

Which Is to Be Master? Competition Law or Regulation in Platform Markets

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The rise of economically strong Internet platform companies has unsettled traditional communications markets. Consequently, debates over the appropriate handling of platformization have moved center stage, including discussions of which instrument—regulation or competition law—is to be master. This article looks into the complex relationship between the two and argues how the often-purported separation between them is conceptually of little avail. It distinguishes two phases of which is to be master and shows how these have similarities but also significant differences. Among other things, the first phase during liberalization and convergence was characterized by a perceptual bias against regulation and for competition law in communications. In contrast, in the second phase of platformization, there is acknowledgement of a need to modernize competition law and concurrent fears that it will be overstrained if employed as a primary instrument and panacea for every new challenge.

Keywords: competition law, antitrust, regulation, reform, Internet platforms, liberalization, convergence, platformization

The platformization of communications markets (i.e., the proliferation of multisided platform markets) has turned traditional, national communications markets upside down. On the one hand, large international Internet companies have established themselves as “bottleneck monopolists,” companies that control both their own products and services as well as those of their competitors (Benjamin & Speta, 2015; Shelanski, 2013). This has affected the traditional media, most notably publishing companies, but also Internet newcomers. Effects on the former have been marked by debates in Germany and Spain, and subsequently at the European level and in other countries over ancillary copyright—a regulation aimed at securing compensation if online news aggregators use publishers’ content online.¹ Effects on the latter are, for example,

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¹ The German ancillary copyright regulation entered into force in August 2013. In September 2019, however, the Court of Justice of the European Union judged that the rules may not be applied because of a failure of prior notification to the EU Commission, a procedure required for regulations affecting information-society services (Case C-299/17, VG Media). A Spanish law that requires news aggregators to pay for the use of news content resulted in a Google News shutdown in 2014. Since June 2019, Article 15 of the new European copyright directive (EU 2019/790) has also included such an ancillary copyright provision aimed at protecting press publications from unauthorized use by online platforms. France was the first EU member to transpose this directive into national law. Google responded with the intent to not comply and instead refrain from

prominently represented in a 2013 U.S. Federal Trade Commission (FTC) settlement agreement with Google. Here, Google committed to refrain from misappropriating competitors' online content—for example from Yelp—and from including such content in its own services as if it were its own (Federal Trade Commission, 2013). On the other hand, the emergence of over-the-top (OTT) platforms, most of which operate outside traditional national licensing and other regulatory provisions, has substantially changed the power relationships in traditional broadcasting and telecommunications markets (Liu, 2016; Lotz, Lobato, & Thomas, 2018; Zboralska & Davis, 2017). With this unsettling of traditional markets, discussions over the appropriate handling of platformization and its effects have moved center stage. This includes the question of which instrument—regulation or competition law—is most suited to dealing with these new challenges. Further, it includes calls for a more prominent role for competition law and policy in communications markets.

Historically, competition law and policy have played a minimal role in the media and communications industries because these markets were owned by the state or regulated as (state) monopolies, thus protecting them from competition. In numerous countries, there were no competition laws, and early noteworthy exceptions of antitrust action did not initially result in a more prominent role for competition (law), for example the 1913 Kingsbury Agreement in the United States—an out-of-court settlement intended to appease government antitrust concerns about AT&T's acquisition strategies. Since the end of the 20th century, this has substantially changed worldwide. Competition law expanded geographically very rapidly and has been extended to sectors not previously covered (Just, 2015). Liberalization ended monopolies in communications and brought about a first range of sector-specific regulation, targeted, among other things, at opening telecommunications markets or controlling the structure of media industries through ownership rules. At the same time, competition law has gained in relevance, leading to a system of formal concurrent application of competition law and sector-specific (competition) regulation (Just, 2015). Altogether, competition policy's rise to fame in communications started with the liberalization of media and telecommunications markets and was intensified in the light of convergence (Just & Latzer, 2000; Latzer, 1998). This was also when the question of which instrument is to be master in communications markets first came sharply to the fore.

This article starts with a discussion of the complex relationship between competition law and regulation—conventionally framed in terms of opposition and distinction—and argues how this often-purported separation is conceptually of little avail because it detracts from more important questions of how to govern communications markets adequately and how to employ available instruments where they fit best.

