Chapter 1:

State of the Art and Prospective Directions in the Digitalisation of Economic Law

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1. Setting the Scene: The Digital Economy and Digital Markets

The digitalisation phenomenon has become unprecedentedly prominent in the recent past. It can be rightfully argued that digitalisation has tremendously influenced our lives and it can be estimated that it will continue to do so, with profound consequences on various facets. It has changed not only the way we communicate, but also what we communicate. It has made it easier to share information quickly and inexpensively among a large number of people.[1] It has also created faster paths for consumers to reach the suppliers of the products and services they desire, to compare the available offers, and in this respect, it has created new ways of interaction between these actors. Beyond reshaping our lifestyles, digitalisation has also revolutionised all sectors of the economy.[2] It has facilitated the development of novel technologies, consequently of new types of products and services, and for that matter, of new types of businesses and markets. Furthermore, digitalisation has forced existing market players to adapt their business models,[3] to the point where even the eminently 'offline' types of activities have nowadays some sort of 'online presence'. Going further, digitalisation brought about a fundamental change in the way people work, while seeming to signal an end to waged labour, the total liberalisation of services, and the extension of worldwide competition far beyond the wildest

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1 See the Informal Company Law Expert Group, Report on Digitalisation in Company Law, (2016), available at: http://ec.europa.eu/justice/civil/files/company-law/icleg-report-on-digitalisation-24-march-2016_en.pdf (last accessed: 21 November 2017).

2 A. Mundt, 'Digitalization Revolutionizes the Economy and the Work of Competition Authorities', (CPI Antitrust Chronicle, February 2017), available at: https://www.competitionpolicyinternational.com/wp-content/uploads/2017/02/CPI-Mundt.pdf (last accessed: 21 November 2017).

3 Ibid.

dreams of those supporting the Bolkestein Proposal for a Services Directive.[4,5] All in all, digitalisation has prompted the emergence of a new type of economy, the 'digital economy', the growth of which has eclipsed that of traditional markets, by expanding globally at an exponential rate. Nowadays, every business, irrespective of its core purpose, can join the digital economy, and the adoption of digitalisation is likely to be a critical determinant of future growth.[6]

There are many ways in which the notion of digital economy may be defined. Essentially, this concept relates to the worldwide network of economic activities, commercial transactions, and professional interactions that are enabled by information and communications technologies. In other words, we are talking about an umbrella term used to describe markets that focus on digital technologies, thus using 'bits instead of atoms'.[7] In this context, the emergence of the digital economy entails a reshaped interaction between the 'analog' and 'digital' worlds, while signalling a shift from physical exchanges to those conceived in a cyber-environment.

This last assertion entails a reconceptualization of the manner in which the traditional economy and the digital economy are bridged. To this end, it is important to understand what the features are that set digital markets apart. From the outset, such markets pertaining to the digital economy are unique in a number of ways.[8] First, these markets are dynamic, or better yet cyclical, since market power is transient due to vulnerability to displacement by the next cycle of innovation. Competition between the players active in such markets exhibits tendencies towards 'winner takes all' competition *for* the market.[9] Second, in this context, fast-paced and often disruptive innovation plays a key role in this environment. Such innovation obviously requires high rates of investment

4 Commission, Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, SEC/2004/21, COM/2004/0002 final.

5 C. Degryse, 'Digitalisation of the Economy and Its Impact on Labour Markets', (2016) ETUI Working Paper No. 2016.02, available at: https://www.etui.org/Publications2/Working-Papers/Digitalisation-of-the-economy-and-its-impact-on-labour-markets (last accessed: 21 November 2017).

6 See N. Elverston and A. Hale, 'An Introduction to Digitalisation', available at: https://www.ashurst.com/en/news-and-insights/legal-updates/get-digital-an-introduction-to-digitalisation/ (last accessed: 21 November 2017); OECD Hearings, The Digital Economy, (2012), DAF/COMP(2012)22, available at: http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf (last accessed: 21 November 2017).

7 See also D. Tapscott, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence*, (McGraw-Hill, 1997); N. Negroponte, *Being Digital*, (Alfred A. Knopf Inc., 1995); OECD, note 6.

8 See Commission, DG for Internal Policies, Challenges for Competition Policy in a Digitalised Economy, (2015), IP/A/ECON/2014-12, 7; V. Robertson, 'Delineating Digital Markets under EU Competition Law: Challenging or Futile?', (2017) 12 The Competition Law Review (2). By no means is the following enumeration to be perceived as exhaustive.

9 OECD, note 6, 5-6.

in R&D, which is at the same time prone to yield rapid technological progress and growth.[10] Third, digital markets are often built on multi-sided platforms, in which an intermediary operates a digital infrastructure used to match buyers and sellers of certain goods or services.[11] Building such platforms often requires high investments / fixed costs. Given that the success of the platform rests with the intermediary's ability to attract many buyers and sellers, such markets are consequently characterised by direct and indirect network effects. This often leads to high market concentration, since the more the platform grows, the more difficult it becomes for competitors to challenge the position of the platform. This discussion may obviously be linked to the 'winner takes all' outcome pointed out above.[12] Fourth, and nevertheless, digital markets may still be relatively contestable, allowing entrants to quickly reach a large segment of the market, because service providers have multiple routes available for delivering digital services to end users. In such settings, when barriers to entry are low, market power can be challenged by entrants more easily and often faster than in more traditional fields of the economy.[13] Fifth, consumers active in such markets often face high and diverse switching costs.[14] This feature may again be connected to the 'winner takes all' discussion above, since the higher the difficulty in switching to other providers is, the more pronounced the so-called 'lock-in effects' will be. Sixth, services are often provided in the digital marketplace for free. Since we are dealing chiefly with multi-sided platforms, the providers will obtain their revenue from selling advertising space.[15] Facing this setting, consumers are highly price sensitive and will quickly search for substitutes when price becomes a factor in their decision making. Yet, seventh (and for now, lastly) consumers will often, and at times unknowingly, 'pay by disclosing their personal data' for the 'purchased' services.[16] Thus, data becomes the 'currency' in digital markets, since businesses collect them for use in behavioural advertising, or for the

10 Ibid, 6. See also M. Kadar, 'European Union Competition Law in the Digital Era', (2015) 4 Zeitschrift für Wettbewerbsrecht, 342 *et seq.*

11 See also M. Kadar, note 10; P. Solano Diaz, 'EU Competition Law Needs to Install a Plug-in', (2017) 40 World Competition (3); T. Hoppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines', (2015) 38 World Competition (3).

12 See also Commission, note 8, 8.

13 Ibid, 7.

14 R.H. Weber, 'Competition Law Issues in the Online World', 20th St. Gallen International Competition Law Forum, available at: https://www.bratschi-law.ch/fileadmin/daten/dokumente/publikation/2013/04_April/SSRN-id2341978.pdf (last accessed: 21 November 2017).

15 See also Monopolkommission, Competition Policy: The Challenge of Digital Markets, (2015), 5, available at: http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf (last accessed: 21 November 2017).

16 See also M. Maher, P. Reynolds, P. Muysert and F. Wandschneider, 'Resetting Competition Policy Frameworks for the Digital Ecosystem', (2016), available at: https://www.gsma.com/publicpolicy/resetting-competition-policy-frameworks-for-the-digital-ecosystem (last accessed: 22 November 2017).

purpose of reselling to third-parties.[17] This setting renders consumer data in digital markets as an immensely valuable and strategic asset, particularly when it cannot be easily replicated by competitors.

2. The Challenges Raised by the Digital Economy and Digital Markets

The specific features which characterise digital markets, as briefly discussed above, and more broadly speaking, the reframed manner in which the relationship between the traditional economy and the digital economy should be perceived, evidently bring forward diverse types of benefits and challenges. As already previewed in the introduction above, this is so, as far as diverse categories of stakeholders are concerned: consumers, businesses and market players, legislators, enforcement authorities, etc. Speaking of the legislative and enforcement mechanisms which are of relevance for the digitalisation of the economy, various challenges have and will continue to arise with regard to various areas of the law affected by the digitalisation phenomenon, ranging from competition and free movement law, to human rights law and labour law, just to name a few.

The breath of the digital economy, and for that matter the countless segments of the economy in which digital markets have emerged, makes it virtually impossible to pinpoint all the challenges that have already materialised, or to preview those which are likely to arise in the future. Since an all-encompassing approach is this respect seems unrealistic, in the following paragraphs we will touch upon some noteworthy items which shape the current discussions surrounding digital markets in the EU.

So, what are the main challenges the actors in digital markets face nowadays? To start off, the balance between the traditional economy and the digital economy has shifted tremendously in a rather short time span, due to the emergence of digital markets. A facet of this trend relates to the consumers purchasing a great deal of the services and products they need online, from the comfort of their own homes. This resulted in many traditional, brick-and-mortar (retail) businesses taking a serious hit, and needing to readjust their business tactics. Good examples here are travel agencies, newspapers, book publishers, etc. This does not necessarily mean that all traditional economy businesses are prone to experiencing difficulties due to digitalisation. The transport, manufacturing, food, etc. sectors could arguably be (more or less) neutral to the pressure that

17 See also N. Elverston and A. Hale, note 6; I. Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms', (2015) 38 World Competition (4).

digital markets bring about. But overall, one could argue that the emergence of the digital economy changed the outlook of the consumer-supplier and the business-to-business relationships. In this respect, one needs to look no further than the challenges brought about by the sharing economy in the recent past, which indeed put such relationships in a different light, when talking for example about how interactions between such actors occur in the context of the AirBnB and Uber platforms.

