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Open Markets in the Era of Fintech and Big Tech: Lessons for the Institutional Design of Competition Policy

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ABSTRACT

This paper analyses three routes for the formation of market-opening rules: competition enforcement, legislation, and UK-style market investigation. Using case studies on facilitating market access for innovative payment services, we identify essential features and limitations of the different modes of rulemaking. The interrelation between them is explored, revealing the merits of having them available in parallel.

Keywords: competition policy, institutional design, competition law, regulation, market investigation, open banking, fintech, big tech, payment services

JEL classification: K21

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I. Introduction

Digitalization is revolutionizing the structure of many markets and payment services are no exception. On the one hand, we see market entries by innovative newcomers. On the other hand, we can observe that the large digital gatekeepers ('big tech', 'GAFAM'[1]) use the network effects that come with their large customer base and their scaling experience to become more active in banking and the payments markets.[2] Thus, incumbent players, in particular the traditional retail banks, see themselves as under pressure from two sides. While ultimately, it seems, they will have no choice but to adapt their business and revenue models, that does not mean that they put themselves right at the forefront of this development. There is always the temptation to react in a defensive, protectionist way and to try to erect entry barriers, to shield the customer base, and to delay open banking. Therefore, to keep markets open, regulatory interventions might be needed that grant rights to access facilities and to connect their own offerings with those of incumbent firms or large digital gatekeepers.

Certainly, it is not only in the payments industry that digitalization entails new challenges for the protection of competition and for keeping markets open. In the EU, it was the legislative initiative for a 'Digital Services Act Package'[3] – which initially envisaged a 'New Competition Tool' that was then put on hold in lieu of the Digital Markets Act (DMA)[4] – which has raised questions over the adequate institutional design of competition policy: which are the comparative advantages of competition enforcement and legislative (*ex ante*[5]) regulation[6] as

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[1] Acronym encompassing Google (Alphabet), Amazon, Facebook (Meta), Apple, and Microsoft.

[2] For a detailed account of big tech's entry into payments markets in France, which can be seen as paradigmatic in this regard, see Autorité de la concurrence, Opinion 21-A-05 of 29 April 2021 on the sector of new technologies applied to payment activities, pp 58–66. For big tech's entry into banking in general see Jorge Padilla and Albert Riera, 'Big Techs, Banks, and the Digital Markets Act', *Concurrences* N°4-2021, 14, 14–16.

[3] See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-internal-market-and-clarifying-responsibilities-for-digital-services_en> (accessed 22 June 2022).

[4] Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM/2020/842 final. In the following, references to the DMA are based on the text according to the 'Draft Agreement' resulting from the trilogue negotiations and the political agreement as it was reached on 24 March 2022 (four-column document of 8 April 2022). See <https://ec.europa.eu/competition-policy/sectors/ict/dma_en>.

[5] It is common parlance to describe rulemaking through (legislative) regulation and through competition enforcement as having an '*ex ante*' or an '*ex post*' effect, respectively. However, when observing the practical effects of different mechanism of market intervention, this distinction does not strictly apply. See e.g. Pablo Ibánez Colomo, 'On the Application of Competition Law as Regulation: Elements of a Theory', (2010) 29 *Yearbook of European Law* 261, 263–264; see also Niamh Dunne, *Competition Law and Economic Regulation* (Cambridge University Press 2015) 43–44. Both modes of rulemaking are contingent on past and future developments. Rulemaking always reacts to certain developments and unfolds a preventive effect from a certain point onwards. Moreover, its mere anticipation may already affect market players' conduct. For example, key players withdrew from the Libra consortium because they feared regulatory intervention, be it by authorities or by legislation. In the following, owing to the indistinct line between '*ex ante*' and '*ex post*' effects, we will avoid those characterizations.

[6] We use the term to mean prescriptions and proscriptions governing the conduct of market operators. While in this paper the relevant rulemaking is done by the legislature, the term 'regulation' may also refer to rulemaking by agencies. In contrast, competition enforcement is characterized by 'an individualised assessment of market positions and behaviour, including its actual or likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question' (recital 10 in the preamble to the DMA). The precise meaning of a competition law provision in a specific case cannot be deduced from the provision as such. It is up to the competition authorities and to the judiciary to create a body of

modes of pro-competitive rulemaking? Should the two instruments[7] be understood and employed as substitutes or as complements? Does the dynamics triggered by the digitalization of markets prompt a new understanding of this relationship? Is there a need for a new mechanism of rulemaking such as the UK type of market investigation that sits between competition enforcement and legislative rulemaking?

In this article, we aim to shed some light on the factors that affect the operation and the interrelation of the various mechanisms of pro-competitive, market-opening rulemaking. While social sciences have a major role to play in identifying factors that determine the functioning of agencies, individuals' willingness to abide by rules, and the like, this article focuses on the legal design of the pro-competitive programme, but also considers how it may be intertwined with findings of the former.[8] In doing so, we will demonstrate and compare inherent limitations of the available instruments. On the one hand, this should allow us to identify the potential for improving the legal framework of those rulemaking mechanisms. On the other hand, it might help us to adjust the ambitions associated with each of these mechanisms to a realistic level, and to recognize that it may be reasonable to keep in stock and foster parallel routes for pro-competitive rulemaking.

Throughout this article, case studies featuring pro-competitive interventions in the payment industry will be used to illustrate and evaluate the merits and weaknesses of different modes of market-opening rulemaking in times of digitization.[9] While in the first case incumbent banks seek to suppress the business model of a newcomer, the second case concerns a big tech firm's attempt to reserve exclusive access to its user base. In both cases, competition proceedings were initiated, but ultimately outpaced by competition-focused regulation. The analysis exposes deficiencies of competition enforcement in the digital sphere but shows why nonetheless it has an eminent complementary role to play. Hereafter, using the CMA's open banking initiative as an example, it is shown how UK-style market investigations work as a mechanism for setting correspondent pro-competitive rules.

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competition rules over time. See for a more detailed account of the features distinguishing 'regulation' and 'competition law' Dunne (n 5) 41–48.

[7] We do not consider rulemaking induced by private rights of action. As far as can be seen, these have not played a significant role so far with regard to the establishment of market-opening rules such as those in focus here, such as obligations to provide for application programming interfaces (APIs) and the like. Analysing the relevant institutional factors determining rulemaking through private enforcement goes beyond the scope of this article.

[8] This is not to say that social scientists would not acknowledge the essential role of 'legal design factors'. See e.g. Robert A. Kagan, 'Regulatory Enforcement' in Richard D. Schwartz and David H. Rosenbloom (eds) *Handbook of Regulation and Administrative Law* (Marcel Dekker 1994) 383, 390 ('To understand enforcement style, therefore, one must look first of all to the "legal design" of the regulatory program: its substantive goals and standards, the powers it gives the agency, and the constraints it imposes on agency discretion').

[9] This article does not focus on issues of rulemaking against the background of (potentially) conflicting policy objectives. If we take, for example, the policy discussion on stable coins and digital currencies, we may observe how in the field of payment services issues of market power can be intertwined with issues of financial stability and/or privacy. This raises questions of institutional design that are outside of this article's scope, for example whether competition enforcement and financial market supervision should be in the hands of one authority, or which other mechanisms should be used to deal with possible trade-offs. Only one facet of this challenge is taken up in this paper. See on the enforcement of pro-competitive rules by financial supervisory authorities below sub IV.4.a).

This article is structured as follows. It begins by introducing the two said case studies on pro-competitive interventions in the payment industry (Section II). We then explore the limits and shortcomings of the making of market-opening rules by way of competition enforcement (Section III). While, at first glance, it may look as if legislative intervention could readily make up for these deficiencies, we will explain why this assumption would be misguided and that competition enforcement will, at any rate, have an important complementary role to play (Section IV). We then focus on rulemaking through UK-style market investigation and explore how it is different from competition enforcement and legislation and may usefully complement both mechanisms (Section V). We conclude by summarizing our findings (Section VI).

II. Open Markets for Payment Services: Two Scenarios, Two Case Studies

Competition enforcement and pro-competitive legislation that aim at opening markets for innovative payment services provide us with good illustrations of differences in scope and effectiveness of both modes of rulemaking, as well as of the potential for a beneficial interplay between the two. Two main scenarios can be distinguished in this respect. In the first scenario, incumbents use anti-competitive measures to keep out new entrants and to suppress new business models. An example of this is the coordinated attempt by German banks to disrupt the market access of providers of payment initiation services. In the second scenario, large digital gatekeepers ('big tech') maintain and use a (quasi-)exclusive access to their user base to exclude competition – be it from established providers or from fintech. An example is Apple's policy to monopolize access to the iPhone's contactless payment chip, the near-field communication (NFC) interface. Both cases, which will briefly be explained in turn and to which we will return in this article by way of illustration, have attracted the attention of competition authorities but eventually resulted in pro-competitive regulation at national and EU level.

1. Targeting Incumbents: Free Market Access for Providers of Payment Initiation Services and Account Information Services[10]

Since around 2005, it has been possible in Germany to pay in e-commerce by using so-called payment initiation services. One well-known provider from the very start was Sofort AG (later acquired by Klarna). Originally, payment initiation service providers used a method known as 'screen scraping'. A customer had to grant the initiation service provider access to an online payment account that he or she held at a bank. The payment initiation service provider verified the availability of sufficient funds in the account and initiated the payment.

For online traders, this service had two main advantages: they could quickly be certain that their customers had fulfilled their payment obligations, and the merchant fees were significantly lower than, for example, payment by credit card. For the customer, the (related) advantage was that the online trader would be able to immediately release the goods or provide the service.[11]

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[10] In the annex to this article, we present a timeline featuring the detailed events that are crucial for the interplay between competition enforcement and legislative rulemaking in this case study.

[11] As surcharging is prohibited in the context of payment services for which the interchange fees are regulated, lower costs for payment services will typically have no direct effect on the online traders' customers. See Article 62(4) Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November

In 2006, the associations of German banks began to draw up terms and conditions for online banking, which were specifically directed against this business model. These model terms and conditions were adopted in 2009 by an umbrella organization of banking associations and recommended to all members for use. This rulebook included terms for keeping the personalized security credentials (PINs) secret and for the secure storage of the authentication instruments (TANs), which, from the perspective of the banks' customers, made the use of payment initiation services appear to be in breach of the contractual obligation they owed their bank. Following a complaint by one payment initiation service (Sofort AG), on 15 July 2010 the Bundeskartellamt (the German competition authority) opened proceedings against the banking associations. On 29 June 2016, the Bundeskartellamt[12] held that these online banking terms violated the prohibition of restrictive agreements under Article 101 TFEU and section 1 of the German Competition Act.[13] The authority left it at establishing the illegality of the said conduct; it imposed neither sanctions nor remedies. This decision was challenged by the banking associations but finally upheld by the Bundesgerichtshof (the German Federal Court of Justice) on 7 April 2020.[14]

In the meantime, however, the EU legislature overtook the Bundeskartellamt in its intervention, or – as we shall see – the latter rather *allowed* itself to be outpaced by the EU legislature. Through the reform of the Payment Services Directive (PSD) in 2016, the EU legislature made sure to open the market for providers of payment initiation services. Recital 69 in the preamble to the PSD2[15] states:

> terms and conditions or other obligations imposed by payment service providers on payment service users in relation to keeping personalised security credentials safe should not be drafted in a way that prevents payment service users from taking advantage of services offered by other payment service providers, including payment initiation services and account information services. Furthermore, such terms and conditions should not contain any provisions that would make it more difficult, in any way, to use the payment services of other payment service providers authorised or registered pursuant to this Directive.