It then shows how the discussions of which is to be master during liberalization and convergence and now platformization have similarities but also significant differences. Altogether, it distinguishes two phases of discussion and an underlying tale. The first phase (liberalization and convergence) is characterized by a focus on traditional electronic (mass) media and telecommunications, asymmetric regulation, as well as ownership rules and attendant questions of media diversity or plurality. In addition, there is evidence of

displaying snippets and previews unless authorized. Subsequently, the French competition authority mandated negotiations, a decision that was backed by the Paris appeal court in October 2020. In the meantime, Google has started the project Google News Showcase, which also pays publishers for news content and—according to Google—involved 450 publications across a dozen countries as of January 2021.

a perceptual bias against regulation and for competition law, and there is a struggle over normative standards and value choices. The latter resulted mainly from the quest to abolish sector-specific media ownership regulation in favor of the sole application of competition law. The second phase (platformization) is marked by comprehensive calls for a stricter application of competition rules to control platform power and a concurrent cautious or restrained attitude as to whether competition law is indeed the proper instrument to comprehensively remedy all issues connected with the rise of platforms. Most prominently, this regards goals that are not at the core of competition law, such as privacy and data protection, which some argue should be dealt with by regulation. Thus far, the second phase has not involved a comparable struggle over normative standards and value choices, but discussions center on the efficiency and respective strength of each area of law and questions about the allocation of competencies. In addition, there is an underlying tale that pervades both phases. This regards the general state of competition law and its enforcement and the question of whether competition law itself is in substantial need of reform. Although this debate was quite restricted or concealed during the first phase of which is to be master, it has essentially evolved into the principal point of discussion during the second phase, also involving wider calls for reform and renewal of competition law.

Competition Law and Regulation: Competing or Complementary Mechanisms?

Competition law, usually known as antitrust law in the United States, and regulation have long been viewed as competing or alternative mechanisms (Brennan, 2008; Breyer, 1987; Bush, 2006). This dichotomy has been upheld with various arguments, some more general, others more specific. The more general ones include a discourse that comments on competition law mostly in terms of public interest and on regulation in terms of special interest and regulatory capture. Competition law, its enforcement, and its decision makers serve the public interest, while regulation mostly benefits well-organized interest groups and the politicians that serve them (Maggiolino, 2015; Shughart & Tollison, 1985; Tollison, 1985). In this general view, competition law is surrounded by an air of supremacy, and its vigor is generally described in well-meaning attributes: It is analytically rigorous, consistent in legal doctrine and procedures, more predictable, and less error-prone because of fact-specific, mostly ex-post adjudication. In contrast, sector-specific regulation is characterized as expensive, ineffective, too complex, prone to delay, unpredictable, interest-driven, susceptible to regulatory capture, and error-prone because of ex-ante enforcement (Just, 2008). In this vein, there is also a tendency to discharge competition law from any other normative premise than its now dominant goal of protecting competition to enhance consumer welfare and economic efficiency (Just, 2015).

The more specific arguments similarly describe competition law and regulation in dichotomous terms, however, with more specific reference to the aims, functions, and enforcement of each (Drexler & Di Porto, 2015; Dunne, 2014a, 2015; Ibáñez Colomo, 2010; Ibáñez Colomo & Kalintiri, 2020; Just, 2008; Stones, 2019). Accordingly, it is argued that competition law is a general law, applying equally to all industries, while regulation is specific. Here it is also claimed that regulation is more intrusive because it aims to shape market structures and the conditions of competition, while competition law protects the competitive process irrespective of specific structures. Competition law's goal is further closely circumscribed as being about the protection of effective competition to achieve the normative goals of consumer welfare maximization and economic efficiency, while regulation is employed to fulfill a wide array of policy goals and essentially bypasses the

competitive process in their pursuit. As such, regulation is seen as proactive and proscriptive, while competition is considered reactive and prescriptive. This argument is also sustained by emphasizing the ex-ante or ex-post character of each or by describing the enforcement as law-driven in the case of competition law (in essence, a pure and predictable interpretation of existing law and a “value-free” translation of it) or policy-driven in the case of regulation (in essence, a focus on certain policies and normative premises with unpredictable outcomes). Especially for the U.S. system, it is further argued that competition law is mainly enforced in adjudication proceedings (in court or in adjudication-like settings), while regulation is dealt with in administrative settings, with the above-mentioned danger of special-interest influence.