Speaking of the actors active on digital markets, one may observe that, due to better access to information and enhanced choice, consumers have become increasingly demanding and proactive, by systematically using peer review systems for comparing offers, rather than simply relying on brand reputation and on the information provided by suppliers. This setting reshapes the manner in which commercial transactions are conceived, especially when it comes to marketing, advertising, and generally speaking, redefining the strategies surrounding business-to-consumer relations.[18] Under these circumstances, the products or services that consumers view as interchangeable change rapidly. Assessing substitutability on behalf of the consumers has become, in other words, a more dynamic and demanding process, which is more difficult to set in stone, than in the case of the traditional economy. The same stands as far as supply-side substitution is concerned, since assessing such substitution in the digital ecosystem is arguably even more speculative than in traditional industries, due to the fast pace of innovation.[19]

In order to cope with such fast-pace and demanding innovation, businesses active on digital markets must adapt their business models and their approach to how to best speculate the market opportunities. Digitalisation actually helps them cut costs and thus achieve cost efficiencies and develop new revenue streams. Furthermore, new forms of financing, such as crowd-funding have caught ground, especially when it comes to start-ups.[20] Yet, in order to stay competitive, such resources must be invested in intensive R&D activities. Alternatively, businesses may choose to engage in collaborative efforts, at times with competitors, or in M&A transactions, which open the path to a smoother access to proprietary assets.

18 See also European Economic and Social Committee, Impact of Digitalisation and the On-Demand Economy on Labour Markets and the Consequences for Employment and Industrial Relations, (2017), 27, available at: https://www.ceps.eu/system/files/EESC_Digitalisation.pdf (last accessed: 22 November 2017).

19 See also M. Maher, P. Reynolds, P. Muysert and F. Wandschneider, note 16, 8, 14, referring to C. Pleatsikas and D. Teece, 'The Analysis of Market Definition and Market Power in the Context of Rapid Innovation', (2001) International Journal of Industrial Organization 19.

20 N. Elverston and A. Hale, note 6.

On a connected note, relating to the adaption of business models in digital markets, an interesting phenomenon relates to establishing new and stronger links between different sectors of the economy, which were not, or were more loosely connected in the past. An example in this respect is the sector of passenger air transport and those of hotel accommodation and car rentals. It is customary these days to see companies which have expanded their activities from one to more such connected markets. Furthermore, based on the data collected, such market players may use various techniques, such as price adjustment algorithms, for targeting their pricing policies, taking into account the demand and supply fluctuations from such connected markets. Similar techniques of price targeting may nowadays also be identified in more traditional sectors of the economy, when it comes to supermarkets, for instance, offering targeted, sometimes personalised, discounts for products the demand for which exhibits abnormal fluctuations during specific timeframes. This last setting signals a somewhat reversed, and to a certain extent unexpected interconnection between tools and techniques specific to the traditional and the digital economy, respectively, which at the end of the day, makes the delineation between these two facets of the economy harder.

Moving on, businesses which make use of consumer data face further challenges when it comes to the use of those data. In such circumstances, it is key that prior to the collection, storage, and processing of such data, the proper arrangements are put in place to ensure compliance with the existing legislation meant to safeguard the protection of the consumers' personal information. Next, when talking about the exploitation of the data, issues concerning the transparency, as far as the data origin is concerned, as well as issues relating to the manner in which access to the data is granted, have to be accurately tackled.[21] One step away from this discussion is the issue of cyber security, which is key when speaking of the due diligence that needs to be exercised in the context of various commercial arrangements taking place in digital markets settings.

While the paragraphs above provide a very brief account of some of the challenges that the digital economy and the spread of digital markets have, or may bring to the table, there is widespread consensus[22] that one of today's

21 See also M. Vestager, 'Helping People Cope with Technological Change', Speech, Rencontres de Bercy, (Paris, 21 November 2017), available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/helping-people-cope-technological-change_en (last accessed: 27 November 2017).

22 See, among many others, J. Confraria, 'A Future for Ex-Ante Electronic Communications Regulation?', (2017) 12 The Competition Law Review (2); P. Solano Diaz, note 11; V. Robertson, note 8; C. Degryse, note 5.

greatest challenges relating to the digitalisation of the economy is how the law deals with this phenomenon.

3. How Does the Law Tackle These Challenges?

It is an undisputed fact that (most of) the laws currently in force were drafted before the digitalisation phenomenon started materialising.[23] As briefly portrayed above, the emergence of new types of market players, new business models, new markets and techniques of acting on a market, challenges the longstanding, and at times inflexible, legal regimes that are currently in place. In this context, the legitimate question arises as to how the law should account for the digitalisation phenomenon? Is the law ready to deal with the challenges that the digital economy brings forward? Are there adjustments that need to be performed on the current regulatory and enforcement frameworks, and if so, how should they be conceived in order to accurately tackle the digitalisation challenges? The volume at hand aims to provide a (more or less) brief account of the various flavours of the approach that economic law and regulation in the EU Internal Market have adopted, or are prone to develop in the future, in order to meet the needs of the various stakeholders active in the digital economy, and to appropriately cope with the legal challenges occurring in digital markets.

From the outset, such questions and the discussions surrounding the digitalisation challenges exhibit two main facets, relating to the material rules provided in the law(s) and to the practical enforcement of such rules. With regard to the former, certain fundamental issues need to be tackled from the get-go: which areas of the (economic) law should be called upon to handle a given practical situation dealing with the various facets of digitalisation? How to delineate the application of rules belonging to various legal branches: free movement law, competition law, sectoral regulation, etc.? Further, how far may the boundaries of the existing laws be stretched in order to accommodate digitalisation challenges and concerns? Is there a solid case that can be made for issuing new legislative tools at EU level, or would soft law / policy guidelines suffice to address the existing and forthcoming challenges? To be more specific, for example, what can competition law do, and what can't it do in digital markets? Moving on, if one deems it appropriate to draft new legal regimes in order to tackle the novel issues brought about by the digital economy, is establishing an overarching (policy) cap, defining the guiding lines of future legal action, appropriate, or would a piecemeal approach suffice in this respect? In the same context, and returning somewhat in the vicinity of competition law

23 See also Informal Company Law Expert Group, note 1, 6.

in the EU, what arguments should drive the choice between competition and sectoral regulation, in various segments of the digital economy? Is the choice between *ex-post* enforcement and *ex-ante* regulatory intervention a valid breeding ground for solving the digital economy 'trials'?

This last question brings us to the second facet of this volume's overarching question, namely how should the enforcement of the law adapt to the challenges of digitalisation in the EU Internal Market? This question has gained increasing significance over time, in the broader picture of the fundamental rationale of the application of the law, given that the value of the substantive rules would become redundant, in the absence of coherent and consistent practical enforcement mechanisms for the said material rules. Therefore, how is enforcement of the law to be conceived in the digital economy context? What degree of intervention should be regarded as desirable, so that markets stay competitive, while innovation is not stifled, or better yet, fostered? Does the focus of the enforcement agencies need to be refined, and in this respect, is added value created from bundling competition and regulatory powers within one and the same enforcement agency? Is there a need for more consistent international cooperation between the respective enforcement agencies, especially since the digitalisation phenomenon is capable of expanding the geographic definition of markets to trans-jurisdictional or even worldwide dimensions? Furthermore, are enforcement authorities in need of extended powers, so that digital evidence is properly collected and fed into the legal analysis to be performed? How should markets be defined in the digital economy and are the existing tools used for market analysis and market power, such as the SSNIP test, market shares, etc., appropriate to identify competition concerns in digital markets? Is there a need for new assessment benchmarks for the behaviour of digital markets actors, since such markets exhibit dynamic / fastly-changing features, and since digital products are often offered 'free of charge'?

The questions above are merely some of the many items on the agenda of the domestic and EU regulators and enforcers, in their attempt to deal with the digitalisation challenges in the EU (and beyond). The enumeration above thus showcases the magnitude of the legal and enforcement issues that digital markets raise in the current EU economic ecosystem. Once again, an all-encompassing approach to solving such challenges is far beyond the purpose of the volume at hand. Instead, in the following paragraphs, we will attempt to first decipher some of the initiatives taken at the EU level to this end, while also attempting to preview some of the foreseeable enforcement and jurisprudential developments, bound to occur in the near future. Next, we

will identify and elucidate the correct context in which some of the proposals put forward by the contributions included in this volume may be placed, while having in mind the broader context of the challenges that the digitalisation of the economy has brought and will continue to bring to the forefront.

4. Initiatives at EU Level

The developments in the digitalised world have not escaped the attention of the EU institutions, in particular that of the European Commission. In order for businesses and consumers in the EU to benefit fully from the digitalised economy, the Commission has not only put forward a number of proposals for EU legislation and policy, but has also, in the field of EU competition law, stepped up its enforcement activities.

4.1. Regulatory Developments

On 6 May 2015, the Digital Single Market (DSM) Strategy for Europe,[24] the flagship of the Junker Commission, was unveiled. The objective of this Strategy is to create an EU Digital Single Market which is defined as a market "in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence."[25] With its DSM Strategy, the Commission aims to break down (fragmented) regulatory barriers and ensure that competitors can operate in a free and fair market. The creation of a Digital Single Market will also ensure that the EU maintains its position as a world leader in the digital economy, help European companies to grow globally and increase the attractiveness of the EU for global companies established outside its borders.