Moreover, via the PSD2 the EU legislature regulated the provision of payment initiation services (PISPs) and account information services (AISPs) (summarized under the term 'third party providers' (TPPs)). TPPs need to be licensed by national financial market authorities unless they already hold a payment services licence. Moreover, the PSD2 defines

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2015 on payment services in the internal market, O.J. 2015 L 337/35, stipulating that 'Member States shall ensure that the payee shall not request charges for the use of payment instruments for which interchange fees are regulated'. In Germany, this provision has been implemented through section 270a of the German Civil Code (Bürgerliches Gesetzbuch). The prohibition of surcharging does not apply, however, to transactions with payment cards issued by third-party payment card schemes, as in the case of American Express (see Article 1(3)(c) of Regulation 2015/751), with the notable exception that payment cards are issued with a co-branding partner (see Article 1(5) of Regulation 2015/751). See on the ECJ's interpretation of the latter provision Case C-304/16, *American Express*, EU:C:2018:66, paras 52 et seq. Besides, EU payment services regulation prohibits anti-steering rules (by payment card systems such as American Express) and, therefore, allows online traders to discount or surcharge for the use of certain payment services. See Article 11(1) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, O.J. 2015 L 123/1, and Article 62(3) of Directive (EU) 2015/2366.

[12] Bundeskartellamt 29 June 2016, B4-71/10, *Zahlungsauslösedienste*.

[13] Gesetz gegen Wettbewerbsbeschränkungen (GWB).

[14] BGH 7 April 2020, KZR 58/11, *Zahlungsauslösedienst*, Juris, DE:BGH:2020:070420BKVR13.19.0.

[15] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. O.J. 2015 L 337/35.

conditions for secure communication between TPPs and account-holding banks. Banks must provide TPPs with dedicated interfaces, which makes the use of screen scraping obsolete and, thus, banks may refuse to grant access this way.

Working out technically mature and secure account access solutions is not a trivial task.[16] In the EU, what is required from the banks has been specified in the 'regulatory technical standards (RTS) for strong customer authentication and common and secure open standards of communication', which were developed with the help of the European Banking Authority and adopted by the Commission in November 2017.[17] The banks coordinated the development of a uniform technical standard for the APIs via the so-called Berlin Group.[18]

In the explanatory memorandum accompanying these amendments to the EU's regulatory framework for payment services, it is explained that the legislature expected that this reform would lead to enhanced competition and thus lower prices and products that meet customer preferences[19] and, thus, would act as an instrument of competition policy.

2. Targeting Big Tech: Open Interfaces for Mobile Payment Services[20]

In July 2018, Apple announced that it would offer its mobile payment application ('Apple Pay') in Germany. NFC chips that enable contactless payments are integrated in smartphones and other mobile devices. Unlike Google, with its Android-based mobile devices, Apple did not allow competing applications to access the NFC chip. As a result, if payment service providers wanted to offer mobile payments to their customers who used Apple mobile devices, they had to integrate into Apple Pay, Apple's default wallet app, which was created in 2014. However, as far as known, Apple made payment service providers pay dearly for allowing access to its users. The payment service providers had to pay significant onboarding fees as well as a significant transaction value fee for each payment initiated via Apple Pay.[21]

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[16] See Bruno Zeller and Brian Lynch, 'Challenges in Open Banking – What Are the Practical Steps to Be Taken Now?', (2021) 48 *University of Western Australia Law Review* 579, 591–592.

[17] Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication. O.J. 2018 L 69/23.

[18] See <https://die-dk.de/themen/pressemitteilungen/ein-einheitlicher-europaischer-standard-fur-den-zugang-zu-bankkonten>.

[19] European Commission, 24 June 2013, Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC, COM(2013) 547 final, p 2 ('To achieve this and promote more competition, efficiency and innovation in the field of payments, there should be legal clarity and a level playing field, leading to downward convergence of costs and prices for payment services users, more choice and transparency of payment services, facilitating the provision of innovative payment services, and to ensure secure and transparent payment services').

[20] A timeline featuring the events that are crucial for the interplay between competition enforcement and regulation in this case study can be found in the annex to this paper.

[21] In a class action complaint against Apple, filed on 18 July 2022, the plaintiffs stated 'Whenever an Apple Pay transaction is completed on a U.S. issuer's payment card, the issuer must pay Apple a fee—15 basis points on credit (.15%) and a flat 0.5 cents ($0.005) on debit. These fees generated a reported $1 billion for Apple in 2019, and this revenue stream—earned from card issuers—is predicted to quadruple by 2023.' Affinity Credit Union v. Apple Inc., N.D. Cal., Case 5:22-cv-04174. Available at <https://www.hbsslaw.com/sites/default/files/case-downloads/apple-pay/2022-07-18-apple-pay-complaint.pdf>. These figures are consistent with previous media reports. See <https://www.itnews.com.au/news/banks-surrender-on-apple-pay-feefight-450874> (13 February 2017, accessed 21 July 2022). In addition, it is said that credit card issuers must pay 7 cents (Visa) or 50 cents

As early as 2018, Competition Commissioner Vestager signalled that the European Commission was mindful of possible competition problems associated with Apple's restrictive NFC policy.[22] In October 2019, the Commission started to inquire into the case[23] and then it announced in June 2020[24] that it had opened a formal competition investigation.[25]

These antitrust proceedings were outpaced by a legislative intervention in Germany. Originally, in June 2019, the German government had signalled that it would leave competition issues arising from Apple's restricted access to NFC interfaces to competition enforcement. However, in what was viewed by many as a surprise move,[26] in November 2019 the German legislature passed a law that grants payment service providers a right to access 'technical infrastructure' that contributes to mobile and internet-based payment services. This section 58a of the German Payment Services Act (PSSA) has become known as the 'Lex Apple Pay' as its objective was indeed widely understood as providing payment service providers, in particular the German banks, with direct access to the NFC interfaces of Apple's mobile devices.

The German legislature justified the regulatory intervention with the expectation that such a right to access would promote technological innovation, which in turn was regarded as a driver of competition and economic prosperity. Thus, quite in line with competition policy concerns, the regulatory objective was to protect consumers' interests in having a wide choice among payment services available, including competing options for mobile and internet-based payments.[27]

In June 2021, the German legislature revised the 'Lex Apple Pay'. The amendments were meant to ensure, among other things, that the right to access also applied to smart watches and smart speakers and that it also encompassed the button assignment (volume control, home button, etc.) and the authentication units (facial recognition, fingerprint sensor, etc.) of the mobile end devices.[28]

(MasterCard) for each card a customer adds to an Apple wallet. Moreover, it has also been reported that, pursuant to Apple's standard agreements, payment service providers must not pass on the transaction fee to its customers. Available at <http://www.wigleylaw.com/assets/Uploads/How-does-Apple-make-money-from-Apple-Pay.pdf> (July 2015, accessed 21 July 2022). This is arguably to be understood as a prohibition of passing on the fee on a one-for-one basis. Therefore, card issuers that pass on costs incurred by Apple's transaction fees must effectively burden all their customers, whether or not they use Apple Pay.

[22] P-004223/2018 Answer given by Commissioner Vestager on behalf of the European Commission (1 October 2018) ('The Commission monitors compliance with competition rules by operators active in the payments systems sector, including mobile payments systems. In that regard, the Commission is aware that Apple does not make the Near-Field-Communication interface to Apple Pay accessible to other financial service providers').

[23] Statement by a European Commission spokesman <https://www.competitionpolicyinternational.com/eu-regulator-looking-into-applepay-over-antitrust-concerns> (16 October 2019, accessed 27 March 2020).

[24] European Commission, Press release 'Antitrust: Commission opens investigation into Apple practices regarding Apple Pay' (16 June 2020).

[25] Case AT.40452 Apple – Mobile payments (2020 ongoing).

[26] Jens-Uwe Franck and Dimitrios Linardatos, 'Germany's "Lex Apple Pay": Payment Services Regulation Overtakes Competition Enforcement', (2021) 12 *JECLAP* 68, 72.

[27] Jens-Uwe Franck and Dimitrios Linardatos, 'Germany's "Lex Apple Pay": Payment Services Regulation Overtakes Competition Enforcement', (2021) 12 *JECLAP* 68, 73.

[28] Deutscher Bundestag, Drucksache 19/30443 of 9 June 2021, 72.

Now, at the EU level, the Commission's competition investigation against Apple will be overtaken by legislative regulation via the EU Digital Markets Act (DMA). Article 6(1)(f) of the DMA will provide that a designated gatekeeper[29] must allow:

> business users and alternative providers of services offered together with or in support of core platform services[30] free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features and access for the purposes of interoperability to, the same operating system, hardware or software features regardless of whether those features are part of the operating system, that are available to or used by the gatekeeper when providing such services.

This will require Apple to treat competing payment service providers on an equal footing, including granting them access to the NFC interface of its mobile interfaces.[31] Apparently that had been on the Commission's radar since the beginning of the legislative initiative on the DMA.[32] Within its scope of application, Article 6(1)(f) DMA will, it seems, supersede the German 'Lex Apple Pay' as it is provided in Article 1(5) DMA that:

> In order to avoid the fragmentation of the internal market, Member States shall not impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets.

In the following, we will analyse and illustrate features of the institutional design and, moreover, the relationship and interplay between competition enforcement and legislative rulemaking against the background of these examples.

III. Limits and Shortcomings of 'Regulating' Competition Enforcement

In both scenarios outlined above, a competition investigation aimed at facilitating market entry for payment services was outpaced by a legislative intervention addressing the suspected competition deficits via legislation. This raises the question: why did the legislature not trust that competition enforcement would ensure open markets?

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[29] Article 3 DMA.

[30] See Article 3(7) and Article 2 point (2) of the DMA Proposal. In the European Parliament, it had been suggested to add 'mobile payment services' to the list of core platform services (CPS) to which the DMA applies (amendment 419). However, ultimately this seems not to have been taken up by IMCO when discussing a set of compromise amendments. See <https://www.europarl.europa.eu/committees/de/contestable-and-fair-markets-in-the-digi/product-details/20211026CAN63854>.

[31] See recital 40 DMA ('Certain services offered together with or in support of relevant core platform services of the gatekeeper, such as … payment services or technical services that support the provision of payment services, such as payments systems for in-app purchases, are crucial for business users to conduct their business and allow them to optimise services. … Gatekeepers should therefore not use their position as undertakings providing core platform services to require their dependent business users to use any of those services provided by the gatekeeper itself as part of the provision of services or products by these business users').

[32] See European Commission, Impact Assessment Report SWD(2020) 363 final, Part 1/2, p 19 (paras 49–50) and pp 43–44: 'The most usual … types of practices observed in the field of operating systems are: … A provider limiting the access to or the interoperability of its operating system and *respective functionalities (e.g. NFC)* with the services offered by business users, reserving those functionalities to their own services' (emphasis added). See also ibid p 58 (reference to national measures relating to access to NFC). See also ibid Part 2/2 p 55.

