

Agnieszka Jabłonowska
Uniwersytet Łódzki
ORCID: 0000-0002-9622-0651

Regulation of online platforms in the digital single market¹

1. Introduction

Online sector has traditionally fitted well into the European Union's internal market project, not least because of its undeniable potential for an increased cross-border activity and economic growth. Harmonisation of laws for the "information society" was also politically less controversial considering that, in many respects, diverging national standards had not yet been in place². It is therefore not surprising that the European legislator became involved with the online sector at a rather early stage. Explicit recognition of the information society came with the 1993 White Paper considering the challenges and ways forward into the 21st century³. Growing interest in this topic was also reflected in the policy documents concerned with consumer protection⁴. These early initiatives bore fruit in the shape of Directives 97/7/EC on distance contracts⁵ and 2000/31/EC on electronic commerce⁶. The picture was completed by the emerging privacy and data protection framework composed of Directives 95/46/EC on the protection of individuals with regard to

¹ The research leading to this paper has been financed by the National Science Centre (*Narodowe Centrum Nauki*) in Poland on the basis of decision no. DEC-2015/19/N/HS5/01557.

² The same reasoning had already been applied at the early stage of consumer policymaking, leading to the successful adoption of the harmonised rules on timeshare and doorstep selling, see: K. Tonner, *From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect*, in: *Varieties of European Economic Law and Regulation: Liber amicorum for Hans Micklitz*, eds. K. Purnhagen and P. Rott, 2014, Springer, p. 702.

³ White Paper, *Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century*, COM (93) 700 final.

⁴ Communication from the Commission, *Priorities for Consumer Policy 1996–1998*, COM (95) 519 final.

⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

⁶ 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 L178/1.

the processing of personal data and on the free movement of such data⁷ and 2002/58/EC on privacy and electronic communications⁸.

After a period of a less intense legislative activity, the position of consumers in the information society has received renewed attention, first with the revision of Directive 97/7/EC and its replacement with Directive 2011/83/EC on consumer rights (CRD)⁹ as well as with the adoption of Directive 2013/11/EU on alternative resolution of consumer disputes¹⁰ and Regulation 524/2013 on online dispute resolution¹¹. In the field of data protection, the adoption of Regulation No 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) is seen as a major breakthrough¹². More recently, the publication of the 2015 Digital Single Market (DSM) strategy marked the return of the digital agenda back as a top priority for the European lawmakers¹³. Besides substantive considerations related to the undeniable cross-border dimension of online trade, at least two additional policy reasons appeared to favour such a move. Similarly to the early discussions on Directive 97/7/EC, the strategy was perceived as a fresh and relatively uncontroversial idea, which could send a much-needed positive signal from Brussels in the era of growing euro-scepticism. In certain areas the intensification of legislative works was further linked to the failure of the Commission's previous initiatives, such as the originally much more ambitious plans for the CRD or

⁷ 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 L281/31.

⁸ 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 L201/37.

⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64. For a national perspective, see: B. Pachuca-Smulka, Implementation of Directive 2011/83/EU into Polish law, "Studia Prawnoustrojowe" 2018, No. 42, pp. 265–208.

¹⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63.

¹¹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

¹² Regulation (EU) 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 L119/1.

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe, COM(2015) 192 final.

the proposed regulation for a Common European Sales Law¹⁴. As the Juncker Commission's mandate is nearing towards the end, it is worth taking a closer look at the state of play of the on-going digital initiatives in the EU. The present paper focuses on one of the most contentious aspects of the DSM strategy, namely the creation of an adequate regulatory framework for online platforms.

2. Online platforms in the market practice

2.1. Shared characteristics and use cases

Due to the lack of a universally accepted definition, online platforms are best characterised by reference to their specific features and functions. They rely on information and communication technologies, operate in multi-sided markets, are largely data-driven and benefit from the so-called network effects¹⁵. Based on functional criteria online platforms can be divided into further categories: from online marketplaces, designed to facilitate the conclusion of contracts by customers and suppliers, to search engines, social media, and media sharing platforms. Their societal and economic advantages are well known¹⁶. By way of illustration, online marketplaces, which include both commonly known e-commerce websites such as eBay¹⁷ and more recent collaborative platforms¹⁸, increase the variety of products and services available to the customers and allow suppliers to obtain an instan-

¹⁴ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final; see also: H. Beale, *The Story of EU Contract Law – From 2001 to 2014*, in: *Research Handbook on EU Consumer and Contract Law*, ed. C. Twigg-Flesner, 2016, Edward Elgar.

¹⁵ Commission Staff Working Document on Online Platforms, SWD (2016) 172; on the concept of a multi-sided market see: J.-C. Rochet, J. Tirole, *Platform Competition in Two-Sided Markets*, "Journal of the European Economic Association" 2003, No. 1, p. 990.

