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REGULATORY CONCEPTS FOR INTERNET PLATFORMS

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Abstract: *Several internet platforms control the central interfaces of the internet and have acquired enormous economic and social importance. These internet platforms show tendencies towards monopoly and expansion. An analysis of various existing regulatory concepts clarifies limits with regard to the challenges in connection with internet platforms. This thesis deals with the phenomenon and problem areas of dominant internet platforms, examines whether these can be adequately countered by existing regulatory concepts and provides recommendations on how these could be better captured by the regulations. This thesis explores the question of how internet platforms are regulated today, i.e. which laws and private regulations currently apply. Correspondingly, specific regulatory concepts are examined in broad detail. The analysis starts with various self-regulation forms, followed by regulatory concepts under competition law, which are intended to ensure the functionality of competition. These are transformed into regulatory concepts for the protection of consumers and their data and finally into comprehensive state forms of regulation in connection with monopolies.*

Keywords: EU, Economic Background, Internet Platforms, Regulatory Concepts.

Introduction

This thesis examines from an economic (and legal) point of view how the strong market positions arise and can be maintained by internet platforms. These internet markets have emerged from a series of innovations and are characterized by rapid technological development. Therefore, to understand how these markets work and to balance the regulatory objectives, it is necessary to deal with innovation research. The positive and negative effects of these markets are analyzed and

it is determined in which areas there may be a need for regulation. A special focus is made on the problem areas of monopolization, dependency and the protection of users and their data. Various existing regulatory concepts that affect the problem areas outlined are tested for their applicability and possible need for adjustment. Taking into account the economic peculiarities as well as findings from innovation and research, recommendations are drawn up on how these problems can be dealt with in regulatory terms. The concepts presented represent current and potential regulatory responses to these challenges. In the following we will deal, among other, with the Microsoft/ Yahoo!, Apple, IBM as well as AT&T cases.

Objective and methodology

The main objective of the article is to comprehensively analyse various existing regulatory concepts and to clarify their limits with regard to challenges in connection with internet platforms. One of the research question is whether the current competition law is still up to data or whether it require modifications associated to digital challenges. Taking into account the economic peculiarities as well as findings from innovation and governance research, recommendations are drawn up on how these problems can be dealt with in regulatory terms. The data was collected from scientific literature, as well as respective case law through in-depth document analysis. We want to achieve our stated objectives, particularly through study of legislation, scientific literature, as well as respective case law. We try to use critical analysis to review the economic-legal and regulatory situation as well as abstractions. By applying a comparative method we also make different view from EU and US perspective. Comparative analysis was used as one of the methods of analysis, which made it possible to compare the look from both sides of Atlantic. The methods used allowed us to obtain reliable and valid conclusions and results.

Self-regulation

The operators of internet platforms use different forms of private self-regulation to solve problems and conflicts, such as codes of conduct (Yara, Brazheyev, Golovko, Bashkatova, 2021). Such codes of conduct enable transnational or even global regulation. Due to its complexity as well as its international character and the cross-border effects of the activities of internet platforms, the internet area is particularly suitable for forms of cooperative regulation or private self-regulation, precisely because there is a lack of state regulation or effective enforcement in many

areas. In the following, various examples of codes of conduct for complaints in the area of internet platforms are presented and their respective advantages and disadvantages are examined.