Although some of these differentiations are plausible, the strict distinction they convey is of little avail to a constructive debate on how to govern communications markets and the employment of these instruments in them. First, the history of competition law shows how its origin and institutionalization was the result of policy and the interplay between political and economic institutions as well as historical circumstance. Even though the now-dominant view holds that competition law’s goal is to protect competition and enhance consumer welfare and economic efficiency, multiple objectives have concurrently or alternately dominated the view of what it seeks to achieve (Alexander, 1996; Budzinski, 2003; Conrad, 1997; DiLorenzo & High, 1988; Just, 2015; Kovacic & Shapiro, 2000; Phillips Sawyer, 2019; Zimmer, 2012). This also includes the sometimes-contested understanding of protecting competitors, which, for example, was also a central concern of U.S. competition law until the 1970s, and noneconomic goals, such as media plurality or, recently, privacy, which strive toward wider social or democratic purposes. Various competition laws contain special provisions for communications markets, such as multiplier factors for turnover or, most recently, provisions that focus on transaction or purchase value to ensure that media or Internet mergers are subject to merger control even if their turnover is below the generally required threshold (e.g., in Austria and Germany). Further, there are measures to protect the plurality of the media, which is commonly understood in terms of multiple independent media owners or competitors, through various ways of investigating or prohibiting certain mergers (e.g., at the EU level, in Austria, the U.K., or Ireland; Just, 2015, 2020). The Stigler Committee on Digital Platforms (2019) recently suggested that the FTC and the Department of Justice (DoJ) should incorporate media plurality as a key metric in merger reviews and—in contrast to the above-mentioned standard—suggest measuring it as the share of the attention devoted by consumers to different media sources. The ambiguousness of who or what is to be protected by competition law and what its aims are has been raised repeatedly—for example, in debates over a European Court of First Instance’s decision on Microsoft in 2007. This confirmed a €497m fine imposed in 2004 because of Microsoft’s abuse of its dominant position in PC operating systems. In the United States, this was criticized by the then-assistant attorney general for the DoJ’s Antitrust Division as a decision in support of competitors instead of competition (Barnett, 2007). In contrast, the generally—albeit controversially—shared assumption that the protection of competitors through structural regulation aimed at a wide dispersal of ownership is an essential goal in the media sector—as a means of achieving communications freedom—still endures today. The deregulatory efforts within the United States and Europe during the first phase of which is to be master put considerable strain on this position, however, and question the extent to which the structure of media industries indeed influences the availability of diverse content in such a way as to warrant a sector-specific ownership regulation aimed at protecting competitors. An interesting indication of how historical circumstances influence the assumptions of what a law should achieve is the reemphasis on the protection of competitors that was manifested in the United States in an October 2020 report of the

Subcommittee on Antitrust, Commercial, and Administrative Law of the U.S. House Committee. This is the result of the House's investigation into competition in digital markets and contains a recommendation on strengthening the law to protect potential rivals, nascent competitors, and startups, among other things, by prohibiting acquisitions of potential rivals and nascent competitors (Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, 2020).