¹⁶ M. Kenney, J. Zysman, *The Rise of the Platform Economy*, "Issues in Science & Technology" 2016, No. 32, pp. 61–69; C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska et al., *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, "Journal of European Consumer and Market Law" 2016, No. 5, pp. 3–10; M. Cantero Gamito, *Regulation.com: Self-Regulation and Contract Governance in the Platform Economy: A Research Agenda*, "European Journal of Legal Studies" 2017, No. 9, pp. 53–67.

¹⁷ See e.g. C. Ramberg, *Internet Marketplaces: The Law of Auctions and Exchanges Online*, 2002, Oxford University Press.

¹⁸ See in particular: R. Botsman, R. Rogers, *What's Mine Is Yours. The Rise of Collaborative Consumption*, 2011, Harper Collins; R. Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, "Journal of Business Research" 2014, No. 67, pp. 1595–1600; M. Cohen, A. Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, "University of Chicago Law Review Online" 2015, No. 82, pp. 116–133; S. Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, "Minnesota Journal of Law, Science & Technology" 2015, No. 16, pp. 457–559.

taneous access to a large customer base. They are able to do so because of the deployment of sophisticated digital architectures, which reduce transaction costs, in particular search costs, for both sides of the exchange and thus match the supply and demand more efficiently than ever. Transactions via online platforms are further facilitated by reliable payment systems and trust-building mechanisms such as reputational feedback systems¹⁹. Because access to platforms is relatively easy and does not entail high business risks for the suppliers, offering goods and services through online marketplaces may appeal to both established businesses that wish to move away from traditional, less efficient distribution channels, micro-sellers, who would otherwise limit their sales to the nearest neighbourhood, and even private individuals, who can earn additional income by sharing their skills and spare resources.

It may thus seem that online platforms, and particularly online marketplaces, allow for a direct contact between customers and suppliers, thus reflecting a broader tendency towards disintermediation. On a close look, however, the role and function assumed by platform operators are not entirely different from those typically associated with offline intermediaries, while their position is often very powerful. Seen through this lens the digital market emerges as an area of an omnipresent intermediation, driven by the new types of market actors with both bright and dark sides²⁰.

2.2. The position of platform operators

As mentioned before, multi-sided markets such as those created by online platforms are characterised by the prevalence of network effects. The concept describes the effects that individual users of a good or a service have on the value of that good or service to other people²¹. Direct network effects occur within the same group of users. For example, the more users start to use a social media platform, the more valuable it becomes for other people to join. The idea behind indirect network effects is that one group of users benefits from the growing presence of a different group of users – e.g. an incre-

¹⁹ On the role of reputation systems, see: C. Busch, *Crowdsourcing Consumer Confidence. How to Regulate Online Rating and Review Systems in the Collaborative Economy*, in: *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, ed. A. De Franceschi, 2016, Intersentia.

²⁰ Bundesministerium für Wirtschaft und Energie, *Weissbuch Digitale Plattformen. Digitale Ordnungspolitik für Wachstum, Innovation, Wettbewerb und Teilhabe*, 2017, p. 21 <www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/weissbuch-digitale-plattformen.html> accessed 1.11.2019. See also: M. Taddeo, L. Floridi (eds), *The Responsibilities of Online Service Providers*, 2017, Springer.

²¹ M. Van Alstyne, G. Parker, *Platform Business: From Resources to Relationships* “GfK-Marketing Intelligence Review” 2017, No. 9, pp. 25–26.

ase in the number of sellers on an online marketplace is likely to stimulate an increase in the number of buyers and vice versa). Indirect network effects may also have asymmetric intensities on both sides of the market. For example, the existence of a large user base on an online platform makes it more attractive to advertisers. The same, however, cannot be said from the perspective of the users who generally do not consider an increased presence of advertisers as an additional benefit²².

Based on large-scale data collection and analysis platform operators are able to stimulate both types of network effects. In a number of cases their incentives for doing so will be aligned with the user interests, but at times they may not. For example, the insights obtained about the users and the market allow platform operators to improve services they provide, thereby making them more attractive to existing and prospective users. Data analysis can further be used to animate indirect effects, e.g. by allowing the platform operator to optimise the presentation of listings or resolve user claims in a way that maintains the desired balance between both sides of the market. The use of data for purpose of stimulating asymmetric network effects in the field of advertising is another striking feature of the platform economy. Indeed, the more the platform operator knows about its user base and the bigger that user base becomes, the more attractive it becomes to the advertisers. These lucrative arrangements with advertisers are instrumental to a large number of online businesses, which seem to be offering their services for free, but in fact collect and monetize user data²³. Extensive data accumulation also creates a potential for abuse, which may give grounds for a regulatory intervention as will be discussed further below.

Other inherent risks of the platform economy are associated with the ability of platform operators to extract significant value from interactions between users while remaining to a large extent outside the scope of the existing legal framework. As a result, online platforms benefit from a technological and regulatory advantage over incumbent businesses, in a way that can be considered unfair. Prominent representatives of the so-called collaborative economy such as Airbnb or, more controversially, Uber can be indicated as an example. What is more, it is not only the suppliers operating outside the platform business model who can be adversely affected by the operator's activities. Also suppliers operating *through* the platform may be subject to the potentially unfair practices of its operator. Admittedly, competition law literature suggests that the market dominance in the digital economy might be more fragile than it initially seems, as the competition in

²² Commission Staff Working Document on Online Platforms, pp. 4–5.

