Digitalisation of economic law in the EU: which way forward?

EU Economic Law – Radboud Economic Law Conference – Digital Markets in the EU (Book Presentation)

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Introduction

On 9 June 2017, the Faculty of Law of Radboud University Nijmegen hosted an international conference entitled 'Digital Markets in the EU'. This event is the second edition of the Radboud Economic Law Conference series. The emergence of the digitalisation phenomenon is bound to continuously raise interesting problems for the development and enforcement of the law. This is why the conference aimed to identify trends and patterns in the direction the law is heading, in order to tackle the digital economy challenges. The speakers at this conference debated interesting and valid legal issues pertaining to diverse sub-domains of the economic law field. The contributions presented at the June 2017 event are included in an edited volume titled 'Digital Markets in the EU', to be published by Wolf Legal Publishers in the first half of 2018. As editors of this volume, in this blog post we would like to briefly present the book's defining features, main findings, red threads, and also the broader context in which it has been developed.

The context

Digitalisation is a phenomenon that has and will very likely continue to change our lives, whether we act as private citizens, consumers, employers or employees, economic actors, policy makers, law enforcers, etc. It has revolutionised all sectors of the economy, while facilitating the development of novel technologies, consequently of new types of products and services, and for that matter, of new types of businesses

and markets.[1] Furthermore, digitalisation has prompted existing market players to adapt their business models, to the point where even the eminently ‘offline’ types of activities have nowadays some sort of ‘online presence’. These developments relate greatly to the emergence of a new type of economy, the ‘digital economy’, which tends to outgrow traditional markets. In this context, the interaction between the ‘analog’ and ‘digital’ worlds has been rapidly reshaped, signalling a shift from physical exchanges to those conceived in a cyber-environment.

This is so, given the uniqueness and attractiveness that digital markets exhibit both for consumers and for producers / suppliers of goods and services: such markets are dynamic in nature, very much focused on innovation, requiring high investments in R&D, and where platforms and networks play a key role.[2] The players active in such markets often compete *for*the market (the so-called ‘winner takes all’ scenario), while the consumers of digital products or services are, more often than not, price sensitive; yet frequently, and at times unknowingly, the consumers will ‘pay for their purchases by disclosing their personal data’. Thus, consumer data becomes the ‘currency’ in digital markets, being a valuable and strategic asset, particularly when it cannot be easily replicated by competitors.[3]

The challenges

In these settings, the digital economy puts forward diverse and interesting challenges for various categories of stakeholders: consumers, businesses and market players, legislators, enforcement authorities, etc. One can argue that the emergence of the digital economy changed the outlook of consumer-supplier and the business-to-business relationships.[4] For example, due to better access to information and enhanced choice, consumers have become increasingly demanding and proactive. They also purchase online the services and products they need, to a greater extent than before. This puts pressure on the ‘brick-and-mortar’ retail level, calling for readjustments of the business models used in this sector of the economy. This is important, since digitalisation actually helps economic operators cut costs, achieve cost efficiencies, and develop new revenue and financing streams. Furthermore, digitalisation allows these actors to establish new and stronger links between different sectors of the economy, which were somewhat loosely connected in the past: in this respect one may think of the sector of passenger air transport and those of hotel accommodation and car rentals. 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. Yet, while speaking of consumer data, those in possession of such data must comply with strict requirements as far as the collection, storage, processing, and exploitation activities are concerned, in order to safeguard the protection of the consumers' personal information.

Moving on, the digitalisation phenomenon impacts various areas of the law and confronts legislators and enforcers with novel problems in need of resolution. In this respect, one of today's greatest challenges relating to the digitalisation of the economy is how the law deals with this phenomenon.[5] It is important to address this issue, especially given that (most of) the laws currently in force were drafted before the digitalisation phenomenon started materialising.[6] Therefore, it is not inconceivable that the emergence of the digital economy and digital markets challenges the longstanding, and at times inflexible, legal regimes that are currently in place. If this is so, how does the law account for the digitalisation phenomenon? Is the law digital era proof, or are there adjustments that need to be performed on the current regulatory and enforcement frameworks?

The manner in which the law should address the challenges

From the outset, and without attempting to be exhaustive in tackling all the (legal) questions that the digitalisation phenomenon has brought about, the appropriateness of the legal regimes (as they currently stand) to handle the digitalisation challenges pertains to the material rules / enforcement rules dichotomy. With regard to the former, how should one delineate between the application of different areas of economic law (free movement, competition, sectoral regulation, etc.) to the digital economy? Do the boundaries of existing laws need to be stretched to accommodate the digitalisation challenges, and if so, should this require legislative or soft-law intervention? With regard to the latter, namely the enforcement end, what degree of intervention should be regarded as desirable, while also not interfering with the innovation process? Is there added value in bundling competition and regulatory powers within one and the same enforcement agency? Do these agencies need more tools and incentives to properly handle digital evidence, to perform cutting-edge economic analysis, or to meaningfully engage in international cooperation?

