaction platform, both sides of the market are to be classified as a single market. On the other hand, the two sides of an attention platform are to be qualified as different markets.[46] For example, the Belgian competition authority has qualified Immoweb`s real estate website as a matching platform that operates on a multi-sided market with buyers on one side and sellers on the other. Accordingly, it is to be assumed that there is a single market for online real estate portals. This corresponds to approaches in the economic literature[47] and is also in line with the European Commission's approach in this regard.[48] However, the German Report also emphasises that the question must be decided on a case-by-case basis.[49]

In Austria, there is neither a legal definition of platforms nor soft law dealing with platforms. How the Australian NCA will deal with platforms can to some extent be derived from a case study of its Amazon investigation and settlement. Although the authority clarifies that it would be insufficient to qualify platforms as one-sided markets in view of Amazon's trading platforms, it remains open as to whether multi-sided markets can be qualified as

[39] UK Report, Section 2.1.
[40] UK Report, Section 2.1.
[41] Belgian Report, Section 3.1; German Report, Section 3.
[42] German Report, 3.1 with reference to BKartA, 22.10.2015, B6-57/15 – *OCPE/EliteMedianet*.
[43] German Report, Section 3.1.
[44] German Report, Section 3.1.
[45] Bundeskartellamt, Arbeitspapier – Marktmacht von Plattformen und Netzwerken, 2016, p. 28.
[46] Belgian Report, Section 3.1; German Report, Section 3.
[47] *L. Filistrucchi, D. Geradin, E. van Dammer, P. Affeldt*, Market definition in two-sided markets: theory and practice. Journal of Competition Law and Economics 2014 (2), pp. 293–339.
[48] The approach is probably also being followed in Switzerland, as the Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 160f. also refers to *L. Fillistrucchii* et. al.
[49] German Report, Section 3.

separate markets for the respective user types or as a single market.[50] In any case, the interdependencies between the individual market sides would have to be taken into account. In a decision against Amazon, the authority came to the conclusion that the market for online trading platforms does not include stationary shops and web shops of retailers.[51]

The Australian ACCC has already been able to take into account the two-sided nature of the market, particularly in the review of Expedia's proposed acquisition of Wotif in 2017[52]. Nevertheless, the Australian Report emphasises that in view of the current lack of cases, it is not yet possible to make statements on the definition of the relevant market. The Swiss Report underlines as well the complexity of market definition in multi-sided digital markets using the example of the Android Platform, on which at least five parties interacted in addition to Google. However, the competition authority does not seem to have developed any further criteria as to how the market definition is to be carried out in individual cases.[53]

In summary, it is surprising that, given the importance of market definition in competition law and the role of digital platforms, there is so little agreement on how market definition should be carried out in individual cases.

1.4 Market for free services

1.4.1 General

As far as can be seen, in all jurisdictions supply markets are based on the substitutability of the product from the demand side's point of view (demand market concept). According to the SSNIP test practised in this respect, it depends on whether the demanders would turn to an alternative product if the supplier were to increase the price of the offered product by 5-10 per cent. If this question is answered in the affirmative, the alternative product belongs to the supplier's market. Otherwise, the alternative product belongs to a different market.[54]

Especially in digital markets, however, suppliers often do not demand monetary consideration for their own performance. This is especially true in the two-sided markets already mentioned. For example, the use of the internet search engine Google or the use of Instagram or Facebook is free of charge for one user group of the platforms, while another user group, especially advertisers, provide a charge for distributing their product, as for instance advertisement. In this respect, the question arises whether the market quality is to be affirmed only for the paid side or also for the free side. Even if this question is closely connected to the question of market definition in two-sided markets[55], it can in principle also arise in one-sided markets.[56]

1.4.2 Fundamental acceptance of the concept of markets for free services

It seems generally accepted in all jurisdictions examined that the fact that a service is offered free of charge does not prevent the assumption of a market.[57] As examples, markets for supplying social media services and supplying general search services are mentioned. This view also corresponds to the view of the European Commission, e.g. in Facebook/WhatsApp.[58] It can be decisive for the success of a platform that the operator gains as many customers as possible on one side of the market in order to be able to achieve high network effects on the other side of the market. Users whose benefit from the platform does not depend or depends only to a limited extent on the number of users on the other side of the market will be won over in particular by low prices. In this respect, it may make economic sense for the platform operator not to demand any monetary consideration at all.[59]

A corresponding legal regulation has so far only been found in Germany. There, the legislator expressly clarified in 2017 that it does not prevent the assumption of a market that a service is provided free of charge.[60] This was

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[50] Austrian Report, Section 2.5.
[51] Austrian Report, Section 2.5.
[52] ACCC Public Register (n.d.) Expedia Inc - proposed acquisition of Wotif.com Holdings Limited, available at http://registers.accc.gov.au/content/index.phtml/itemId/1182044/fromItemId/751046. Accessed 14 September 2021.
[53] Swiss Report, 2.2; cf. also Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 162f., retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf.
[54] Cf. in general *Lindsay*, EC Merger Regulation: Substantive Issues, Sweet Maxwell 2003, p. 75 et seq.
[55] Cf. Section 1.4.3 above and Norwegian Report, Section 3.2.
[56] Cf. German Report, Section 4.
[57] Australian Report, Section 3; Austrian Report, Section 2.6 (“undisputed”); Belgian Report, Section 3.1; French Report, Section Q4; German Report, Section 4; Hungarian Report, Section 4; Norwegian Report, Section 3.2; Swiss Report, Section 2.2; UK Report, Section 2.2.
[58] COMP/M.7217.
[59] German Report, Section 4; cf. also Norwegian Report, Section 3.2.
[60] Section 18 (2a) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.

also in line with the Bundeskartellamt's previous practice.[61] In contrast, the OLG Düsseldorf still assumed in 2015 that in the case of hotel booking portals only the paid side constitutes a market.[62] The Bundeskartellamt has already applied the new provision, for example, to a platform that provides services with regard to event tickets. The relationship between the platform and advance booking agencies was qualified as a market, although the service was free of charge.[63] In the Facebook case, the authority also assumed that the social network services qualified as a market despite being free of charge.[64]

In the other jurisdictions, national law does not provide for a legal provision comparable to the German regulation. However, as already mentioned, the possibility of a market for free services is also recognised here in principle. In particular, corresponding statements can sometimes be found in publications of the NCA and/or the authorities have assumed a market in their case practice despite the fact that a service is free of charge. It is even assumed that free services of digital platforms do not pose any specific challenges to competition law, since corresponding services were already known "in the analogue age".[65] The possibility of a market for free services is justified in particular by the fact that the service is – actually – not for free at all, since the user provides another form of non-monetised consideration, in particular through the provision of attention[66], personal data, preferences and user-generated content.[67] According to the Hungarian GVH even circumstances such as the limiting of the scope of future decisions can be considered as a value that is provided by the user.[68] Given that there is widespread agreement that users provide significant economic value to platforms, it is even suggested that "*the zero-price paid is in fact too high and consumers could be extracting a greater value in return for their data*."[69]

Considering that the concept of markets for free services does not seem to pose any major difficulties for the jurisdictions examined, the question may arise whether it is at all advantageous for the legislator to enact a corresponding legal regulation, as in Germany. As the German Report emphasises, Section 18 (2a) German Cartel Act[70] simplifies the application of the law since the assumption of a market, for instance, does not depend on the discussion of whether the user, who does not pay a monetary consideration, might provide another service. In other words, the assumption of a market for free services does not require any special justification.[71] However, this does not mean that under German law every free service also justifies the assumption of a relevant market. Rather, it is necessary that the free service is offered for economic reasons or part of a strategy being at least indirectly profit-oriented. In this regard, a private scholarship, for instance, may not be qualified as a market.[72] The German legislator emphasises in particular that the assumption of a market necessarily presupposes an exchange relationship. This makes it clear that the term "free" is only to be understood in the sense that the user does not necessarily owe a monetary consideration. However, some kind of exchange must take place. Thus, the criteria outlined above for determining the existence of a market for free services are therefore likely to remain relevant for German law as well.

1.4.3 Methodological issues

Even if the possibility of a market for free services is recognised, there are at least considerable problems with regard to the method of market definition. As already seen above, the SSNIP test usually used in this respect cannot be applied (without modifications) because a hypothetical five percent price increase of a non-monetised service is logically excluded. The Swiss Report emphasises that the application of the SSNIP test to multi-sided markets is generally made even more complex by the fact that the determination of prices for each side depends on the determination of prices on the other side, and therefore cannot be considered separately for both parties. [73]

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[61] Bundeskartellamt, Fallbericht vom 25. Juni 2015, Az. B6-39/15 – Online-Immobilienplattformen; Beschluss vom 22. Oktober 2015, Az. B6-57/15 – Online-Datingplattformen.
[62] OLG Düsseldorf, 9 January 2015, VI Kart 1/14 (V), para. 43.
[63] Bundeskartellamt, Decision of 4 December 2017 – B6-132/14-2, para 144; Bundeskartellamt, Decision of 23 November 2017 – B6-35/17, para. 123.
[64] Bundeskartellamt, Decision of 6 February 2019 – B6-22/16, paras. 239 ff; BGH, Judgment of 23 June 2020 – KVR 69/19, paras. 27 ff. – *facebook* (interim decision).
[65] Cf. for instance French Report, Section Q4; UK Report, Section 2.2.
[66] Cf. for Instance UK Report, Section 2.2.
[67] Cf. Swiss Report, Section 2.2; Hungarian Report, Section 4.1; Norwegian Report, Section 3.2; UK Report, Section 2.2.
[68] Hungarian Report, Section 4.
[69] UK Report, Section 2.2 with reference to *Harford*, 'Treat social media like email and search engines', Financial Times, 27 April 2018.
[70] Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.
[71] German Report, Section 4.
[72] German Report; Section 4; Legislative reasons, Official Gazette 18/10207, p. 48.
[73] Swiss Report, Section 2.2, with further reference.

