

Digital ecosystems, decision-making, competition and consumers

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**Is it a matter for competition law to
protect decision-making by consumers?**

Restrictive business agreements

101 TFEU

- Apple e-books
- Amazon and traders (ongoing)

Abuse of dominance

102 TFEU, national rules

- Facebook user data
- Google Android, Shopping
- Amazon e-books MFN/parity

Merger control

ECMR, national rules

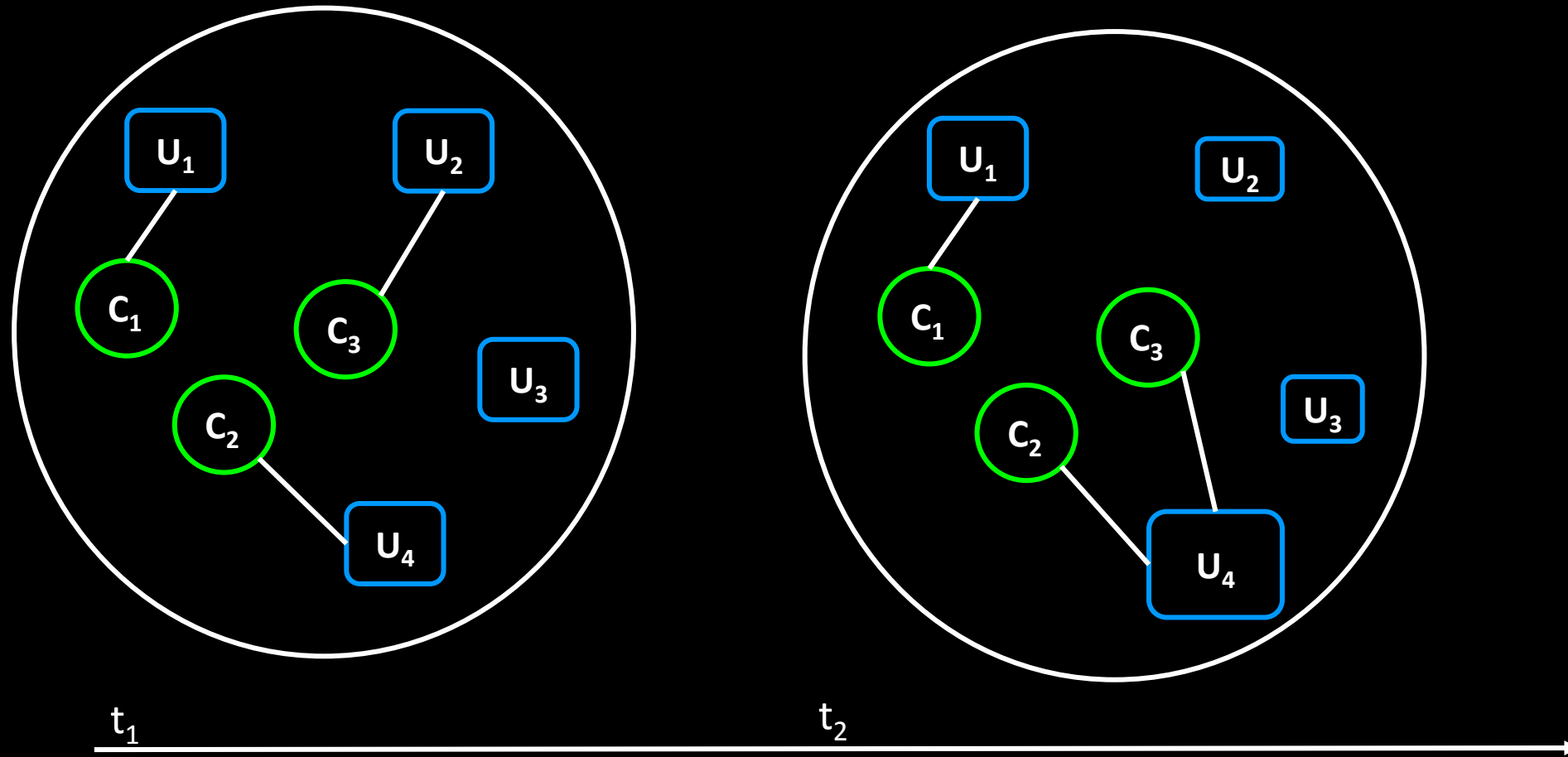
- Facebook/WhatsApp
- Microsoft/LinkedIn