These objectives will be achieved by a combination of amendments to existing EU legislation and by the adoption of new legislation and policy initiatives. The Commission hopes that these initiatives will contribute an additional €415 billion per year to the economy of the EU,[26] create jobs and transform public services in the EU.

The DSM Strategy is built on three pillars: (1) better access for consumers and businesses to online goods and services across the EU; (2) creating the right

24 Commission, Communication, A Digital Single Market Strategy for Europe, COM/2015/192 final.
25 Ibid, 3.
26 Ibid.

conditions and a level playing field for digital networks and innovative services to flourish; (3) maximising the growth potential of the EU digital economy. Each of these three pillars contains a number of specific target actions (16 in total) which form the cornerstone of the DSM Strategy. It is impossible in this Chapter to deal with all of these target actions. We will, therefore, limit ourselves to a brief selection of a number of key developments.

Under the first pillar, the Commission intends to remove major differences between the online and offline worlds and to eradicate barriers to cross-border online activity. Target actions to be taken under this pillar include abolishing differences in contract and copyright law between the Member States and simplifying VAT rules. In order to create consumer confidence in cross-border online sales, affordable and high-quality cross-border parcel delivery services are also required. The Commission will, therefore, launch measures to improve price transparency and enhance the regulatory supervision of parcel delivery. The DSM Strategy also intends to lay down a suitable e-commerce framework and prevent unfair discrimination against consumers and businesses (with regard to nationality, residence or geographic location) when they attempt to buy goods and services or access content online. To this end, the Commission will draw up legislative proposals to put a stop to unjustified geo-blocking.

The second pillar is concerned with creating the right conditions and a level playing field for advanced digital networks and innovative services. According to the Commission, the DSM must be based on be reliable, trustworthy, high-speed, affordable networks and services that safeguard consumers' fundamental rights to privacy and personal data protection while at the same time encouraging innovation. In order to bring this about, a strong, competitive, and dynamic telecoms sector is needed which can carry out the necessary investments and exploit innovations such as Cloud computing, Big Data and the Internet of Things. In this context, the Commission fears, however, that the market power of some online platforms may give rise to concern.[27]

Under this pillar, the Commission is planning an ambitious reform of the EU telecom rules in order to make them 'fit for purpose' and a review of the current Audiovisual Media Services Directive[28] in order to adapt it to new business models for content distribution. The growing market power of online platforms (e.g. search engines, social media, e-commerce platforms, app stores, price

27 Ibid, 9.

28 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive), [2010] OJ L 95/1.

comparison websites) and the way in which they use this market power is of particular concern to the Commission. Therefore, the Commission plans to launch a comprehensive assessment of the role of such platforms which will cover issues such as: (i) transparency, (ii) platforms' use of the information which they collect, (iii) relations between platforms and suppliers, (iv) obstacles making it difficult for individuals and businesses to move from one platform to another and (v) an analysis of how best to tackle illegal content on the internet.[29]

The third pillar is intended to maximise the growth potential of the digital economy in the EU so that every EU citizen can enjoy its full benefit. According to the Commission a range of measures is needed in order to ensure that European industries play a lead role in developing and exploiting digital technology, automation, sustainable manufacturing, and processing technologies to serve the markets of the future. Also, EU citizens are at present not receiving the full benefit of digital services (such as e-government, e-health, e-energy, and e-transport).[30]

Measures proposed by the Commission to close these gaps include tackling restrictions on the free movement of data for reasons other than the protection of personal data in the EU and unjustified restrictions on the location of data for storage or processing purposes. Furthermore, the Commission intends to define priorities for standards and interoperability aiming to ensure that in the future all devices will be able to connect and share data with each other, regardless of the manufacturer, operating system or other technical details. The Commission also intends to present a new e-Government Action Plan 2016-2020 to connect business registers across the EU and to ensure that different national systems can work together, thus permitting businesses and individuals to have to communicate their data to public administrations only once (the 'Only-once' principle).

In summary, the proposals put forward by the Commission in the DSM Strategy can, broadly speaking, be divided into two groups: those geared at uniting the fragmented EU digital market and those aimed at curtailing possible abuses of market power.

In May 2017, halfway through its term of office, the Commission published a Mid-Term Review of the DSM Strategy.[31] This Review evaluates and presents the progress made in implementing the DSM Strategy since 2015 and points

29 Digital Single Market Strategy, note 24, 12.

30 Ibid, 14.

31 Commission, Communication, Mid-Term Review on the Implementation of the Digital Single Market Strategy. A Connected Digital Single Market for All, (Mid-Term Review), COM/2017/228 final.

out where further actions are needed. It is accompanied by the 2017 European Digital Progress Reports[32] outlining the progress made both at EU and Member State level and a Staff Working Document[33] providing an overview of the implementation of the DSM Strategy to date.

The Mid-Term Review mentions that the Commission has tabled 35 legislative proposals and policy initiatives to stimulate the different target actions underlying the three pillars outlined above. The focus is now on obtaining agreement with the European Parliament and the Council in order to finalise the Commission's proposals. The Commission calls on these institutions to act swiftly on all proposals already tabled.

At the time of the review, agreement with the European Parliament and the Council had been reached only regarding the following issues:

- The abolition of roaming charges as of 15 June 2017.[34] This means that, when travelling in the EU, consumers will pay the same price for telephone calls, text and internet usage as they pay at home.
- The portability of online content.[35] This means that, from early 2018, consumers will be able to access their subscriptions to online content (films, e-books, music, video games, sporting events, etc.), not only in their Member State of residence, but also when travelling in other Member States.
- The new EU General Data Protection Regulation (GDPR)[36] which will come into force on 25 May 2018. This Regulation aims to protect individuals with regard to the processing of their personal data and to guarantee the free movement of such data. This Regulation is a modernised and tighter version of the 1995 Data Protection Directive.[37] It sets stricter requirements than its predecessor and provides for high fines for infringers.

32 Commission, Staff Working Document. Europe's Digital Progress Report 2017, SWD/2017/160 final.
33 Commission, Staff Working Document, SWD/2017/155 final.
34 Regulation 2015/2120 of the European Parliament and of the Council of 25 November 2015 Laying Down Measures Concerning Open Internet Access and Amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services and Regulation 531/2012 on Roaming on Public Mobile Communications Networks within the Union, [2015] OJ L 310/1.
35 Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on Cross-Border Portability of Online Content Services in the Internal Market, [2017] OJ L 168/1.
36 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.
37 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, [1995] OJ L 281/31.

- The co-ordination of the availability of 700 MHz band across the EU as of 2020.[38] This spectrum is required for 5G networks and the new services associated with them (connected cars, remote healthcare, smart cities) to work.

The Mid-Term Review demonstrates that there is still much work to be done if the Commission is to achieve its aim of implementing the DSM Strategy in 2018. Apart from the initiatives already tabled, the Commission also highlighted three main areas where further immediate action is required:[39]

- The European Data Economy. The Commission intends to prepare legislative proposals on the cross-border free flow of non-personal data in 2017, and an initiative on the accessibility and re-use of public and publicly funded data in early 2018.
- Cybersecurity. By September 2017, the Commission intends to develop measures on cyber security standards, certification and labelling to make ICT-based systems more cyber-secure and to review the 2013 EU Cybersecurity Strategy and the mandate of the European Union Agency for Network and Information Security (ENISA) to ensure that they are aligned to the new EU-wide framework on cybersecurity and that they are fully equipped to deal with the new challenges that continue to arise.
- Online platforms. In its May 2016 Communication on Online Platforms,[40] the Commission identified two specific issues for further investigation: (i) a study of platform to business trading practices in order to ensure a fair and innovation-friendly business environment; and (ii) ensuring that illegal content online can be easily reported and effectively removed. To ensure a level playing field in platform-to-business practices, avoiding situations in which an online platform may favour one business to the disadvantage of others, by the end of 2017, the Commission will prepare legislation to address unfair contractual clauses and trading practices identified in platform-to-business relationships. It also intends to clarify the position on illegal online hate speech and on the sale of counterfeit goods, as well as developing practices for the removal of illegal content.

38 Decision 2017/899 of the European Parliament and of the Council of 17 May 2017 on the Use of the 470-790 MHz Frequency Band in the Union, [2017] OJ L 138/131.
39 Mid-Term Review, note 31, 7-13.
40 Commission, Communication, Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe, COM/2016/288 final.

The Mid-Term Review also demonstrates that substantial additional investment in digital skills and infrastructure and technologies, combining resources from the EU, Member States, and the private sector, is greatly needed.[41]

The DSM will remain a priority for the Commission during the remainder of its term of office. However, the DSM initiatives must gather speed if the Commission is to provide the results it promised. 2018 is the last full year of office of the current Commission. In 2019, after the elections to the European Parliament, a new Commission will be appointed. This means that 2018 is going to be a key year for the DSM Strategy.

In October 2017, the Commission adopted its 2018 Work Programme[42] which sets out a challenging variety of legislative and policy initiatives to be realised in the context of the DSM Strategy. Annex 1 to this Work Programme mentions the following four new initiatives to be put forward in 2018:

- A proposal for legislation on fairness in platform-to-business relations;
- A non-legislative initiative addressing online platform challenges as regards the spreading of fake information;
- Revision of the Commission guidelines on market analysis and assessment of significant market power in the electronic communications sector;[43]
- A proposal for legislation establishing rules at EU level allowing taxation of profits generated by multinationals through the digital economy.