Second, the representation of the relationship between competition law and regulation in terms of opposition and distinction has been challenged by reevaluations that increasingly accord a regulatory nature to competition law, thus obviating some of the original characterizations of competition law as distinct from regulation. This metamorphosis toward just being another form of regulation is substantiated by various developments (Drexl & Di Porto, 2015; Dunne, 2015; Geradin & Sidak, 2003; Ibáñez Colomo, 2010; Maggolino, 2015). Indicators of this change include a move away from a largely law-enforcement, litigation-oriented, adjudicative system toward a more administrative regulatory model of competition law. The latter is characterized by the growing importance of modern industrial economics in competition analysis (Budzinski, 2007) and by an increasingly bureaucratic regulatory nature of competition law and its enforcement, with more collaboration between the enforcers and the industry. The increasing prominence of economics in what some view(ed) as a pure law-enforcement domain or a pure quest to interpret legal doctrine opens the door to criticism, including claims that the enforcement personnel apply economic concepts, theories, and instruments faultily or insufficiently (Budzinski & Wacker, 2007; Economides, 2005). The regulatory character, on the other hand, is exemplified by an increased number of consent decrees, commitment decisions, premerger screenings, fix-it-first approaches, and by less litigation (Ibáñez Colomo & Kalintiri, 2020; Kauper, 1994; Kovacic & Shapiro, 2000; Massorotto, 2015; Melamed, 1995; Organisation for Economic Co-operation and Development, 2016; Stones, 2019; Sullivan, 1986; Waller, 1998). Although this move away from a litigation-oriented, adjudicative system is best sustained for the U.S. antitrust system, this and the other indicators have gained recognition in Europe, too, where there are increasingly various policy statements and guidelines about how competition law is or will be applied (e.g., the notice on definition of relevant market, guidelines on mergers and state aid, guidelines on market analysis and the assessment of significant market power for electronic communications networks and services, or on the application of state aid rules to public-service broadcasting). Further, Article 9 of European Regulation 1/2003 introduced a procedure enabling formal commitment decisions. Accordingly, the European Commission may accept and make certain commitments offered by investigated companies to remedy competitive concerns legally binding, without establishing an official infringement (Dunne, 2014b; Ibáñez Colomo & Kalintiri, 2020; Massorotto, 2015; Stones, 2019). But even if the Commission concludes cases with prohibition decisions (Article 7 Regulation 1/2003), it may still pass substantial responsibility onto companies to find remedies for infringements.² This was recently done in the Google Search (Shopping)

² According to Regulation 1/2003, the European Commission has various possibilities to conclude a proceeding, most prominently a unilateral finding and termination of infringements according to Article 7 and a collaborative commitment procedure according to Article 9, where the Commission may accept commitments from companies to remedy infringements. Before Regulation 1/2003, commitments were also informal common practice, and the Commission had the power to informally conclude a case by comfort letter. However, in cases of noncompliance, the commitments could not be enforced by fines and the Commission had to resume proceedings. Article 9 now formalizes the procedure for commitment decisions,

case, which was originally tried under Article 9 but then reverted to an Article 7 procedure (Case AT.39740). Accordingly, Google has been required only to cease the established infringements but is free to decide on the means (Just, 2018).

Altogether, on closer inspection, it appears that the strict conceptual separation between these two instruments is of little practical value. Here it is argued that seeing competition law pragmatically as one of many possible instruments makes it possible to focus on the goals instead of merely on the instruments. Accordingly, the emphasis needs to be shifted to balancing the appropriate mix of competition law and regulation to apply each instrument where it fits best.

Which Is to Be Master? The First Phase—Liberalization and Convergence

The first phase of which is to be master should generally be seen in line with transformations brought about by the liberalization of and the convergence between the media and telecommunications, which took place from roughly the 1980s. In addition, and more specifically, it is to be regarded in the context of three interrelated approaches to broad institutional developments and changes of governance in general and communications governance in particular. This is about shifts from government to governance (Engel, 2001), from the interventionist or positive state to the regulatory state (Majone, 1996), and the transformation of statehood in the converged communications sector (mediamatics; Latzer, 1999). The latter denotes the erosion of the traditionally dominant pattern of government intervention in the communications sectors, with far-reaching changes in content (policy), institutional structures (polity), and processes (politics) of regulation.

