



# Digital Markets in the EU

Radboud  
Economic Law  
Series

Marc Veenbrink,  
Anne Looijestijn-Clearie  
& Catalin S. Rusu (eds)

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*Radboud Economic Law Series*

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RADBOUD ECONOMIC LAW SERIES

VOLUME 2

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## About This Series

### Radboud Economic Law Series

The aim of this series is to disseminate ideas and research presented at the Radboud Economic Law international conferences, which are organised annually by the staff of the International and European Law Department of Radboud University Nijmegen, the Netherlands. The conference and the published contributions focus on economic law. This legal field is dynamic and broad. Its complexity stems from the multitude of sub-domains embedded in it, as well as from the interplay between them. Economic law entails constantly developing policies and frameworks, multi-layered regulatory and law enforcement regimes, and actors active at various (domestic and transnational) jurisdictional levels. This series attempts to unravel some of the complexities which occur in the interplay between various international, EU, and domestic legal aspects pertaining to the economic law realm. Each conference, and consequently each resulting edited volume, discusses a specific economic law development from academic and practical perspectives. Therefore, the interdisciplinary nature of this series makes it attractive for academics and practitioners with an interest in (international, EU, and domestic) economic law.

#### TITLES IN THIS SERIES

- Boosting the Enforcement of EU Competition Law at the Domestic Level (Cambridge Scholars Publishing, 2017)
- Digital Markets in the EU (2018)
- Upgrading Trade and Services in EU and International Economic Law (forthcoming, 2019)





## Acknowledgments

This volume is based on the contributions presented at the second Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on 9 June 2017. The theme of this conference was focused on 'Digital Markets in the EU'. The speakers present at this event dealt with various economic law issues pertaining to digitalisation, ranging from the dynamic behaviour of players active in digital markets, to the challenges faced by regulatory, enforcement, legislative, and judicial entities, when it comes to designing, applying, and interpreting the law in this new era. In this respect, the conference, and this volume for that matter, touch upon diverse, yet interconnected branches of (EU and domestic) economic law: competition law, sectoral regulation, consumer protection, services of general economic interest, free movement, data sharing and cyber security, etc.

The editors of this volume would like to express their gratitude to a number of persons without whose help both the conference and this volume would not have been possible. We are thankful to the Faculty of Law of the Radboud University Nijmegen for giving us the opportunity to host this conference in the Grotius Building. We are also grateful to all the speakers who presented their interesting research findings during the conference and then contributed to this volume. Many thanks go to Professors Johan van de Gronden, Antoon Quaedvlieg, and Wolf Sauter, who chaired the discussion sessions during the conference, in a stimulating and thought-provoking manner.

We would also like to express our gratitude to Mrs Charley Berndsen from the Law Faculty, who ensured that everything ran smoothly from an organisational perspective before, during and after the 2017 conference. Last but not least, we would like to thank Mr Thomas Arnold, student assistant at the Department of International and European Law, for using his valuable editing skills, which were essential for bringing together the various contributions to this volume.

This volume takes account of the law(s) in force and rulings handed down up until 30 November 2017.

Marc Veenbrink, Anne Looijestijn-Clearie and Catalin S. Rusu

Nijmegen, February 2018



## List of Abbreviations

ACM	Authority for Consumers and Markets
AI	Artificial Intelligence
APPA	Across-Platform Parity Agreements
B2C	Business-to-Consumer
BEREC	Body of European Regulators for Electronic Communications
C2C	Consumer-to-Consumer
CERRE	Centre on Regulation in Europe
CJEU	Court of Justice of the European Union
DSM	Digital Single Market
ECJ	European Court of Justice
ECN	European Competition Network
ENISA	European Union Agency for Network and Information Security
ETC	Eligible Telecommunications Carrier
EU	European Union
FCC	Federal Communications Commission
GC	General Court
GDPR	General Data Protection Regulation
INSPIRE	Infrastructure for Spatial Information in the European Community
ISP	Internet Service Provider
ITS	Intelligent Transport System
NGN	Next Generation Networks
OTA	Online Travel Agency
R&D	Research and Development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union