Annex 3 to the Work Programme sets out a number of pending proposals to which priority will be granted in 2018. This extensive list includes pending proposals in the following fields: cross-border parcel delivery, digital contracts (contracts for the supply of digital content and contracts for the online sale of goods), telecoms reform, copyright, copyright and related rights in broadcasting, a modernised audiovisual framework, the prevention of geo-blocking, e-privacy (a proposal for a Regulation on privacy and electronic communications which will repeal Directive 2002/58/EC),[44] EU internal data protection rules (aligned to

41 Mid-Term Review, note 31, 2.

42 Commission, Communication, Commission Work Programme 2018. An Agenda for a More United, Stronger and More Democratic Europe, COM/2017/650 final.

43 Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services, [2002] OJ C 1656.

44 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), [2002] OJ L 201/37.

the GDPR), free flow of non-personal data and a proposal for the setting up of an EU Cybersecurity Agency.

All in all, in the context of the DSM Strategy, 2018 promises to be an eventful year as far as legislation and policy initiatives are concerned.

4.2. Enforcement Developments

4.2.1. Enforcement by the European Commission

Free and fair competition is at the core of the Commission's plans for the DSM. The Commission, therefore, intends to eliminate all barriers to trade, erected by undertakings, capable of impeding the development of the digital economy in the EU. One prime example, according to the Commission, is the inclusion of contractual restrictions in distribution agreements that prevent retailers from selling goods or services online or cross-border to customers located in other EU Member States.

To this end, on 6 May 2015, the Commission launched, as part of its DSM Strategy adopted on the same day, a Sector Inquiry into E-Commerce, on the basis of the EU competition law rules (Article 17 of Regulation 1/2003).[45] The objective of the inquiry is to obtain an overview of the main market trends, collect evidence of possible competition barriers and analyse potentially anti-competitive business practices.

As part of the Sector Inquiry, the Commission requested information from a variety of stakeholders in e-commerce markets throughout the EU both with regard to the online sales of consumer goods (such as electronics, clothing, shoes, and sports equipment), as well as with regard to the online distribution of digital content. The results of this inquiry will help to focus the enforcement of the EU competition law rules on e-commerce business practices that are damaging for competition and cross-border trade. In the context of the inquiry, the Commission gathered evidence from nearly 1900 companies operating in the e-commerce fields of consumer goods and digital content. Furthermore, the Commission analysed around 8000 distribution contracts.

45 Regulation 1/2003 of the Council of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

On 15 September 2016, the Commission published a 290-page Preliminary Report on the E-Commerce Sector Inquiry[46] where it set out its initial findings. This Preliminary Report provides an overview of the main market trends relevant for competition law identified in the inquiry and points out possible competition law concerns. It was followed by a public consultation and a stakeholder conference, ending in November 2016.

On 10 May 2017, the Commission published its Final Report on the E-Commerce Sector Inquiry. The Final Report consists of two documents: a short summary document (only 16 pages)[47] and a 298-page Staff Working Document[48] (together the Final Report) that is more or less a restatement of the Preliminary Report. The Final Report contains the Commission's definitive findings and takes into account the observations received on the Preliminary Report. Since the findings in the Final Report are similar to those in the Preliminary Report, we will only provide a very brief overview of the findings set out in the Final Report.

The Report confirms the growing significance of e-commerce. It also identifies certain business practices that may restrict online competition. The Report should, therefore, encourage companies to review their current distribution contracts and bring them in line with the EU competition law rules. The Commission also mentions that many companies have already done so during the sector inquiry. The Commission also indicates that it may open own-initiative investigations to ensure compliance with the EU competition rules.

Like the Preliminary Report, the Final Report is divided into two separate sections: the first section deals with e-commerce in the consumer goods sector (the lion's share of the Report), while the second focuses on e-commerce in the digital content sector.

In the first section of the Report dealing with consumer goods, the Report confirms that the growth of e-commerce over the last decade and, in particular, increased online price transparency and price competition, has had a significant impact on companies' distribution strategies and consumer behaviour. The final results of the Sector Inquiry demonstrate the following main market trends:[49]

46 Commission, Staff Working Document. Preliminary Report on the E-Commerce Sector Inquiry, SWD/2016/312 final.

47 Report from the Commission to the Council and the European Parliament. Final Report on the E-Commerce Sector Inquiry, COM/2017/229 final.

48 Commission, Staff Working Document Accompanying the Final Report on the E-Commerce Sector Inquiry, SWD/2017/154 final.

49 See Commission, Press Release, 'Antitrust: Commission Publishes Final Report on E-Commerce Sector Inquiry', IP/17/1261, 10 May 2017.

- A large proportion of manufacturers have decided over the last ten years to sell their products directly to consumers via their own online retail shops, thereby competing increasingly with their own independent retailers;
- An increased use of selective distribution systems, where the products in question can be sold only by pre-selected authorised distributors, allows manufacturers to better monitor their distribution networks, in particular in terms of the quality of distribution but also price;
- An increased use of contractual restrictions (vertical restraints) to better control product distribution. Depending on the business model and strategy, such restrictions take various forms, such as pricing restrictions, marketplace / platform bans, restrictions on the use of price comparison tools and exclusion of pure online operators from distribution networks.

Some of these practices may be justified, for example in order to improve the quality of product distribution, whereas others may unduly prevent consumers from benefitting from greater product choice and lower prices and, therefore, may require action from the Commission to ensure compliance with the EU competition law rules.

An interesting part of the Final Report is a new section on the use of data in e-commerce. The Report highlights that the collection and processing of large amounts of data is becoming increasingly important for e-commerce. While Big Data allow companies to become more efficient and permit them to better target offers to fit the needs of the consumer, there are also potential competition concerns with regard to the collection and use of such data. This applies in particular to the exchange of competitively sensitive data, such as on prices or qualities sold, between competitors.

Another interesting issue touched upon briefly in the Final Report concerns pricing software. The Report points to the concern that (automated) pricing software could facilitate the monitoring of retail prices and thus reinforce resale price maintenance arrangements. Furthermore, the Report points out the concern that pricing software can create price transparency that may facilitate collusion between competitors.

The Report demonstrates that, in the field of the online sale of consumer goods, the Commission has uncovered evidence of widespread contractual restrictions affecting online sales which give rise to serious competition law concerns and which are likely to be the subject of further enforcement action by the Commission.

As far as the second section of the Report, digital content, is concerned, the Commission focused on barriers to entry or expansion and innovation. The results of the Sector Inquiry confirm that the availability of licences from content copyright holders is essential for digital content providers and is a key factor in determining the level of competition in the market.[50] The Report pinpoints certain licensing practices which may make it more difficult for new online business models and services to enter the market. It also finds that copyright licensing agreements are complex and often exclusive. Such agreements usually restrict the territory, technology and release windows that can be used by digital content providers.

In its Report, the Commission states that it will assess on a case-by-case basis, having regard to the characteristics of the specific product and geographic markets, whether certain licensing practices may restrict competition and whether enforcement is necessary in order to ensure effective competition. It also notes that the online distribution of digital content is a complex matter. Accordingly, it will assess each case on its specific merits. Enforcement action concerning possible infringements of competition law can, however, not be excluded.

One of the key findings of the Sector Inquiry is the widespread use of geo-blocking. Geo-blocking prevents consumers from purchasing consumer goods and accessing content online from other EU Member States. In March 2016, the Commission published its initial findings on geo-blocking.[51] These findings have now been incorporated into the Final Report on the E-Commerce Sector Inquiry. This Report shows that of the retailers, participating in the inquiry, who sell consumer goods, 38% 'geo-block', while 68% of the digital content operators engage in similar practices. The Report confirms that geo-blocking is one of the main issues in e-commerce markets and that the Commission is set on tackling it both by proposing new legislation and by stepping up the enforcement of the EU competition law rules. Geo-blocking is not prohibited under the EU competition law rules when it is the result of unilateral conduct by non-dominant undertakings. Where, however, geo-blocking results from agreements between suppliers and distributors, this may amount to an infringement of the EU competition law rules (Article 101 TFEU). Any competition law enforcement measure against geo-blocking would, however, have to be based on a case-by-case assessment, which would also include an analysis of potential justifications (such as VAT or public interest issues) for restrictions that have been identified.

In summary, the Final Report confirms that the Commission will adopt a more pro-active approach to the enforcement of the EU competition law rules in the e-commerce sector. The Report suggests that there will be a pronounced increase in the Commission's enforcement of vertical restraints and territorial restrictions. The Commission is sending an unambiguous signal that it will step up enforcement in order to stop certain practices hindering the creation of the DSM.

Finally, with regard to policy change, the Final Report makes clear that the Commission has no immediate plans for amending the Vertical Block Exemption Regulation.[52] The findings of the E-Commerce Inquiry will, however, serve as input when reviewing this Regulation leading up to its expiry in 2022.

Furthermore, on the basis of the results of the Sector Inquiry, the Commission has announced that it will broaden the dialogue with national competition authorities within the European Competition Network in order to promote a consistent application and interpretation of the EU competition law rules to commercial practices in the e-commerce sector.

True to its word, the Commission has recently launched a number of antitrust investigations in the e-commerce sector. Below, we provide an overview of these investigations.