Liberalization ended monopolies and brought about a first range of sector-specific regulation targeted, among other things, at opening telecommunications markets or controlling the structure of media industries through ownership rules. At the same time, competition law gained in relevance, leading to a system of formal concurrent application of competition law and sector-specific (competition) regulation (Just, 2015). This first phase focused on traditional (electronic) mass media and telecommunications and was generally accompanied by a perceptual bias against regulation and for competition law in communications. "Let antitrust do it!" (The Skeptical Regulator, 2003) was the commonly held view by many proponents of deregulation, who eventually favored a shift from sector-specific regulation to general competition law. This was evident in policy documents preceding new legislation and newly adopted communications laws. The 1996 U.S. Telecommunications Act was considered an "Act to promote competition and reduce regulation." Likewise, the European telecommunications reform, including the 2002 European electronic communications framework and the 2006 EC Review, was based on the acknowledgement of an increased reliance on competition rules accompanied by a gradual phasing out of sector-specific rules as the market becomes more competitive. "Less but better regulation" and "More competition for a stronger Europe" were its guiding principles. Regulation was designed to be transitory, and competition law was eventually to ensure the proper functioning of the telecommunications market

and the Commission has the power to make commitments legally binding and to sanction in cases of noncompliance. The proceeding can also be closed without formally establishing an infringement, thus saving substantial resources.

(Just, 2008). Indicative of this phasing-out is the decreasing number of relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, from 18 in 2003 to seven in 2007 and finally four in 2014 (European Commission, 2003, 2007, 2014). Similarly, in the media sectors, deregulatory initiatives were pursued in the United States and in various European countries, for example the U.K., Austria, and Italy, mostly in ownership regulation. This shift toward an increased reliance on competition law has been evident at the institutional and the substantive levels. Most recently, the U.S. Federal Communications Commission added another round of relaxation of long-standing media ownership rules in 2017, when it eliminated, among other things, the newspaper-broadcast cross-ownership rule and the radio-television cross-ownership rule. Against the background of convergence, it has been argued that these sector-specific rules are obsolete, arbitrary, insufficient, and difficult to enforce in a convergent many-channel media environment and that general competition-law enforcement would thus suffice (Just, 2009, 2015, 2020). The influence of competition policy did not even stop at European public-service broadcasting, which has, since its inception, mostly been publicly procured and financed. Here, the European Commission initiated various investigations based on distinctively European state-aid rules. These are part of the European competition framework and declare such aid to be incompatible if it distorts competition and adversely affects trade between member states. With this, the Commission essentially pursued media policy through competition rules without legal competence, as media matters usually rest with the member states (Just & Latzer, 2011).

This shift from sector-specific regulation to general competition law in convergent communications sectors (telecommunications and media) has been widely debated in academic work (Braun & Capito, 2002; Geradin & Kerf, 2003; Just, 2009; Katz, 2004; Prosser, 2005; Shelanski, 2002, 2006, 2007). In the light of convergence, the decision about whether sector-specific regulation should be abolished in favor of competition law put the emphasis on the differences and commonalities of regulation in the affected areas and on the question of whether competition law would suffice for prominent noneconomic goals such as media diversity. Sector-specific regulation in telecommunications and media reveals various differences, including its underlying normative assumptions, its objectives, and the possibilities of exemption from competition law. Although sector-specific telecommunications regulation extends beyond the scope of general competition law, it normatively correlates with it, inasmuch as it is largely targeted at the development and consequently the protection of effective competition. This is different for the media, where sector-specific regulation aims at media plurality and consequently at a pluralism of opinion to ensure freedom of communication. It is thus aimed at establishing certain market structures (e.g., a wide range of independent owners—in essence, a protection of competitors). Especially because media products and services are simultaneously considered economic and cultural goods (i.e., commodities and constitutive elements of public-opinion formation), the quest to allow competition law to fulfill this function sparked controversies and struggles over normative standards and value choices. This included fears that economic goals would take precedence over noneconomic ones and that competition law alone would not account sufficiently for the peculiarities and social functions of the media sector, because of its narrow focus on consumer welfare and economic efficiency and therefore its alleged insensitivity to wider social, political, and democratic concerns (C. E. Baker, 2007; Doyle & Vick, 2005; Just, 2009; Shelanski, 2006).