The Belgian and the Norwegian Reports suggest adapting the SSNIP test and - as already practised by the European Commission in Google Android[74] - to focus on shifts in consumer demand in response to a quality degradation rather than a price increase (SSNDQ test).[75]

In practice, however, such a test is associated with considerable legal uncertainties, because it is unclear on the basis of which criteria "quality" can be determined with legal certainty.[76] In view of these uncertainties, the Belgian NCA has already called for updated guidelines.[77] In Australia, there is the peculiarity that although the assumption of a market for free services would be compatible with the wording of the law, the then Trade Practices Tribunal in the QMA Case in 1976 expressly relied on hypothetical price changes for the determination of the market.[78] However, one hopes for clarifying words from the Federal Court in the case *Dialogue Consulting Pty Ltd. v. Instagram Inc & Ors*.

Since the question of market definition depends on how consumer demand changes in relation to any change in "free" goods the call of the President of the Belgian NCA for a "more behavioural economic approach" (notion by author) can be endorsed, who, in view of non-price markets, calls for greater consideration of behavioural economics in competition law.[79]

1.5 Market power and abuse of dominant position

1.5.1 General

Usually, the criteria for determining market power are market shares and barriers to entry for competitors. These criteria can also be taken into consideration in digital markets. However, they are not as meaningful there as in traditional "analogue" markets. For example, the criterion of turn-over fails if a company offers free services. It needs to be kept in mind as well, that digital markets are often very dynamic. Even if a company currently has a high market share, this can change within a very short time.

Nevertheless, with the exception of Germany, the legislators within the legal systems examined have not yet taken action and developed criteria that would have to be taken into account when determining market power. However, changes to the legal framework are being considered at the suggestion of the competition authorities, for example in Switzerland. In view of a statement by the Competition Commission, the Swiss legislator declared "*that it may be necessary and useful to adapt the merger notification criteria so that the authorities can examine mergers or acquisitions of young internet platforms that could possibly impact competition*"[80]. In addition, the Swiss Competition Commission pointed out in a 2016 report "*that the turnover-based thresholds in merger control could lead to a situation where mergers are not controlled, even though, in relation to customer data, a dominant position exists*"[81]. Subsequently, the Swiss Government has stated that it could be useful to adapt the merger notification criteria to ensure that competition authorities can also intercept mergers or acquisitions of young internet platforms that potentially affect competition.[82]

In Hungary, there has been introduced a new merger notification regime in 2017. It allows the GVH to exercise control over some lover-value transactions, like start-ups or newly established players on the digital markets with a high development and innovation potential.[83] The Norwegian NCA is as well equipped in the digital sector with ex ante enforcement tools against concentrations below the general turnover thresholds for mandatory notification and as well against acquisitions of non-controlling shareholdings.[84]

The Australian ACCC sees the need for far-reaching reforms to merger control law. There should be a new test, predicating on a lower probability of competitive harm than that which applies to acquisitions in the broader

[74] CASE AT.40099, paras 284 – 322 and 483 – 566.
[75] Belgian Report, Section 3.1; Norwegian Report, 3.2.
[76] Cf. Belgian Report, Section 3.1 with further reference.
[77] Belgian Report, Section 3.1; BCA, Decision of 7 November 2016, ABC-2016-I/O-31-AUD, *Immoweb*, paras 22–27.
[78] Australian Report, Section 3.
[79] Cf. Belgian Report, Section 3.1; with reference to *Steenbergen*, On competition policy and online markets, European Competition and Regulatory Law Review 2019(1), VII.
[80] Swiss Report, Section 2.2.
[81] Swiss Report, Section 2.2. with reference to Competition Commission annual report, 2016, p.28.
[82] Swiss Report, Section 2.2.
[83] Hungarian Report, Section 3.2.3.
[84] Norwegian Report, Section 2.

economy. Furthermore, the application of this test to any given digital platform should depend on the size and scope of the platform's services in Australia and whether it acts as a 'gateway'.[85]

According to the Austrian Report, especially in connection with assessing market power, the current Austrian law leaves sufficient room for manoeuvre and does not need to be adapted. The problem of applying the current antitrust law to digital cases is not that the existing legal framework is insufficient, but that digital cases require more effort and that the authorities are not sufficiently equipped in this respect.[86]

Apparently, the national competition authorities have not yet issued guidelines or other soft law instruments dealing specifically with market power in digital markets. However, with the exception of the Norwegian and Hungarian competition authorities, the national authorities have at least dealt with the phenomenon of market power in digital markets in reports and opinions. Some competition authorities have also been confronted with the issue in case practice, both in the context of merger control and in the context of abuse proceedings. In this respect, it is noteworthy that the Australian ACCC recently referred to a case from 1976, which cited rather static criteria for the assessment of market power.[87] The Australian Report emphasises that the authority failed to adapt its guidelines to digital markets on this case. Thus, there are concerns as to whether this approach is appropriate for digital markets.[88] The Hungarian Report outlines that despite numerous guidelines and other soft law instruments dealing with digital markets none of them specially addressed the abuse of market power so that there is some kind of a "*vacuum regarding judicial interpretations of market power definitions concerning digital markets*", especially since no cases have yet been decided by the authorities.[89]

1.5.2 Criteria considered to be relevant

As already mentioned, German law is the only legal system to date that provides explicit regulations dealing with the question of which criteria can be relevant for the determination of market power in digital markets. Accordingly to German law, market shares remain the starting point for determining the market position of a company, although this criterion is of comparatively minor importance. In order to determine market shares on digital markets, the Bundeskartellamt uses alternative criteria in its case practice, e.g. the used number of search queries with regard to search engines or the number of registered members and individuals with regard to dating platforms.[90] In addition, the provision of Section 18 (3a) German Cartel Act now expressly contains five further criteria that are to be taken into account in particular in the case of multi-sided markets (meaning platforms) and networks. The provision, which is not exhaustive, mentions (*i*) direct and indirect network effects, (*ii*) the parallel use of networks (so-called multi-homing) and the cost of switching between platforms, (*iii*) economies of scale, (*iv*) the access of data and, (*v*) competitive pressure through innovation. Finally, Section 18b (3b) German Cartel Act, which addresses companies that are active as intermediaries in multi-homed markets, did come into force in 2021. According to this legal provision, when assessing the market position of such companies, the importance of the intermediary services it provides for access to procurement and sales markets must also be taken into account in particular.

Even if other jurisdictions do not contain any legal provisions as in Germany, similar criteria can be found in particular in the reports of the competition authorities and their case practice. When it comes to barriers to entry, in other Jurisdictions as well criteria such as strong network effects[91], barriers to switching[92], the existence of economies of scale[93], access to user data[94], or the vulnerability of the undertaking's position in the market in relation to innovation cycles[95] are considered to be essential. Importance is attached not only to the number of data an undertaking possesses, but in particular also the quality of the data.[96] For example, the Hungarian GVH, referring

[85] Australian Report, Section 6.
[86] Austrian Report, Section 2.4.
[87] Australian Report, Section 4.
[88] Australian Report, Section 4.
[89] Hungarian Report, Section 3.2.
[90] German Report, Section 2.1.
[91] Austrian Report, Section 2.4; Belgian Report, Section 3.1; French Report, Section Q2, 1.
[92] Austrian Report, Section 2.4.
[93] Belgian Report, Section 3.1; French Report, Section Q2, 1.
[94] Austrian Report, Section 2.4.
[95] Swiss Report, Section 2.2.
[96] Hungarian Report, Section 3.2.2; ; s. also German Report, Section 2.1 with reference to the German Legislative reasons, Official Gazette 18/10207, p. 51.

to the European Commission's *Apple/Shazam*[97] EU case, emphasised that the most valuable data are those that can be used to predict consumer behaviour.[98] In this respect, it becomes clear that some kind of a "more behavioural economic approach" already mentioned above[99] may be important not only in the context of determining the relevant market but as well in connection with the determination of market power. This is also made clear in the UK Report, where inter alia consumer behaviour and the power of defaults, i.e. default behaviour by consumers and the way in which choices are presented to consumers, is qualified as an important criterion.[100]

In UK, the CMA noted that metrics such as level of concentrations, user numbers, traffic generated, or time spent on each service could be considered by assessing market power. This is consistent with the Belgian Report.[101] Also important are barriers to entry and the degree of control that some platforms have over (i) the relationship between buyers and sellers; and (ii) the access that advertisers have to potential buyers.[102] The CMA has also used profitability analysis, and has identified the following conditions creating barriers to entry and undermine competition: (i) network effects and economies of scale; (ii) consumer behaviour and the power of defaults (i.e. default behaviour by consumers and the way in which choices are presented to consumers); (iii) unequal access to user data; (iv) problems relating to a lack of transparency; and (v) vertical integration and conflicts of interest.[103]

The Norwegian NCA is currently, especially in merger cases, increasing reliance on other analytical tools than structural market factors to measure market power, whereby the authority is inspired in particular by US economic theory and UK merger practice. The NCA bases its decisions especially on customer surveys, analyses of closeness of competition, diversion ratios and price pressure indexes.[104]

1.5.3 Relative market power or economic dependency

In several of the legal systems examined, the national cartel authorities have the possibility to take action on the basis of specific competition law standards against companies that do not hold a dominant position. Norway is a notable exception in this respect. The Norwegian Competition Act does not provide for any general possibilities to initiate abuse proceedings against companies that do not have a dominant market position. Although the government would have the legal possibilities to implement corresponding, market-specific regulations, such legal changes are so far only on the agenda for the grocery market, but not for digital markets.[105]

What most of the regulations have in common is that the company that is not necessarily in a dominant position holds a position by virtue of which another company is “dependent” on it in the broadest sense.