In June 2015, one month after launching the E-Commerce Inquiry, the Commission opened formal antitrust proceedings into certain of Amazon's agreements with publishers concerning the distribution of e-books.[53] The investigation focused on most-favoured-nation or parity clauses, one of the issues of concern later identified by the Commission in the Final Report on the E-Commerce Sector Inquiry. These clauses allegedly granted Amazon the right to be informed of more favourable or alternative terms offered to its competitors, and / or the right to terms and conditions at least as good as those offered to its competitors. According to the Commission, these clauses may make it more difficult for other e-book distributors to compete with Amazon, by reducing their ability and incentive to develop new and innovative products and services. The clauses may possibly also limit competition between the various

50 Ibid.

51 Summary of Responses to the European Commission's 2015 Consultation on 'Geo-Blocking and Other Geographically-Based Restrictions when Shopping and Accessing Information in the EU, A synopsis of the report is available at: https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-geoblocking (last accessed: 18 February 2018).

52 Commission Regulation 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, [2010] OJ L 102/1.

53 See Commission, Press Release, 'Antitrust: Commission Opens Formal Investigation into Amazon's e-book Distribution Agreements', IP/15/5166, 11 June 2015.

e-book distributors to the detriment of consumers. The conduct of Amazon may, according to the Commission, violate EU the competition law rules that prohibit the abuse of a dominant position (Article 102 TFEU) and restrictive business practices (Article 101 TFEU). On 4 May 2017, the case was resolved when the Commission adopted a Decision, based on Article 9 of Regulation 1/2003,[54] rendering legally binding commitments offered by Amazon to no longer enforce or introduce such clauses in agreements with publishers.[55]

Following the publishing of the Preliminary Report on the E-Commerce Sector Inquiry, on 2 February 2017, the Commission launched three separate investigations into anti-competitive online sales practices, concerning consumer electronics, video games, and hotel accommodation.[56] These investigations aim to tackle the specific issues of retail price restrictions, geo-blocking, and discrimination on the basis of location.[57]

The investigation in the consumer electronics sector involves Asus, Denon & Marantz, Philips, and Pioneer who are suspected of having infringed the EU competition law rules by restricting the ability of online retailers to set their own prices for popular consumer electronics products such as household appliances, notebooks, and hi-fi products. Interestingly the Commission suspects that these price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors. As a result, the alleged behaviour may have had a broader impact on overall online prices for the consumer electronics products in question.

The second investigation concerns certain bilateral agreements concluded between Valve Corporation, owner of the Steam game distribution platform, and five video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax. These agreements may contain geo-blocking clauses preventing consumers from purchasing digital content (PC video games) depending on their location or country of residence. The investigation focuses on whether the agreements in question require of have required the use of

54 Regulation 1/2003, note 45.

55 More information, including the full version of the commitments is available on the Commission's competition website, in the public case register, under case number AT.40153.

56 See Commission, Press Release, 'Antitrust: Commission Opens Three Investigations into Suspected Anticompetitive Practices in E-Commerce', IP/17/201, 2 February 2017.

57 More information on these investigations is available on the Commission's competition website, in the public case register: for the retail pricing agreements investigation, under the case numbers AT.40465 (*Asus*), AT.40469 (*Denton & Marantz*), AT.40181 (*Philips*), AT.40182 (*Pioneer*); for the video games investigation, under the case numbers AT.40413 (*Focus Home*), AT.40414 (*Koch Media*), AT.40420 (*ZeniMax*), AT.40422 (*Bandai Namco*), AT.40424 (*Capcom*); for the hotel pricing investigation, under the case number AT.40308.

'activation keys' for the purpose of geo-blocking. Activation keys can be used in order to restrict access to a purchased game to consumers in particular EU Member States. This practice could infringe the EU competition law rules as it may restrict parallel trade within the EU and prevent consumers from buying cheaper games available in other Member States.

In the third investigation, launched after complaints from consumers, the Commission is looking at agreements on hotel accommodation entered into between the largest European tour operators, Kuoni, REWE, Thomas Cook, and TUI, on the one hand, and Meliá Hotels, on the other. The Commission is investigating whether such agreements discriminate between customers on the basis of their location. The agreements under scrutiny may contain clauses that discriminate between consumers from different Member States by not showing the best prices to consumers in or from certain Member States. This practice may infringe EU competition law by preventing hotel rooms from being booked at prices available in other Member States simply because of nationality or place of residence.

Four months later, in June 2017, the Commission started formal antitrust investigations in four further cases. The first is an investigation into the distribution agreements and practices of clothing manufacturer and retailer Guess.[58] This investigation concerns allegations of geo-blocking practices. It aims to establish whether Guess's distribution agreements may restrict authorised retailers from selling online to consumers or retailers in other Member States. These agreements may also impede wholesalers from selling to retailers in other Member States.[59]

The other three investigations also involve possible geo-blocking. These are separate antitrust investigations focusing on whether certain licensing and distribution practices of Nike, Sanrio, and Universal Studios restrict traders from selling licensed merchandise cross-border and online within the EU. Nike, Sanrio, and Universal Studios license the rights for some of the world's well-known brands. Sport apparel manufacturer, Nike, is the licensor of rights for, among other brands, Football Club Barcelona's merchandise, Sanrio is the licensor of rights for the brand 'Hello Kitty', and Universal Studios is the licensor

58 See Commission, Press Release, 'Antitrust: Commission Opens Formal Investigation into Distribution Practices of Clothing Company Guess', IP/17/1549, 6 June 2017.

59 More information can be accessed on the Commission's competition website, in the public case register, under the case number AT.40428.

for the brands 'Minions' and 'Despicable Me'.[60] The Commission is concerned that consumers may have had less choice and paid higher prices for these merchandised products due to restrictions on cross-border and online sales.

These recent cases are a clear signal of the Commission's intensified focus on online distribution and related practices which may be damaging to competition.

A number of the above-mentioned investigations make clear that cracking down on geo-blocking is high on the Commission's agenda. In January 2014, the Commission started formal antitrust proceedings into certain provisions in licensing agreements entered into between six major Hollywood studios (NBCUniversal, Paramount Pictures, Sony Pictures, Twentieth Century Fox, Disney, and Warner Brothers) and the largest TV-broadcasters in the EU such as Sky UK, Canal Plus of France, Sky Italia, Sky Deutschland, and DTS of Spain. The focus of the investigation is on whether these provisions prevent broadcasters from providing their services across borders, for example by refusing potential subscribers from other Member States or blocking cross-border access to their services.[61] In 2015, the Commission sent a Statement of Objections to Sky UK, Disney, NBCUniversal, Paramount Pictures, Sony Pictures, Twentieth Century Fox, and Warner Brothers identifying certain geo-blocking provisions in the licensing agreements between Sky UK and these six film studios that, according to the Commission, may give rise to competition concerns. The Commission alleges that each of the six film studios and Sky UK have bilaterally agreed to put in place contractual restrictions which oblige Sky UK to block access to films to consumers outside the UK and Ireland through its online and satellite pay-TV services, grant absolute territorial exclusivity to Sky UK, and eliminate competition between broadcasters.[62] In April 2016, Paramount Pictures offered commitments to allay the Commission's competition concerns. These commitments were rendered legally binding by Commission Decision of 26 July 2016.[63] By accepting the commitments, the Commission ended its investigation of Paramount. The investigation into the other five film studios is still ongoing, with these companies still disputing the Commission's allegations.

60 More information on these investigations is available on the Commission's competition website, in the public case register, under the case numbers AT.40432 (*Sanrio*), AT.40433 (*Universal Studios*), and AT.40436 (*Nike*).

61 See Commission, Press Release, 'Antitrust: Commission Investigates Restrictions Affecting Cross-border Provision of Pay-TV Services', IP/14/15, 13 January 2014.

62 See Commission, Press Release, 'Antitrust: Commission Sends Statement of Objections on Cross-border Provision of Pay-TV Services Available in UK and Ireland', IP/15/5432, 23 July 2015.

63 See Commission, Press Release, 'Antitrust: Commission Accepts Commitments by Paramount on Cross-border Pay-TV Services', IP/16/2645, 26 July 2016. A full version of the commitments can be accessed on the Commission's competition website, in the public case register, under case number AT.40023.

In the meantime, the French pay-TV operator, Canal Plus, has brought an action before the General Court requesting the annulment of the Commission's Decision accepting the commitments offered by Paramount.[64]

As mentioned above, one of the concerns identified by the Commission in its DSM Strategy, is related to the increasing market power of a number of online platforms and the way in which they use this power. This has prompted the Commission to take action against digital platforms found by the Commission to have abused their market power. The three investigations into the practices of Google are prime examples.

The first concerns Google's comparison shopping service (*Google Search – Shopping*). On 27 June 2017, the Commission imposed on Google (and its parent company, Alphabet Inc.) a record fine of €2.42 billion for abuse of a dominant position in the market for general search engines by stifling competition in comparison shopping services. According to the Commission, Google systematically gave prominent place to its own comparison shopping service, thus demoting rival comparison shopping services in its search results.[65] This practice allowed Google's comparison shopping service to make significant gains in traffic at the expense of its rivals and to the detriment of consumers in the EU.[66] On 11 September 2017, Google brought an action for the annulment of the Commission Decision before the General Court.[67]

On 15 April 2015, the Commission opened a second formal antitrust investigation into the practices of Google. This investigation concerns the Android operating system and mobile applications. A Statement of Objections was sent to Google on 20 April 2016 in which the Commission expressed it preliminary view that Google has implemented a strategy on mobile devices in order to preserve and strengthen its dominant position in general internet search by imposing restrictions on Android device manufacturers and mobile network operators. The Commission alleges that Google requires manufacturers to pre-install Google Search and Google's Chrome browser and to set Google Search as default search service on their devices in return for a licence for certain Google proprietary apps. In addition, Google also prevents manufacturers from selling smart mobile devices running on competing operating systems based on the

64 Case T-873/16 *Groupe Canal + v Commission* [2017] ECLI:EU:T:2017:556.

65 More information on this case can be found on the Commission's competition website, in the public case register, under case number AT.39740.