Although there is a formal concurrent application of competition law and sector-specific regulation in communications, theoretically and practically there are insecurities as to the actual extent of their parallel

applicability, for example regarding the roles that they and their attendant institutions should play. Should there, for instance, be a competition law restraint when an elaborate sector-specific framework is in place? Sometimes competition law's role is limited by express exemption for certain regulated industries. Within Europe, Article 106 of the Treaty on the Functioning of the European Union allows for exempting companies entrusted with the operation of services of general economic interest, such as public broadcasters and telecommunications companies, from competition rules if these obstruct the performance of the assigned task. In contrast, the 1996 U.S. Telecommunications Act bars express immunity by stating that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws" (Section 601, lit. b). Nevertheless, insecurities remain, as was also indicated by the U.S. Supreme Court's *Trinko* decision, which raised the question of whether a regulation like the Telecommunications Act can be a shield against antitrust scrutiny (*Verizon v. Trinko*, 540 U.S. 398, 2004). Controversies about where regulation ends and when competition law steps in, and how much sector-specific regulation is indeed necessary in the communications sector, have been at the center of communications policy debates ever since, resurfacing particularly during platformization.

During this first phase of which is to be master, regulation was widely presented as an inferior instrument, while competition law was accorded the well-meaning attributes described above. However, what was essentially omitted during that discussion is that competition law was just then subject to similar criticisms as those directed at regulation, including the above-discussed political and social reality behind it, its value-ladenness, regulatory nature or ambiguous goals (Shughart & Tollison, 1985; Tollison, 1985). Rowe (1984) argued: "Bereft of contemporary purpose and direction, antitrust is drifting into irrelevancy. More and more, and increasingly apparent, antitrust is a law lacking vision, a religion without a cause, a policy in search of itself" (p. 1569). Dibadj (2004) maintained that: "Trashing antitrust is common among distinguished intellectuals of every stripe. Some would like to see the law sharply curtailed" (p. 745). And Svetiev (2007) viewed antitrust in a "new phase of an always-controversial existence" and considered it "legitimate to ask whether there remains even a residual role" for it (pp. 593–597). Some characterized competition law as an anachronism (Williamson, 1992). Revisionists openly called for its repeal (Armentano, 2002) or for the focus to be on only the most significant violations and apparent threats to competition, such as explicit collusion and large horizontal mergers. The reasons given for this were the weak empirical case for its effectiveness (Crandall & Winston, 2003). Empirical studies often indicate policy failure and suggest that competition law bureaucracy operates much like regulatory bureaucracy in general. Competition law and its enforcement are thus similarly politicized, corrupted by special interests, and value-laden as regulation (Shughart & Tollison, 1985; Tollison, 1985), and regarded as a legislative response to protectionist pressures (DiLorenzo, 1985).

Though some of this criticism came from quarters generally opposed to any form of government intervention, others were more concerned with the need for institutional and substantive reforms of the law to fit it to changing circumstances. For example, in response to some of this criticism of competition law's ineffectiveness, scholars developed approaches to "Saving Antitrust" (Dibadj, 2004, p. 745), or suggested "a new antitrust approach for the 21st century" (Piraino, 2007, p. 345). These included calls to look beyond doctrinal boundaries and to consider institutional reforms. In the United States, the Antitrust Modernization Commission was founded under the 2002 Antitrust Modernization Act to examine whether there was a need to modernize the laws. This was also against the background of technological change and the discussion

over competition law's role in high-technology industries. Recommendations for change were less concerned with the substantive issues (e.g., no calls for changes to the statutes) than with institutional matters, calling also for more empirical studies into the effectiveness of certain provisions (Antitrust Modernization Commission, 2007).

Altogether, this troubled side of competition law and its enforcement was widely neglected in the discussions over the more prominent role for competition policy in communications and over a shift from regulation to competition-law regimes during this first phase of which is to be master. What was looming during this first phase emerged in the light of platformization and now marks the ongoing second phase.

Which Is to Be Master? The Second Phase—Platformization

Economically and socially powerful Internet platforms have come to substantially shape and restructure our societal communications systems (Mansell, 2015; Mansell & Steinmueller, 2020; van Dijck et al., 2018). Many of these platforms have assumed roles comparable to the traditional media but are outside the same regulatory and legal framework because they have successfully resisted such definition (Napoli & Caplan, 2017). Altogether, their governance has become one of the most pressing regulatory and policy challenges worldwide. In the light of the economic power of Internet platforms, the critical appraisal of competition law in communications—as evident in the first phase—has somehow faded. Competition law and policy are now predominantly invoked as the leading means to counter the economic and political power of platforms, not least because they are considered to strike at their roots (J. B. Baker, 2019; Khan, 2017; Wu, 2018). Competition law is generally in a period of being “sexy again” (Shapiro, 2018, p. 714) or “back on the menu” (Crane, 2018, p. 135) to deal with economic power in general and the rising power of Internet platforms in particular.