²³ A. Krämer, R. Kalka, How Digital Disruption Changes Pricing Strategies and Price Models, in: Phantom Ex Machina. Digital Disruption's Role in Business Model Transformation, eds. A. Khare, B. Stewart, R. Schatz, 2017, Springer, pp. 90–91.

the market can effectively be replaced with the competition *for* the market²⁴. One may, however, also argue that in the markets so significantly affected by the network effects not all socially desirable parameters can easily be provided by market mechanisms alone²⁵. One thing is clear: individuals wishing to participate in the information society as we know it today are dependent on the operators of online platforms in one way or another. This is a development towards which the EU can hardly remain indifferent if it wants to support the development of a digitally minded society as a pillar of its modern, technology-based economy. It is therefore not surprising that the potential of EU law to assess and, where necessary, respond to the activities of platform operators has been extensively explored in recent years. On top of that, new legislative initiatives have been undertaken under the Digital Single Market strategy. The following analysis focuses on two recurring topics in these debates, namely: 1) the protection and commodification of personal data and 2) the allocation of risks and responsibilities.

3. Regulatory issues in the platform economy from EU law perspective

3.1. Protection and commodification of personal data

While the EU law has long taken account of the regulatory issues associated with the use of data, the remarkable expansion of the platform economy confronts it with new challenges. Large-scale collection and processing of personal and other data by the operators of online platforms can have an impact on nearly all levels of social and economic organisation²⁶. It allows platform operators not only to optimize their business models, but also to obtain an informational advantage over recipients of their services, which can later be used in various ways. There is no doubt that access to the vast amount of data – sometimes referred to as the currency of the digital world – can also be a source of a significant competitive advantage. Data-enabled network effects may constitute a significant barrier to entry and create po-

²⁴ R. Podszun, S. Kreifels, Digital Platforms and Competition Law, “Journal of European Consumer and Market Law” 2016, No. 5, p. 38; see also: S. Holzweber, Market Definition for Multi-Sided Platforms: A Legal Reappraisal, “World Competition” 2017, No. 40, pp. 563–582.

²⁵ W. Kerber, Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection, “Journal of Intellectual Property Law and Practice” 2016, No. 11, pp. 857–860; See also: B. T. Ratchford, Quality May Not Win, “Journal of Marketing Research”, 2009, No. 46, pp. 150–151; G. Lougher, S. Kalmanowicz, EU Competition Law in the Sharing Economy, “Journal of European Competition Law and Practice”, 2016, No. 7, pp. 87–102.

²⁶ See generally: M. Hildebrandt, S. Gutwirth (eds), Profiling the European Citizen: Cross-Disciplinary Perspectives, 2008, Springer.

tential for exclusionary behaviours. This has triggered a debate in the field of competition law as to whether access to data could be regarded as an essential facility²⁷ or whether and, if so, how it can be integrated into the abuse of dominance test²⁸. Data profiling can also be used to increase effectiveness of advertising or to directly maximize profit from a transaction in a potentially exploitative way. For example, algorithms can adapt prices of particular goods or services in real time according to the user who makes the query and determine which advertisements are most likely to be of interest to the searcher²⁹. This can not only be problematic from the point of view of the prospective buyer, who might be charged a higher price if his profile suggests that he is able to afford it or is genuinely interested in the purchase. It raises further concerns for the sellers, who have based their online presence on hybrid platforms, whose operators also offer competing products in their own capacity³⁰. Several questions arise: Is the consent to the processing of personal data free if the individual is hardly aware of its consequences, has no choice as to the extent to which he is giving up his rights and the only alternative available to him is to refrain from using the service altogether? Can we speak about private autonomy and informational self-determination if one party, e.g. through big data analytics, knows more about its contractual partner than the latter knows about himself and is able to target him with commercial messages specifically tailored to his profile? Should an operator of an online marketplace be allowed to first gather data about most profitable business avenues pursued by the suppliers and then launch and aggressively promote its own competing products?

One may be tempted to conclude that the issues laid out before should primarily be tackled via data protection law. For some of these questions the General Data Protection Regulation might indeed provide a promising avenue. The instrument elaborates on the role of data subjects' consent as one of available legal grounds for the lawful processing of personal data³¹. According to recital 32, consent of the data subject should be expressed "by a clear affirmative act establishing a freely given, specific, informed and unambi-

²⁷ B. P. Paal, *Internet Search Engines and Antitrust Law*, "Journal of Intellectual Property Law and Practice" 2016, No. 11, pp. 302–303.

²⁸ R. Podszun, S. Kreifels, *op. cit.*, pp. 33–36.

²⁹ N. Helberger, *Profiling and Targeting Consumers in the Internet of Things*, in: *Digital Revolution: Challenges for Contract Law in Practice*, eds. R. Schulze, D. Staudenmayer, 2016, Nomos/Hart, p. 139.