66 See Commission, Press Release, 'Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service', IP/17/1784, 27 June 2017.

67 Case T-612/17 *Google and Alphabet v Commission* [2017] OJ C 369/37.

Android open source code. Finally, the Commission suspects that Google is giving financial incentives to manufacturers and mobile network operators if they exclusively pre-install Google Search on their devices. According to the Commission, these practices may affect the ability of other mobile browsers to compete with Google Chrome and impede the development of operating systems based on the Android open source code and, thus, restrict the development of new apps and services, to the detriment of the consumer.[68] The investigation is still pending at present.[69]

On 14 July 2016, the Commission opened a third set of antitrust proceedings against Google. This investigation concerns Google's 'AdSense for Search' platform.[70] The Commission alleges that Google has abused its dominant position on the online search advertising market by artificially restricting the possibility for third-party websites to display search advertisements from its competitors. This investigation is at present also still pending.[71]

The number of investigations launched by the Commission into alleged anti-competitive practices in the digital world, and the variety of topics involved, suggests that more enforcement action is on the horizon. The outcome of these investigations should shed more light on the rules that operators in the digital world must follow.

4.2.2. Enforcement by the European Court of Justice (CJEU)

Not only the Commission, but also the CJEU, has a very important role to play in the interpretation and application of EU law. The fact that Google has brought an action, before the General Court, for the annulment of the Commission decision in the *Google Search – Shopping* case, demonstrates that the digital world has entered the hallowed halls of Luxembourg.

In 2017, the CJEU itself handed down two rulings which have profound consequences, not only for the parties to the cases, but also for the digital economy in general. Furthermore, on 30 January 2018, the Austrian Supreme

68 See Commission, Press Release, 'Antitrust: Commission Sends Statement of Objections to Google on Android Operating System and Applications', IP/16/1492, 20 April 2016.

69 More information on this investigation is available on the Commission's competition website, in the public case register, under case number AT.40099.

70 See Commission, Press Release, 'Antitrust: Commission Takes Further Steps in Investigations Alleging Google's Comparison Shopping and Advertising-Related Practices in Breach of EU Rules', IP/16/2532, 14 July 2016.

71 More information on this case is available on the Commission's competition website, in the public case register, under case number AT.40411.

Court put preliminary questions to the CJEU on the subject of hate speech. Below we briefly review these three cases.

One of the most controversial issues at the moment, in the context of online distribution, is whether and to what degree a supplier can prohibit its distributors from selling its products on online marketplaces, such as Amazon and eBay. This was precisely the issue that the CJEU had to deal with in the *Coty* case.[72]

In its ruling, handed down on 6 December 2017, the CJEU firstly confirmed its earlier case law[73] by stating that a selective distribution system for luxury goods which is designed primarily to preserve the luxury image of those products does not fall foul of Article 101(1) TFEU, provided that the three conditions set out in the 1977 *Metro* ruling[74] are met: (i) distributors are chosen on the basis of objective criteria of a qualitative nature, laid down in a uniform fashion for all potential distributors and are not applied in a discriminatory fashion; (ii) the characteristics of the product in question necessitate such a network in order to preserve the quality of the products concerned and ensure their proper use; (iii) the criteria laid down do not go beyond what is necessary (proportionality). Secondly, the CJEU decided that, within the context of a selective distribution network, a ban imposed on a distributor prohibiting it from selling the goods in question on third-party platforms or marketplaces discernible to the public also escapes the prohibition of Article 101(1) TFEU if the three *Metro* conditions are satisfied. The ruling further confirms that bans on the use of third-party platforms form neither a restriction on selling to particular customers nor a restriction on passive sales, and, therefore, do not amount to hardcore restrictions within the meaning of Article 4 of the Block Exemption Regulation on Vertical Agreements.[75] Furthermore, the CJEU found that, even if the German court found the agreements between Coty and its distributors to infringe Article 101(1) TFEU, these agreements would benefit from the Block Exemption Regulation on Vertical Agreements, since they do not restrict the territory into which a distributor may sell, nor do they prevent the distributor from selling to any particular customer group. The CJEU further observed that the ban imposed by Coty on its distributors does not amount to an absolute prohibition

72 Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941. This case is mentioned in some of the other contributions in this volume. It should, however, be noted that at the time that these contributions were completed (30 November 2017), the CJEU had not yet handed down its ruling. The present Chapter was written later than the other contributions and takes into account later developments.

73 See case 26/76 *Metro SB-Grossmärkte GmbH v Commission* [1977] ECLI:EU:C:1977:167.

74 Ibid, paras 20-21.

75 Commission Regulation 330/2010, note 52.

of all internet sales since consumers can purchase the goods in question via the website of authorised distributors.

The ruling of the CJEU is in line with the approach adopted by the Commission in its Final Report on the E-Commerce Sector Inquiry. In this Report, the Commission states that third-party platform bans do not necessarily amount to hardcore restrictions of competition within the meaning of Article 4 of the Block Exemption Regulation on Vertical Agreements because they do not, in general, amount to a *de facto* prohibition of sales via the internet, since alternative ways of selling online exist (i.e. on the distributor's own website). The Commission, however, notes that this does not mean that absolute bans on sales via the internet will in general be compatible with EU competition law.

The second case, *Uber Spain*,[76] also handed down in December 2017, raises questions with regard to the sharing or collaborative economy. The case at hand concerns a dispute between a professional organisation of taxi drivers in Barcelona, Élite Taxi, and the Spanish company Uber Spain SL which operates the UberPop service. This service brings potential passengers, using a smartphone equipped with the Uber app, into contact with unlicensed drivers who use their own vehicles to pick up passengers for low fares. Élite Taxi maintained that the use of the UberPop service amounted to unfair competition because neither Uber Spain nor the drivers of the vehicles have the licences required by the city of Barcelona for the provision of taxi services.[77]

The main question that the CJEU had to decide in this case was how the activities of Uber should be classified under EU law. Should these activities be classified as electronic intermediary services falling under the E-Commerce Directive[78] or as transport services? The answer to this question has important ramifications for ability of the Member States to regulate the activities of Uber.

76 Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981. M. Inglese discusses the *Uber* case in Chapter 8. It should be mentioned though, that Chapters 2 to 10 of this book were concluded as of 30 November 2017. The judgment in the *Uber* case was not yet issued at that time. Therefore, Inglese focuses on the AG's Opinion in this case. The introductory Chapter nevertheless, has been written after 30 November 2017 and can therefore take into account some developments which occurred after the aforementioned date.

77 Two other preliminary references have also reached the CJEU concerning the activities of Uber. In case C-526/15 *Uber Belgium BVBA v Taxi Radio Bruxellois NV* [2016] ECLI:EU:C:2016:830, the request for a preliminary ruling was declared inadmissible. The second case, Case C-320/16 *Criminal proceedings against Uber France SAS* is still pending. On 4 July 2017 Advocate General Szpunar delivered his Opinion on this case, ECLI:EU:C:2017:511.

78 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), [2000] OJ L 178/1.

In summary, the CJEU decided that Uber provides a transport service rather an information society service. It found that the service provided by Uber is more than a mere intermediation service consisting in connecting, by means of a smartphone app, potential passengers and drivers. Moreover, the provider of the intermediation service (Uber) simultaneously offers urban transport services. The CJEU observes in that regard that the Uber app is indispensable both for the drivers and the persons wishing to make an urban journey. Another important factor, taken into consideration by the CJEU, is the fact that Uber exercises decisive influence over the conditions under which the drivers provide their services. This leads the CJEU to conclude that the intermediation service must be considered to be an integral part of an overall service, the main component of which is a transport service and, thus, must be classified as a service in the field of transport, not as an information society service.[79]

The ruling of the CJEU makes clear that information society services that form an integral part of an overall service the main component of which consists of a service which is not an information society service, will not be classified as information society services. The fact that the CJEU qualifies the services provided by Uber as services in the field of transport means that Member States are free to regulate the conditions under which such services are provided, for example by requiring licences or authorisations.

It is difficult to say what consequences the ruling of the CJEU will have for other companies operating within the framework of the collaborative economy, such as Airbnb, whose business models differ from that of Uber in a number of important respects.

In the third case, *Glawischnig-Piesczek*,[80] the Austrian Supreme Court put three preliminary questions to the CJEU on the subject of hate speech. The case concerns the posting, by a Facebook user with a fake alias, on Facebook of an image of the Austrian green politician, Dr. Eva Glawischnig-Pieszcek, accompanied by comments of an offensive nature. The questions put to the

79 Case C-434/15, note 76, paras 37-40.

80 Case C-18/18 *Glawischnig-Piesczek*, n.y.r.

CJEU concern the scope of Article 15 of the E-Commerce Directive[81] in the context of an order from a national court obliging a host provider to remove illegal content from its website. Tackling hate speech and illegal content is one of the issues that the Commission intends to address within the framework of the DSM Strategy. It is to be hoped that the ruling of the CJEU in this case will lay down clear standards of review to be applied in cases of hate speech.