Thus, under Austrian law, a company is also considered dominant when it has a predominant position in relation to its customers or suppliers. This is the case when customers or suppliers are obliged to maintain business relations with the dominant company in order to avoid suffering significant economic losses.[106] The French NCA can sanction the abusive exploitation of the existence of a situation of economic dependency if the abuse has an actual or potential effect on the functioning of the structure of the competition of the market. In this context, the situation of economic dependency requires that it is impossible for the dependent undertaking to find a technically and commercially equivalent solution.[107] Although the relevant provision of the Code de Commerce itself was initially introduced to protect suppliers against large retailers, this hitherto rather neglected instrument is experiencing a renaissance, so to speak, as it is considered suitable to provide good services to assess unfair trading conditions in the field of online platforms and marketplaces.[108] For example, the French NCA has already issued two sanction decisions against Apple and Google based on the relevant regulation in the past year.[109]

The Belgian legislator has taken the outlined French regulation as a model and enacted a law on abuse of economic dependency in 2020. According to this law, the competition authority can also take action against a company for

[97] Case M.8788 - *Apple/Shazam*.
[98] Hungarian Report, Section 3.2.2.
[99] Section 1.4.3 above.
[100] UK Report, Section 2.
[101] Belgian Report, Section 3.1.
[102] UK Report, Section 2.
[103] UK Report, Section 2.
[104] Norwegian report, Section 3.2.
[105] Norwegian Report, Section 3.7.
[106] Austrian Report, Section 2.10.
[107] Article L.420-2§2 of the French Commercial Code.
[108] French Report, Section Q10, 1.
[109] French Report, Section Q10, 1 with further reference.

abusive behaviour if it does not have absolute market power, but rather a case of economic dependency exists. This is qualified as a sub-case of relative market power. This regulation was not intended for the digital economy, but could play a central role here.[110]

German law also provides for comparable regulations in Section 20 German Cartel Act.[111] According to Section 20 (1) sentence 2, certain prohibitions intended for dominant companies also apply to companies with relative market power. Relative market power of the company requires that other companies are dependent on it as suppliers or customers in such a way that there are no sufficient and reasonable possibilities to switch to third companies. Section 20 (1) sentence 2 German Cartel Act, which was not introduced until 2021, is specifically tailored to digital markets and also provides for prohibitions for undertakings that are active as intermediaries in multi-sided markets, insofar as other undertakings are dependent on their intermediary services in such a way that sufficient and reasonable sales opportunities do not exist. It is worth mentioning in this respect that, according to Section 20 (1a) German Cartel Act, which was also introduced in 2021, a dependency within the meaning of Section 20 (1) German Cartel Act can also result from the fact that a company is dependent on access to data controlled by another company for its own activities. The denial of access to such data for a reasonable fee may be abusive. Furthermore, German law allows abuse proceedings for unfair obstruction against companies that have superior market power over small and medium-sized competitors, Section 20 (3) German Cartel Act. According to Section 20 (3a) German Cartel Act, which is also tailored to digital markets and came into force in 2021, an unfair obstruction in this sense can also be that the company with superior market power obstructs the independent achievement of network effects by competitors. As the German Report explicitly emphasises, it can be assumed that the provision of Section 20 German Cartel Act will have considerable practical significance for the protection of competition in digital markets.

The concept of relative market power will also come into force in the Swiss legal system at the end of 2021, whereby the Swiss legislator has been inspired by the German regulations in this respect. In contrast to German law, "*it will not include relative dominance for intermediation on platforms [...] and data*."[112] The Swiss report also points out that the Competition Commission and the Swiss courts will develop their own interpretation practice, which currently leads to a considerable degree of legal uncertainty.[113]

1.5.4 Other legal instruments

Given the fact that market definition and the proof of a dominant position are associated with considerable difficulties, especially in digital markets, that abuse proceedings are too costly and lengthy, and that the associated ex post assessment of conduct may not be suitable for averting damage from the fast-moving digital markets,[114] there seems to be an increasing focus on legal instruments that allow to intervene even if a company does not have a dominant market position. In this respect, more general institutes and instruments beyond the core antitrust law, such as provisions of fair trading law or duties of good conduct under commercial law, are coming into focus as well.[115]

For instance, French competition law allows certain abusive practices (e.g. abruptly terminating established commercial relations) by undertakings towards their partners to be sanctioned regardless of whether the company has a dominant position and regardless of the effects of the abusive practice on the market. The potential importance of these instruments for digital markets becomes clear when one realises that the Paris Commercial Court has recently imposed sanctions on Booking, Expedia and Amazon on the basis of them.[116] However, it is not the French NCA that is responsible in this respect, but the Commercial Court. In Austria, to give another example, sanctions by the Cartel Court can be considered if a company violates provisions on good business behaviour, provided the violation is likely to threaten the performance-related competition.[117]

The Hungarian Competition Authority GVH has competences both in antitrust and in consumer protection. Especially in digital markets, the advantage is that the authority can act independently of proof of a dominant

[110] Belgian Report, Section 3.2.4.
[111] Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.
[112] Swiss Report, Section 2.5.
[113] Swiss Report, Section 2.5.
[114] Cf. Belgian Report, Section 3.2.4; French Report, Section Q10, 1.
[115] Cf. for instance Austrian Report, Section 2.10; French Report, Section Q10, 2.
[116] French Report, Section Q10, 2.
[117] Austrian Report, Section 2.10.

position or an abuse. The Hungarian report emphasises in this respect that the GVH, due to its competences in consumer protection law, was able to investigate comparable questions as other major competition law enforcing jurisdictions like the EU and Germany, whereby the advantage in this respect is that consumer protection procedures can be carried out significantly faster.[118]

1.6 Undertakings with excessive market power

1.6.1 General

The activities of companies with excessive market power are followed with great concern. The focus here is primarily on Facebook, Google, and their activities in the online advertising market.

According to the investigations of the competition authorities in Australia, France and the UK, Facebook and Google play the central role in the market for online advertising.[119] Various reasons are given for the strong position of both companies. In general, they offer specific benefits, such as targeted advertising in particular, at more favourable conditions than other providers, especially of traditional advertising.[120] Google can permanently improve its algorithms based on "click-and-query-data" from the broad user base and now even trace users offline.[121] In addition, compared to their competitors, both companies have significantly larger data volumes, which are also constantly updated, and are both active at both the publishing and the technical intermediation level. Moreover, almost all social platforms, including Facebook in particular, make use of the platform conditional on users agreeing to personalised advertising (take it or leave it). In particular, the lack of alternatives forces users to disclose more data about themselves than they would usually be willing to disclose.[122] Overall, the large number of users of Facebook and Google are a source of market power due to network effects and economies of scale. Additionally, the data possessed by these companies can be a source of exclusionary und exploitative behaviour.[123] There are inter alia concerns about the possibility for leverage into other areas enabled by the Google and Facebook ecosystems and, particularly for Google, the possibility to self-preference its own activities and to reinforce its market power.[124] There are also complaints about a lack of transparency, which not only affects consumer, but also the advertising companies on the other side of the market. As the UK Report outlines for instance, due to a lack of transparency in the operation of online-automated bidding for digital advertising inventory, advertisers often do not know whether they are receiving value for money.[125]

Against the background of the excessive market power held by Google and Facebook in particular, but also by other companies such as Apple, Microsoft and Amazon, concerns are expressed that the current law is still up to the challenges posed by digital platforms in particular.[126] In addition, there are institutional concerns, which have already been mentioned above.[127] In particular, it is argued that ex-post control by way of abuse proceedings is too cumbersome and lengthy to be able to avert damage from digital markets. In this respect, there is, for example, a plea for greater recourse to interim measures and a lowering of the burden of proof, although concerns about the rule of law are also raised in this respect.