This ongoing governance debate particularly acknowledges what has been widely ignored during the first of phase of which is to be master, namely that there may be a need to modernize competition law (Gilbert, 2020; Schweitzer, Haucap, Kerber, & Welker, 2018; Zimmer, 2015), essentially through a wider paradigmatic change in competition policy to get to grips with the challenges posed by online platforms (Just, 2018). Innumerable policy papers, statements, and reports have been published addressing this need for renewal in different ways. Although many share the general insight about a need for reform, there is also potential disagreement and uncertainty as to which problems are the most pressing or how they should be addressed (Australian Competition and Consumer Commission, 2019; Crémer, de Montjoye, & Schweitzer, 2019; Deffains, d’Ormesson, & Perroud, 2020; Digital Competition Expert Panel, 2019; European Commission, 2020b; House Judiciary Committee, 2019; Stigler Committee on Digital Platforms, 2019). In line with this consideration, countries have adapted their competition laws to meet new challenges or are in the process of discussing reforms. In 2017, Germany identified access to data as a possible criterion for market power, and both Austria and Germany introduced a transaction-value threshold for merger review in their competition laws (Just, 2018). Comparable proposals for this have also recently been suggested for the United States (Gilbert, 2020; Stigler Committee on Digital Platforms, 2019). Furthermore, in January 2021, Germany adopted additional amendments to its competition law that aim at further adjusting it to the new realities of platform markets. This reform includes provisions on intermediation power in market-power assessment or about the willful causation of market tipping by companies. The former takes account of the specific intermediary

functions that platforms perform in multisided markets and the attendant gatekeeping powers this may entail; the latter refers to purposeful activities that cause the market to tip toward monopolistic market structures.³

Similarly, the Subcommittee on Antitrust, Commercial, and Administrative Law of the U.S. House Committee on the Judiciary concluded its investigation into competition in digital markets with a comprehensive list of recommendations, including measures to restore competition; the law and enforcement, among other things, through structural separations; and nondiscriminatory requirements and interoperability, by protecting nascent competitors and strengthening congressional oversight and private enforcement (Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, 2020). Furthermore, in June 2020, the European Commission started consultations on a proposal for a New Competition Tool and on platform-specific ex-ante regulation (European Commission, 2020a, 2020c). This is to supplement competition law and to aid in tackling “concerns that affect many markets at once” and in fighting “what’s really a systemic problem” (Vestager, 2020). The latter, in particular, indicates that there is renewed room for regulation alongside competition law in communications markets.

In general, many policymakers and scholars share the acknowledgement that a stricter application of competition rules and reforms of its enforcement are warranted to cope with platform power, but there are also cautious voices that fear competition law will be overstrained if it is expanded to also cover wider social and political goals (Dorsey, Manne, Rybnicek, Stout, & Wright, 2020; Wright & Portuese, 2020), or if it has to bear the major burden, for example, by also having to resolve issues that may be in the realm of regulation (Lamadrid & Villiers, 2017). With this, the question about the relationship between regulation and competition law has reemerged. As compared with the first phase, in which the protection of media diversity through competition law was central, the question of which is to be master has now arisen in particular about privacy and data protection through competition law (Autorité de la concurrence & Bundeskartellamt, 2016). The Stigler Committee on Digital Platforms (2019), for example, argues that the concerns about Internet platforms span different fields that are all, however, linked to the power of data. This is because the business models of Internet platforms are predicated on the collection and processing of big data through sophisticated algorithmic methods (Latzer, Hollnbuchner, Just, & Saurwein, 2016), and to the acknowledgement that personal data is a potential currency and privacy a non-price-competitive element (Just, 2018).