1. Substantive Limitations of Competition Law

The focus of this article will not be on substantive aspects of competition law. A brief insight should, however, make it clear that substantive limitations inherent to competition law can make pro-competitive legislative intervention appear necessary.

a) Competition Law Addresses Anti-competitive Use of Market Power

Articles 101 and 102 TFEU protect competition from distortion that results from the use of market power, where the latter must not only be understood as a legitimizing topos but as being enshrined in the *modus operandi* of EU competition law. In somewhat simplified terms, the application of competition law requires demonstrating a certain degree of monopoly power and its anti-competitive use to be established in each individual case.[33] This is evident in the case of Article 102 TFEU, as the provision addresses only conduct by 'undertakings of a dominant position within the internal market'.[34] Article 101 TFEU addresses collaborations between undertakings in the form of agreements or concerted practices that have as their object or effect the restriction of competition. As an analysis of the practice on Article 101 TFEU reveals, the provision covers anti-competitive restrictions (only) on the premise that they result from the exercise of (at least) a certain degree of market power.[35]

(1) Foreclosure of payment initiation services. If one considers against this background the case of the foreclosed payment initiation services, it becomes clear that a competition law infringement could only be established because the banks had coordinated their behaviour. If the individual banks had, independently of each other, developed and applied the same or similar online terms and conditions, this might have had a foreclosing effect of practically the same quality. However, it could arguably not have been captured by competition law. This is so because the relevant contracts are not as such between undertakings but between undertakings (the banks) and end consumers (the banks' customers).[36] Therefore, a restriction of competition as required by Article 101 TFEU could not have been established based on the foreclosing effects of a bundle of similar contracts between banks and their customers.[37] Moreover, there is nothing to suggest that any of the banks had a dominant position in the market for online accounts. Collective market dominance (based on the assumption of tacit collusion among the banks) is a conceivable option,[38] but hardly verifiable.

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[33] Jens-Uwe Franck and Nils Stock, 'What Is "Competition Law"?—Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements', (2020) 39 *YEL* 320, 324.

[34] Alternatively, Article 102 TFEU addresses undertaking that collectively dominate a market. Besides, pursuant to some national competition laws, the prohibition of abuse may also apply to firms that do not enjoy market power in the strict sense. See, for example, section 20(1) of the German Competition Act, according to which the prohibition of abusive conduct equally applies to undertakings that enjoy a position of 'relative market power'.

[35] See the analysis in Jens-Uwe Franck and Nils Stock, 'What Is "Competition Law"?—Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements', (2020) 39 *YEL* 320, 352–355.

[36] It is settled case law that final consumers are not to be considered 'undertakings' within the meaning of Article 101 TFEU (although they demand products on markets and can, thus, restrict competition by way of coordinated activities). See Case C-180-184/98, *Pavlov and Others*, EU:C:2000:428, para 81.

[37] For an application of the so-called 'bundle theory' see Case C-234/89, *Delimitis v Henninger Bräu*, EU:C:1991:91, paras 14–27.

[38] The concept of 'collective dominance' has been developed in the ECJ's adjudication on mergers. See Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, EU:C:2008:392, paras 119–126.

The banks were, thus, in a position to comply with competition law simply by ceasing their coordinating activities that hindered market entry of payment initiations services. This appears to be one reason why the Bundeskartellamt did not see itself as being in a position to impose behavioural remedies on the banks – such as a duty to provide APIs – which would have effectively facilitated the market entry of the said fintech firms.[39]

(2) Refusal of access to Apple's NFC chips. In the case of Apple's refusal to grant direct access to its NFC chips, we are dealing in any event with unilateral conduct, for which at the EU level only Article 102 TFEU may apply. In the proceedings initiated by the European Commission, it is therefore a question of whether Apple can be shown to have a dominant position. This is not indicated by Apple's market shares in smartphone sales[40] or in internet usage with mobile phones.[41] However, there are at least two conceivable avenues by which it could be argued that Apple is nevertheless an addressee of Article 102 TFEU.

First, this can be the case as users of Apple devices are (much) more likely than those using competing devices to use mobile payment services. Thus, in *Twint/Apple* (2019), a case that concerned contactless mobile payments based by scanning a QR code, the Swiss Competition authority found that, even in a market that included devices that run on Android, the share of Apple's integrated iOS platform in the usage of mobile payment apps amounted to 60 to 70 percent.[42]

Second, Apple is a monopolist if we define a separate market for payment apps that run on iOS devices.[43] This would be in line with the Commission's findings in the Android case, where it assumed a separate market for app stores for the Android mobile operating system, which is dominated by Google's app store. This rests upon the assumption that consumers are single-homers as they make a discrete choice to use a device based on Android's, Apple's, or another firm's operating system, while app developers tend to be multi-homers.[44]

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[39] See below sub III.3.a).

[40] In the third quarter of 2021, Apple's market share in smartphone sales in Europe was estimated at 20 per cent. See <https://de.statista.com/statistik/daten/studie/831667/umfrage/marktanteile-der-smartphone-hersteller-in-europa>. According to the publicly available version of the Commission's decision in Case M.8788 – Apple / Shazam (6 September 2018), the parties had estimated Apple's market share in shipped smart mobile devices in the EEA at approximately 20–30 percent.

[41] The market share of Apple's operating system iOS in internet usage with mobile phones in Europe was estimated at 35.4 percent in November 2021 (Android: 64.0 percent). See <https://de.statista.com/statistik/daten/studie/184516/umfrage/marktanteil-der-mobilen-betriebssysteme-in-europa-seit-2009>. In its sector enquiry on mobile apps, the Bundeskartellamt assumed a 'recent penetration of iPhones and Android smartphones in Germany' of around 23 percent (Apple) versus 77 percent (Android). See Bundeskartellamt, Sektoruntersuchung Mobile Apps, Bericht, Juli 2021, p 15 note 41, available at <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Mobile_Apps.pdf?__blob=publicationFile&v=4>.

[42] Schlussbericht des Sekretariats der WEKO vom 12.3.2019, 31-0519 TWINT/Apple para 159. See Jens-Uwe Franck and Dimitrios Linardatos, 'Germany's "Lex Apple Pay": Payment Services Regulation Overtakes Competition Enforcement', (2021) 12 *JECLAP* 68, 70, n 18.

[43] This is indeed the position of plaintiffs in a class action complaint against Apple, filed on 18 July 2022. See *Affinity Credit Union v. Apple Inc.*, N.D. Cal., Case 5:22-cv-04174, para 108 ('… there is a relevant antitrust market for Tap and Pay iOS Mobile Wallets. These wallets provide a distinct service and offer distinct features that differentiate them from other modes of payments'). Available at <https://www.hbsslaw.com/sites/default/files/case-downloads/apple-pay/2022-07-18-apple-pay-complaint.pdf>.

[44] Case AT.40099, *Google Android*, para 306. An appeal is pending before the General Court (Case T-604/18 *Google and Alphabet v. Commission*).

Both lines of argument are plausible but depend on empirical insights into user behaviour. In any case, it is not a priori evident whether or in what context Apple is to be regarded as market-dominant pursuant to Article 102 TFEU when it comes to the use of mobile devices for contactless payment.

b) Competition Law Requires Facilitating Competitors' Market Entry Only Under Strict Conditions

Competition law is generally reluctant to prescribe conduct that actively fosters competition from other firms. Traditionally, according to the ECJ's case law, the refusal of a market-dominant firm to allow (potential) competitors to access a certain facility (as, for example, infrastructure such as a newspaper home-delivery scheme in *Bronner*) or an input can only be regarded as 'abusive' under Article 102 TFEU[45] where the facility or the input is *indispensable* for entering an adjacent market and, hence, the denial of access may eliminate *all* competition in this neighbouring market.[46] This rule has recently been reinforced by the Court in *Slovak Telecom*:

> where a dominant undertaking refuses to give access to an infrastructure that it has developed for the needs of its own business, the decision to oblige that undertaking to grant that access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.
>
> The application, to a particular case, of the conditions laid down by the Court of Justice in the judgment in *Bronner* … and in particular the condition relating to the indispensability of the access to the dominant undertaking's infrastructure, allows the competent authority or national court to determine whether that undertaking has a genuinely tight grip on the market by virtue of that infrastructure.[47]

In the case of Apple Pay, this could indeed only be presumed if one defined a separate market for apps that enable mobile payments via iOS devices.

In the *Google Shopping* proceedings, the European Commission based the allegation of abuse against Google on a (new) doctrine of self-preferencing.[48] The General Court upheld the decision, stressing Google's eminent position as provider of the dominant search engine and noting that 'Google's general search results page has characteristics akin to those of an essential facility'.[49] What is more, the Court qualified Google's self-preferential conduct on the search market as an 'active exclusionary practice' and thus distinguished it from a simple (passive) refusal-to-do-deal scenario (as e.g. in *Bronner*).[50] Therefore, the Court argued that for an abuse of its dominant position in the search market to be shown it is *not* necessary to

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[45] Only under exceptional circumstances can Article 101 TFEU be applied to that effect. If a certain facility has been established based on an agreement that may have both pro- and anti-competitive effect, the question of whether this amounts to a restriction of competition pursuant to Article 101(1) TFEU may depend on whether the parties to the agreement allow competitors access to this facility on a non-discriminatory basis. See Case C-238/05, *Asnef Equifax*, EU:C:2006:734, para 60.

[46] Case C-7/97, *Bronner*, EU:C:1998:569, para 41; Case C-241/91 P and C-242/91 P, *RTE and ITP v Commission ('Magill')*, EU:C:1995:98, para 56; Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, para 332.

[47] Case C-165/19 P, *Slovak Telekom* EU:C:2021:239 paras 48–49.

[48] Case AT.39740, *Google Search (Shopping)*.

[49] Case T-612/17, *Google and Alphabet v Commission*, EU:T:2021:763, para 224.

[50] Case T-612/17, *Google and Alphabet v Commission*, EU:T:2021:763, para 244.

demonstrate that Google's search engine is 'indispensable' as to enter the market for price comparing websites (or any other adjacent market).

While the General Court has stated its view on when self-preferencing and, thus, discriminatory conduct by a digital platform can be considered abusive, it remains unclear whether and under which conditions such a ban on self-preferencing could (implicitly) provide a right to access beyond the conventional doctrines of 'essential facilities' and 'refusal to supply'. The fact that this cannot be deduced from the General Court's reasoning is due to the fact that the Court had (only) to examine whether the Commission was correct in considering Google's self-preferencing to be 'abusive'. Since there was no access right (imposed as remedy) at issue in the case, the Court did not have to (explicitly) elaborate on this aspect.

c) Conclusion

This brief insight should suffice to illustrate that there are substantive limitations to competition law, which indeed can be relevant when it comes to enabling or facilitating market access for payment service providers. In certain scenarios this may make pro-competitive legislation necessary.