³⁰ European Commission, *Business-to-business relations in the online platform environment*, 2017, p. 7 <<https://publications.europa.eu/en/publication-detail/-/publication/04c75b09-4b2b-11e7-aea8-01aa75ed71a1/language-en>> accessed 1.11.2019.

³¹ For a consumer-oriented overview of the GDPR, see: P. Schmechel, *Verbraucherdatenschutzrecht in der EU-Datenschutz-Grundverordnung*, SVRV 2016, <www.svr-verbraucherfragen.de/dokumente/verbraucherdatenschutzrecht-in-der-eu-datenschutz-grundverordnung/> accessed 1.11.2019.

guous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement". What is more, consent should be granular, which implies the ability of data subjects to give separate consent to different personal data processing operations. The act goes on to say, in recitals 42 and 43, that consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment. The same applies if performance of a contract, including provision of a service, is dependent on the consent despite this not being necessary. Finally, the GDPR provides data subjects – who, importantly, are not only consumers – with rights of access to their data. Such an autonomy-based approach to the protection of personal data is generally to be welcomed. However, as the market practice shows, access to one's data may not always be easy to obtain³² and consent to data processing may be obtained as a result of potentially misleading practices, including so-called dark patterns³³.

The protection arising from data protection law might therefore not be sufficient for addressing the challenges associated with the handling of personal and, especially, other data by platform operators. Could answers be found in other areas, such as contract and marketing law? One of the most disputed questions in this regard is whether data provided by a platform user can be considered a form of remuneration in the contractual sense and if so, with what consequences. This idea has recently gained broader attention in the context of Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services³⁴, adopted as part of the DSM strategy. The inclusion within its scope of the business models, in which no monetary price is paid by the consumer, but instead personal and other data is being collected by the service provider, has generally been welcomed in the literature³⁵. Beyond this rough consensus, however, the

³² S. Holder, *For Ride-Hailing Drivers, Data is Power*, City Lab 2019 <www.citylab.com/transportation/2019/08/uber-drivers-lawsuit-personal-data-ride-hailing-gig-economy/594232/> accessed 1.11.2019.

³³ K. Szymielewicz, K. Iwańska, *Śledzenie i profilowanie w sieci. Jak z klienta stajesz się towarem*, Panoptikon 2019, pp. 7–9 <https://panoptikon.org/sites/default/files/publikacje/panoptikon_raport_o sledzeniu_final.pdf> accessed 1.11.2019.

³⁴ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

³⁵ C. Wendehorst, *Consumer Contracts and the Internet of Things*, in: *Digital Revolution: Challenges for Contract Law in Practice*, eds. R. Schulze, D. Staudenmayer, 2016, Nomos/Hart, p. 193. On the need to develop general rules on data as counter-performance, see: C. Langhanke, M. Schmidt-Kessel, *Consumer Data as Consideration*, "Journal of European Consumer and Market Law" 2015, No. 4, pp. 218–223.

assessment of the directive is more ambiguous. The European Data Protection Supervisor considers that the term “data as a counter-performance” should be avoided altogether and even commentators who approve of this wording are divided on its implications³⁶. Most important doubts concern the practical interactions between the rights derived from the data protection framework and the possible contractual remedies³⁷. By way of an example, Directive 2019/770 stipulates the data-related consequences of contract termination. At the same time, personal data framework allows data subjects to withdraw their consent at any time, without mentioning its contractual implications³⁸. Similar questions can be posed with regard to the right to be forgotten and the right to data portability, laid down in Articles 17 and 20 of the GDPR, as well as the right to retrieve data and the obligation of the supplier to stop using them included in Directive 2019/770. According to recitals 37–39 of the Directive, the act remains without prejudice to EU data protection law, including the aforementioned rights of the data subjects. Still, the relationship between contract and data protection law will need to be developed further. The problem remains of direct relevance to platform economy, considering that platform services are to a large degree covered by Directive 2019/770³⁹.

Finally, a prominent role in safeguarding consumer interests associated with the processing of personal data can also be played by EU marketing law, in particular Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (UCPD)⁴⁰. Here the goal is to ensure that consumer transactional decisions – e.g. to grant consent to the processing of personal data – remain truly autonomous. The emerging decision-making practice shows significant potential for assessing data processing operations under Article 8 of the UCPD on misleading omissions or Ar-

³⁶ European Data Protection Supervisor, Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf> accessed 1.11.2019.

³⁷ N. Helberger, M. B. M. Loos, L. Guibault et al., *Digital Content Contracts for Consumers*, “*Journal of Consumer Policy*” 2013, No. 36, p. 52.

³⁸ For one of the possible interpretations see: C. Twigg-Flesner, *Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law*, in: *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, ed. A. De Franceschi, 2016, Intersentia, pp. 40–42.

³⁹ See, in particular, the definition of a ‘digital service’ in Article 2(2), which refers to: (a) a service that allows the consumer to create, process, store or access data in digital form; or (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.