These are questions which, if placed in the EU context, relate to the regulatory and enforcement initiatives taken by the EU institutions, in order to allow EU businesses and consumers to benefit fully from the digital economy.

Regarding the former, namely regulatory efforts, the Commission's 2015 Digital Single Market Strategy for Europe (DSM)[7] aims to break down regulatory barriers and ensure that competitors can operate in a free and fair market, while also securing the EU's leadership in the digital economy. The DSM initiative is premised on numerous prospective legislative amendments built on three pillars: 1) better access for consumers and businesses to online goods and services (for example, through abolishing differences in contract and copyright law between the Member States, simplifying VAT rules, curbing geo-blocking, and improving price transparency and regulatory supervision of parcel delivery); 2) creating a level playing field for digital networks and innovative services (for example, by reforming the telecom sector, exploiting innovations such as Cloud computing, Big Data and the Internet of Things, and by thoroughly assessing the competitive role of online platforms); 3) maximising the growth potential of the EU digital economy (for example, by tackling restrictions on the free movement of data and fostering interoperability and data sharing). All in all, the DSM aims to unite the fragmented EU digital market and curtail abuses of market power. The 2017 Commission Mid-Term Review of the DSM Strategy[8] signals that progress is well underway, with 35 legislative proposals and policy initiatives having already been tabled by the Commission. Yet, much work remains to be done in 2018, during the current Commission's term of office, specifically when it comes to aspects pertaining to the European data economy, cybersecurity, and online platforms.

As far as the enforcement developments relating to digital markets in the EU are concerned, the discussion pertains to enforcement activities by the Commission and by the EU courts, respectively. The Commission aims to eliminate all barriers to trade, erected by undertakings, capable of impeding the development of the digital economy in the EU. To this end, the Sector Inquiry into E-Commerce based on Article 17 of Regulation 1/2003[9] was launched to obtain an overview of the main market trends and potentially identify anti-competitive business practices. The 2017 Final Report[10] on this inquiry confirms the growing significance of e-commerce, while identifying certain business practices that may restrict online competition. This is so, given that lately, as portrayed above, increased online price transparency and price competition have had a significant impact on companies' distribution strategies. Furthermore, practices in the digital realm may result in erecting barriers to market entry or expansion, or stifle innovation. In this respect, further *ex-officio* investigations by the Commission (besides the already commenced and / or tackled *Amazon* investigation,[11] the consumer electronics, video games, and hotel accommodation investigations,[12] the infamous *Google* investigations,[13] etc.) to

ensure compliance with the EU competition rules, primarily when it comes to vertical restraints and territorial restrictions, are to be expected. Beyond such action, a reinforced approach to the dialogue with national competition authorities within the ECN is also anticipated, for the purpose of consistently applying and interpreting competition law rules in the e-commerce sector.

The EU courts too have been recently called upon to handle complex cases connected to the digital economy, which pertain to diverse, yet interconnected areas of economic law. It is interesting to identify the trends that emerge from some of such rulings and the manner in which the various branches of EU economic law are developing, especially in light of the traditional – digital economy relationship. The *Coty* ruling[14] interpreted the provisions of the TFEU cartel prohibition and of the Vertical Block Exemption Regulation,[15] in the context of selective distribution systems which have an online dimension. The Court confirmed its stance embedded in its 'aging' *Metro* ruling,[16] according to which selective distribution systems for luxury goods, designed primarily to preserve the luxury image of those products, do not infringe Article 101(1) TFEU, provided that certain (objectivity and proportionality) conditions are met. Selective distribution networks which entail distributors being prohibited from selling on third party (online) platforms discernible to the public, enjoy the same regime, while also escaping the prohibition of Article 4 of Regulation 330/2010, because neither restrictions on selling to particular customers, nor restrictions on passive sales are present. The CJEU's approach in this respect is consistent with the Commission's E-Commerce Sector Inquiry findings: third-party platform bans are not necessarily hardcore restrictions because they do not, in general, amount to a *de facto* prohibition of sales via the internet. Moving on, in the *Uber Spain* ruling[17] the CJEU was confronted with interesting aspects relating to the sharing / collaborative economy, which may have, in the long run, important ramifications for the ability of the Member States to regulate activities such as those performed by Uber. It ruled that Uber provides a transport service rather an information society service, as this service entails more than mere intermediation, since the provider simultaneously offers urban transport services. Thus, the Court made 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. By ruling that the Uber service is a transport service, the Court reverted to the traditional economy approach, while dealing with the challenges of the digital era. At the same time, it placed the ball in the Member States' court since the Member States are free to regulate the conditions under which such services are provided. This may not