There are numerous codes of conduct on the internet. A code of conduct to which many internet companies like Google, Microsoft, Amazon or Facebook (Funta, 2018a) have committed is that of the Internet Society. The Internet Society pursues the goal of an "internet for everyone". The Code of Conduct of the Internet Society contains, among other things, various requirements that are of interest in the context of this paper. The members undertake to respect the rights of users to privacy of information. Furthermore, all users should be treated fairly and on the basis of the same conditions. In addition, the members have to respect intellectual property rights (Daňko, Žárská, 2019). Specifically with regard to the right of internet users to privacy, various codes of conduct have been developed in the USA by means of a multi-stakeholder process. It is a governance system which seeks to bring stakeholders together to participate in dialogue, decision making, and implementation of responses to commonly perceived problems. Self-regulation works most effectively when the responsibility lies with the actors with the greatest incentives to regulate, they have the most information to identify harmful behaviors, and are best able to address these abuses by enforcing self-regulatory norms. The Code of Conduct of the Internet Society evidently met with a high level of acceptance in the internet industry (Signoret, 2020). On the other hand, the effectiveness of this code of conduct is probably rather modest due to the lack of a supervisory and sanction system. Thus, it is questionable whether Google, for example, actually respects the right to privacy of its users or even promotes it according to its possibilities. In addition, the Code of Conduct naturally only applies to those companies that are members of the Internet Society and have committed to comply with it. Furthermore, the international anchoring of the Internet Society makes it possible to create rules with cross-border validity.

Right to protection of personality

Legal protection does not exist against every damage that is inflicted in mutual competition, but only against that which is caused by a violation of either the general legal order or an individual right (Králik, Králiková, 2007). E.g. Amazon delayed the delivery of the books for the publishers, on the other hand, Amazon stopped advertising of these books. This allegedly led to some dramatic drops in the sales of the relevant books. In this regard, it should be noted that Amazon generally

and publicly acts as a sales platform, both for private individuals and for companies that want to sell their services or goods via Amazon (Funta, 2018b).

The question now arises as to whether the provision of sales represents a service. In fact, it is now open to anyone with an internet connection via various internet platforms such as Amazon, eBay, etc. to sell goods or services. Whether this is enough to make sales over the internet one of the indispensable normal needs is questionable. On the other hand, there is hardly a company that does not (also) offer its goods and services via the internet and a general internet presence can probably be described as essential - but this does not necessarily have to take place via Amazon as a sales platform. Thus, if we consider the strong market position that Amazon has in the book market, especially in the area of online book retail, the question arises whether there are alternatives that actually represent a reasonable alternative to Amazon. Amazon has a dominant market share in online retail for both printed books and e-books (e.g. in the later case 66% based on Magnolia Media's research). Publishers want to sell their books in order to reach the most customers - if they lack access to the largest book trade platform, their personal economic freedom is restricted accordingly. Even if there are numerous other online sales platforms for books, these do not have such a market share like Amazon and are therefore far less attractive to publishers. In addition to Amazon as the world's largest online bookseller, publishers also have access to other online booksellers. In addition, direct sales, for example via a publisher's own website, are also conceivable. Distribution via Amazon is extremely important for publishers due to its market position, but there are reasonable alternatives. Profit maximization as a core business objective can hardly be denied objectivity, especially since Amazon seems to treat all contractual partners equally in this regard, i.e. no preferences or disadvantages are discernible. The pursuit of commercial interests represents a possible justification in the sense of "legitimate business reasons". Amazon's behavior is therefore not to be classified as arbitrary.

Competition law

As the guardians of competition, the competition authorities are obviously a point of contact for issues in connection with large internet platforms. In fact, the laissez-faire approach with regard to internet platforms means that, in the absence of specific regulation for problem solving, competition law and the relevant authorities have to be approached. It can also be observed that many of these proceedings (e.g. Apple IP/12/1367 or IBM IP/11/1539) are settled through an

agreement between the company concerned and the competition authority. An agreement can lead to a faster solution, i.e. improve competitive conditions faster than lengthy investigations which end in a unilateral decision, which can be an advantage in view of the frequently changing conditions in the internet sector. The question is repeatedly asked whether current competition law is still up to the digital challenges or whether a change in the legal basis or at least in practice is not necessary (Zingales, Lancieri, 2019).