⁴⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L149/22.

ticle 9 on aggressive commercial practices⁴¹. What is more, if data is to be qualified as “counter-performance”, undisclosed processing of such data could fall under No. 20 of the Annex I to the Directive⁴². According to this provision, describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item, is considered to be unfair in all circumstances. Unfortunately, the body of cases is still scarce and the ongoing reform of EU marketing law, undertaken as part of the so-called ‘New Deal for Consumers’, fails to directly engage with these vital matters⁴³.

3.2. Allocation of risks and responsibilities

The discussion about responsibility and liability of online intermediaries has long centred around safe harbours laid down in Directive 2000/31/EC on electronic commerce⁴⁴. Exemptions enshrined therein shield certain online intermediaries from the liability for illegal activities carried out by their users, such as making available of the content infringing intellectual property rights or classified as hate speech or defamation. This is generally considered to be a right approach, as it would not only be practically impossible for a service provider, whose activity is merely technical, automatic and of a passive nature, to monitor the entire online content, but such an obligation could also raise valid questions from the fundamental rights perspective. Still, it is often argued that safe harbour provisions in their current form discourage online intermediaries from taking voluntary measures in order to prevent illegal activity on their servers, which leads to sub-optimal results⁴⁵. What is more, platform operators often create new markets that cut across established categories. This may result in regulatory asymmetries between platform markets and established business models, as seen from the exam-

⁴¹ See: judgment of the Court of Justice of 13.9.2018 in joined cases C-54/17 and C-55/17 *Wind Tre* ECLI:EU:C:2018:710; decision of the Italian Competition and Market Authority (*Autorità Garante della Concorrenza e del Mercato*) of 29.11.2018 in case PS11112 *Facebook*.

⁴² N. Helberger, op. cit., pp. 146–147.

⁴³ See: Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185 final.

⁴⁴ For a more recent overview see: A. Guadamuz, *Developments in Intermediary Liability*, in: *Research Handbook on EU Internet Law*, eds. A. Savin, J. Trzaskowski, 2014, Edward Elgar, pp. 312–336.

⁴⁵ Commission Staff Working Document Accompanying the Communication on the Mid-Term Review on the implementation of the Digital Single Market Strategy. A Connected Digital Single Market for All, SWD (2017) 155 final, p. 28.

ple of the over-the-top communication service providers⁴⁶ and the above-mentioned collaborative platforms. Finally, the extent of activities of certain platform operators raises doubts about their “passive” nature. It may be argued that many such activities are no longer comparable to the provision of simple notice boards as they go far beyond mere programming and maintenance of a website that links supply and demand. Oftentimes operators of online marketplaces also organise and coordinate the whole contracting process, and even affect the material content of underlying contracts. Operators of online platforms, however, typically refuse to assume any legal responsibility for their own activities and disclaim all liability “to the maximum extent permitted by law”. While again, it would be excessive to require intermediaries to have full control over their large user bases, questions can be raised if the existing legal framework provides for an adequate allocation of risk and responsibility.

Some of the issues raised above been recognised by the European Commission, which in 2015 carried out a public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing as well as the collaborative economy. This led to the adoption of two communications in 2016: a general one on online platforms⁴⁷ and more specific one focused on the opportunities and challenges associated with collaborative economy⁴⁸. Both documents identify a number of areas that warrant further monitoring or call for targeted responses. The asymmetry between the risks borne by the operator of an online platform, on the one hand, and customers and suppliers, on the other, is particularly emphasised in the communication on collaborative economy.

The Commission recognises that, in triangular relationships established via online platforms, it is usually the individual supplier (e.g. an Airbnb host) who needs to ensure compliance with the necessary market access requirements, and it is him who ultimately faces sanctions. The customer, in turn, needs to rely on the reputation system as the primary tool of ascertaining the supplier’s credibility and the quality of the service. The operator of the platform is, by contrast, able to collect stable revenue from the commis-

⁴⁶ J. Krämer, M. Wohlfarth, Market Power, Regulatory Convergence, and the Role of Data in Digital Markets, “Telecommunications Policy” 2017, No. 41, pp. 948–961.

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe, COM (2016) 288 final.

⁴⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy, COM (2016) 356 final. See also: C. Cauffman, The Commission’s European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?, “Journal of European Consumer and Market Law”, 2016, No. 5, pp. 235–243; V. Hatzopoulos, S. Roma, Caring for Sharing? The Collaborative Economy under EU Law, “Common Market Law Review” 2017, No. 54, pp. 81–128.