# Foreword

*Johan van de Gronden\**

The digital revolution has brought about major changes in modern society. It does not come as a surprise that competition law and other areas of economic law are confronted with the challenges resulting from this revolution. Important questions must be addressed. For example, is competition law capable of accommodating the special features of digital markets? In the past, the EU competition rules were subject to a process of decentralisation and the economic approach also reshaped these rules. Are the Treaty provisions on competition sufficiently flexible to do justice to the emergence of ICT applications, such as price bots and algorithms? What is the response of the European courts to these developments? Are these courts capable of reshaping and bending the classic European competition rules, which date back to the Treaty of Rome of 1957, in such a way that they address adequately the challenges of the innovative and flashy ICT applications? Is competition law too old to tackle the problems of the 21<sup>st</sup> century? Or, on the contrary, should it be pointed out that EU competition law provides the tools that are desperately needed for taking action against enterprises that operate on global ICT markets. Given their size and importance, such firms could escape the scrutiny of national state bodies. In these circumstances, the European Commission, as a supranational authority, can exercise countervailing power against the large enterprises operating on a wide variety of global ICT markets. The large fines imposed on companies, such as Google, demonstrate that the European Commission does not shy away from taking firm action. Then again, it should be awaited whether the decisions of the Commission will pass the judicial review of the European courts.

In any event, information plays a key role in digital markets. Data related to, for example, consumer behaviour are of great economic value. Access to these data determines whether corporations will be successful or will fail. In close relation to this, the question arises how these data should be protected? Enhancing consumer welfare by introducing new digital products must not jeopardise the privacy of the consumer. To put it differently, consumer welfare presupposes

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that the privacy of the consumers browsing the internet in their search for new products or services is respected.

All these developments call for action. The European Commission has answered this call by launching its Digital Single Market Strategy for Europe. The EU Internal Market should reap the benefits resulting from the digital revolution and, accordingly, barriers to online trade have to be removed. However, consumers as well as economic operators must also be protected from the adverse effects of this revolution. Intervening on digital markets is walking a fine line: it requires a good balance of all interests, objectives, and values at play.

It is clear from the outset that it is inevitable to rethink competition and economic law in light of the rapid ICT developments. The changes resulting from the digital revolution will have a considerable impact of these areas of law. The volume 'Digital Markets in the EU' offers a great opportunity to explore issues that are relevant in this respect. Both scholars and practitioners have contributed to this volume, approaching the subject of digital markets from different angles. Well-known concepts of European competition law are revisited and their ability to respond to ICT developments is tested. New legislative developments are analysed and reviewed: what action is needed regarding, *inter alia*, the collaborative economy, the access to data, and cyber security? The analyses carried out by the authors lead to valuable and interesting insights.

A wide variety of legal issues and legislation are discussed, but the common denominator is constituted by the challenges the emergence of digital markets gives rise to. This overarching theme ties together the interesting contributions written by the authors. The present volume is an excellent starting point for studying the relationship between economic law, digital markets, and ICT.

# Digital Markets in the EU

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The opportunities presented by the internet have changed the way in which businesses conduct their commercial practices. Some businesses have emerged over the years due to the opportunities created by the digital era, while others have adapted their business models to cope with the new challenges of the 'digital economy'. Digital markets are dynamic in nature and exhibit features which set them apart from the 'traditional economy': for example, players active in such markets are driven by the 'winner takes all' mirage, while the consumers of digital products or services often pay for their purchases by 'disclosing their personal data'. Digitalisation is thus a phenomenon that has and will very likely continue to change our lives, regardless of the roles one may play in the digital markets context. The developments in the digital era occur at a mindboggling pace. Therefore, policymakers, legislators, and law enforcers need to keep up to date with these developments. This book examines some of the economic law challenges which the digitalisation of our society raises for policymakers and law enforcers. In this respect, both recent regulatory and enforcement (EU and domestic) initiatives are discussed. The common thread which ties this book's contributions together relates to the question of whether we need regulation, or whether the market, and thus the current legal framework(s), are suitable for tackling the challenges of the digital era.

*This volume in the Radboud Economic Law Series is based on the contributions presented at the second Radboud Economic Law Conference, held at Radboud University Nijmegen, the Netherlands, on 9 June 2017.*