2. Legal Uncertainty and Delayed Regulatory Effect: Competition Law as a *Standard*

A legislature may establish provisions that contain precise behavioural instructions (prescriptions and proscriptions), i.e. *rules* according to the dichotomy of *rules* and *standards*.[51] In contrast, competition law provisions such as Articles 101 and 102 TFEU can rather be characterized as *standards*: their precise meaning with regard to particular scenarios cannot be deduced from the provision itself but remains unclear *ex ante*. It needs to be carved out by the courts on a case-by-case basis. Thus, the judiciary will incrementally create a body of competition *rules*. Their ultimate content, though, remains uncertain until supreme court rulings are established. Therein lies a weakness, which arises not only in respect of rulemaking via EU competition enforcement but is especially the case there: the number of cases decided by the ECJ is relatively small and many of the Court's statements hinge on specific facts. Legislative regulation therefore not only has the benefit of greater clarity and certainty of applicable law but also promises promptness in terms of regulatory effect.

The latter aspect is particularly important where the addressees of competition enforcement have sufficient resources to easily exhaust all legal options to prevent, delay, or mitigate an authority's measure, even if chances of (ultimate) success are not substantial. This is true of the major digital gatekeepers[52] but also applies to large incumbent players. The German

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[51] See Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557. In the literature on regulation, the term is sometimes given a broader meaning, embracing also 'standards'. See e.g. Julia Black, *Rules and Regulators* (Clarendon Press 1997) 10('… rules … are entrenched, authoritative statements which are meant to guide behaviour, be applied on an indefinite number of occasions, and which have sanctions attached for their breach').

[52] For this reason the German legislature has provided for only an abridged judicial review of the competition authority's measures under the newly introduced section 19a of the Competition Act, which is essentially

banking associations exhausted all legal remedies against the Bundeskartellamt's decision in the payment initiation services case. This is quite remarkable, given that, first, the competition authorities had in any case only ordered them to stop the illegal coordination (without imposing fines); second, chances of succeeding in the litigation were low; and, third, as it was apparent that, in the light of PSD2, the activities they defended would not be able to prevent the market entry of payment initiation services anyway. Thus, firms with deep pockets can flex their muscles and signal their willingness to challenge each decision that is detrimental to them. From an authority's perspective, this may be interpreted as a warning to consider carefully which decisions and remedies it wants to risk tying up its resources in a possibly long and costly legal dispute over.

Such considerations are apparently one reason why the German legislature did not want to rely on competition enforcement but opted for legislative intervention to ensure that payment service providers had a right to access the technical infrastructure integrated in mobile phones and other devices.[53] Even if in 2019 the legislature had been convinced that such a right would follow from competition enforcement, the choice in favour of regulation seems very understandable. After all, several years might easily have passed before legal clarity could have been achieved in this respect and whether the ultimate outcome would have satisfied the legislature was naturally uncertain. The legislature therefore had reason to fear that in the meantime structural developments in the market for mobile payments could have become entrenched and could not easily have been corrected through later competition remedies.

Legal uncertainty and delayed regulatory effect are drawbacks of competition enforcement that are particularly critical in digital markets. Digital business models may benefit from large-scale economies and network effects. Absent swift and timely intervention, undesirable market developments can therefore quickly become entrenched. Hence, in digital settings, a legislature will – for good reasons – be more inclined to rely on regulation to try to open markets and promote competitive structures.

3. Procedural and Institutional Limitations of Rulemaking by Competition Enforcement

The promotion of competitive structures, especially in digital markets, often depends on setting positive standards that facilitate market access for new technologies and business models. Competition enforcement tends to struggle when detailed positive guidance is needed to remedy an infringement. Such behavioural specifications are, however, needed when it comes to opening markets or to keeping markets open, and where it is thus required to define conditions under which competitors must get access to data or certain facilities or under which conditions data portability or interoperability must be guaranteed.[54]

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aimed at the large digital gatekeepers. See Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 *JECLAP* 513, 525.

[53] Jens-Uwe Franck and Dimitrios Linardatos, 'Germany's "Lex Apple Pay": Payment Services Regulation Overtakes Competition Enforcement', (2021) 12 *JECLAP* 68, 71–72.

[54] Note that we take it as a given that rule formation and rule application cannot be clearly distinguished. See Julia Black, 'Talking about Regulation', (1998) *Public Law* 77, 78. See also Keith Hawkins and John M. Thomas, 'The Enforcement Process in Regulatory Bureaucracies' in Keith Hawkins and John M. Thomas (eds) *Enforcing Regulation* (Springer-Science 1984) 3, 10 ('The regulatory agency has primary

It is remarkable that in the payment initiation services case the Bundeskartellamt delayed its proceedings against the banks' associations when the latter sought to force the newcomers out of the market. According to press reports, the Bundeskartellamt had already formed a view on the facts and the legal assessment of the case in April 2011,[55] which already contained everything that was later the basis for its decision in 2016, where the authority left it at finding that the coordination and decisions of the banking associations were unlawful. Apparently, the Bundeskartellamt had even signalled to the banks to decide the case only after the PSD2 had come into force. In doing so, however, the authority accepted that the banks' barriers to market entry, which had been erected in violation of competition law, were effective for another five years. So why did the Bundeskartellamt hesitate over intervening more swiftly and with more far-reaching remedies? This points us to procedural and institutional limitations of competition enforcement.

a) Procedural Limitations

The establishment of an infringement in the payment initiation service case was based on finding that, via their various banking associations, the banks had coordinated their behaviour to hinder the market access of payment initiation services.[56] Thus, ceasing this coordination ended the infringement. Arguably, the Bundeskartellamt presumed that it did not have a mandate – or at least not a sufficiently clear one – to force the banks to allow their customers the use of payment initiation services based on the screen scraping technique or via APIs.

As a matter of fact, from the point of view of a competition authority, there are severe limitations and uncertainties, especially in the case of infringements of Article 101 TFEU and/or the corresponding national provisions, about their competences to impose positive behavioural remedies.[57] This is also true for the Bundeskartellamt, whose powers to take

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responsibility for the development of substantive policy together with the implementation of that policy. Policy formation can be viewed as the "law-in-action", a process whereby the agency interprets and translates legislative goals into rules, standards and plans of actions … Policy formation necessarily implies decisionmaking about enforcement … enforcement is typically governed by policy decisions about the case management process; for example, the allocation of resources between proactively identifying cases versus responding to complaints … and establishing priorities among the potential targets of regulation …').

[55] Kay Weidner, then press spokesman of the Federal Cartel Office, has been quoted as stating 'Um die Sicherheit des Zahlungsverkehrs zu gewährleisten, könnten die Banken weniger wettbewerbsbeschränkende Methoden wählen' ('To ensure the security of payment transactions, banks could choose methods that are less restrictive of competition'). Available at <https://www.welt.de/wirtschaft/webwelt/article13061344/Welche-Bezahlsysteme-im-Internet-sicher-sind.html> (published 4 April 2011, accessed 6 February 2022).

[56] While the Bundeskartellamt only established an infringement by the banking associations and their umbrella association, according to the facts established in the decision, it would have seemed that an illegal agreement or a concerted practice on the part of the banks that were organized in the respective banking associations and which were either directly involved in the coordination of the conditions through their representatives or had implemented them could also have been established. In practice, however, this would only have made a difference if the authority had considered fining the banks or imposing (behavioural) remedies on them. Neither was apparently the case. On the issue of behavioral remedies, see below text accompanying note 63.

[57] Accordingly, it has also been noted that, when it comes to ordering specific action under Article 7(1) of Regulation 1/2003, the European Commission 'appears to take a more cautious stance with regard to agreements and restrictive practices caught by Article 101(1) TFEU'. Ralf Sauer and Manuel Kellerbauer, in Luis Ortiz Blanco (ed.) *EU Competition Procedure* (4th ed., Oxford University Press 2021), para 11.08.

remedial action are governed by section 32 of the German Competition Act, which corresponds with (and in part is even modelled on) Article 7(1) of Regulation 1/2003.[58] It has been pointed out in the academic literature that, based thereon, behavioural remedies can be aimed at restoring a 'lawful state of affairs'.[59] This relates to the ECJ's statement that measures can be imposed that are appropriate and necessary for the 'reestablishment of compliance with the rules infringed'.[60]

On this basis, it seems not to be a priori excluded but at any rate uncertain that an authority may impose positive measures to remove barriers to entry that have been erected in violation of Article 101 TFEU or section 1 of the German Competition Act. With regard to a contractual system violating competition law, it has been noted that the authority is not limited to merely prohibiting the contracts that violate the law but that it can impose on the undertakings specifications for the contracts to be concluded in the future if this appears necessary to reopen the market.[61] This is in line with the adjudication of the Bundesgerichtshof, which, in the case of a network of parallel long-term gas supply contracts that violated (now) Article 101 TFEU due to their market-foreclosing effect, has approved of the Bundeskartellamt not only ordering the termination of current contracts but also setting rules for new supply contracts to be concluded.[62] In the light of this, in the payment initiation services case, it might have seemed at least conceivable for the German competition authority to instruct the banks[63] to adapt their terms and conditions in such a way that their customers were allowed to use payment initiation services.

Having said that, however, such a remedy would have gone beyond the existing case law. If the authority prohibited or prescribed the use of certain contractual clauses in distribution contracts, this would have affected the very contract that is subject to control under Article 101(1) TFEU or section 1 of the German Competition Act.[64] In contrast, in a case like the one regarding payment initiation services, such a remedy would not affect the (illegal) coordination between the undertakings (the banks) but the (coordinated) downstream

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[58] Section 32(1) and (2), 1st sentence, of the German Competition Act read: 'The competition authority may oblige undertakings or associations of undertakings to terminate an infringement of a provision of this Part or of Articles 101 or 102 of the Treaty on the Functioning of the European Union. For this purpose, it may require them to take all necessary behavioural or structural remedies that are proportionate to the infringement identified and necessary to bring the infringement effectively to an end.' Translation taken from <https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0227> (accessed 7 February 2022).

[59] Wolfgang Jaeger in Wolfgang Jaeger et al. (eds) Frankfurter Kommentar zum Kartellrecht, 2019, § 32 GWB no 23.

[60] Case C-241/91 P, *RTE and ITP v Commission*, ECLI:EU:C:1995:98, para 93 ('the principle of proportionality means that the burden imposed on undertakings in order to bring an infringement … to an end must not exceed what is appropriate and necessary to attain the objective sought, namely reestablishment of compliance with the rules infringed').

[61] Volker Emmerich in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds) *Immenga and Mestmäcker, Wettbewerbsrecht* (Volume 2, 6th ed. 2020), § 32 GWB para 36.

[62] BGH 10 February 2009 – KVR 67/07, NJW-RR 2009, 1635, 1637–1641.

[63] This would have presupposed, however, that the authority had assumed an infringement by the banks (and not only by the banking associations). Against the background of the facts established in the case, this seemed quite possible. See above note 56. It appears therefore that the authority deliberately refrained from doing so because it did not intend to impose (behavioural) remedies or even fines on the banks.