sion charged from intermediated transactions, or from data monetization, without incurring considerable risks. The Commission, however, does not seem to have a clear idea how to handle this issue. Greater transparency is admittedly called upon, *inter alia* with respect to the formulation of standard terms, presentation of information to users as well as functioning of reputation systems in order to minimize the risk of bias or manipulation⁴⁹. However, actions taken in this direction have so far remained limited. Enforcement measures on the basis of Directive 93/13/EEC on unfair terms⁵⁰ and new information duties imposed on the operators of online marketplaces as part of the proposed reform of EU consumer law⁵¹ are certainly a step in a right direction. However, broader questions about the responsibility and liability of platform operators have been left almost entirely to the academia⁵². The collaborative economy communication only describes a number of criteria, which can be applied to assess if it is the operator himself and not the individual supplier that provides the underlying (e.g. transport) service. This aspect of the debate has rightly attracted the attention in the recent months, following the judgment of the Court of Justice in *Uber Spain*⁵³. What, however, appears to be lacking is a more critical view on the platform operator's duties with respect to services that he actually provides, possibly from a sectoral perspective. Given that redress possibilities in the underlying peer-to-peer relationships can turn out to be theoretical, there seems to be a case for analysing this topic in more detail, with a specific focus on collaborative economy.

In view of the above, it may be regretted that no comprehensive actions concerning the allocation of risks and responsibilities have been taken by the end of Juncker Commission's mandate. To the credit of the Commission, this does not mean that the challenges observed in this and other areas of the platform economy have been completely disregarded. In particular, concrete legislative measures have been taken to address the relationship between platform operators and business suppliers. Indeed, already the 2016 commu-

⁴⁹ Communication on Online Platforms and the Digital Single Market, p. 11.

⁵⁰ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. See also: European Commission, 'EU consumer rules: The European Commission and EU consumer authorities push Airbnb to comply' <https://europa.eu/rapid/press-release_IP-18-4453_en.htm>.

⁵¹ Proposal for a Directive as regards better enforcement and modernisation of EU consumer protection rules, COM (2018) 185 final, Article 2(4).

⁵² See especially: Research group on the Law of Digital Services, Discussion Draft of a Directive on Online Intermediary Platforms, "Journal of European Consumer and Market Law" 2016, No. 5, pp. 164–169.

⁵³ In this landmark case the Court of Justice ruled that Uber is not a provider of an online intermediation service, but rather provides services in the field of transport. See: judgment of the Court of 20 December 2017 in Case C-434/15, *Asociación Profesional Élite Taxi*, ECLI:EU:C:2017:981.

nication on online platforms recognised that there might be contractual problems in platform-to-business relationships that cannot be adequately addressed by competition law. A subsequent fact-finding exercise on platform-to-business trading practices pointed to a number of potentially unfair trading practices employed by platform operators vis-à-vis suppliers, such as the removal of products or services without due notice or any effective recourse mechanism, which could merit regulatory attention. The lack of transparency, e.g. in ranking or search results, discrimination between different suppliers, restrictions on the access to, and the use of, personal and non-personal data were also considered to be a cause for concern. In April 2018 the Commission responded to these issues by proposing regulation addressing unfair trading practices in platform-to-business relations⁵⁴, which was swiftly adopted by the European Parliament and the Council⁵⁵. When it comes to the protection from unlawful conduct in underlying legal relationships, the focus has so far remained on the implementation of good practices for tackling illegal content online⁵⁶, yet – according to media reports⁵⁷ – further legislative steps are not entirely off the table. The growing interests in this topic creates an opportunity to clarify the long-standing debate about the extent to which the liability exemption in E-Commerce Directive refers to the hosting of illegal “information” (e.g. copyright-infringing material) or to enabling unlawful “activity” (e.g. offering a lodging which falls short of basic safety standards). A focus on organisational measures, developed in dialogue with relevant stakeholders, also appears to be a promising way forward⁵⁸.

4. Conclusion

The dynamic development of online platforms has significantly altered the functioning of the market in a both qualitative and quantitative perspective. The underlying social interactions, for example sale of goods or short-term rental of accommodations in case of popular online marketplaces, are

⁵⁴ Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM (2018) 238 final.

⁵⁵ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

⁵⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms, COM (2017) 555 final.

⁵⁷ M. Khan, M. Murgia, EU Draws Up Sweeping Rules to Curb Illegal Online Content, Financial Times 2019 <www.ft.com/content/e9aa1ed4-ad35-11e9-8030-530adfa879c2> accessed 1.11.2019.

⁵⁸ M. Cantero Gamito, *op. cit.*, p. 61.

in itself nothing new. However, the unprecedented scale of distance and, in particular, peer-to-peer transactions, which is closely related to technological development, can be regarded as a novel challenge. The main qualitative change is the growing importance of online platforms, which is a development towards which the EU can hardly remain indifferent.

The advantages of online platforms, associated in particular with the technological advance, cannot be disputed. Yet it would also be a mistake to overlook the challenges, which they entail. The present article focused on the following two aspects: the protection and commodification of personal data and the allocation of risks and responsibilities. It described and generally welcomed the approach, which begins to form at the EU level in respect of both topics. Comparably high standards of personal data protection certainly deserve recognition, even if the fitness of the GDPR for the digital age is yet to be ascertained. At the same time, more research is urgently needed as regards the intersection of data protection law and other disciplines such as contract and marketing law. Finally, the Commission has correctly identified the key questions concerning the responsibility of platform operators. The overall approach, especially the recognition that the intermediaries themselves must be a part of relevant debates, appears to be a move in the right direction. Nevertheless, one could have expected more of its follow-up initiatives especially in the fields like collaborative economy. Significant work at both political and technical-analytical level thus still needs to be done if the strategy on online platforms is to move from the phase of policy declarations and produce observable effects in the market practice.