5. The Expanding Reach of the Freedom to Provide Services and the Withering Away of the Free Movement of Goods

As mentioned above, digital markets raise interesting, but also difficult challenges, for enforcers and legislators alike. The question then is whether the law can keep up with the developments in this digital era? We will focus in this Section solely on one area of EU law, namely the free movement of goods. Traditional retail stores face increasingly more competition from digital stores. As it will be explained below, this, *inter alia*, appears to diminish the scope of the free movement of goods substantially. Therefore, the question is whether the free movement of goods is 'digital era-proof'.

In the *Visser Vastgoed* case, the CJEU was asked by the Dutch Council of State to make a delimitation between the free movement of goods and the free movement of services.[82] AG Szpunar suggested in his Opinion that the internet has reduced the scope of the free movement of goods. Brick-and-mortar stores have to compete with internet stores[83] by providing services, which means that "retail [does] not only consists of merely selling a product, but also of advising, counselling and offering follow-up services."[84]

81 The text of Article 15 of the E-Commerce Directive reads:
"1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

82 Strictly speaking, the national court wonders whether retail services fall within the scope of the Services Directive. See the Opinion of AG Szpunar in Joined cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2017:397, paras 30 and 63.

83 Noteworthy to mention is para 18 of the preamble of Directive 2000/31/EC, note 78, which provides that information society *services* can, in particular, consist of selling goods online. It would be strange to regard the offline sale of goods not as a service, in particular when brick-and-mortar stores have to compete more fiercely, as AG Szpunar mentions, with online stores.

84 Opinion of AG Szpunar in Joined cases C-360/15 and C-31/16, note 82, para 102.

This approach would greatly reduce the scope of the free movement of goods. The Dutch Council of State suggested, in its referral to the Court, a different approach. In the past, the Council of State already ruled that retail activities do not fall within the scope of the free movement of services, but within the scope of the free movement of goods.[85] Nevertheless, the referring court does also mention that contradicting indications exist as to whether retail should be regarded as the selling of goods or the provision of a service.[86]

In the *Uber* case,[87] also discussed in the previous Section, the CJEU used a traditional way of dealing with the challenges of the digital era.[88] The Court was asked, *inter alia*, to classify the service which Uber provides either as an information society service or a transport service. Uber provided, according to the Court, a transport service since it did not only provide an intermediation service, but it also had, in short, control over the "non-professional" drivers.[89] Interestingly, the Court mentioned in paragraph 41 that: "[t]hat classification is indeed confirmed by the case-law of the Court, according to which the concept of 'services in the field of transport' includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport (see, to that effect, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraphs 45 and 46, and Opinion 2/15 *(Free Trade Agreement with Singapore)* of 16 May 2017, EU:C:2017:376, paragraph 61)."

The *Grupo Itevelesa* case, which is referred to by the Court, dealt with the traditional economy, whereas the Opinion on the Singapore Trade Agreement merely refers back to *Grupo Itevelesa* on this aspect. It therefore seems that the Court applies case law on the traditional economy to the digital market and thus tries to fit digital markets into a traditional straitjacket.

In *Visser Vastgoed* the Court seems to take into account the developments which the digital era has brought about. The Court ruled that "the activity of retail trade in goods such as shoes and clothing falls within the scope of the concept of 'service' within the meaning of Article 4(1) of that directive".[90] Previous case law in which the CJEU made a distinction between the free movement of services and other free movement provisions in the Treaty itself cannot be used

85 *Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam* [2016] ECLI:NL:RVS:2016:75, paras 15 and 15.3.

86 Ibid, para 16.5.

87 Case 434/15, note 76.

88 M. Inglese discusses the *Uber* case in Chapter 8. See also remark under note 76 above.

89 See for the precise deliberations of the Court, paras 37-40.

90 Joined cases C-360/15 and C-31/16 *X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2018:44, para 91.

to determine the scope of the Services Directive.[91] Retail activities not falling under the Services Directive[92] are scarce, if not non-existent. Retail activities are thus in general excluded from the scope of the free movement of goods. The Court, in line with the Opinion of AG Szpunar, also ruled that "retail trade in goods, [...] nowadays encompasses not only the legal act of sale / purchase but also an increasing range of activities or services that are closely inter-related and that are intended to induce a consumer to conclude that sale / purchase with one economic operator rather than another, to provide advice and assistance to the consumer at the time of that sale / purchase or to provide after-sales services".[93]

The scope of the free movement of goods is thus diminished by the developments in digital markets. Is this a welcome development? In general, one might say that all the free movement provisions prevent discrimination and all other market access restrictions. In the *Federspiel* case, the Court could not determine whether Sabine Federspiel was a self-employed doctor or an employee of a hospital and therefore treated the free movement of workers and the freedom of establishment on a par, thus precluding any national measure which is capable of hindering or rendering less attractive the exercise of the fundamental freedoms.[94] Accordingly, the Court referred to all Treaty provisions on the free movement of *persons*. One could argue, that the same reasoning applies to the free movement of goods as well. There are nonetheless some differences between the free movement of goods and the other fundamental freedoms.[95]

A notable difference in this respect is the so-called *Keck* rule which merely applies to the free movement of goods.[96] Would this be a reason though not to catch up with the developments in the digital era? Legislators and enforcers can currently rely on the *Keck* rule to remove selling arrangements from the scope of the free movement of goods. This would no longer be possible if we were to regard the selling of goods via brick-and-mortar stores as the provision of a service.

91 Ibid, para 92.

92 Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, [2006] OJ L 376/36.

93 Joined cases C-360/15 and C-31/16, note 90, para 95.

94 Case C-419/16 *Sabine Simma Federspiel v Provincia autonoma di Bolzano and Equitalia Nord SpA* [2017] ECLI:EU:C:2017:997, paras 34-35.

95 The difference in the degree of harmonisation is noteworthy: e.g. the sector overarching harmonisation by the Services Directive for the freedom to provide services and the freedom of establishment versus the casuistic harmonisation measures under the free movement of goods.

96 See J. Stuyck, 'Is Keck Still Alive and Kicking?', (2012) Revue Européene de Droit de la Consommation (2). Stucyk mentions that, even though the Court did not explicitly endorse the use of the *Keck* doctrine in other freedoms, it did nonetheless sometimes use in "some judgments on free provisions of services [a] language that is somewhat reminiscent of *Keck*".

Over time however, the significance of *Keck* has diminished. One might even argue that *Keck* has been put into a coma, due to the internet, amongst others. We can distinguish four general categories of selling arrangements, namely: limiting the channels of trade, advertising limitations, price limitations, and limitations on trading hours.[97] The first two have become obsolete due to the internet. In the pre-internet era it was logical to sell goods through a physical store, but this is no longer the only way to sell goods. Limiting the sale of goods by requiring a physical store would make it more difficult for foreign traders to sell goods in another Member State and would thus amount to a discriminatory selling arrangement.[98] The same reasoning could be applied to limiting advertising, since online stores rely heavily on advertisements to penetrate a market.[99]

Only two categories of selling arrangements, and therefore the *Keck* rule, are not directly influenced by the emergence of the internet: price limitations and limitations on trading hours. A ban on minimum prices though, might still not benefit from the *Keck* rule, since it can be discriminatory to traders which only sell their products through the internet. Online stores incur, in general, less costs than brick-and-mortar stores. An online store does not need e.g. a store in a shopping street, which means that it incurs less costs. Lower costs in their turn can ensure that prices can be kept lower by online stores than the prices in a brick-and-mortar store. It is, in line with the case law discussed above, likely that foreign traders use an online store to sell their goods in another Member State. If a Member State were to put a ban on minimum prices this would disturb the competitive advantage which a foreign trader may have over its competitors with brick-and-mortar stores.

97 E. Spaventa, 'Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos', (2009) 35 European Law Review (6), incorporated an outline of all post-*Keck* case law on selling arrangements up until 2009. Our division in four categories is loosely based on this outline.

98 Case C-322/01 *Deutscher Apothekerverband eV v o8oo DocMorris NV and Jacques Waterval* [2003] ECLI:EU:C:2003:664, paras 74-75. The Court refers here also to the "emergence of the internet as a method of cross-border sales", as a factor which should be taken into account to determine whether a selling arrangement is discriminatory.

99 The Court did not always find this to be problematic, as long as the ban was not a complete advertising ban. See e.g. case C-412/93 *Société d'importation Edouard Leclerc-Siplec v TF1 Publicité SA en M6 Publicité SA* [1995] ECLI:EU:C:1995:26, para 22. In Joined cases C-34/95 to C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* [1997] ECLI:EU:C:1997:344, paras 42-47, the Court found strong indications that the total advertisement ban was discriminatory, but it left it up to the national court to determine whether this was truly the case. Just as with the *Deutsche Apothekerverband* case, the Court could nowadays take into account the "emergence of the internet" to regard all advertisement bans as discriminatory selling arrangements.