[64] Or under Article 102 TFEU or section 19 of the German Competition Act if the use of a certain clause constituted an abuse of market dominance.

contracts between the banks and their customers, which were, however, as such not subject to scrutiny under Article 101 TFEU or section 1 of the German Competition Act.[65]

Whether and to what extent remedies may also capture these downstream contracts under German law depends on the interpretation of section 32(2), 1st sentence, of the Competition Act, according to which remedies must be 'proportionate to the infringement identified and necessary to bring the infringement effectively to an end'. Strictly speaking, in the scenario of a collusively erected entry barrier in breach of Article 101 TFEU or section 1 of the German Competition Act, prescribing a specific clause in a downstream contract is not necessary to end the prohibited collusion but can at most be seen as necessary to eliminate the foreclosing effect following the illegal coordination. Irrespective of proportionality considerations related to the individual case, it is therefore uncertain whether an authority is competent to do so. Moreover, the criteria of 'necessity' and 'proportionality' are intended to avoid undue interference in the entrepreneurial freedom of the addressees and the competitive process. The authority should therefore not be allowed to order a specific action if several measures come into consideration that could be equally effective. Furthermore, it has been argued that, since in practice the authority could hardly ever demonstrate that there is only one way to act in compliance with competition law, an authority was practically limited to an *ex post* control of whether the infringers have taken adequate steps to ensure compliance with the law.[66]

The Bundeskartellamt may in any event only impose positive behavioural remedies after detailed consideration of the effects of the infringement and of conceivable remedies. Such a decision must be substantiated comprehensively and in detail. In a quite similar way, Article 7(1) of Regulation 1/2003 limits the Commission's scope to impose market-opening (positive) behavioural remedies.[67] In view of these severe procedural requirements and the legal uncertainty that remains in any case as to where the limit of their competences lies, competition authorities are naturally hesitant to test how far their remedial powers go in an individual case.

These findings suggest a need to define the remedial power of competition authorities more clearly and arguably also more broadly; in particular, an authority should have the power to impose remedies to remove barriers to entry that have been created by illegal collusion.

Commitment procedures may be a route for competition authorities to overcome uncertainties and limitations as to their remedial powers. This is at least true for the European Commission[68] since the ECJ held in *Alrosa* that the principle of proportionality applies in an adjusted form: a commitment is to be regarded as proportionate if it addresses the concerns expressed by the Commission, if the undertakings have not offered less

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[65] See above note 36 and accompanying text.

[66] Rupprecht Podszun in Jan Busche and Andreas Röhling (eds) *Kölner Kommentar zum Kartellrecht* (Wolters Kluwer 2017) Vol. 1, § 32 GWB no 26.

[67] Ralf Sauer and Manuel Kellerbauer, in Luis Ortiz Blanco (ed.) *EU Competition Procedure* (4th ed., Oxford University Press 2021), para 11.08.

[68] It is argued that the *Alrosa* doctrine on the principle of proportionality should also be applied to the corresponding provision on commitment decisions under German competition law. See Albrecht Bach in Thorsten Körber, Heike Schweitzer and Daniel Zimmer (eds) *Immenga/Mestmäcker. Wettbewerbsrecht* Vol. 2 (6th ed. C.H. Beck 2020) §32b GWB para 16.

onerous commitments, and if third-party interests were considered.[69] Consequently, under Article 9 of Regulation 1/2003, the Commission may make binding any commitments that would have had to be regarded as disproportionate if the file had been closed under Article 7 of Regulation 1/2003.[70] In fact, in some cases involving financial services, namely in *Standard & Poor's* and *Reuters Instrument Codes*,[71] as well as in *Credit Default Swaps*,[72] the Commission has declared commitments to be binding that aimed at facilitating market entry by granting third parties access to financial data (at a fair price[73]) via FRAND licensing agreements, allowing for the portability of information and interoperability between various and, thus, implementing the kind of rules that are of interest in our context.[74]

b) Institutional Limitations

Even where competition authorities are assumed to have the competence to prescribe specific actions to be taken to open up a market, they tend to be hesitant to make use of such enforcement powers. The reason for this arguably lies in certain institutional limitations of competition enforcement. Several aspects seem to play a role here.

First, competition authorities may lack routines in the drafting of detailed behavioural instructions and in procedures by which external technical expertise can be included. A certain reluctance may thus have to do with the authorities' sensitivity to their own information deficits or lack of expertise. This seems particularly relevant where the necessary remedies concern technical details. While the well-informed reasoning of the Bundeskartellamt's decision in the case concerning the payment initiation services shows that the authority was indeed comprehensively informed about the relevant technical aspects, setting a new technical standard certainly goes one step further.

Second, even if formally authorized, when it comes to detailed rulemaking competition authorities might see themselves as not being sufficiently legitimized.[75] This may especially be the case in proceedings brought against multiple firms in one industry (such as the German banks in the payment initiation services case), where the imposition of uniform behavioural remedies comes close to industry-wide regulation. Most notably, an option for public oral hearings may not be available in competition proceedings (as for instance at the

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[69] Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377, para 41.

[70] Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377, para 47.

[71] European Commission 15.11.2011, Case COMP/39.592, *Standard & Poor's*, C (2011) 8209 final, and European Commission 20.12.2012, Case COMP/39.654, *Reuters Instrument Codes (RICs)*, C (2012) 9635 final. See Fabiana Di Porto, 'Abuses of Information and Informational Remedies: Rethinking Exchange of Information under Competition Law' in Josef Drexl and Fabiana Di Porto (eds) *Competition Law as Regulation* (Edward Elgar 2015) 296, 307–308.

[72] European Commission 20.7.2016, Case AT.39745, *CDS - Information Market*, C(2016) 4583 final (ISDA) and C(2016) 4585 final (Markit). See René Plank, 'Antitrust and Financial Services in the EU: Commitment in Credit Default Swaps (CDS)' (2016) *Zeitschrift für Wettbewerbsrecht* 416–428.

[73] The price-regulating aspect in the *Standard & Poor's* decision was rightly emphasized by Niamh Dunne, 'Commitment Decisions in EU Competition Law', (2014) 10 *Journal of Competition Law & Economics* 399, 422, 424.

[74] Consequently, the commitment procedure has been characterized as an 'administrative tool … placed at the forefront' of 'the regulatory model of competition enforcement'. Niamh Dunne, 'Commitment Decisions in EU Competition Law', (2014) 10 *Journal of Competition Law & Economics* 399, 415.

[75] This might be concerns of democratic legitimacy but also the capability of creating norms that are widely accepted by market players and, thus, legitimation understood in a more functional sense. See on the legitimation of rulemaking by authorities as opposed to legislative rulemaking below sub IV.2.

EU level[76]), or least not by default.[77] This goes hand in hand with the fact that stakeholder participation is typically not provided for, or provided for only to a limited extent. German law, for example, provides that the competition authority may give representatives of the affected business sectors an opportunity to state their case.[78] In contrast, legislative initiatives are regularly accompanied by public consultations. At the EU level this is laid down in the Better Regulation principles. Stakeholders participating in this public consultation may include individual academics and research institutions, business associations, companies, consumer organizations, NGOs, public authorities, trade unions, and individual EU citizens.[79]

Third, a competition authority, which must cope with limited resources, may consider it efficient to avoid drafting detailed behavioural remedies, compliance with which, after all, it would then also have to monitor. The latter is often not a trivial exercise because addressees who are bent on resisting a remedy will find ways of 'creative compliance'[80] – that is, to comply with the wording but not the spirit and purpose of a remedy. In fact, when opportunity costs are considered, it may be reasonable for a competition authority to focus its resources on intervening in markets to detect and sanction infringements.

Finally, it should not be underestimated that, based on the tasks and powers assigned to it and the political environment it operates, an agency may develop a certain 'culture' or an 'internal ethos' that may have a significant impact on its enforcement activities.[81] Thus, it may be the case that competition authorities seek to avoid the role of a quasi-regulator as they fear for their 'pro-competitive spirit',[82] which rests on a the belief that one competition authority should avoid the temptation to engage in market design but that competition enforcement should be limited to *ad hoc ex post* control and the prohibition of certain defined elements of market conduct.

Therefore, a legislature that wished for a more active role of competition authorities in establishing market-opening rules through competition enforcement should provide an option for a competition procedure that facilitates and encourages stakeholder and external expert involvement and provides for public hearings. In addition, the resources of the authority would have to be increased appropriately.

4. Regulatory Fragmentation in the Internal Market

National regulatory interventions – no matter whether through competition enforcement or legislation – may cause significant distortions of competition and obstruct fundamental

[76] To be sure, undertakings under investigation have a right to be heard and may request a formal oral hearing. See Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. O.J. 2004 L 123/18.

[77] Pursuant to section 56(7) of the Competition Act, the competition authority may, upon application of a party or acting *ex officio*, hold a public hearing.

[78] Article 56(2) of the Competition Act. See also Article 27(3) of Regulation 1/2003.

[79] See, for example, the European Commission's consultation on a new Digital Finance Strategy, Summary Report of 24 September 2020, 3–4. Available at <https://ec.europa.eu/info/consultations/finance-2020-digital-finance-strategy_en>.

[80] Julia Black, 'Talking about Regulation', (1998) *Public Law* 77, 89.

[81] See Kagan (n 8) 391; Hawkins and Thomas (n 54) 18.

[82] The terminological dichotomy of 'pro-competitive spirit' versus 'regulatory mindset' is borrowed from Thomas Ackermann, 'Excessive Pricing and the Goals of Competition Law' in Daniel Zimmer (ed.) *The Goals of Competition Law* (Edward Elgar 2012) 349, 369.

freedoms and, thus, may have a negative effect on the functioning of the EU's internal market.[83] If this is to be remedied by rulemaking at EU level, EU competition enforcement is not an option. EU competition law has only a limited harmonizing effect. Stricter regulatory measures under national law remain untouched if they are based on enforcement of (national) competition rules that address unilateral behaviour or on national laws that pursue objectives that are distinct from those underlying Articles 101 and 102 TFEU.[84]

To establish, for instance, a regulatory level playing field for payment services in the internal market, the EU legislature must necessarily resort to regulation. This is an essential (political) reason why the requirements for market access for payment initiation services have eventually been regulated by a harmonizing EU legal measure (the PSD2) and why the German 'Lex Apple Pay' will be superseded when the DMA is applicable. Both EU measures are based on Article 114 TFEU, the Treaty provision that grants the EU legislature the power to foster the establishment and functioning of the internal market.

5. Conclusion

The foregoing analysis has established a range of principal shortcomings and limitations of competition enforcement when it comes to effectively facilitating market entry. Hence, one might be inclined to ask: why, then, are these market failures not always directly addressed by means of legislative interventions? Or, put in other words: in what way can competition enforcement be at any rate a valuable complement in scenarios where legislation is considered the preferable option to guarantee open markets?

IV. Competition Law as a Complement to Legislation

1. On (Opportunity) Costs of Legislative Rulemaking

Legislative rulemaking absorbs considerable resources and, thus, comes with opportunity costs. Politicians, so it seems, have an intuitive grasp of these limitations, and tend to be well aware that, to get things done, they will have to focus their 'political capital' on a limited number of projects.[85] In our context it is interesting to note that (limited) legislative resources can be saved by leaving rulemaking to competition practice. While the latter is not free of costs either, the capacities for competition enforcement (unlike those for legislation) can, as a matter of principle, readily be expanded.

Looking only at the relative implementation costs, legislative rulemaking is the more worthwhile the more frequently the established rule will subsequently be applied. For rare applications, the relatively high information and implementation costs of competition enforcement *in an individual case* (compared to the enforcement of an *ex ante* rule) are

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[83] Article 26 TFEU.