Literature

- Beale H. (2016), *The Story of EU Contract Law – From 2001 to 2014*, [in:] *Research Handbook on EU Consumer and Contract Law*, (ed.) C. Twigg-Flesner, Edward Elgar.
- Belk R. (2014), *You Are What You Can Access: Sharing and Collaborative Consumption Online*, “Journal of Business Research”, No. 67.
- Botsman R., Rogers R. (2011), *What’s Mine Is Yours. The Rise of Collaborative Consumption*, Harper Collins.
- Busch C. (2016), *Crowdsourcing Consumer Confidence. How to Regulate Online Rating and Review Systems in the Collaborative Economy*, [in:] *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, (ed.) A. De Franceschi, Intersentia.
- Busch C., Schulte-Nölke H., Wiewiórska-Domagalska A., Zoll F. (2016), *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, “Journal of European Consumer and Market Law”, No. 5.
- Cantero Gamito M. (2017), *Regulation.com: Self-Regulation and Contract Governance in the Platform Economy: A Research Agenda*, “European Journal of Legal Studies”, No. 9.

- Cauffman C. (2016), *The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?*, "Journal of European Consumer and Market Law", No. 5.
- Cohen M., Sundararajan A. (2015), *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, "University of Chicago Law Review Online", No. 82.
- Guadamuz A. (2014), *Developments in Intermediary Liability*, in: *Research Handbook on EU Internet Law*, (eds.) A. Savin, J. Trzaskowski, Edward Elgar.
- Hatzopoulos V., Roma S. (2017), *Caring for Sharing? The Collaborative Economy under EU Law*, "Common Market Law Review", No. 54.
- Helberger N. (2016), *Profiling and Targeting Consumers in the Internet of Things*, in: *Digital Revolution: Challenges for Contract Law in Practice*, (eds.) R. Schulze, D. Staudenmayer, Nomos/Hart.
- Helberger N., Loos M. B. M., Guibault L., Mak C., Pessers L. (2013), *Digital Content Contracts for Consumers*, "Journal of Consumer Policy", No. 36.
- Hildebrandt M., Gutwirth S. (eds) (2008), *Profiling the European Citizen: Cross-Disciplinary Perspectives*, Springer.
- Holder S. (2019), *For Ride-Hailing Drivers, Data Is Power*, *City Lab* <www.citylab.com/transportation/2019/08/uber-drivers-lawsuit-personal-data-ride-hailing-gig-economy/594232/> accessed 1.11.2019.
- Holzweber S. (2017), *Market Definition for Multi-Sided Platforms: A Legal Reappraisal*, "World Competition", No. 40.
- Kenney M., Zysman J. (2016), *The Rise of the Platform Economy*, "Issues in Science & Technology", No. 32.
- Kerber W. (2016), *Digital markets, data, and privacy: competition law, consumer law and data protection*, "Journal of Intellectual Property Law and Practice", No. 11.
- Khan M., Murgia M. (2019), *EU draws up sweeping rules to curb illegal online content*, *Financial Times* <www.ft.com/content/e9aa1ed4-ad35-11e9-8030-530adfa879c2> accessed 1.11.2019.
- Krämer A., Kalka R. (2017), *How Digital Disruption Changes Pricing Strategies and Price Models*, [in:] *Phantom Ex Machina. Digital Disruption's Role in Business Model Transformation*, (eds.) A. Khare, B. Stewart, R. Schatz, Springer.
- Krämer J., Wohlfarth M. (2017), *Market Power, Regulatory Convergence, and the Role of Data in Digital Markets*, "Telecommunications Policy", No. 41.
- Langhanke A., Schmidt-Kessel M. (2015), *Consumer Data as Consideration*, "Journal of European Consumer and Market Law", No. 4.
- Lougher G., Kalmanowicz S. (2016), *EU Competition Law in the Sharing Economy*, "Journal of European Competition Law and Practice", No. 7.
- Paal B. P. (2016), *Internet Search Engines and Antitrust Law*, "Journal of Intellectual Property Law and Practice", No. 11.
- Pachuca-Smulska B. (2018), *Implementation of Directive 2011/83/EU into Polish law*, "Studia Prawnoustrojowe", No. 42.
- Podszun R., Kreifels S. (2016), *Digital Platforms and Competition Law*, "Journal of European Consumer and Market Law", No. 5.
- Ranchordás S. (2015), *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, "Minnesota Journal of Law, Science & Technology", No. 16.
- Ramberg C. (2002), *Internet Marketplaces: The Law of Auctions and Exchanges Online*, Oxford University Press.
- Ratchford B. T. (2009), *Quality May Not Win*, "Journal of Marketing Research", No. 46.