Competition law, as well as privacy and data regulation, thus infiltrate each other in a way that now makes privacy, consumer, and data protection the central policy area affected by discussions on this relationship. However, unlike the first phase, the discussion is no longer about the phasing-out of regulation in favor of competition law but about the respective roles that each should play and on the allocation of competencies (Colangelo & Maggolino, 2017; European Data Protection Supervisor, 2014; Grunes & Stucke, 2015; Kennedy, 2017; Kerber, 2016; Ohlhausen & Okuliar, 2015; Sokol & Comerford, 2016). Although the European Commission and the U.S. Federal Trade Commission have made efforts to generally emphasize the separate responsibilities of competition law and regulation in the areas of data and privacy protection, there are also statements that have floated the possibility of considering such concerns in competition assessments

³ These amendments prompted the German Cartel Office to immediately extend abuse proceedings initiated against Facebook in December 2020 under these new rules. This case concerns the linkage of Oculus virtual reality products with Facebook’s social network.

(Just, 2018). This view was particularly supported in proceedings of the German Cartel Office (Bundeskartellamt) against Facebook, concluded in February 2019. Accordingly, it determined an abuse of market power based on the extent of collecting, using, and merging data and imposed far-reaching restrictions on this. This decision was later called into question by the Düsseldorf Higher Regional Court (OLG), which suspended its enforcement until its final decision. In June 2020, however, the Cartel Senate of the German Federal Court of Justice (Bundesgerichtshof) overturned this suspension, thus supporting the assessment of the Bundeskartellamt. However, enforcement was again suspended in November 2020 by the OLG on the request of Facebook and repeatedly objected to by the German Cartel Office in December 2020. The ultimate outcome is pending. In March 2021, the OLG halted the proceedings and filed a request to the European Court of Justice for preliminary ruling. This legal struggle also finely indicates how the general question of competencies and instruments is still contested. In cases involving the handling of data by digital platforms, a more prominent role for competition law enforcement is often favored on the grounds of its widely agreed-on ability to assert itself better *vis-à-vis* economically powerful Internet companies. This is because of more financial resources and personnel, the ability to require far-reaching behavioral and structural remedies, and the ability to impose higher fines. More clarity may emerge throughout the above-mentioned ongoing reforms aimed at revising competition laws and enforcement, including provisions on data and market power. Further, to the extent that the narrow goal of consumer welfare and economic efficiency of competition law is now officially being reconsidered, including the protection of competitors or democratic ideals (Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, 2020), this may make competition law more widely acceptable, also among those who, thus far, have alleged ignorance of wider economic and democratic concerns. These developments indicate a likelihood that competition law and its enforcement may eventually play a more prominent role in the handling of platform power.

Nonetheless, this second phase is in full flow, and it is still up in the air whether or not the increased efforts to modernize competition law and to clarify its relationship with regulation will provide for a proper framework to adequately address platform power. At the moment, many construction sites are rife with methodological and conceptual quandaries for which, to date, no satisfactory answers have been given and where in-depth research is urgently needed.

Conclusions

The platformization of communications markets has intensified debates over its appropriate handling, including discussions of which instrument—regulation or competition law—is to be master. This article has distinguished two phases of which is to be master and an underlying tale. It has shown how the discussions on the issue during liberalization and convergence and now platformization have similarities but also significant differences.

During the first phase (liberalization and convergence), the focus was on traditional electronic (mass) media and telecommunications as well as on ownership rules and asymmetric regulation. It was further characterized by a perceptual bias against regulation and for competition law and a struggle over normative standards and value choices. The second and ongoing phase (platformization) is marked by comprehensive calls for a stricter application of competition rules to control platform power and a concurrent cautious or restrained attitude as to whether competition law is indeed the proper instrument to

comprehensively remedy all issues connected with the rise of platforms, most prominently privacy, consumer, and data protection, which some argue should be dealt with by regulation. There is further an underlying tale that pervades both phases. This is about the general state of competition law and its enforcement and the question of whether competition law itself is in substantial need of reform. Although this debate was quite restricted or concealed during the first phase of which is to be master, it has essentially evolved into the principal point of discussion during the second phase, also involving wider calls for reform and renewal of competition law. Altogether, it remains to be seen how this second phase will evolve and whether or not the increased efforts to modernize competition law and clarify its relationship with regulation will provide a proper framework to adequately address platform power.

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