[84] See Article 3(2) and (3) of Regulation 1/2003. On the criteria for defining the latter category see Jens-Uwe Franck and Nils Stock, 'What Is "Competition Law"?—Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements', (2020) 39 *YEL* 320, 324–325, 345–356.

[85] See Colin S. Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 *Yale Law Journal* 65, 73 ('Rulemaking involves two sorts of social costs: the cost of obtaining and analyzing information about the rule's probable impact, and the cost of securing agreement among participants in the rulemaking process').

relatively less significant.[86] This may be one reason why the German legislature passed the 'Lex Apple Pay', whereas, for example, no one yet seems to have proposed to regulate ferry lines' access to ferry ports.[87]

2. Different Modes of Legitimation: Competition Enforcement as the (More) Technocratic Way of Rulemaking

In a democratic society, the legitimation of legislative rulemaking is straightforward: enacted provisions are approved by elected representatives who can be held accountable by the people. In contrast, the legitimacy of rules established through competition enforcement draws on various components. Robert Baldwin has identified five main arguments that are consistently employed to justify administrative rulemaking: legislative mandate, accountability or control, due process, expertise, and efficiency.[88] These rationales also carry persuasive power with regard to competition enforcement: competition authorities act based on competences granted to them by the legislature and with a mandate with a (relatively) clearly defined set of tasks. Competition proceedings follow the rule of law and measures imposed on firms are scrutinized by courts.[89] Authorities are considered to have special professional and technical expertise. Consequently, judicial review may be restricted.[90]

Rulemaking through an interplay of authorities and courts, as a matter of principle, can be perfectly democratically legitimized. Certainly, starting from the premise that only input-oriented legitimacy matters for assessing the democratic legitimacy of rulemaking,[91] legislative rulemaking as such stands on a firmer foundation and might be seen, therefore, as preferable. But this does not mean that, even if only viewed from the perspective of such a majoritarian model of democratic legitimacy, authorities whose actions are only indirectly linked to the will of the people could not be regarded as not having sufficient democratic legitimacy. Controversies then revolve (only) around whether, in the light of non-majoritarian

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[86] See Louis Kaplow, 'Rules versus Standards: An Economic Analysis', (1992) 42 *Duke Law Journal* 552, 563–564, 621.

[87] Two of the leading German cases based on the 'essential facilities doctrine' revolved about whether (competing) ferry lines should have a right to use a ferry port to start new ferry connections between Puttgarden and Rødby. See Bundeskartellamt 21 December 1999, B9-63330-T199/97 and T-16/98, *Puttgarden*, WuW/E-V 253; BGH 24 September 2002, KVR 15/01, *Fährhafen Puttgarden I*, Juris; and Bundeskartellamt 27 January 2010, B9-188/05; BGH 11 December 2012, KVR 7/12, *Fährhafen Puttgarden II*, Juris.

[88] Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 42–48.

[89] This is true for most Member States as they follow an 'administrative model'. In contrast, Ireland and Austria seem to follow a 'judicial model', according to which the competition authority can investigate a case, yet, where an infringement is found, cannot impose a remedy but must bring the case before court. In Sweden, such a strict separation between investigation and decision-making applies only where the authority seeks a fine to be imposed. In Denmark and Finland, which for fining decisions follow a 'weakened' 'judicial model', the authority may render a decision establishing that there has been an infringement, but then has to bring the case before court if it wants the infringer to be fined. See for an overview of these models ECN Working Group Cooperation Issues and Due Process, Decision-Making Powers, Report, 31 October 2012, pp 5–10. On the trade-offs involved in choosing one of the models see William E. Kovacic and David A. Hyman, 'Competition Agency Design: What's on the Menu?', (2012) 8 *ECJ* 527, 535–536 ('The decision to unbundle or integrate involves trade-offs between decision-making speed and expertise v quality control and legitimacy.').

[90] See e.g. the Commission's margin of assessment regarding economic matters as confirmed in the ECJ's case-law. Case C-412/06 P, *Bertelsmann and Sony Corporation of America v Impala*, EU:C:2008:392, para 69.

[91] This position has recently been reiterated, for example, by Martijn van den Brink, 'The European Union's *Demoi*cratic Legislature', (2021) 19 *International Journal of Constitutional Law* 914, 916–924.

concepts of democracy,[92] measures by independent authorities can be seen as *equivalent* to legislative rulemaking in terms of democratic legitimacy.

While clarifying this issue is beyond the scope of this article, a more functional facet of the non-majoritarian status of independent authorities is of interest here: where the formation of a rule is (or is perceived as being) more technocratic and less politicized, this may be significant for the way a pro-competitive intervention is received and in fact accepted by its addressees and stakeholders. Thus, we consider here a functional dimension of legitimacy: does the public accept a measure without having to be coerced?[93] The point here is not to argue that one way of rulemaking is (as such) more adequate than another. But, because of their different modes of legitimization and certain effects associated with them, they can play different, at times complementary, roles in the system of democratic rulemaking.

This can be seen in the way in which objections to the legitimacy of a pro-competitive intervention – arguing, for example, that a measure was in fact driven by protectionist motives or was not acceptable because of the unpredictability of its effects – can be countered. If EU institutions or EU Member States set rules that restrict the large digital gatekeepers in their entrepreneurial freedom, this is politically sensitive because the accusation quickly arises that the real aim was not to open markets and promote competition but to shift rents to Europe. Thus, it was widely reported that Apple had intervened against the then envisaged German 'Lex Apple Pay' at the Federal Chancellery, both directly and via the then US ambassador.[94] Against this background, the question arises: which mode of rulemaking is more apt to defuse such political tensions that may arise from such interventions? On the one hand, a legislative intervention carries stronger political weight. It sends a clear political signal that, given the will of the elected representatives, the level of regulation set for the territory of the EU or an individual Member State has to be considered as being in the best interest of the EU or the respective country. If, on the other hand, a rule is the product of a more technocratic and less politicized process, this might signal that the process of rulemaking was not steered by protectionist objectives. A government can point to the independence of the authorities and courts that must apply the existing competition law.

Given these ambiguities, it does not seem obvious under which circumstances which mode of rulemaking is, thus, more likely to ensure a higher degree of acceptance by the adversely affected companies or, in international contexts, their respective home state. But, in any case, it should not be overlooked that in certain contexts rulemaking through competition

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[92] See e.g. Giandemenico D. Majone, 'Regulatory Legitimacy' in Giandemenico D. Majone (ed.) *Regulating Europe* (Routledge 1996) 284–301.

[93] That corresponds to the use of the term 'legitimacy' by Jody Freeman, 'Private Parties, Public Function and the Real Democracy Problem in the New Administrative Law', (2000) 52 *Administrative Law Review* 813, 818, n 13.

[94] See various press reports, for example by the Handelsblatt, available at <https://amp2.handelsblatt.com/finanzen/recht-steuern/nfc-schnittstelle-finanzausschuss-bringt-gesetz-gegen-apple-pay-monopol-auf-den-weg/25222218.html> (14 November 2019, accessed 31 January 2022) and by the Tagesspiegel, available at <https://www.tagesspiegel.de/wirtschaft/hat-der-us-botschafter-interveniert-wie-der-streit-um-apple-pay-zum-krimi-im-bundestag-wurde/25234382.html> (15 November 2019, accessed 31 January 2022). While the US ambassador denied any interference, the German government neither confirmed nor denied the fact. See answer given on 19 December 2019 by Parliamentary State Secretary Sarah Ryglewski on behalf of the Bundesregierung to the question by the member of the Bundestag Michael Leukert (BT-Drs. 19/16190, 20 December 2019, 11–12).

enforcement may be preferable exactly because it is based on a less politicized and more technocratic mode of legitimization.

3. Competition Enforcement as a Trailblazer: Informing Legislative Rulemaking

Competition enforcement may pave the way for market-opening regulation.[95] The Bundeskartellamt's cartel proceedings against the German banks illustrates this pattern: for various reasons, competition authorities may have advance information.

a) Market Players Report Competitive Deficits

Competition authorities often become aware of competitive deficits in certain markets at a relatively early stage (without there necessarily having to be an infringement). This may be the case because market participants who consider themselves adversely affected by a restriction of competition complain to the authority, hoping for an intervention. Payment initiation services such as Sofort AG turned to the Bundeskartellamt when the banks tried to force them out of the market. Later, when there were indications of similar activities at the European level orchestrated by the European Payments Council (EPC), payment initiation services complained to the Commission. The Commission then launched a competition investigation to assess whether banks' self-regulation for the Single Euro Payments Area (SEPA) unduly restricted competition and excluded new entrants and non-bank payment service providers from the market.[96] In the course of these proceedings, the EPC assured the Commission that it would refrain from any kind of standardization in electronic payments that could have a foreclosing effect. Sofort AG then withdrew its complaint and the Commission announced in June 2013 that it was closing the proceedings but would continue to monitor the market for electronic payments.[97]

b) Gathering of Market Intelligence: Competition Authorities as Factfinders

Competition authorities have the expertise and the investigative powers to explore in detail through competition proceedings or sector inquiries[98] the conditions of competition in a certain market. On this basis, cartel authorities may not only inform the legislator about deficiencies but also make recommendations for rulemaking.[99]

In the example of the Bundeskartellamt's proceedings against the German banks, it can be observed that, as required under Article 11(3) of Regulation 1/2003, the authority informed the Commission about the initiation of the proceedings.[100] The case was then discussed several times with the Commission and other national competition authorities within the

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[95] See, more general, on how competition enforcement can lead to the adoption of regulation, thereby listing various examples, OECD, *Competition Enforcement and Regulatory Alternatives, OECD Competition Discussion Paper* (2021), 23–26.

[96] European Commission, Press release IP/11/1076 of 26 September 2011, 'Antitrust: Commission opens investigation in e-payment market'.

[97] European Commission, Memo of 13 June 2013, 'Antitrust: Commission closes investigation of EPC but continues monitoring online payments market'.

[98] On the role of sector inquiry see below sub V.1.

[99] Note the double role of the European Commission as the EU competition authority (see Article 105 TFEU and Article 4 of Regulation 1/2003) and as the institution competent to initiate legislative procedures at EU level (see Article 17(2) TEU).

[100] Reported in Bundeskartellamt 29 June 2016, B4-71/10, *Zahlungsauslösedienste*, para 256.

framework of the European Competition Network.[101] Consequently, with reference to the proceedings before the Bundeskartellamt, the market access problems of payment initiation services were noted in the impact analysis commissioned by the Commission to prepare the reform of the Payment Services Directive.[102]

We may safely assume that the Bundeskartellamt's early communication to the European Commission of the assessment of the bank's general terms and conditions under investigation as a barrier to market entry against payment initiation services made the Commission aware of a need for regulatory intervention and, thus, had an impact on the respective EU legislation through the PSD2.[103]

c) Competition Authorities (Should) Know Their Own Limitations in Forcing Market Openings

Although competition authorities are often seen as rather confident enforcers, they are aware of the legal and practical limitations of rulemaking by way of individual competition proceedings and remedies imposed. In the case of the proceedings against the German banks, this concerned, on the one hand, the necessity of providing detailed specifications on the communication between banks and payment initiation services. On the other hand, the Bundeskartellamt must also have been aware that this case possibly provided a window of opportunity for a market-opening intervention but that it would hardly have a handhold against future unilateral (possibly tacitly colluded) practices directed against payment initiation services.[104] Against this background, suggestions from competition authorities of a need for pro-competitive regulation should be seen as particularly significant for a legislature.

d) Conclusion

For designing competition policy, it is crucial to recognize that competition authorities may have an information advantage, in terms of both real competition deficits and the limits of existing mechanisms to address them. It should therefore be acknowledged and encouraged that, in addition to their role as competition enforcers, they also play the role of advocates of competition in the political sphere.