Market definition

The aim of market definition is the determination and assessment of the competitive forces to which a company is exposed in a certain market (Mazák, Jánošíková, 2009). When determining the relevant market, the actual or potential alternative offer is decisive, which is available to the business partners of the company concerned with regard to its goods or services. Essentially, the first step is therefore about the alternative options for the opposite side of the market and, in a second step, about their counterweight. With this alternative offer, the actual and potential competitors (Miskolczi-Bodnár, Szuchy, 2017) as well as the opposite side of the market can be determined, which are decisive for the second step, the determination of the degree of power of a company in this market. The relevant market is to be determined in terms of product, geography and time. The relevant product market includes all goods or services which are viewed as substitutable by the other side of the market with regard to their properties and their intended use. Digitization has led to a general expansion of the relevant geographic market, so that a global market can often be assumed. The temporally relevant market refers to the availability of materially and spatially substitutable offers in a certain period of time.

Google Search and Amazon

The geographically relevant market is basically global, since the internet platforms offer goods and services worldwide, while the temporally relevant market plays no role due to its constant availability. When defining the relevant product market from Google as a search engine, for example, one is faced with the problem that Google, as a multi-sided internet platform fulfills different needs and therefore serves several markets (Šmejkal, 2016). Accordingly, several independent relevant sub-markets must be defined. In addition, the products and services - and with them the corresponding markets - are constantly evolving. The size of the relevant market for

online search services is highly controversial. Only the determination of the opposite side of the market, which has to be carried out before the market is defined, is extremely difficult. Google offers advertisers, at least at first glance, an alternative way of placing advertisements next to TV advertisements, magazine advertisements, but also advertisements on other internet platforms. In addition, internet users who use search services and website operators, which want to be indexed by search engines represent a part of the opposite side of the market. For example, travel portals, online retailers, social networks, newspaper portals and various apps offer vertical search services. With regard to the size of the market for online search, it is therefore crucial whether providers of vertical search services are also included in addition to providers of horizontal search services. Based on previous European case law, a narrow market definition can probably be assumed from the user's point of view, which only includes horizontal search services (COMP/M.5727). Too strong focus on Google's search engine service is a tricky one, as it would exclude the advertising aspect, which is particularly important for Google financially, and ignore the multi-sidedness of the market. With regard to advertising, the relevant market can therefore be defined as that for search engine advertising, that for online advertising or even that for advertising in general. It is difficult to define the market for advertising, and Google can hardly be accused of having an absolute monopoly on the cross-media advertising market and the online advertising market. The relevant product market could therefore on the one hand be very broad, in addition to advertising on online search services and social media. If the relevant product market (Stehlík, Hamuľák, Petr, 2017) is narrowed down and limited to advertising options via the internet, social networks such as Facebook in particular, but also the online portals of various newspapers as providers of online advertising space, must be taken into account (Funta, 2017).

When defining the market in the Amazon case, the question arises whether the physical retail trade or physical book trade should be included in the definition of the relevant product market in addition to online retailers (LaVecchia, Mitchell, 2016). When defining the market, the main focus is on the substitutability of the corresponding products and services, by means of which the competitors can be determined. If the potential competition in dynamic markets is underestimated, these markets are defined too narrowly, so that the existence of a dominant position in innovative markets may be assumed too quickly under certain circumstances. However, the dynamism or the restraining effect of potential competition must not be overestimated. This type of market power determination is also criticized in the EU and in the USA, where the market

definition is becoming less important and the cartel authorities have adopted a more dynamic perspective. Kaplow (2010) demands the abolition of the market definition process in the context of antitrust investigations. A crucial point in defining the relevant market is that it also determines the degree of market dominance.