1.6.2 European level: Digital Markets Act

At Union level, the DMA in particular aims to address the challenges posed by powerful digital platforms. The Act aims in particular to ensure contestable and fair markets in the digtital sector across the EU where so called gatekeepers are present. According to Article 3 DMA a provider of core platform services shall be designated as gatekeeper if: (i) it has a significant impact on the internal market; (ii) it operates a core platform service which serves as an important gateway for business users to reach and users; and (iii) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

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[118] Hungarian Report, Section 1 and 3.2.
[119] Australian Report, Section 9; French Report, Section Q5; UK Report, Section 1.2; The Bundeskartellamt's sector enquiry has not yet been completed. It aims in particular to better understand the significance of various technical services such as data collection and processing, targeting and benchmarking and auctioning of advertising spots, cf. German Report, Section 5.
[120] Australian Report, Section 9.
[121] UK Report, Section 1.2.
[122] CMA Digital Report, paragraphs 31 to 36.
[123] Belgian Report, 3.2.2.
[124] Australian Report, Section 9; Belgian Report, Section 3.2.1; Norwegian Report, Section 3.5; UK Report, Section 1.2.
[125] UK Report, 1.2.
[126] Cf. for instance Belgian Report, Section 3.2.4; UK Report, Sections 1 and 3.
[127] Cf. Section 1.2 above.

The Digital Markets Act provides for a total of 18 requirements and prohibitions that gatekeepers must comply with, and in this respect introduces a new ex ante regulatory instrument. In this respect, the DMA aims to prevent, among other things, the behaviour of powerful companies described above, which is considered particularly problematic. For instance, a gatekeeper shall refrain from combining personal data sourced from its core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services.

1.6.3 German law

The German legislator has already reacted to some of the challenges posed by undertakings with excessive market power. According to Section 19a of the German Cartel Act[128], the Bundeskartellamt has the possibility to determine that an undertaking which is active to a considerable extent on platform markets has an "overriding cross-market importance" for competition. The provision intends to enable effective control over digital corporations. It aims at companies that not only have a dominant position in individual platform or network markets, but also have the resources and opportunities to continuously expand their own business activities.[129] If these conditions are met, the Bundeskartellamt can prevent certain strategies of such companies in a second step, including inter alia self-preferencing, impeding competitors, abuses by using data, certain deficiencies in the information policy to prevent other companies and so on.[130] Furthermore, the addressees of the standard bear the burden of proof that their conduct is objectively justified.

It would go beyond the scope of this article to compare the current German regulatory concept with the concept of the DMA. However, two major differences should be pointed out: Whereas under German law a gatekeeper status can only be established in the context of a formal administrative procedure, under Art. 3(3) DMA companies are obliged to notify the Commission of their gatekeeper status on their own initiative. In particular, however, under the current German legal situation there are no ex-ante obligations on the companies concerned even after they have qualified as gatekeepers. Rather, the Bundeskartellamt can only prohibit the companies from certain conduct in specific individual cases.

1.6.4 French law

The French Report underlines that various French regulators as well have recently endeavoured to find new expressions of the market power of digital platforms. Thus, the concept of the structuring platform is proposed.[131]

According to this, market power only becomes a trigger for intervention by public authorities instead of a legal standard to demonstrate an abuse of dominant position.[132] In this respect, of course, criteria are also required by which a structuring platform can be identified. Insofar, the FCA and the French electronic communications regulator ARCEP have made proposals that are comparable to the criteria of a gatekeeper within the meaning of Art. 3 Digital Markets Act[133]. The French ARCEP suggests a definition of structuring digital platforms which relies on a body of primary evidence (e.g. bottleneck power of the platform, size of the platform defined in terms of the number of unique users of the platform) and secondary evidence, e.g. access to significant volumes of qualitative data. According to the French Report the proposed approach differs from a "classic" dominance assessment insofar as a "*definition essay with an operational scope*" is proposed.[134]

The extent to which the status of a company as a structuring platform under French competition law entails further obligations, cannot be assessed here. The French Report outlines in this context, that the FCA has already applied its traditional decisional practice to "structuring" platforms". The authority has stated that "[t]*he principle of commercial freedom also applies to so-called "structuring" platforms, […] provided that the rules governing access or maintenance of economic operators to or on these platforms do not have the purpose or effect of restricting competition*".[135] The FCA went on to say that the structuring platform is "*free to define rules providing*

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[128] Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.
[129] *Paal*, IN: Gersdorf/Paal (ed.), BeckOK Informations- und Medienrecht, 33th Ed., Beck 2021, § 19a GWB para 1.
[130] Cf. as well German Report, Section 2.9.
[131] French Report, Section Q2, 2.
[132] French Report, Section Q2, 1.
[133] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.
[134] French Report, Section Q2, 2.2.
[135] Decision No. 21-D-07 of 17 March 2021 on a request for interim measures filed by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil and Achat Media, and Syndicat des Régies Internet associations in the sector of mobile applications advertising on iOS, para. 136; French Report, Section Q6, 3.

additional protection for Internet users compared with what is otherwise required by the regulations" but must not "*direct the economic model of the economic operators listed on its platform, limit their freedom of enterprise, and influence the quality and diversity of the offer open to Internet users*" by means of anticompetitive practices.[136]

1.6.5 UK law

As already seen, [137] in the UK there is widespread agreement that a special pro-competitive regime is needed for companies holding a Strategic Market Status. In particular, current tools such as the special responsibility of dominant companies were insufficient to meet the challenges of these companies.

In its Taskforce Report, the Digital Markets Taskforce made some suggestions on key issues that the new law should address. A central concern of the proposed regime is the concept of Strategic Markets Status. The Task Force recommends that this status requires that a firm has "*substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position in respect of that activity*."[138] The temporary or transitory possession of market power is not so important, it is rather crucial that the position becomes – as under the DMA – *entrenched*, which means that it is expected to "*persist over time and is unlikely to be competed away in the short term*".[139] If an undertaking holds entrenched market power, it can be assumed that prices on the market concerned will be permanently higher, while quality, investment and innovation will be permanently lower, to the long-term detriment of consumers.[140]

As far as a company has strategic market status, it will in future have to comply with a legally enforceable code of conduct. This Code of Conduct will provide a set of *ex ante* principles. It aims to prevent consumers from being exploited and the company from engaging in behaviour that undermines competition.[141] Interestingly, the code will be tailor-made for each individual company with structured market power.

1.6.6 Other jurisdictions

The Australian government has also commissioned the ACCC to develop a Code of Conduct in order to compensate bargaining power imbalances between digital platforms and media companies.[142] In Hungary, the sector-specific NRA responsible in this regard has endeavoured to define a list of companies with significant market power in two Broadband Market Resolutions and has established rules according to which the companies concerned must guarantee access to their infrastructure so that competitors without the corresponding infrastructure can also enter the market.[143] The Benelux NCAs also advocate the introduction of ex-ante instruments, and even suggest that the criterion of abuse be dispended.[144]

1.7 Comparison portals

Comparison portals are generally viewed positively in the various jurisdictions, both from the perspective of competition law and consumer protection law.[145] In particular, comparison portals can contribute to consumers making more informed decisions in line with their needs due to the increased transparency. At the same time, the competitive pressure is increased and competition is strengthened. Of course, this is only true if the comparison portals follow certain codes of conduct and meet certain quality criteria, especially if they are neutral. Otherwise, the effects of comparison portals on competition can be negative and harm consumers.

Sector inquiries, market studies and proceedings of the authorities have shown that comparison portals often do not meet these requirements. For example, in a case against Trivago, the Australian ACCC revealed that it had an influence on the rating of a hotel whether it had paid a cost-per-click fee. Trivago had also not compared the same

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[136] Decision No. 21-D-07 of 17 March 2021 on a request for interim measures filed by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil and Achat Media, and Syndicat des Régies Internet associations in the sector of mobile applications advertising on iOS, paras. 137 and 138; French Report, Section Q6, 3.
[137] Section 1.2 above.
[138] Appendix B § 56 , Taskforce Report; UK Report, Section 3.1.2.
[139] Taskforce Report, paras 28-30; UK Report, Section 3.1.2.
[140] UK Report, Section 3.1.2.
[141] UK Report, Section 3.1.2.
[142] UK Report, Section 3 with reference to The Hon Paul Fletcher MP, ACCC mandatory Code of Conduct to govern the commercial relationship between digital platforms and media companies (Media Release, 20 April 2020).
[143] The NRA's Broadband Decisions are available at http://nmhh.hu/dokumentum/191571/3a_piac_hatrozat_17915_64.pdf and http://nmhh.hu/dokumentum/191577/3b_piac_hatrozat_17920_64.pdf (accessed 14 September 2021); cf. also Section 1.11 below.
[144] Belgian Report, Section 3.2.4.
[145] The Norwegian Report, Section 3.6 offers some serious criticism. However, this criticism seems to refer only to comparison portals in markets that are oligopolistic.

room categories, for example, without making this sufficiently clear to consumers.[146] Comparable practices were also uncovered by the market inquiry of the German Bundeskartellamt and the Hungarian GVH.[147] Other shortcomings include the fact that platforms often cooperate with each other, e.g. by using the same databases, which gives consumers the erroneous impression that the result of one comparison portal has been confirmed by the (independently obtained) result of another comparison portal. The market coverage of the comparison portals is also low in many cases, with precisely those companies being excluded from the comparison that were not willing to pay a fee to the comparison portal operator. In addition, it is sometimes unclear on the basis of which criteria services are compared with each other at all, or complex services are compared in an under-complex manner on the basis of only one criterion, which does not allow for a meaningful result.[148] All these shortcomings ultimately result in consumers not being properly informed and not being able to make a sufficiently informed decision. This is aggravated by the fact that consumers who have consulted a comparison portal will often be convinced that they are making a particularly informed decision that is in their best interests.