European Commission, Case M.7813 – *Sanofi/Google*

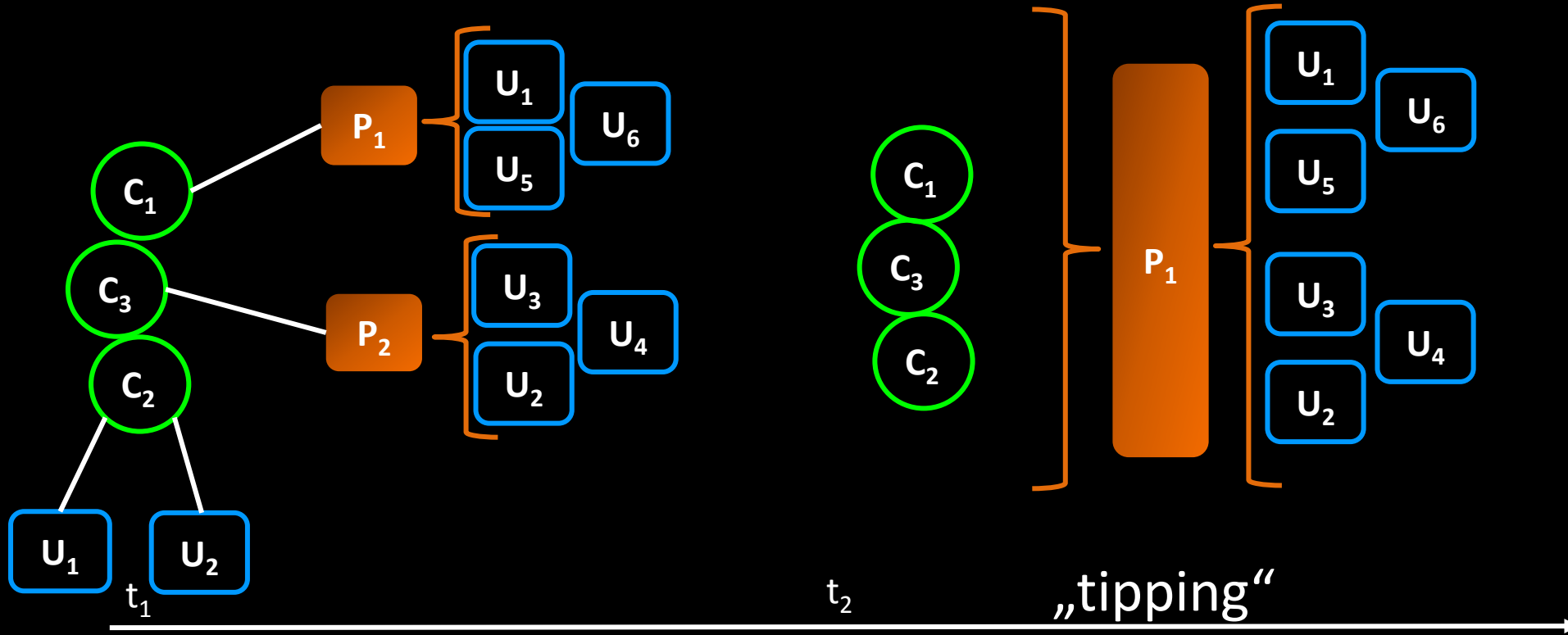
Onduo Virtual Diabetes Clinic

From platforms to ecosystems

Competition *on* the market



Competition for the market

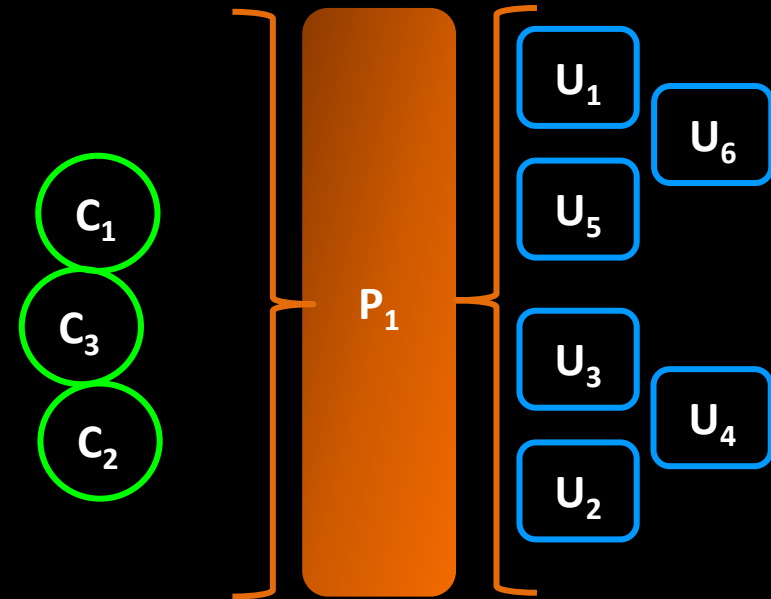


Incentive for platform to shift from brokering transactions to getting involved:

- Reduce choices
- Steer information
- Favour own products

No control:

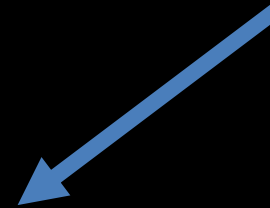
Competition pushed to the periphery



Network effects
Use of data
Modular product design



Economies of scale and
scope, zero marginal costs



In case of success: extreme
returns

Follow-up strategies

Digital ecosystems (1):

➤ consumer lock-in

- choices made
- biased information
- path dependency with high switching costs

Digital ecosystems (2):

➤ supplier lock-in

- technological requirements (API)
 - contractual restrictions
 - biased information