Market dominance: Google Search

After defining the relevant market, the question of whether the company controls the relevant market in an absolute and/or relative manner is examined (Varga, 2006). It can be stated that Google operates on a multi-sided market and that its market power on the one hand does not necessarily mean that it also possess market power on other market sides, such as the market for advertising. Even a market share of over 90% in the online search market may possibly say little about the actual competitive situation, since the complexity of the online search market has to be taken into account. It is questionable whether Google is dominant in the market for online search services, in which Google has held the leading market position for over 10 years. Smaller search engines could also expand their capacities and serve new customers without any major delay and with relatively little financial outlay, compared to conventional production facilities. Personalized search services, lock-in effect, network effects of the largest provider of online as well as the connection with other Google services, however, speak for the existence of structural dependencies and thus a market dominance through relative market power. The high market share or the absolute market power of Google in the market for online search services is not very meaningful in itself, which is why the assessment of the competitive situation requires a comprehensive consideration (Crémer, de Montjoye, Schweitzer, 2019). In sum, there is evidence of the existence of a monopoly or at least a dominant market position for Google if the relevant market is limited to online search services. On the one hand, the Google search engine probably has absolute market power, since Google does not face any effective competition in this market. On the other hand, there are some arguments in favor of the existence of relative market power, because users of the search service and companies that want to be found via the search engine hardly have any alternatives and are accordingly dependent due to the monopolistic market structure. This also corresponds to the trend towards monopolizing this market, which can be explained and foreseen due to the economic peculiarities (Funta, 2020a).

When assessing the possible abuse of a certain behavior in terms of competition law (Stehlík, Hamuľák, Petr, 2016), the ambivalent consequences for innovation must also be taken into account in the context of the effects on competition (Krausová, 2018). A strong market position or even a monopoly position can set innovation incentives. However, due to a lack of interoperability, for example, this can have negative consequences for the level of innovation in the entire industry. But even strong competition can hinder innovation. Therefore, a precise weighing of the innovation-inhibiting and innovation-promoting effects of a potentially abusive behavior of a market-dominant company has to be made (Klimek, 2013). Competition law or the relevant authorities alone are not always able to adequately meet the challenges posed by internet platforms with strong market positions, for example with regard to user data. The involvement of other authorities and the affected market participants points the way towards multi-stakeholder or collaborative governance. But competition law itself has also produced flexible concepts which can be adapted to critical situations in the field of internet platforms in terms of competition policy. For example, denials of access or the preference for company-owned services could certainly be subsumconsued under the respective norms regarding abusive behavior by companies with a dominant market position (Svoboda, Munková, Kindl, 2012).

Data protection law

The operators of internet platforms such as Google, Amazon or Facebook emerged as pioneers in the field of big data. The term “Big Data” means not only huge amounts of structured and unstructured data brought together from different sources, but also the information technology procedures and processes that enable rapid analysis, processing and allow visualization of this continuously accumulating amount of data. The operators of internet platforms such as Google, Amazon or Facebook make use of the big data technologies available to them in order to use the huge amounts of data obtained through their services for commercial use. From the point of view of promoting innovation it should be noted that the technological development of big data is not yet complete and the associated innovation opportunities are also not exhausted. The application possibilities of big data are extremely diverse, since big data is used in diverse areas such as marketing, science, health care or public administration (Fedushko et al., 2021).

Big Data vs. Privacy?

The application of the principles of data protection law is usually given when data is processed in the context of big data, unless the data is purely factual data or anonymized personal data that cannot be assigned to a person (Mesarčík, 2020). The compatibility of the use of big data technologies by internet platforms with the principles of data protection has been questioned on various occasions. Internet platforms also collect personal data as part of their activities, including those that are particularly worthy of protection (Andraško, Horvat, Mesarčík, 2019). Personal profiles on social networks, but also the compilation and analysis of search queries, calendar entries, digital communications (Funta, 2020a) and other information available on the internet using big data technologies often provide a comprehensive insight into a person's personality (Funta, 2019). However, many people are not aware that the information from these different data sources can be linked and condensed into detailed personal profiles (Polčák, 2018). In addition, it is not even clear to many users whether and which of their data is being evaluated and for what purpose this is done. The collection of personal data without the explicit consent of the users should not be collected. Indeed, there is a certain risk of surveillance, manipulation and discrimination, since the personal data gives the processor appropriate power over the data subjects. It should also be noted that data that does not (yet) represent personal data at a certain point can be classified as personal data at a later point due to the technological developments. However, due to the possibility of revoking consent at any time, this difficulty can be countered by adequately informing the data subject about subsequent processing for other purposes. The voluntary nature of consent is also called into question by the existence of dependencies or monopoly positions (Furman, 2019). If a user does not consent to the data processing, services are often refused or only offered to a very limited extent, which significantly relativizes the voluntary nature of consent. Improved protection of the right to privacy (Svák, 2000) could not only be achieved by adapting the legal framework, but also through technical measures (e.g. using "Privacy by Design" and "Privacy by Default").