Differences exist in the various jurisdictions with regard to the question of the extent to which the practices outlined constitute violations of the law and, in particular, can also be enforced by the competition authorities or at least other authorities. According Australian Report, the current legal framework is sufficient and has already proven itself in practice to get the outlined practices under control.[149] The French Consumer Code provides for specific information obligations for operators of online platforms, the breach of which can result in an administrative fine, whereby the DGCCRF, not the FCA, is responsible in this respect[150]. Under Hungarian law, the GVH is also responsible for enforcing fair trading law and consumer protection law; in addition, criminal and civil sanctions are possible in the case of misleading commercial practices, whereby consumer class actions are also conceivable.

The CMA also has comprehensive competences, especially in consumer protection law. In the DMA Digital Comparison Tools market study, the authority made a series of recommendations to ensure that consumers are treated fairly, whereby comparison portals in particular must be Clear, Accurate, Responsible and Easy to use (CLEAR).[151] The CMA has also used its powers to enforce consumer protection rules on many occasions, for example, taking action against misleading sales practices in the hotel booking sector.

In contrast, there is probably a legal enforcement deficit in Germany in particular. Although the Bundeskartellamt has the possibility to conduct sector enquiries that concern aspects of consumer protection law, authority has no competence to sanction such conduct in any form. In principle, some of the uncovered practices may violate the Unfair Competition Act.[152] However, as the German Report also points out, such violations cannot be asserted by a public authority, but only by way of private enforcement. In this respect, of course, it must be taken into account that individual consumers cannot derive any claims from the Unfair Competition Act. One could still think of a claim for damages under private law by affected consumers who have made an uninformed decision. However, it is questionable to what extent consumers should have any knowledge at all that they have become "victims" of a corresponding practice. Even if they have such knowledge, the damages they suffer are likely to be small in many cases, so that a lawsuit will often fail due to the consumers' rational lack of interest. To a certain extent, only the model declaratory action pursuant to §§ 611 ff of the German Code of Civil Procedure (ZPO)[153], a certain form of class action, could provide a remedy.

1.8 Most favored nation clauses

1.8.1 General

Most favoured nation clauses (hereafter: MFN), also called best price clauses or parity clauses, have already been the subject of official investigations and decisions in most jurisdictions and have in some cases already occupied the courts and legislators. They play an important role in digital platforms, especially in comparison portals where customers can also conclude a contract with the providers, such as Expedia, Booking and HRS, or on Amazon. In digital markets, MFNs are typically designed in such a way that the provider offering a service or good on one

[146] Australian Report, Section 7.3.
[147] German Report, Section 9; Hungarian Report, Section 5.3.1.
[148] Hungarian Report, 5.3.1.
[149] Australian Report, Section 7.3.
[150] French Report, Section Q9, 2.
[151] Cf. UK Report, Section 5.1.
[152] Gesetz gegen den unlauteren Wettbewerb in der Fassung der Bekanntmachung vom 3. März 2010, BGBl. I p. 254.
[153] Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005, BGBl. I p. 3202; 2006 I, p. 431; 2007 I, p. 1781.

platform is not authorised to offer the same service on another distribution channel at a lower price or on better terms. The other distribution channels can be competing platforms, the supplier's own homepage or even offline distribution, depending on the design of the clause.

MFNs can take different forms depending on the context. In many jurisdictions, a fundamental differentiation between wide and narrow MFNs is recognised. This differentiation is linked to the extent to which the contracting parties are prohibited from offering their products through another distribution channel on better terms. A narrow MFN is spoken of if the prohibition only refers to the supplier's own distribution channels, e.g. a hotel is not allowed to offer rooms on its own homepage at more favourable conditions. A wide clause is used if the prohibition also extends to distribution via competing platforms.[154]

In this respect, too, the terminology is not uniform and a clear-cut classification of an MFN as wide or narrow is not possible. As the German Report mentions by way of example, German authorities and courts have described MFNs as "wide" and subsequently invalid (see below), which were significantly narrower than an MFN in a Czech case against Booking.[155] MFNs sometimes go beyond the mere prohibition to offer the product on other distribution channels at more favourable conditions. For example, Amazon has given commitment to the European Commission that it will not use MFNs that oblige competitors to inform Amazon about competitors' business models, promotions, prices, etc.

As far as can be seen, there is consensus within the various jurisdictions that MFNs can both violate the prohibition of cartels and constitute an abuse of market power. On the one hand, MFNs can increase competition in vertical relationships. In addition, comparison portals whose operators often use MFNs also have positive effects on competition. Finally, platform operators may have a legitimate interest in preventing providers from using their platform only to attract the attention of customers in order to offer them the product via another distribution channel at more favourable conditions (so-called free riding). With regard to the advantages that MFNs can have, these clauses tended to be assessed positively in Australia, for example.[156] On the other hand, it should be noted that MFNs can restrict competition between different platforms and also represent a considerable interference in the pricing freedom of the obligated suppliers.

The way in which the competition authorities and the courts deal with MFNs within the individual jurisdictions can only be outlined with broad brushstrokes, as the practice even within the jurisdictions still seems to be in flux.

However, the rule of thumb that broad MFNs are generally inadmissible, while narrow MFNs may be admissible, seems to be recognised across jurisdictions. It is true that narrow MFNs can be subsumed under the prohibition of cartels (for instance Art. 101 (1) TFEU). In view of the already mentioned interest of the platform operators to prevent free riding, the use of an MFN can, however, be objectively justified. On the level of EU law, an MFN can also fall under the Block Exemption Regulation 330/2010[157]. Though, this justification does not apply if broad clauses are used. The rule of thumb corresponds in principle to the results of a monitoring exercise of the EU Commission and nine national competition authorities concerning the hotel sector, which was published in 2017.[158] The practice of the authorities and jurisdiction outlined in the individual national reports also seems to be oriented towards it – also beyond the hotel sector.[159]

Of course, an assessment of the respective clause in the concrete individual case is necessary.[160] That even narrow MFNs can also be potentially inadmissible is proven by the example of the use of narrow MFNs by Booking, which is also mentioned in the German Report. Contrary to the outlined rule of thumb, the Bundeskartellamt had assumed that narrow MFNs also violated Article 101 (1) TFEU without being objectively justified by efficiencies under Article 101 (3) TFEU. This decision was initially confirmed by the Düsseldorf Higher Regional Court (OLG

[154] Cf. for instance Swiss Report, Section 2.2; Belgian Report, Section 3.2.3; German Report, Section 11; Hungarian Report, Section 5.2.2; Swiss Report, Section 2.2; UK Report, Section 6.
[155] German Report, Section 11.
[156] Australian Report, Section 9.
[157] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) Traty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ from 24 April 2016 L102/1.
[158] EC Monitoring Exercise carried out in the online hotel booking sector by EU competition authorities in 2016, available at https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf (accessed 14 September 2021).
[159] Cf. Austrian Report Section 2.8; Belgian Report, Section 3.2.3; French Report, Section Q7, 1; German Report, Section 11; Hungarian Report, Section 5.2.2; Swiss Report, Section 2.2; UK Report, Section 6.
[160] Swiss Report, Section 2.2.

Düsseldorf) in an interim decision, but later reserved. At the moment, the Bundesgerichtshof BGH (Supreme Court) is dealing with the question.

The Hungarian NCA also had concerns about a narrow MFN in the online food ordering market. The Hungarian Report emphasises that, in the opinion of the NCA, only such narrow clauses are permissible that extend to the supplier's own online sales, but not to offline sales.[161] The Australian competition authority, which does not seem to adhere strictly to the dogmatic distinction between narrow and broad MFNs, does not seem to have found a uniform approach to MFNs across different sectors.[162]

1.8.2 MFN-related specific regulation

It is worth mentioning that some jurisdictions provide for special regulations for MFNs, which are sometimes stricter than the principles outlined above.

In 2018, the Belgian Parliament enacted a law regarding the freedom of tariffs by hoteliers in contracts concluded with platform operators for online reservation.[163] According to this law, operators of online platforms are per se prohibited from restricting the freedom of hotel owners to set prices in any form - and thus also through FMN - provided that the hotel property is located in Belgium.[164]

The use of MFN in the hotel industry is also in the focus of the legislator in Switzerland. Thus, the Swiss parliament has recently approved a motion that would introduce a general ban on all MFNs in the hotel industry. According to the Swiss Report this should lead to a legislative prohibition of all price parity clauses in the future, regardless of their nature.[165]

The French Commercial Code prohibits an economic operator from requiring its partners to grant it the same advantages as its competitors.[166] Based on this, the use of MFNs by travel and hotel booking platforms in particular has been sanctioned. In addition, any producer, trader, or service provider shall be held liable and obliged to remedy the damage caused in the course of business negociation, the conclusion or the execution of a contract for submitting or attempting to submit a trading partner to obligations creating a significant imbalance in the rights and obligations of the parties.[167] Based on this standard, for example, a broad MFN used by Booking was declared null and void by the Paris Commercial Court.[168] Finally, with Art. L-311-5 of the French Tourism Code, a sectoral per se ban on MFNs in the hotel sector was enacted. According to this legal provision the hotelier retains the freedom to grant the client any discount or pricing advantage of any kind, any clause to the contrary being deemed unwritten. The impact of this law is considered positive by the Comité des affaires économiques.[169]

The fact that individual legislators prohibit the use of MFNs in whole or in part is in line with potential legal developments at the EU level. Thus, according to Art. 5 lit. (b) DMA, a gatekeeper shall allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. These developments at the national level are thus already at least partly in line with the above-mentioned[170] call for increased ex ante regulation.