necessarily mean though that all prospective collaborative economy cases will reach similar outcomes to the *Uber* case, since business models in this field are rather diverse. While in the *Uber* ruling, as pointed above, the CJEU employs the traditional economy approach to deal with the digitalisation challenges, in the *Visser Vastgoed* ruling,[18] the Court seems to embrace more visibly the developments brought about by the digital era. The ruling acknowledged the changes brought about by digitalisation, in that brick-and-mortar stores have to compete with internet stores by providing services, which means that retail activities do not only consists of merely selling a product, but also of advising and offering follow-up services. In this light, the Court ruled that retail trade in goods falls within the scope of the concept of 'service' within the meaning of Article 4(1) of the Services Directive.[19] This approach seems to signal a shift from the free movement of goods towards the free movement of services; in other words, digitalisation diminishes the scope of the free movement of goods provisions, while signalling the prominence of services activities, the large majority of which fall under the scope of the Services Directive. A side-effect of such a shift in approach would be further relegating the '*Keck* selling arrangements' doctrine to a mere historically odd occurrence.

All in all, both the regulatory and the enforcement initiatives prompted at the EU level by the digitalisation phenomenon showcase the breadth and diversity of the challenges the digital economy has started, and most likely will continue to raise for the various branches of EU economic law.

The conference and the book

It is with a view to decipher some of the challenges, and to clarify the scope of the initiatives and enforcement developments discussed above, that we organised the 'Digital Markets in the EU' conference. The speakers touched upon diverse digitalisation topics, focusing on the dynamic behaviour of the digital markets players and on the challenges faced by regulatory, enforcement, legislative and judicial entities, when designing, applying, and interpreting the law. Thus, the conference explored legal questions pertaining to a multitude of EU and domestic economic law fields: competition law, sectoral regulation, consumer protection, services of general economic interest, free movement, data sharing and cyber security, etc. The works presented at the 2nd Radboud Economic Law Conference form the basis of the edited volume[20] mentioned in the introduction of this blog post, in which the authors essentially try to establish whether the law as it stands can survive the digitalisation challenges. To be more specific, the authors question whether we need regulation, or

whether the market, and thus the existing legal framework(s), are sufficient to tackle the challenges of the digital era. As briefly summed up in the following lines, they approach this issue from diverse angles.

Hans Vedder and Jan Blockx, in their respective contributions, tackle the use of algorithms and the competition law problems which they might cause. In this context, issues such as the accountability of undertakings for the behaviour of the algorithms which they own or use, and the collusion problems which such settings may entail are dealt with. Both authors agree that competition law as it stands can tackle the problems which the digital era brings about, although they put forward different opinions as to the desirability of the current approaches adopted by law enforcers and courts. Thibault Schrepel, on the other hand, argues in his contribution that the current competition law rules are not always suitable to catch certain behaviour by undertakings. Therefore, he proposes to thoroughly acknowledge the use of a new concept, ingeniously labelled as ‘predatory innovation’, which under the cap of Article 102 TFEU, should curb certain specific types of exclusionary abuses which occur in digital markets. The contribution of Csongor Nagy also delves into the merits of workable competition versus the need for the regulation, while focusing on the concept of universal service. He argues that due to the emergence of the digitalisation phenomenon, new universal services might come into existence. Thus, technological development in electronic communications is bound to reshape universal service and may call for its re-conceptualisation, potentially warranting a novel regulatory approach. Carsten Koenig also proposes the extension of the legal regime as it stands in relation to the ‘essential facilities’ doctrine, and its interaction with the Database Directive.[21] While making a case for regulatory intervention in this realm, he argues that the free market system and the competition law limits undertakings face are not sufficient to ensure a proper balance between access to data and protection of data in digital markets. Speaking of regulation, the contributions of Siún O’Keeffe and Bart Noé, on one hand, and of Pieter Van Cleynenbreugel, on the other hand, dwell upon the benefits and bottlenecks of approaching competition law enforcement and the enforcement deployed in regulated sectors, by integrated authorities. Specifically in relation to the digital economy, Van Cleynenbreugel highlights the complimentary function which the rules under the DSM agenda may have for the enforcement of EU competition law. In this respect, the example of the Dutch Authority for Consumers and Markets, which O’Keeffe and Noé showcase, may very well constitute a model to be adopted by the Member States aiming to appropriately cope with the digitalisation of economic law phenomenon. Moving on, when this phenomenon is viewed in the bigger EU Internal Market picture, the issues which the attempt to regulate the