Essential Facility Doctrine (Law)

The essential facility doctrine was introduced in antitrust law in a 1912 ruling by the US Supreme Court. The essential facility doctrine is about cases in which a company uses its control over a bottleneck to eliminate actual or potential competitors, for example to monopolize a market.

For this reason, antitrust law requires companies that control an essential facility to grant others access to it on reasonable, non-discriminatory terms. The essential facility doctrine thus promotes competition in markets which, for structural reasons, tend to monopolize. Such a monopoly can be found in many internet markets. According to the US case law (MCI Communications Corp. v. AT&T Co.), four requirements must be met: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. The justification of the essential facility doctrine lies in the basic assumption of competition policy that consumer welfare is fundamentally promoted by intense competition. The aim of the essential facility doctrine is to promote consumer welfare and not to protect the economic interests of individual competitors. This applies not only to natural monopolies, but also to monopolies created by intellectual property rights, since there, too, functioning competition promotes innovation. Similarly, there are also cases where non-physical facilities, such as copyrighted databases or software, have been classified as essential facilities. However, the application of the essential facility doctrine to monopolies created by intellectual property rights is also criticized because it is precisely those that are particularly worthy of protection. The essential facility doctrine also found its way into the practice of the EU. In the beginning, the essential facility doctrine was applied to physical infrastructure facilities such as ports or tunnels; later, under exceptional circumstances, the scope was expanded to include monopolies created by intellectual property rights. The scope of application of the essential facility doctrine is consequently much broader in the EU than in the USA.

Google uses its search engine to control exclusive access to a facility that is essential for society and, for these reasons and in the absence of any other access regulation, should be subordinated to the resource facility doctrine. In order for the essential facility doctrine to be applied, there must first be a monopoly or a dominant market position in the relevant market. In this case, the relevant market is assumed to be that for horizontal online search engines. In this market, Google probably has a monopoly position, which is evident on the one hand in the high market shares, and on the other hand in the fact that Google is able to objectively display its services in the search results to represent superior services, precisely because the users would have no real alternatives. By adapting the search results, Google has a direct influence on - and control over - the searchability of websites and services. Their access to the search engine or "being found"

depends not only on the relevance for the users, but also on their financial possibilities, which tends to disadvantage smaller and newer companies. Google has been repeatedly accused of using this monopoly power to exclude or disadvantage competitors. If Google continues to use its supremacy in the horizontal search market to present its vertical search engines preferentially over others, it will harm both competition and consumers, as they may not see the search results that are most relevant to them. That is why Google's competitors are not able to gain a foothold in the market and compete effectively with Google. US law also presupposes that there is a specific intention to monopolize, which the Federal Trade Commission (FTC) could not prove in the case of Google's search engine.

Vertical search engines and website operators such as retailers or service providers need to appear in Google's search results in order to be found by users and, if necessary, to compete with Google. The search engine is also essential because it represents an essential access point to the internet, which is used by users for various purposes such as communication, education, work or entertainment. Search engines exert a decisive influence on culture, science, economy and politics and, as gatekeepers, control a bottleneck in the information infrastructure, which gives them power over enormous data flows. Another requirement by the appllication of the essential facility doctrine is the denial of access to competitors (in the US point of view) or to the opposite side of the market (in the EU point of view). Google effectively denies its competitors or the opposite side of the market access to the decisive top positions in the search results and thus to its huge user base. However, without knowledge of the search algorithm, it is difficult to prove whether the Google algorithm actually disadvantages its competitors or the opposite side of the market. The FTC came to the conclusion that giving preference to its own products or services in Google's search results did not constitute a violation of US antitrust law, but the FTC will continue to closely monitor the market situation due to Google's strong market position. Possible disadvantages of competitors are to be seen as result of changes that likely improve the quality of Google’s search results, which justifies Google's behavior.