1.9 Interaction between Competition Law and Data Protection Regulation

1.9.1 General

Competition law and data protection law are materially separate legal matters, which each pursue independent objectives, at least in their starting point.[171] While competition law protects competition and is intended to prevent companies from engaging in anti-competitive behaviour, data protection law generally aims to protect the rights

[161] Hungarian Report, Section 5.2.2.
[162] Australian Report, Section 9.
[163] Wet betreffende de tariefvrijheid van exploitanten van toeristische logies in de contracten afgesloten met platform-operators voor online reservatie, Official Gazette 2018, N. 188, p. 62710.
[164] Cf. Belgian Report, Section 3.2.3.
[165] Swiss Report, Section 2.2.
[166] Art. L. 442-3 Code de Commerce.
[167] Art. L.442-1 Code de Commerce.
[168] French Report, Section Q7 2.2.
[169] French Report, Section Q7 2.3.
[170] Cf. Section 1.6 above.
[171] Cf. for instance Swiss Report, Section 2.1.

and interests of individuals who are affected by the collection, evaluation and use of personal data (right to privacy, right to informational self-determination).[172] This substantive distinction between competition law and data protection law is reflected in a formal-institutional sense in that the enforcement of data protection law in all jurisdictions is not one of the (core) competences of the competition authorities, but that special data protection authorities are responsible in this respect.[173] According to Art. 51 GDPR, the establishment of independent data protection authorities in the Member States is even mandatory.

However, both areas of law can overlap. The reason for this, to put it simply, is that they are partly linked to the same factual aspects. As data protection law is generally linked to the collection, evaluation, use and disclosure of personal data, these factual aspects raise, as already seen, specific competition law questions and concerns. For instance, the special standing of digital platforms is based precisely on the fact that they can collect, evaluate, combine and use data otherwise, that data has monetary value, ownership and use of data can create or strengthen market power.[174] In addition, data protection aspects have a link to consumer welfare, because consumers value data protection aspects as an important product characteristic.[175]

1.9.2 Starting point: complementary relationship

The relationship between data protection law and competition law is increasingly coming into focus in most jurisdictions. One central question is whether a violation of data protection law can constitute an abuse of market power. If this question is answered in the affirmative, the result is that - contrary to the outlined material and institutional distinction between data protection law and competition law - to a certain extent the NCAs would also be responsible for sanctioning data protection law infringements.

A clear picture of opinion on this question within the various jurisdictions is not yet apparent from the National Reports. In principle, there seems to be agreement that the data protection authorities and the competition authorities - as the Norwegian report aptly points out - have complementary competences.[176] The enforcement of data protection law is the very own and, in principle, exclusive task of the data protection authorities. However, the competition authorities can intervene if a matter not only essentially concerns data protection issues, but also raises specific competition law concerns, i.e. if the collection, use and analysis of data lead to anti-competitive conducts or agreements or constitute an abuse of market power. If mergers are at issue, the accumulation of data would have to give rise to competitive concerns.[177]

1.9.3 Current approaches

According to what has been said so far, it is decisive when data protection law issues raise competition law concerns beyond data protection law.

As regards the further specification of these general requirements, the French Report refers to a joint study conducted by the FCA with the Bundeskartellamt in 2016. According to this study, data processing can always trigger competition concerns if "*privacy policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services and A close link between the dominance of the company, its data collection processes and competition on the relevant markets could justify the consideration of privacy policies and regulations in competition proceedings*" [178].

In its Facebook case, the Bundeskartellamt took a primarily data protection-oriented approach and took the view that the abuse of a dominant position could essentially be argued on the ground that Facebook had disregarded the requirements of the GDPR when combining user data and device-related data collected on the Facebook website with "off Facebook data".[179] In contrast, the Bundesgerichsthof BGH (Federal Supreme Court) preferred a more competition-oriented approach in order to keep the overlaps with data protection law low.[180] Thus, the court

[172] It is worth noting that the right to privacy is not constitutionally guaranteed in Australia, cf., Australian Report, Section 8.1.
[173] Australian Report, Section 8; Austrian Report, Section 2.3; Belgian Report, Section 3.2.2; French Report, Section Q1; Hungarian Report, Section 2; Norwegian Report, Section 3.4; Swiss Report, Section 2.1; UK Report, Section 4.3.
[174] Austrian Report, Section 2.2.
[175] Hungarian Report, Section 2; Australian Report, Section 8.2.
[176] Norwegian Report, Section 3.4.
[177] In this sense, cf. Austrian Report, Section 2.3; Belgian Report, Section 3.2.2; French Report, Section Q6 1; Norwegian Report, Section 3.4; Swiss Report, Section 2.1.
[178] Bundeskartellamt and French Competition Authority, Joint Study on Competition Law and Data, 10 May 2016, pp. 23-24.
[179] See in detail German Report, Section 1; Bundeskartellamt, Decision of 6 February 2019 – B6-22/16.
[180] See in detail German Report, Section 1; BGH, Judgment of 23 June 2020 – KVR 69/19.

primarily focused on the fact that the lack of an option for users to opt-in to have only the data generated when using Facebook itself used for personalised advertising restricts the users' freedom of choice. Since it is generally part of the business model of social networks to collect data in order to place advertisements, a company that collects data in violation of the GDPR gains an advantage over its competitors that behave in a legally compliant manner. In particular, barriers to entry would be erected because competitors acting in a data protection-compliant manner would not be able to offer personalised advertising in the same way as Facebook and would consequently also find it difficult to finance their network. Moreover, in the context of the balancing of interests required under the German Cartel Act[181], conduct in breach of data protection was only of secondary importance. In regard of the relationship between competition law and data protection law, the German Report outlines that the BGH refers to the infringement of the GDPR only as one factor in the balancing of interests. A violation of the GDPR is not a necessary requirement for a competition law infringement, whilst on the other hand an infringement of competition law is even possible when the requirements of the GDPR are met. Now, it is on the OLG Düsseldorf to decide the case in the main proceedings. On the 24 March 2021, the OLG Düsseldorf made a referral to the CJEU according to Art. 267 TFEU. With regard to the relationship between data protection law and competition law, the OLG submitted the following questions, among others, to the CJEU:

> a) Can a national cartel authority of a Member State, such as the Bundeskartellamt, which is not a supervisory authority within the meaning of Art. 51 et seq. GDRP and which examines an infringement of the prohibition of abuse under antitrust law by a dominant undertaking which does not consist in an infringement of its data processing conditions and their implementation against the GDPR, make findings, for example in the context of the balancing of interests, as to whether the data processing conditions of that undertaking and their implementation comply with the GDPR?
>
> b) If so, does this also apply with regard to Article 4(3) TEU if, at the same time, the competent lead supervisory authority pursuant to Article 56(1) GDPR subjects the data processing conditions of that undertaking to an investigation procedure?

In an opinion, the French NCA clarified its view that data protection has an impact on competition and is therefore likely to be taken into account by the French NCA in its analyses[182] In Austria, according to the NCA, violations of other fields of law must be taken into account as well when assessing the abuse of a dominant position.[183] In contrast, the Belgian report explicitly raises concerns about the practice of the Bundeskartellamt and assumes that the Belgian NCA would not intervene in a comparable case: Exploitative cases were significantly more difficult to bring than exclusionary cases. In addition, data protection aspects were more likely to be affected and the Belgian NCA preferred the approach of the European Commission that the data protection authorities are responsible in such a case.[184] The Norwegian NCA has also expressed scepticism as to whether competition law is an adequate instrument to enforce data protection law.[185]

In Hungary, the enforcement of data protection law is also the exclusive responsibility of the data protection authority HDPA. However, since data protection could be considered part of consumer welfare and data-related practices could also constitute unfair commercial practice, the authority wants to resort to instruments of fair trading law.[186] The Hungarian NCA has not yet applied antitrust law to the data-processing activities of social networks.[187]

The Australian report emphasises that the Australian federal data protection authority OAIC has so far hardly taken any action against platforms and in particular has not taken into account the systemic concerns associated with the collection and use of device-related data across different platforms. The Australian Privacy Act is also "woefully under-litigated" and the central concept of "personal information" is unclear. However, the ACCC is increasingly focusing on the protection of consumer privacy. In its final report, the ACCC pleads for far-reaching changes to

[181] Section 19 (1) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013, BGBl. I p. 1750, 3245.
[182] French Report, Section Q1.
[183] Austrian Report, Sections 2.2, 2.3.
[184] Belgian Report, Section 3.2.2.
[185] Norwegian Report, Section 2.
[186] Hungarian Report, Section 2.
[187] Hungarian Report, Section 2.

the Australian information privacy law framework in order to be able to take appropriate action against the market power of digital platforms.[188]

1.9.4 Need for further coordination

It should be borne in mind that the tensions between the two areas of law go beyond the question just outlined of whether NCAs can also take action based on a breach of data protection law. The question of the appropriate coordination of competition law and data protection law has other dimensions as well.[189]

In particular, an uncoordinated coexistence of data protection law and competition law can lead to the legal areas obstructing each other, i.e. the enforcement of data protection law standards has adverse effects from a competition law perspective and is therefore undesirable, or vice versa. Such obstructions between antitrust law and data protection law are generally due to the fact that there can also be conflicts of objectives between the two areas of law despite partly identical objectives.[190] The UK Report impressively demonstrates the fact that such conflicts of objectives are already relevant in practice. For instance, the CMA is concerned that Google and Facebook are abusing the GDPR to deny third parties access to relevant data, but are using this data themselves within their own ecosystem.[191] Google has recently announced that it will discontinue support for third-part cookies on the Chrome browser for data protection reasons, with the support of the ICO. This may be desirable from the singular perspective of data protection law, but - at least in the view of the CMA - leads to publishers' ability to offer personalised advertising being restricted, while Google continues to have access to the data of Google Search and YouTube users.[192] The examples show that the question of the relationship between competition law and data protection law goes far beyond a clear demarcation of the two areas of law. Even if a material demarcation should succeed, the difficult question of the relationship between the two areas of law is not answered. In particular, the effects of one on the other area of law must not be denied and neglected in praxis.