4. Competition Enforcement as Fallback Option

If a competitive deficit is addressed by legislative regulation, competition enforcement has an important role as a fallback option. A need to resort to competition law may exist, on the one hand, due to substantive limits of enacted statutes. Legislative intervention never succeeds

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[101] Reported in Bundeskartellamt 29 June 2016, B4-71/10, *Zahlungsauslösedienste*, para 256.

[102] Study on the impact of Directive 2007/64/EC on payment services in the internal market and on the application of Regulation (EC) No 924/2009 on cross-border payments in the Community, February 2013, S. 106 ('… the German competition authority … took the position in 2011 that the terms and conditions from the banks Giropay is a subsidiary of, were invalid insofar as they prevent providers like Sofort AG from lawfully offering their services').

[103] In its press release of 5 July 2016 on the decision in the payment initiation services case ('Restriction of online payment services by German banking industry in violation of competition law') the Bundeskartellamt noted 'deliberations on a reform of the law governing this sector will benefit from the Bundeskartellamt's detailed legal interpretation based on its official investigations'. Available at <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/05_07_2016_Sofort%C3%BCberweisung.html?nn=3591568> (accessed 6 February 2022).

[104] See above sub III.1.a).

perfectly and, moreover, markets and challenges to competition problems change. Regulation is then adjusted with a time lag (at best). This can be seen, for example, in the fact that, as early as June 2021, i.e. not even half a year after its entry into force, the German legislature saw the need to revise the 'Lex Apple Pay' to ensure that the provision actually had the intended reach.[105] Moreover, as explained in more detail below, competition enforcement may compensate for enforcement deficits.

a) First Scenario: Enforcement of Pro-competitive Regulation by Financial Market Authorities

The enforcement of legislative regulation may be in the hands of authorities that supervise a particular sector. Thus, in Germany, for example, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (Federal Financial Supervisory Authority) is responsible for enforcing the rules designed to facilitate the market entry of payment initiation services.[106]

Not to put too fine a point on it, authorities responsible for financial market supervision seem not to be perfectly incentivized to enforce procompetitive rules. Typically, those authorities' priority will lie with the stability of the supervised sector. Yet, rigorous enforcement of rules that are intended to open markets and provoke fiercer competition may be seen as problematic in this respect, because when the traditional business models of the banks are challenged this may entail risks – in part real, in part only perceived – for the stability of the financial sector.[107] The supervisory authority may therefore find itself to be in a conflict of objectives and might be tempted to take the latter effect into account when deciding how vigorously it will work to enforce rules designed to open up markets to newcomers.[108]

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[105] See above note 28 and accompanying text.

[106] See sections 48–52 PSSA (transposing Articles 64 and 66 PSD2).

[107] See on the interrelation between financial stability and competition in financial markets Dean Corbae and Ross Levine, 'Competition, Stability and Efficiency in Financial Markets' in *2018 Jackson Hole Symposium: Changing market Structure and Implications for Monetary Policy* (Kansas City Federal Reserve, available at <https://www.kansascityfed.org/Jackson%20Hole/documents/6988/Corbae_JH2018.pdf>) pp 357–409, who conclude at p. 395: '1. An intensification of bank competition tends to (a) squeeze bank profit margins, reduce bank charter values, and spur lending and (b) increase the fragility of banks. There is a competition-stability trade-off. 2. Policymakers can get the efficiency benefit of competition without the fragility costs by enhancing bank governance and tightening leverage requirements.' See also Xavier Vives, *Competition and Stability in Banking. The Role of Regulation and Competition Policy* (Princeton University Press 2016) 228 ('Competition is a source of efficiency in general, but in banking we have to take into account how it impacts stability'). An overview of the economic literature and its ambiguous results on the interrelationship between intensity of competition and stability of financial markets is provided by Juliane K. Mendelsohn, *Systemrisiko und Wirtschaftsordnung im Bankensektor. Zum Ende von Too Big To Fail* (Nomos 2018) 146–166.

[108] Elena Carletti and Agnieszka Smolenska, '10 years on from the Financial Crisis: Co-operation between Competition Agencies and Regulators in the Financial Sector', *OECD Note* DAF/COMP/WP2(2017)8 (13 October 2017), 20 ('supervisory focus on ensuring bank stability and profitability might encourage adoption or testing of FinTech technologies by incumbents, rather than encouraging market entry'). Martin Hellwig, 'Competition Policy and Sector-Specific Regulation in the Financial Sector', *Discussion Paper of the Max Planck Institute for Research on Collective Goods* (Bonn 2018/7) 5 ('… whereas the sector-specific regulator is concerned with one industry and with the legal norms governing that particular industry, competition authorities are concerned with abstract rules that apply to all industries. Where one institution thinks about coherence in terms of policies for "its" industry, the other institution is concerned with coherence in the application of "its" rules across all industries'). See also William E. Kovacic and David A. Hyman, 'Competition Agency Design: What's on the Menu?', (2012) 8 *ECJ* 527, 533 ('multi-purpose agencies can realise synergies … These synergies will only exist if the functions to be combined are true policy complements and do not consist of a rubbish bin of dissimilar (or, worse, conflicting) duties').

Regarding payment systems, it is the supervisory authorities' essential responsibility to protect their security and technical integrity. It is, for example, noteworthy that BaFin staff, when discussing the market entry of payment initiation services in an article published in its journal during the legislative process for PSD2, focused solely on the technical risks (in particular, the possibility of 'man-in-the middle attacks') and presented them, it seems, in an overly general and exaggerated manner.[109] In contrast, in its decision in the payment initiation services case, the Bundeskartellamt put those risks into perspective and pointed to the fact that the banks themselves offered services that entailed exactly the same risks.[110]

Furthermore, an authority that is monitoring one sector and supervising particular firms, which goes hand in hand with a continuous exchange and the developing of an ongoing relationship with the regulated that will often even entail a personal acquaintance of some type, will tend to opt for a cooperative enforcement strategy.[111] This has been characterized as a '"compliance orientation" in law enforcement where it is felt that negotiation between the regulator and the regulated is important to correct a problem'[112] – in contrast to a style described as 'legalistic' and 'deterrence-oriented'.[113] Indeed, to ensure an optimal level of compliance in the long run, it might be preferable not to pursue each infringement, or to leave it at a cease-and-desist order where it would also have been possible to impose a fine. This is because it can be crucial for effective enforcement, in particular for avoiding strategies of 'minimal' or 'creative' compliance, to prevent the regulatee from becoming entrenched in an attitude of resentment and resistance.[114] Instead, the regulatee should be made genuinely aware that it makes good sense to comply with a rule, thus promoting a 'willingness to comply'.[115] Yet, while, as a whole, this might indeed be a rationale strategy for the enforcement of, for instance, financial regulation, it will in all likelihood lead to the authority

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[109] Josef Kokert and Markus Held, 'Zahlungsdiensterichtlinie II – Risiken und schwerwiegende Folgen für Nutzer und Kreditinstitute' ('Payment Services Directive II – Risks and severe consequences for users and credit institutions'), *BaFin Journal* (Juni 2014), available at <https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2014/fa_bj_1406_zahlungsdiensterichtlinie_II.html> (accessed 31 January 2022).

[110] Bundeskartellamt 29 June 2016, B4-71/10, *Zahlungsauslösedienste*, paras 351–358 and 417–422.

[111] Julia Black, 'Talking about Regulation', (1998) *Public Law* 77, 88 ('A compliance approach tends to be adopted where there is an on-going relationship between regulator and regulated, and particularly where the individuals involved know one another or share a common background or outlook'). However, a broad spectrum of factors may determine the enforcement style: 'the nature of the breach … and judgments as to its seriousness … the nature of the regulatees (whether they are well or ill-intentioned, well or ill-informed, and whether the breach was careless, negligent or malicious), and the social and moral legitimacy of the regulation being enforced': Julia Black, 'Talking about Regulation', (1998) *Public Law* 77, 87. Hawkins and Thomas (n 54) 14 identify three main reasons for the adoption of a compliance strategy: (1) 'rule-breaking behaviour' not consisting of 'clear-cut acts' but being 'episodic, repetitive, or continuous'; (2) enforcers dealing only with a 'limited sector of the public'; (3) victims being 'not dramatically evident to the enforcement agent'. Kagan (n 8) 390–391, collects multiple factors identified by scholars as determinants of enforcement style. He groups them into four sets: legal design factors; task environment factors; political environment factors; leadership factors.

[112] Hawkins and Thomas (n 54) 5. See also Keith Hawkins, *Environment and Enforcement* (Clarendon Press 1984) 4 ('In a compliance strategy … the style is conciliatory and relies upon bargaining to attain conformity. Enforcement here is prospective: a matter of responding to a problem and negotiating future conformity to standards which are often administratively determined').

[113] Eugene Bardach and Robert A. Kagan, *Going by the Book* (Temple University Press 1982/3rd Printing, Transaction Publishers 2006) 57.

[114] This is one of the main themes of Eugene Bardach and Robert A. Kagan (n 113): overregulation and rigorous, inflexible enforcement of rules may entail resentment and resistance among the regulated that may in fact undermine the regulatory objectives.

[115] Julia Black, 'Talking about Regulation', (1998) *Public Law* 77, 87.

developing a deep understanding of the interests and positions of the incumbent market participants[116] – which may eventually discourage them from a rigorous enforcement of pro-competitive regulation.

We may add to this the risk of regulatory capture – that is, the possibility that the financial supervisory authority enforces the law with a clear bias toward the interest of the industry.[117] It is generally acknowledged that sector-specific supervisory authorities are more vulnerable to capture:[118] they typically have multiple contacts to representatives of the industry, compared to, for example, competition authorities that exercise cross-industry enforcement powers. What is more, where an industry is subject to sector-specific regulation, industry participants have strong incentives to invest in maintaining good relations with the competent authority. Certainly, we may be hopeful that outright bribery and corruption will remain a (rare?) exception in the countries of the EU. However, it is fair to assume, as learned observers of financial market regulation have remarked, that 'there are a variety of other more subtle ways in which the regulator's agenda may be captured by the industry'. First, it is not uncommon that enforcers, to ensure their expertise, are recruited from the financial industry, and that they will work (again) for the industry after their tenure. Those 'revolving doors' may tempt enforcers to act leniently in individual cases when they hope for later benefits. Second, prestige and budget of a regulator may be related to the fact that the supervised industry is flourishing – aligning the interests of enforcers and regulatees. Third, given the natural information deficit that each enforcer faces, regulated firms have strong incentives to even coordinate and to strategically bias the information a sector-specific enforcer will get hold of so that the latter gets a systematically distorted picture of the state of the industry.[119]

All in all, we may conclude that financial supervisory authorities are hardly the ideal enforcers of market-opening, pro-competitive regulation; at any rate, there are crucial aspects that make them seem less suitable for this than competition authorities.

b) Second Scenario: No Public Enforcement

German law does not provide for public enforcement of section 58a PSSA ('Lex Apple Pay'). Parties aggrieved by an infringement must enforce their right of access in the civil courts.[120] This may appear reasonable with a view to the incumbent banking industry. The availability of only private enforcement may seem, however, less convincing regarding (smaller) fintech

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[116] Martin Hellwig, 'Competition Policy and Sector-Specific Regulation in the Financial Sector', Discussion Paper of the Max Planck Institute for Research on Collective Goods Bonn 2018/7, p 10 ('Specifying and enforcing a desired behavior requires expertise and information, which the regulator can only obtain through constant interaction with the people he supervises. This interaction creates social ties and potential biases as the people involved on the side of the authority come to understand the firms' point of view too well').