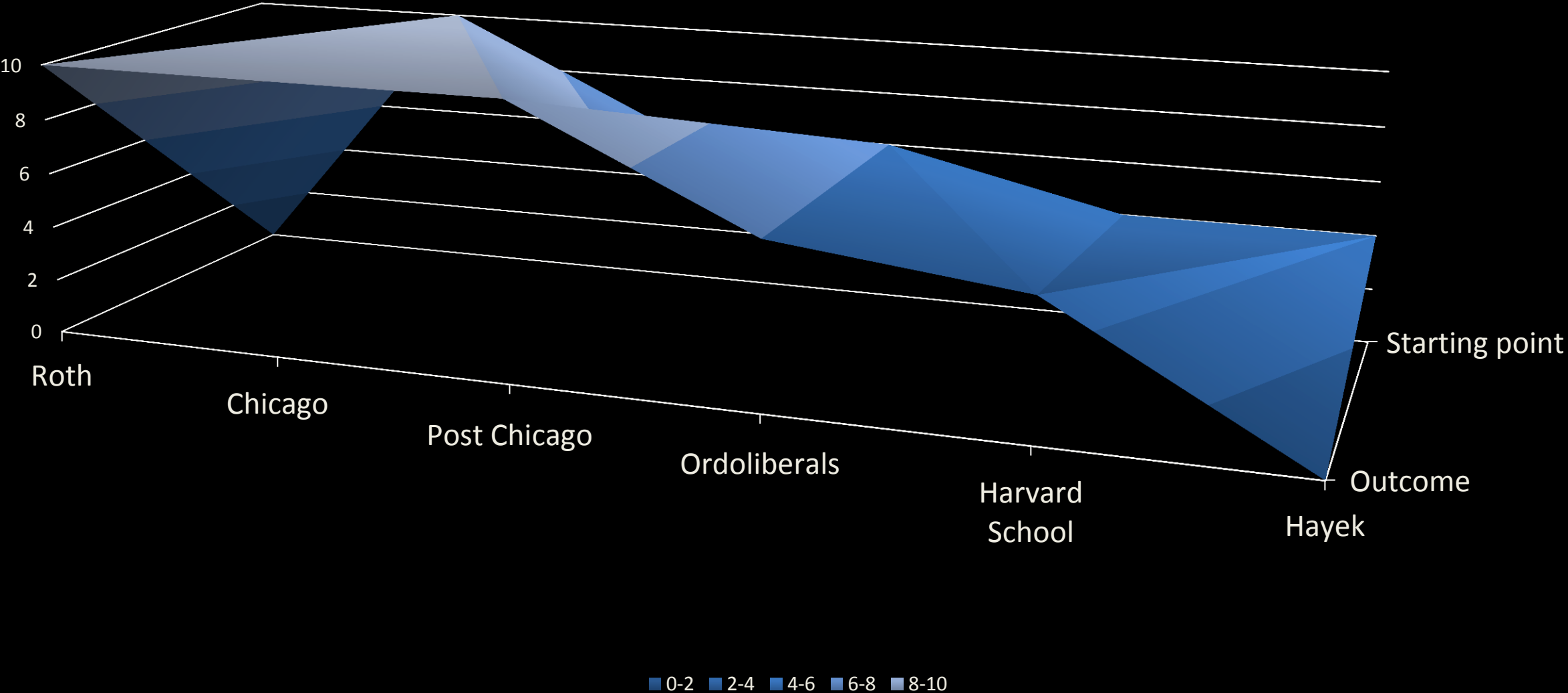
Is this the economy we want?

„Competition is for losers.“

Peter Thiel (2014)

Market design (Alvin Roth) vs discovery
procedure (Friedrich von Hayek)

Structure or effects?



Recalibrating the goals of competition law?

„If we will not endure a king as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.“

John Sherman, Speech in Senate, 21.3.1890

„From a political point of view, the excessive concentration of economic power destroys the basis of our liberal order. Political democracy and the market economy are unimaginable without decentralising power.“

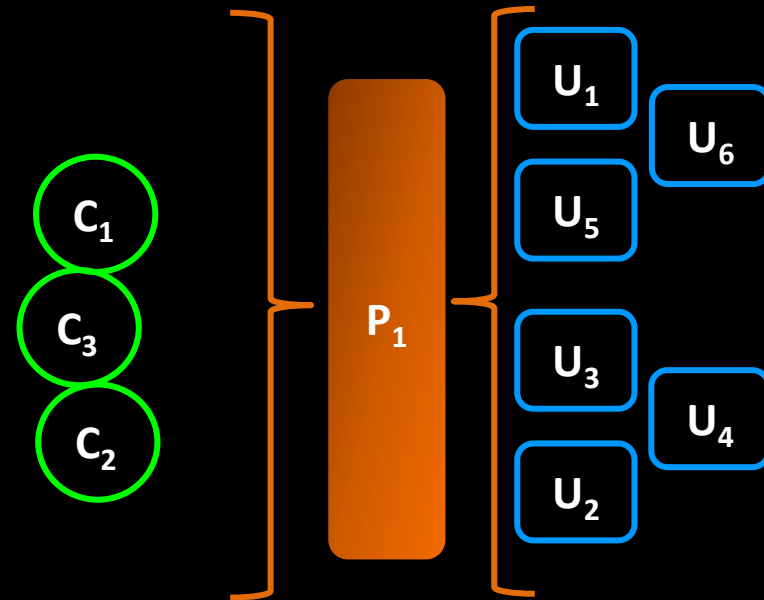
German legislature, introduction of merger control, 1973