Given the importance of data in the digital economy and the power of digital platforms, the discussion should rather focus on exploring how data protection law and competition law can be meaningfully intertwined. This requires a more detailed analysis, especially of the extent to which both areas of law, despite their different meta-goals, also pursue common (intermediate) goals, and the extent to which the respective instruments of one area of law can, if necessary, also be used in a supportive manner in order to be able to achieve (intermediate) goals of the other area of law. In addition, special emphasis must be placed on uncovering the conflicts of objectives between the areas of law and analysing in which context data protection law and competition law obstruct each other and for what reasons. Finally, this material-dogmatic interlocking must also be secured institutionally by meanings of substantial cooperation between legislators and authorities. We should not only think of informal cooperation between the data protection and competition authorities, but also of legally binding procedural regulations that guarantee such cooperation. For example, mandatory consultation of the respective other authority in administrative and judicial proceedings relating to the respective other regulatory matter, corresponding information rights of the authorities, the establishment of special, competent panels of judges at courts, etc. should be considered.

Most of the Jurisdictions already seem to address such cooperative considerations, albeit only through non-binding agreements. The French DGCCRF and the CNIL signed, for instance, a cooperation protocol in order to strengthen the entities' collaboration. The Austrian NCA announced to join forces with the national telecommunications regulator in purpose of monitoring digital platforms.[193] In the UK, the CMA, the ICO and Ofcom have jointly founded the Digital Regulation Cooperation Forum (DCRF), whose role consists primarily of supporting cooperation and coordination between the mentioned authorities to advance a coherent regulatory approach.[194]

All in all, it can be said that the analysis of the relationship between data protection law and competition law is only just beginning. In my view, the consistent exploration of this relationship seems elementary in order to be able to adequately meet the challenges of digitalisation. Just for the sake of completeness, it should be pointed out

[188] Australian Report, Section 8.1.
[189] On the coordination of different areas of law and the associated methodological and doctrinal issues, cf. *Schäfers*, Korrelative Systeminterferenzen, Mohr Siebeck 2021.
[190] Cf. on this concept in detail Schäfers, Korrelative Systeminterferenzen, Mohr Siebeck 2021, p. 250 ff.
[191] UK Report, Section 1.2.
[192] UK Report, Section 4.1.
[193] Austrian Report, Section 1.
[194] UK Report, Section 4.1.

that with regard to the collection, evaluation and use of data, other areas of law also collide with both data protection law and competition law. Above all, one should think of fair trading law, consumer protection law and general private law, especially general contract law. Legal science and practice are thus faced with an extremely difficult coordination task that will probably occupy researchers and practitioners for many years to come.

1.10 General terms and conditions, consumer protection

Related to the questions dealt with under Section 1.6 and 1.8 above and not easy to differentiate from them is the issue of the extent to which competition authorities also take action against general terms and conditions, especially with regard to data collection and consumer protection law.

In the Swiss legal system there is so far no case dealing with the use of inadmissible general terms and conditions regarding data collection.[195] The same applies to Hungary.[196] However, the Hungarian Report emphasizes that the GVH is also very active in the enforcement of consumer protection law as far as mobile service providers are concerned.[197] The Norwegian report emphasises that the use of general terms and conditions for data collection is primarily a task for data protection and consumer protection authorities.[198]

According to the Austrian Report, the Austrian NCA was initially authorised as the Austrian authority for Cooperation of EU Authorities in Consumer protection to remedy intra-EU infringements of certain consumer protection regulations, insofar as collective interests were affected. However, the authority lost its competence at the beginning of 2020.[199]

The French NCA has specified the legality requirements for the terms of use of Google's services in the advertising market on several occasions since 2010. The authority placed particular emphasis on the predictability and non-discriminatory application of the terms of use.[200]

The CMA is authorised to conduct market inquiries under the specific aspect of consumer protection law. It has also taken a closer look at the default settings and the design of the privacy terms and conditions of digital platforms.[201] According to the CMA, default settings have a far-reaching influence on the shape of competition in both search and social media, because they affect the way in which users use the search engine and, especially in the case of social networks, have a considerable influence on the possibilities of collecting data about their customers. The CMA also criticised the design of the privacy terms and conditions, which are too long and complicated, with the result that users simply give their consent.[202] Another criticism is that consumers often have no possibility to use a service without being exposed to personalised advertising.[203] Even if they have the option, they need clear and understandable information about what exactly is happening with their data. In the CMA's view, these conditions are often not met. As a result, many consumers would use services that they would not use if they were properly informed.[204] Against this backdrop, the CMA Digital Report recommends a "Fairness by Design obligation" to maximise users' ability to make informed choices.[205]

In its DPI Final Report, the Australian ACCC as well criticised a discrepancy between the expectations of consumers and the actual terms and conditions underlying their agreements with digital platforms, particularly with regard to what and how much data is collected by the platforms, how and to what extent it is used and passed on to third parties.[206] The fact that consumers nevertheless accepted the terms and conditions despite fundamental reservations about data protection law vis-à-vis platforms (privacy paradox) was due in particular to the lack of bargaining power of consumers, who had no choice but to join the platform, as well as information asymmetries

[195] Swiss report, Section 2.1.
[196] Hungarian Report, Section 6.2.
[197] Hungarian Report, Section 6.2.
[198] Norwegian Report, Section 3.4.
[199] Austrian Report, Section 2.11.
[200] Decision No. 21-D-07 of 17 March 2021 on a request for interim measures filed by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil and Achat Media, and Syndicat des Régies Internet associations in the sector of mobile applications advertising on iOS, paras. 137 and 138; French Report, Section Q6, 3.
[201] UK Report, Section 4.4.
[202] UK Report, Section 4.4.
[203] UK Report, Section 4.2.
[204] UK Report, Section 4.2., 4.3.
[205] UK Report, Section 4.3.
[206] Australian Report, Section 7.1.

between the platforms and the consumers.[207] In reviewing the terms and conditions of digital platforms, the ACCC specifically identified the following practices of digital platforms that are of concern: Terms and conditions are presented on a take-it-or-leave-it basis; clickwrap agreements contain unobtrusive links to online documents that permit the collection, use and disclosure of vast amounts of user data; data use consents are bundled for different uses and different services; privacy policies are long, complex, vague and difficult to navigate.[208] Since the practices outlined will further increase the imbalance between the parties, it was deemed necessary to re-evaluate the consumer protection legal framework.[209] In this respect, the peculiarity of Australian law has to be taken into account, that the ACCC, together with other authorities, has the competence for administering also consumer protection law. Although the DPI Final Report came to the conclusion that consumer protection law provides several effective instruments against questionable practices of digital platforms, the DPI Final Report and the DPSI2020 nevertheless provide for certain tightenings or innovations of consumer protection law that deal specifically with unfair contract terms and commercial practices. Changes to the Australian information privacy law framework are also needed to counter the market power of digital platforms. These changes should aim, among other things, to provide consumers with information to enable them to decide whether services meet their privacy preferences, and to address bargaining imbalances in relation to the collection, use and disclosure of consumers' personal information.[210]

Since 2017, the German Bundeskartellamt has had for the first time the power to conduct sector enquiries also in relation to economic consumer protection. The competence also extends in particular to the law of unfair competition and the law on general terms and conditions. In this respect, however, it must be considered that the Bundeskartellamt has no powers to sanction violations of consumer protection regulations or to enforce consumer protection regulations. Rather, consumer protection standards in Germany are largely enforced by way of private enforcement. As already mentioned above, the Bundeskartellamt had though just accused Facebook of using invalid general terms and conditions and thus violating the GDPR.[211]

1.11 Telecommunications sector

1.11.1 General

For large digital platforms in particular, there is currently a considerable incentive to integrate vertically in the telecommunications supply chain, as they are dependent on telecommunications networks and therefore have an interest in reliable and far-reaching telecommunications services.[212] The NCAs, which in principle supervise every activity of companies regardless of the economic sector, also have competences in the telecommunications sector. In addition, sector-specific authorities (sometimes several) are responsible in the individual jurisdictions as well. The responsibilities of the sector-specific authorities and the competition authorities may overlap, but the activities of the different authorities are primarily complementary.[213]

1.11.2 Consumer protection

Regarding the telecommunication sector, consumer protection issues seem to play an important role especially in Australia and Hungary.