The fourth and final condition for the applicability of the essential facility doctrine is the feasibility of granting access to the monopolist. Google could grant access to its competitors if the search algorithm treats Google's own services and third-party services equally and these appear in the same way in the search results. The exact design of a neutral search engine, which sorts the results only according to relevance, would cause difficulties due to the lack of objectivity of these

terms. Another variant would be to lower the prices for the search keywords in order to give other companies access to the search engine at fair prices (Petr, 2020). Antitrust law (including the essential facility doctrine) is improper for regulating internet platforms in view of the complexity, which rather requires new and specialized legislation.

Conclusions

A regulatory intervention in the area of internet platforms appears not only justified in view of the diverse problem areas and numerous public interests, but also practically necessary due to unsuccessful self-regulation attempts. The application examples and the peculiarities of internet platforms with regard to innovation and economy make it clear that the challenges associated cannot be met with conventional legal ways and that there is a call for a new regulatory regime. In order to determine the regulatory goals, however, in some cases opposing interests must be combined, but the primary goal should be to protect users and smaller companies from the existing market power imbalance.

The challenges in the area of internet platforms do not only affect a single subject or legal area (Daňko, Banková, 2020). The area-wide effects of the internet platforms and the significant differences between internet markets and conventional markets rather point the way towards comprehensive, sector-specific regulation. The economic peculiarities and the special innovation processes of internet platforms must be taken into account as well as their novel functions and the associated central position in economic and social life. In the area of internet governance, a number of principles and guidelines have emerged which must also be observed. The focus is on transparency, data sovereignty, non-discriminatory access and the prevention of misuse. These principles can be implemented by various means, which differ in their intensity. For example, effective informational self-determination is only possible if there is sufficient transparency about the collection and use of data. With regard to the regulation of dominant internet platforms, there has so far been a great reluctance on the part of state actors, which can be traced back to a belief in dynamic, self-regulating, functioning internet markets on the one hand, and to a certain excessive demands in view of the scope of technological, social and economic innovations in connection with internet platforms. This development can be explained by means of the economic peculiarities of the internet markets as network markets and the peculiarities of the innovation processes in such markets. The resulting monopoly situations have negative consequences for

everyone who uses internet platforms in any way, private users as well as companies and organizations. While the operation of the dominant Internet platforms encompasses more and more areas of life, their enormous importance is only slowly penetrating the awareness of wider circles in society, business and science (Andrukhiv et al., 2021). The largely invisible big data machinery moves, or at least it has the impression, largely under the radar of state regulators (Ondria, Šimoňák, 2011). So far, there is a lack of comprehensive answers to the diverse challenges that arise from dominant internet platforms (Schweitzer, Haucap, Kerber, Welker, 2018). The difficulty lies in the fact that these not only cross national borders, but also inter- and intra-disciplinary borders. Accordingly, only a comprehensive solution that bridges these limits can counteract the risk of a regulatory patchwork. Specifically, this should lead to an international governance process in which, in addition to state actors, various other interest groups, in particular the internet platforms themselves, user associations and representatives of science from the fields of economics, technology, innovation research and law are involved (Wen, Feng, 2018). From a legal point of view, a wide variety of areas are affected, which is why a comprehensive, sector-specific regulation should be given priority over selective changes in various laws at both international and national level. This is the only way to ensure that the various legal elements are coordinated with one another and that there is clarity and legal certainty for all those involved with regard to the central regulatory aspects of internet platforms.

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