**Institutional economics framing
of the loss of decision-making?**



Doubled agency costs

- conflict of interest
- information asymmetries
- misrepresentation
- monitoring
- lost opportunities



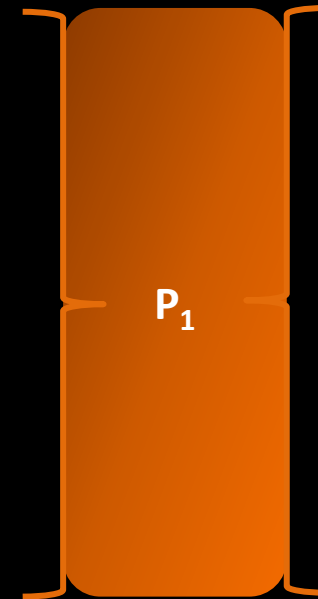
Loss of innovation

Centrally operated „markets“ may tip:

reducing transaction costs (efficient intermediary)

vs

raising agency costs and reducing dynamic efficiencies (inefficient gatekeeper)



Reducing agency costs:

- ~~competition for agents~~
- ~~performance-based rewards~~
- ~~information rights and obligations (P2B-regulation)~~
- collective bargaining
- hierarchical control

Protection of autonomy in competition law

requirement of independence:

“...the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market...”

ECJ, Case 40/73, at 173 – *Suiker Unie*

Settled case law
yet: horizontal cases

- Züchner (1981)
- Astruienne (1984)
- John Deere (1998)
- Hüls (1999)
- Anic Partecipazioni (1999)
- Steel Cases (Eurofer, Thyssen, Krupp Hoesch, Corus) (2003)
- Asnef Equifax (2006)
- T-Mobile Netherlands (2009)
- Dole Food (2015)

New:

application to

- consumers
- digital ecosystems (horizontal, vertical, conglomerate)
- abuse cases

It is an abuse of dominance if a gatekeeper systematically reduces the decision-making authority of consumers and third-party companies.

Sanofi/Google – Onduo JV

Commission assessment (2016):

- separate markets
- no horizontal overlaps, thus no competitive concern
- non-opposition
- right to data portability

The way forward

DICE Consult

Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen

Endbericht

Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi)

Projekt Nr. 66/17

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Unlocking digital competition

Report of the Digital Competition Expert Panel



March 2019



Competition policy for the digital era

A report by
Jacques Crémer
Yves-Alexandre de Montjoye
Heike Schweitzer

Kommission Wettbewerbsrecht 4.0

Digitalunternehmen mit neuen, datengetriebenen Geschäftsmodellen verändern unsere Wirtschaft. Um das Wettbewerbsrecht für die Herausforderungen des digitalen Wandels fit zu machen, hat die Bundesregierung die „Kommission Wettbewerbsrecht 4.0“ eingesetzt.
mehr



Key ideas:

- Tougher merger control for killer acquisitions
- Earlier intervention in case of „monopolisation“-strategies
- Lowering the threshold (dependency / dominance)
- Access to data

- Moving away from market definition
- Ease data sharing
- Creating national and European champions

Regulation?

cf Platform-to-business-regulation (2019)

Divestiture?

Market failure of super platforms

- Monopoly power
- Information asymmetries
- Principal-agent-conflicts
- Strong imbalance of power

- Systemic risks?
- Structural unfairness?
- Role as marketplaces?

„We are a utility.“

Mark Zuckerberg

(according to Eli Pariser, The Filter Bubble)

1. Shift from platforms to ecosystems
2. Incentive for gatekeepers to deprive consumers and suppliers of decision-making authority
3. Market design vs digital autonomy
4. Economic framing as a principal-agent-problem with doubled agency costs and a loss of innovation
5. Take „requirement of independence“ from horizontal to ecosystem cases, also for consumer benefit

Thank you!

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