collaborative economy might run into are dealt with by Marco Inglese, in his contribution. He discusses the problems that arise in connection to the legal basis which may be used to harmonise sector rules pertaining to the sharing economy, while also venturing possible best practices examples stemming from the Italian domestic experience with platforms belonging to this novel branch of the economy. Last but not least, in the same bigger EU Internal Market picture, yet from a somewhat different standpoint, Pieter Wolters focuses in his work on the extent to which the Digital Single Market imposes consistent private law cyber security obligations on the providers of goods and services on digital markets. This is an important issue, given that data protection and the privacy of consumers are key items which need to be observed while developing the legal regimes applicable to the various realms of the digital economy. He argues that despite the existing extensive harmonisation efforts, the approach to ensuring cyber security in digital markets remains piecemeal. The gaps left open in the current legal regime may encourage strategic behaviour of the market players, which requires swift action if the EU is truly committed to the creation of a level playing field with a high level of cyber security.

Looking forward

The contributions included in our edited volume, and the diversity of approaches adopted by the distinguished authors, highlight the many angles from which digital markets in the EU may be approached. At the same time, the book showcases the breadth of the legal issues which have or are bound to occur in connection to the digitalisation phenomenon. Yet, we are now barely at the starting point of the digital revolution. The manner in which this will impact the long-run unfolding of economic realities will undoubtedly change our understanding of the law(s) applicable to the various sectors of the economy. The pieces of the digital legal puzzle seem still rather scattered at this point in time. It is in this context that the 'Digital Markets in the EU' volume aims to shed light on some of the techniques that may be employed to solve the digitalisation of economic law riddles.

[1] See also 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.

[2] See also European Commission, DG for Internal Policies, Challenges for Competition Policy in a Digitalised Economy, (2015), IP/A/ECON/2014-12, 7. For more

on the features that set digital markets apart see, for example, M. Kadar, 'European Union Competition Law in the Digital Era', (2015) 4 Zeitschrift für Wettbewerbsrecht, 342 *et seq*; 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); 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

[3] For more on data-related aspects, see I. Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms', (2015) 38 World Competition (4).

[4] 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.

[5] See also J. Confraria, 'A Future for Ex-Ante Electronic Communications Regulation?', (2017) 12 The Competition Law Review (2).

[6] 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.

[7] Communication, COM/2015/192 final.

[8] Communication, COM/2017/228 final.

[9] [2003] OJ L 1/1.

[10] COM/2017/229 final.

[11] See Commission Press Release, IP/15/5166, 11 June 2015; case AT.40153.

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

[13] See cases AT.39740, AT.40099, and AT.40411, case T-612/17 *Google and Alphabet v Commission* [2017] OJ C 369/37, and Commission Press Releases IP/17/1784, 27 June 2017, IP/16/1492, 20 April 2016, and IP/16/2532, 14 July 2016.

[14] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.

[15] Regulation 330/2010, [2010] OJ L 102/1.

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

[17] Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* [2017] ECLI:EU:C:2017:981.

[18] 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.

[19] Directive 2006/123, [2006] OJ L 376/36.

[20] The volume 'Digital Markets in the EU' includes the following contributions: 'Foreword', by Johan van de Gronden; 'State of the Art and Prospective Directions in the Digitalisation of Economic Law', by Catalin S. Rusu, Anne Looijestijn-Clearie and Marc Veenbrink; 'Digital Markets in the EU: The Importance of the Footloose Consumer', by Siún O'Keeffe and Bart Noé; 'Don't Be Evil: Can We Teach Algorithms Not to Break Competition Law', by Hans Vedder; 'Antitrust in Digital Markets in the EU: Policing Price Bots', by Jan Blockx; 'Predatory Innovation: The Time Has Come Today!', by Thibault Schrepel; 'Streamlining EU Law Enforcement in a Regulated Digital Market Environment', by Pieter Van Cleynenbreugel; 'Universal Service in Electronic Communications: Pouring New Wine into Old Bottles?', by Csongor István Nagy; 'Should the European Union Regulate the Collaborative Economy?', by Marco Inglese; 'Towards a Data Sharing Economy: The Legal Framework for Access to Data', by Carsten Koenig; 'Private Law Cyber Security Obligations in the Digital Single Market', by Pieter Wolters.

[21] Directive 96/9/EC, [1996] OJ L 77/20.