Even if the last two categories are not affected by the digital era, it remains to be seen whether the *Keck* rule can still be relied upon to remove these from the scope of Article 34 TFEU. In both the *Scotch Whisky Association* and the *Deutsche Parkinson Vereinigung* cases, the Court did not apply the *Keck* analysis and ruled that the minimum price requirement and the channel of sale limitation, respectively, were restrictions to the access to the market. AG Bot advised the Court to take this approach in the *Scotch Whisky Association*.[100] By contrast, in *Deutsche Parkinson Vereinigung*, AG Szpunar mentioned that "the instances in which the Court has, in effect, applied the *Keck* exception are rare and, moreover, the Court has never positively defined what exactly it understands by a 'selling arrangement'. Since they do exist however, *Keck* is still alive and must be examined in the case at issue."[101] Strangely, the Court did not follow this approach. The Court applied its market access test. By contrast, the Court actually did apply *Keck* in the similar 2003 *DocMorris* case,[102] to which the Court also referred in *Deutsche Parkinson Vereiniging*.[103] Overall, one gets the impression that the CJEU is starting to abandon *Keck*, both due to the developments which the digital era has brought about and by applying the overarching market access test.

Concluding, in our opinion treating the sale of goods through brick-and-mortar stores as the provision of a service is not ground-breaking. It would indeed mean that the scope of the free movement of goods is limited, but the convergence between the free movement provisions prevents large problems. The law as it stands does not need any adaptation, but the way in which we interpret it will be changed by the emergence of digital markets.

6. Digital Markets: (Sector) Regulation or Free Market?

The authors who contributed to this book also try to establish whether the law as it stands can survive the challenges of the digital era. We can see a common thread throughout these contributions, namely: do we need regulation, or is the market, and thus the legal framework as it currently stands, sufficient to tackle the challenges of the digital era? From a competition law perspective, we could argue that the market will correct itself when problems occur. By contrast, one

100 Opinion of AG Bot in case C-333/14 *Scotch Whisky Association and others v The Lord Advocate and The Advocate General for Scotland* [2015] ECLI:EU:C:2015:527, paras 58-60.

101 Opinion of AG Szpunar in case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2016] ECLI:EU:C:2016:394, para 23.

102 Case C-322/01, note 98, para 68.

103 Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2016] ECLI:EU:C:2016:776, para 23.

could argue that this is not sufficient and that we thus need regulatory action. As Nagy (Chapter 7) mentions in his contribution to this book, "the existence of workable competition may exclude the extension of universal service regulation to industries that would otherwise call for state intervention and to services that would qualify as fundamental."

The use of algorithms and the competition law problems which they might cause are discussed in both the contributions of Vedder (Chapter 3) and Blockx (Chapter 4). Algorithms can easily obtain price information which is made available on the internet. This information can be used by undertakings to adapt their pricing policies accordingly. An extra step might be taken when algorithms start 'colluding'. It might be strange to accuse algorithms of such a thing, since they are merely programs created by natural persons. In his contribution, Blockx focuses, *inter alia*, on the accountability of undertakings for the behaviour of algorithms which they own or which they merely use. Vedder focuses more on the collusion aspect. The case law of the CJEU makes it difficult for programmers to establish 'rules' according to which their algorithms should behave. Nevertheless, both authors agree that competition law as it stands can tackle problems which the digital era brings about, although they differ on the desirability of the current approach.

In our opinion however, the first step is putting sensitive information online. Without sensitive information, algorithms cannot create cartels. Acting upon publicly available non-sensitive information, such as the current pricing policy of an undertaking, cannot lead to a cartel. Parallel behaviour as such is not prohibited by Article 101 TFEU. As the Court of Justice stated in *Wood Pulp*: "[i]t must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article [101 TFEU] prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors [...]."[104]

Undertakings can adapt themselves intelligently on the market, but they may not knowingly substitute the risks of competition by colluding.[105] In *T-Mobile*, the Court also added that Article 101 TFEU "preclude[s] any direct or indirect contact between [...] operators by which an undertaking may influence the

104 Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECLI:EU:1993:120, para 71.

105 Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343, para 26.

conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question."[106] This case law also applies to digital markets. To catch behaviour which infringes Article 101 TFEU, we first need to have an undertaking placing sensitive information online. We can compare this to the traditional economy. Petrol stations which adapt their prices in accordance with the price information on billboards at other petrol stations do not infringe the competition rules. Were they to publish their pricing information for the coming months, this would be different. In order to prevent the problems perceived by Vedder and Blockx, it might just mean that undertakings should be more careful what information they place online. Driving past petrol stations to see the prices is obviously more difficult than merely using an algorithm to find pricing information on the 'digital highway', which increases the potential for cartels. However, it does not give a waiver to undertakings to be careless with the information they make publicly available.

As mentioned above, both Vedder and Blockx agree that the law as it stands can catch anti-competitive behaviour by algorithms. Schrepel (Chapter 5) brings up a different problem for competition law. Do we need a new type of abuse (under Article 102 TFEU), which he calls 'predatory innovation'? In his contribution, Schrepel argues that competition law as it currently stands is not suitable to catch certain behaviour by undertakings, which leads to predatory innovation. One might wonder whether the essential facilities doctrine, as developed by the Court in its refusal to supply cases, can provide a different solution. The *Microsoft* case[107] could perhaps be used to argue that undertakings should not only be given access to interoperability information, but also access to digital platforms.

The essential facilities doctrine and its interaction with the Database Directive are discussed by Koenig (Chapter 9).[108] He argues that regulation might be preferred over the free market system. Regulatory law can be "better [...] tailored around individual circumstances". The free market system, and the limits imposed upon undertakings by competition law, is not sufficient to ensure a proper balance between access to data and protection of data in digital markets.

106 Ibid, para 33.
107 Case T-201/04 *Microsoft Corp. v Commission* [2007] ECLI:EU:T:2007:289.
108 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, [1996] OJ L 77/20.

O'Keeffe and Noé (Chapter 2) discuss in their contribution, *inter alia*, Across Platform Parity Agreements (APPA's). In the Netherlands, the question arose whether Thuisbezorgd.nl, a platform which brings together restaurants and consumers for home delivery meals, might infringe competition law by using same price guarantees in its contracts. The Dutch Competition Authority (ACM) concluded that small APPA's, where the same price agreement only applies to the platform and the website / menu of the restaurant itself, do not lead to competition law problems. Broad APPA's, where the agreements are extended to all platforms on which a restaurant is active, do however lead to competition law issues. O'Keeffe and Noé concluded that ACM did not find any competition problems in the Netherlands with regard to the use of small APPA's by Thuisbezorgd.nl. In the future, this might change, in our opinion. If multiple platforms were to use small APPA's with same price guarantees, then this would lead implicitly to a broad APPA, since restaurants have to use the same price for each platform on which they are active. Whether Thuisbezorgd.nl is completely in the clear might thus depend on the behaviour of its competitors.

ACM is, as O'Keeffe and Noé also mention, an authority which does not only enforce competition law, it also has powers to enforce regulatory rules in other areas.[109] Such an integrated competition law authority is also a solution which Van Cleynenbreugel (Chapter 6) envisions with the development of the DSM agenda in the EU. Van Cleynenbreugel mentions in his contribution the complimentary function which the rules under the DSM agenda may have for the enforcement of EU competition law. Regulatory measures taken on the basis of the DSM agenda are needed to supplement competition law enforcement. This can lead to enforcement problems in one Member State, but also between Member States. One solution which Van Cleynenbreugel proposes is to create ACM-like integrated authorities which can enforce both the competition rules and the rules created for the DSM.

Inglese (Chapter 8) also sees a role for regulatory action. He focuses on the collaborative economy in his contribution. The approach suggested by AG Szpunar in the *Uber* case, to regard the service provided by Uber as a transport service, can lead to difficulties with regulating the collaborative economy. The harmonisation clause in Article 114 TFEU cannot be used in such a case, according to Inglese. Regulating the collaborative economy would thus depend on the nature of the platform itself. In December 2017, the Court of Justice issued its ruling in the *Uber* case and decided to follow the AG on this point. The problems

109 ACM can also enforce certain consumer protection rules and it has the competence to create and enforce rules in the following sectors: telecommunication, transportation, post-delivery and energy.

perceived by Inglese might therefore occur. On the other hand, it is debatable whether Uber and e.g. Airbnb are the same type of platform. Looijestijn-Clearie mentions in a blogpost: "Airbnb does not exercise control over the persons renting out the rooms advertised on its site. Also on its website, Airbnb goes to great lengths to emphasise that it does not set the prices charged. The prices and conditions are set by the persons renting out the rooms. On the other hand, like the services supplied by Uber, those provided by Airbnb exist solely because of the platform".[110] It therefore remains to be seen whether Uber is, as a platform, just the odd one out or not.

Nagy (Chapter 7) focuses on the concept of 'universal service'. He establishes the parameters for such a service and determines which services in the electronic communications market can be regarded as universal services. Workable competition excludes the need for the regulation of universal services. Nevertheless, due to the digital era in which we live, universal services might eventually come into existence. Broadband, for example, might be regarded as a new universal service. Perhaps in the future we might become so dependent on certain platforms that they in themselves would amount to universal services, to which everyone should have access. We would then have moved from the network (broadband) as a universal service to the platform (a service on the network) as a universal service.

With this book, we hope to provide a contribution to the discussions on the legal developments brought about by the emergence of digital markets.

110 A. Looijestijn-Clearie, 'It Looks Like a Duck, Walks Like a Duck, Quacks Like a Duck. But Is It a Taxi? A Commentary on the Opinion of Advocate General Szpunar in Case C-434/15 – Asociación Profesional Elite Taxi v Uber Systems Spain SL', (2017) Radboud Economic Law Blog, available at: www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2017/looks-like-duck-walks-like-duck-quacks-like-duck/ (last accessed: 23 January 2018).