In Australia, the telecommunications industry is monitored by three different authorities. In addition, the Telecommunications Industry Ombudsman (TIO), a free service to consumers and small businesses, has been established with the particular task of developing solutions to minor disputes.[214] Despite the establishment of the TIO, the ACCC had denounced in its DPI Final Report that there were no effective dispute resolution processes for consumers and businesses in their dealings with digital platforms. The ACCC suggested that the ACMA should develop specific standards with best practice principles, e.g. concerning internal dispute resolution, accessibility or collection of information.[215] The Australian government has shown itself to be open to the proposals in principle,

[207] Australian Report, Section 7.1.
[208] Australian Report, Section 7.1.
[209] Australian Report, Section 7.1.
[210] Australian Report, Section 8.2.
[211] Cf. 1.9.3.
[212] Australian Report, Section 5.1 with reference to DPSI2020, p. 79 et seq.
[213] Cf. for instance Norwegian Report, Section 3.3.
[214] Austrian Report, Section 2.9.
[215] Australian Report with reference to DPSI2020, p. 508 et seq.

but has also committed itself to developing a pilot external dispute resolution scheme in consultation with major digital platforms, consumer groups and relevant governmental agencies.[216]

In Hungary, the GVH attaches importance to effectively enforcing consumer protection standards against mobile phone providers, e.g. with regard to unlawful pricing and discounting practices or unlawful statements on market leadership and other misleading advertising.

1.11.3 Mergers and abuse of dominant position

In Germany, Hungary, Norway and Switzerland, the telecommunications sector was the focus of the competition authorities, especially with regard to mergers and abusive behaviour by dominant undertakings.[217] The case practice within the various jurisdictions proves in this respect that in particular the possibilities of commitment decisions can be an adequate means to ensure the rapid spread of high technology through the possibility of mergers on the one hand, but on the other hand to eliminate associated competition law concerns.[218]

The German Bundeskartellamt had investigated, for instance, a cooperation agreement and the creation of a joint venture between the leading internet network operators *EWE* and *Telekom Deutschland*, which wanted to cooperate on the expansion of the fast fibre optic network.[219] The Bundeskartellamt approved the merger, requiring the two companies to submit commitments. Among other things, it had to be guaranteed that a minimum number of households would be connected to the fast internet by 2023 and that the network would be expanded to a certain extent in rural areas. In addition, the companies had to undertake to participate independently in future public tenders and not to involve the joint venture in the tenders.

In Hungary, the sector-specific NRA responsible in this regard has endeavoured to define a list of companies with significant market power in two Broadband Market Resolutions and has established rules according to which the companies concerned must guarantee access to their infrastructure so that competitors without the corresponding infrastructure can also enter the market.[220] With regard to the prices at which undertakings with significant market power are obliged to grant access to their networks, the NRA applied for the first time the bottom-up pure LRIC cost calculation methodology recommended by the EU Commission.[221] The case *DIGI*/*Invitel* concerned the merger of two major Hungarian companies in the market for wired telecommunications. In view of the extensive networks of both companies, it was to be feared that the merger would have led to a significant impairment of competition. Interestingly, the GVH did not oblige DIGI to grant other companies access to DIGI's infrastructure. Rather, DIGI had to sell the relevant networks. According to the Hungarian report, this is a deviation from the usual practice within the EU, whereby GVH is probably trying to encourage competitors to build their own parallel networks rather than cooperate with each other.[222]

The Norwegian NCA also sees it as one of its priority tasks to strengthen competition in the telecommunications sector.[223] In particular, the authority has intervened several times against mergers in the telecommunications sector, as the mergers would have had anti-competitive effects. In each case, however, the competition authority made use of the possibility of commitments and was thus able to accept the mergers. In addition, the authority has concentrated on proceedings against *Telenor* for abuse of its dominant position by using pricing structures that distort competition.[224]

1.12 Summary

The National Reports were dedicated to the overarching question of whether disruptive technologies call for disruptive competition law enforcement. Based on the analysis of the reports from the various jurisdictions, this question can neither be generally answered in the affirmative nor in the negative. In particular, a blanket answer

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[216] Austrian Report, Section 5.1 with further reference.
[217] Cf. for instance German Report, Section 8; Hungarian Report, Section 6.1, Norwegian Report, Section 3.3, Swiss Report, Section 2.4.
[218] German Report, Section 8.
[219] Bundeskartellamt, Commitment of 4 December 2019 – B7-21/18.
[220] The NRA's Broadband Decisions are available at http://nmhh.hu/dokumentum/191571/3a_piac_hatrozat_17915_64.pdf and http://nmhh.hu/dokumentum/191577/3b_piac_hatrozat_17920_64.pdf (accessed 14 September 2021); cf. already Section 1.5.5.2 above.
[221] Hungarian Report, Section 6.1.
[222] Hungarian Report, Section 6.1.
[223] Norwegian Report, Section 3.3.
[224] Norwegian Report, Section 3.3.

to this question that claims to apply to all jurisdictions is out of the question, if only in view of the different structures of the individual legal systems.

At any rate, competition law seems to be well positioned to meet the challenges of digitalisation at least at the starting point. It has been shown in various contexts that the fact that the central competition law norms, in particular the prohibition of the abuse of market power, are structured as general clauses is an advantage in this respect. Competition law proves to be sufficiently flexible to be able to react appropriately to many challenges of disruptive technologies. In particular, a certain restraint on the part of the legislator also has the advantage that the authorities can gradually gain experience in dealing with the new technologies under competition law, e.g. in the context of initial proceedings against digital platforms, the conduct of market inquiries, etc. This experience can possibly be better incorporated into regulation in a decentralised and flexible manner, e.g. through soft law instruments, than through lengthy changes to the legal framework that may soon be outdated by case practice. For example, the initially problematic question of whether markets for free services should be recognised could be dealt with relatively quickly and uniformly within all jurisdictions without the legislators having to take action. In view of this unanimous view within different jurisdictions, it seems doubtful, for example, to what extent the introduction of a corresponding legal regulation in Germany was necessary and beneficial at all. Also with regard to the basic criteria that can be used to determine market power in digital markets, especially the competition authorities within most jurisdictions have developed criteria that are largely in line with the explicit German regulation.

With regard to the principle of legal certainty and democratic legitimacy, it is certainly recommendable that the legislators take action and successively adapt the legal framework. Legal certainty is especially important for (young) companies in digital markets and generally promotes innovation. Sometimes, however, it is doubtful whether new regulations contribute to legal certainty. For example, although the German legislator has explicitly addressed platforms, the central question of the definition of platforms has been left open. The section of the German Cartel Act addressing markets for free services also does not answer the question of how to define such markets, which is considered extremely difficult in many jurisdictions. Nevertheless, such legislative initiatives can be understood as a signal to (powerful) companies on digital markets that the legislator has their activities on its radar.

Despite this fundamentally optimistic assessment of the existing legal framework, the National Reports have also shown that new conceptual and methodological approaches, as well as completely new regulatory approaches, are required in a wide variety of contexts in order to be able to deal with the new technologies. This relates, for example, to the question of market definition on multilateral markets as well as on markets for free services. In this respect, the demand for greater consideration of the findings of behavioural economics seems to me to be of particular relevance. If one takes into account that the advantage of collecting, combining and evaluating data consists, among other things, precisely in being able to foresee the idiosyncratic needs and weaknesses of consumers and to influence their behaviour, it is unavoidable that the relevant findings of behavioural economics should also be taken into account on the part of the authorities and legislators.

In addition, there are widespread concerns about the extent to which abuse proceedings in particular are suitable for overcoming the challenges in digital markets. From an institutional point of view, abuse proceedings appear to be too lengthy and cumbersome in view of the rapid developments on digital markets. The associated ex-post regulation is probably not suitable for providing sufficient protection in digital markets. Whether it is also appropriate against the background of the rule of law to make greater use of interim measures or to change the burden of proof is discussed controversially. It is also evident, especially in digital markets, that proving a dominant position can be associated with considerable difficulties or that intervention by the competition authorities may be necessary even if a company does not (yet) hold a dominant position. In this respect, however, it has been shown that in many jurisdictions legal instruments already exist to regulate companies without a dominant market position.

However, companies with excessive market power pose particular challenges to competition law. In this respect, considerable concerns are being expressed in several jurisdictions that the current legal framework is still up to these challenges. At the EU level, the draft Digital Markets Act should be taken into account, which is intended to introduce specific obligations for so-called gatekeepers and would result in ex ante regulation of these companies. In the UK, too, there is a plea for ex ante regulation for companies with a so-called structural market status. The

German legislator has already introduced an independent standard for companies with a so-called overriding cross-market-importance. Unlike the drafts at EU level and in the UK, however, the German regulation does not lead to ex ante regulation of these companies. In France, regulators have recently developed the concept of structuring platforms to find new expressions of market power of digital platforms. This concept is based on the criteria of the DMA for gatekeepers.

Finally, one of the possibly most far-reaching challenges to competition law through digitalisation is to coordinate competition law with other areas of law, especially data protection law. The process of addressing this issue is only just beginning.