- Research group on the Law of Digital Services (2016), *Discussion Draft of a Directive on Online Intermediary Platforms*, "Journal of European Consumer and Market Law", No. 5.
- Rochet J.-C., Tirole J. (2003), *Platform Competition in Two-Sided Markets*, "Journal of the European Economic Association", No. 1.
- Schmechel P. (2016), *Verbraucherdatenschutzrecht in Der EU-Datenschutz-Grundverordnung*, SVRV <www.svr-verbraucherfragen.de/dokumente/verbraucherdatenschutzrecht-in-der-eu-datenschutz-grundverordnung/> accessed 1.11.2019.
- Szymielewicz K., Iwańska K. (2019), *Śledzenie i profilowanie w sieci. Jak z klienta stajesz się towarem*, Panoptykon <https://panoptykon.org/sites/default/files/publikacje/panoptykon_raport_o_sledzeniu_final.pdf> accessed 1.11.2019.
- Taddeo M., Floridi L. (eds) (2017), *The Responsibilities of Online Service Providers*, Springer.
- Tonner K. (2014), *From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect*, [in:] *Varieties of European Economic Law and Regulation: Liber amicorum for Hans Micklitz*, (eds.) K. Purnhagen and P. Rott, Springer.
- Twigg-Flesner C. (2016), *Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law*, [in:] *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution*, (ed.) A. De Franceschi, Intersentia.
- Van Alstyne M., Parker G. (2017), *Platform Business: From Resources to Relationships*, "GfK-Marketing Intelligence Review", No. 9.
- Wendehorst C. (2016), *Consumer Contracts and the Internet of Things*, [in:] *Digital Revolution: Challenges for Contract Law in Practice*, (eds.) R. Schulze, D. Staudenmayer, Nomos/Hart.

Summary

Regulation of online platforms in the digital single market

Key words: online platforms, collaborative economy, European Union, Digital Single Market.

The purpose of this article is to analyse and assess the initiatives taken at the European Union level to establish an adequate regulatory framework for online platforms. The Digital Single Market Strategy, published by the European Commission in 2015, forms the starting point for the inquiry. The article discusses the role of online platforms in the digital economy, describes their characteristic features and associated benefits and risks. It subsequently moves to the two central issues from the point of view of the lawmaker: protection and commodification of personal data and the allocation of risks and responsibilities. The analysis takes a number of legal sources into account, such as the General Data Protection Regulation 2016/679, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation servi-

ces. It further includes a selection of *soft law* instruments, such as the European Commission's communications on online platforms, on collaborative economy and on tackling illegal content online. According to the author, the direction of steps already taken is to be welcomed. However, the success of the overall project will depend on the effectiveness of implementing measures. Further research is also necessary to explore the relations between contract law and data protection law as well as possibility of leveraging the position of online platforms to minimize the risks associated with their growth.

Streszczenie

Regulacja platform internetowych na jednolitym rynku cyfrowym

Słowa kluczowe: platformy internetowe, gospodarka współpracy, Unia Europejska, jednolity rynek cyfrowy.

Celem artykułu jest analiza i ocena inicjatyw podejmowanych na poziomie Unii Europejskiej, w celu odpowiedniego uregulowania platform internetowych. Punktem wyjścia dla przeprowadzonych badań jest opublikowana przez Komisję Europejską w 2015 r. „Strategia jednolitego rynku cyfrowego dla Europy”. W artykule podjęto rozważania na temat roli platform internetowych we współczesnej gospodarce cyfrowej, przedstawiono ich charakterystyczne cechy oraz związane z nimi szanse i zagrożenia. Następnie analizie zostały poddane dwa zagadnienia o kluczowym, zdaniem autorki, znaczeniu z punktu widzenia prawodawcy: ochrona i uprzedmiotowienie danych osobowych oraz alokacja ryzyka i odpowiedzialności. W toku analizy uwzględniono m.in. przepisy rozporządzenia 2016/679 o ochronie danych osobowych, dyrektywy 2019/770 w sprawie niektórych aspektów umów o dostarczanie treści cyfrowych i usług cyfrowych oraz rozporządzenia 2019/1150 w sprawie propagowania sprawiedliwości i przejrzystości dla użytkowników biznesowych korzystających z usług pośrednictwa internetowego. Analizie poddano ponadto instrumenty o charakterze *soft law*, takie jak komunikaty Komisji Europejskiej o platformach internetowych, o platformach współpracy oraz o zwalczaniu nielegalnych treści w Internecie. W ocenie autorki, wyznaczony przez powyższe akty kierunek działań zasługuje na aprobatę, o sukcesie projektu decydować będzie jednak skuteczność kolejnych kroków implementacyjnych. Niezbędne są również dalsze badania naukowe dotyczące takich kwestii, jak relacje prawa umów i prawa ochrony danych osobowych oraz możliwości skutecznego zaangażowania platform internetowych w celu minimalizowania zagrożeń związanych z ich rozwojem.