[117] John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer, and Jennifer Payne, *Principles of Financial Regulation* (Oxford University Press 2016) p. 91.

[118] Tamar Indig and Michal S. Gal, 'New Powers – New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in Josef Drexl and Fabiana Di Porto (eds) *Competition Law as Regulation* (Edward Elgar 2015) 89, 108; Martin Hellwig, 'Competition Policy and Sector-Specific Regulation in the Financial Sector', Discussion Paper of the Max Planck Institute for Research on Collective Goods Bonn 2018/7, p. 5.

[119] Armour et al. (n 117) 92.

[120] Note also their right to claim damages under section 58a(4) PSSA.

firms (such as app developers), for whom the prospect of having to initiate a lawsuit against one of the big tech players can be quite daunting.

c) Third Scenario: Enforcement of Pro-competitive Regulation by Competition Authorities

It is consistent with its role as supervisor of financial service providers[121] that the German BaFin is *not* responsible for enforcing section 58a PSSA ('Lex Apple Pay'). Financial service providers can derive rights from this provision against operators of infrastructure facilities such as Apple or other big tech firms. For the latter, however, there exists no industry-specific supervisory authority. In fact, given the heterogeneity of business models, one may doubt whether there is such a thing as a 'digital industry'.[122] This raises the question: if one sees a need for public enforcement, which authority should be in charge?

This lends itself to delegating the enforcement of pro-competitive regulation to the competition authorities. The regulatory purpose of these provisions corresponds to their pro-competitive mindset.[123] Moreover, competition authorities are experienced with and tend not to shy away from taking confrontational action also against the top dogs in a market.

A remarkable illustration in the context of payment services regulation is provided for by Article 8 of the Interchange Fee Regulation (IFR).[124] In order to enhance competition on the market for payment cards, the provision ensures that issuers have the possibility of co-badging and that consumer may even require their bank to co-badge a single device – which may be a card or a smartphone (wallet app) – 'with all other brands offered as compatible apps (for a wallet) or other card products offered by the bank (for a card)'.[125] While the majority of Member States (including Germany) entrusted the enforcement of this provision to an authority responsible for financial market supervision, various Member States, including France, the Netherlands, and Denmark,[126] assigned the competence to their respective competition authority.[127]

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[121] See section 4(1) PSSA and the corresponding (general) enforcement competence pursuant to section 4(2) PSSA.

[122] To designate an authority responsible for the supervision of large digital gatekeepers (only) is certainly not far-fetched. But it remains the question of whether this authority should then only be competent for the enforcement of rules that address only those gatekeepers (as in the case of the DMA) or also of provisions that are otherwise enforced by specialised authorities (such as in the case of competition law or data protection law, for instance).

[123] Certainly, competition authorities with a multi-purpose mandate (including, for example, the enforcement of consumer protection laws) may also have difficulties in defining a coherent authority purpose and sometimes even in avoiding internal contradictions. See David A. Hyman and William E. Kovacic, 'Institutional Design, Agency Life Cycle, and the Goals of Competition Law', (2013) 81 *Fordham Law Review* 2163, 2168. However, one may assume that even with a competition authority that is also responsible for enforcing consumer protection law, the likelihood that it will overestimate possible risks to financial market stability, or the technical integrity of payment transactions is significantly less pronounced than with an authority whose primary purpose is precisely to protect against these risks.

[124] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions. O.J. 2015 L 123/1.

[125] European Commission – Fact Sheet, Antitrust: Regulation on Interchange Fees (9 June 2016). Available at <https://ec.europa.eu/commission/presscorner/detail/de/MEMO_16_2162>.

[126] Note that in these Member States the authority competent for competition authority is also responsible for the enforcement of consumer protection laws.

[127] A list of the competent national authorities may be found on DG Comp's website <https://ec.europa.eu/competition/sectors/financial_services/national_competent_authorities.pdf> (accessed 5 November 2021).

The enforcement of (procompetitive) sector-specific law follows a different pattern from competition enforcement. While the latter normally requires assessing and weighing up the market circumstances and the likely consequences of intervention in each individual case, infringements of hard rules simply need to be detected and sanctioned. At most, the authority has discretion as to whether to take up a case and what sanctions to impose. This may seem quite unsatisfactory to a competition authority that seeks to get to the root of an identified competition deficit. In addition to the reluctance to devote resources to the ongoing supervision of a sector,[128] this may also be a reason why competition authorities are sceptical about expanding their competences to the enforcement of pro-competitive regulation. On the other hand, however, competition authorities are characterized by 'a specific competition focus and expertise',[129] which suggests that they can readily be entrusted with the enforcement of legislature-made pro-competitive rules.

When the DMA comes into force, it will be the Commission that will have to take on big tech firms to enforce rules enshrined in the DMA intended to guarantee free market access for payment service providers. This can be seen as an example of the enforcement of pro-competitive legislation by a competition authority. While the exact institutional setting of the enforcement architecture within the Commission has not yet been fixed, it appears that the Directorate-General for Competition (DG COMP) will be responsible for the case handling, while the Directorate-General for Communications Networks, Content and Technology (DG CNCT) will mostly supply the technical expertise required for monitoring compliance and enforcement of the DMA.[130]

d) Conclusion

Enforcement of market-opening rules established by the legislature solely by means of private rights of action may typically entail significant enforcement deficits. It is therefore advisable to also keep public enforcement available. Although the *modus operandi* of competition enforcement differs from the enforcement of pro-competitive regulation, the parallel objective and the required 'pro-competitive spirit' suggest that competition authorities should be given a more prominent role in this respect.

V. UK-Style Market Investigation as Yet Another Possible Complement

1. Sector Inquiries as Catalysts for Regulation

The toolbox of most competition laws includes the power to initiate so-called sector inquiries. If there is a suspicion of competitive deficits in a particular sector of the economy, the authority can typically request information from the undertakings in the industry and, if necessary, even carry out inspections.[131] At the end of the inquiry, the authority publishes its

[128] See above sub III.3.
[129] Dunne (n 5) 287.
[130] See Euractiv of 5th July 2022 available at <https://www.euractiv.com/section/digital/news/commissioner-hints-at-enforcement-details-as-eu-parliament-adopts-dsa-and-dma> (accessed 8 July 2022).
[131] See e.g. Article 17(1) of Regulation 1/2003.

findings in a report, on the basis of which it can be decided whether or not further measures or proceedings are needed to enforce the competition law provisions.[132]

Beyond this, however, insights a competition authority might gain through a sector inquiry may also point to a need for legislative intervention. Certainly, according to the typical legal design of a sector inquiry, the entailed investigatory powers must aim at enabling an effective enforcement of competition law.[133] Therefore, acquiring intelligence to be used for pro-competitive legislation must not be the actual purpose of a sector inquiry but may only be a (desirable) side effect. Nevertheless, for the information of competition policy, the results of sector inquiries may play a crucial role.[134] This is all the more true at the EU level, because the European Commission not only acts as a competition enforcer but also has the competence[135] to initiate legislative regulation.[136] For example, the aforementioned[137] right to co-badging under Article 8 of the Interchange Fee Regulation (IFR) of 2015 stems in part from the findings of the Commission's sector inquiry into retail banking back in 2007. There, the Commission had found that the terms of the major payment card schemes (MasterCard, Visa) prohibited card issuers from co-badging with competing schemes, which made entry more difficult and limited competition between payment networks and card-issuing institutions. As the latter was apparently understood to capture (only) payment systems operating on an international level, these restrictions prevented domestic payment systems (such as *girocard* in Germany or *cartes bancaires* in France) from attempting cross-border expansion and made it more difficult for new payment systems to enter the market and to offer cross-border payment services.[138] The Commission initially left the problem to self-regulation,[139] but eventually, in 2013, proposed the said rules through the IF Regulation after finding that the competitive deficiencies had not been adequately addressed in the industry.

In sum, sector inquiries may reveal the causes for a particular market not functioning well and why competition enforcement arguably is not apt to tackle the identified deficiencies. Yet, by way of a typical sector inquiry, competition authorities are not endowed with the power to take remedial action. They are confined to making policy recommendations. Thus, this illustrates (only) another possible facet of an interrelation between competition enforcement

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[132] Id.

[133] See e.g. Article 17(1) of Regulation 1/2003 ('for giving effect to [now] Articles [101] and [102] of the Treaty').

[134] See European Commission, *A Pro-Active Competition Policy for a Competitive Europe* (COM (2004) 293 final), pp 16–17 ('Conducting market investigations or sector inquiries will be particularly helpful in detecting entry barriers … the different instruments of competition policy [i.e. the regulatory framework for competition and competition enforcement] can then be employed to tackle detected problems either in an integrated fashion or by employing the instrument best suited for the particular problem'). With a view to practice in Germany, see e.g. Joachim Bornkamm and Jan Tolkmitt in Hermann-Josef Bunte (ed.) *Kartellrecht, Band 1, Deutsches Kartellrecht* (14th ed., Luchterhand 2022) §32e GWB para 15 ('The cartel authority can pass on the results of the investigation to the federal government, which can examine the need for legislative measures'). The authors identify instances where results of a sector inquiry of the Bundeskartellamt have been taken up either by the EU or the German legislature or government.

[135] Article 17(2) TEU.

[136] Dunne (n 5) 281.

[137] See note 124 and accompanying text.

[138] European Commission, 31 January 2007, COM(2007) 33 final, Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Retail Banking (Final report), SEC(2007) 106, para 21, and Commission Staff Working Document Accompanying the Final Report, paras 119–121,

[139] Sector Inquiry on Retail Banking (Final Report) (note 138), paras 45–48, and Commission Staff Working Document Accompanying the Final Report, para 121.

and pro-competitive legislative regulation. It does not, however, open an original way of rulemaking.

2. The UK Market Investigation Tool: (Quasi-)Market Regulation Through a Competition Authority

Few jurisdictions provide for an instrument whereby a competition authority has the power, based on its findings in a market inquiry and irrespective of the finding of an infringement, to impose remedies that even may have a quasi-regulatory effect.[140] In the UK, this tool is called 'market investigation' and is typically[141] initiated by way of a two-stage process. First, the CMA (Competition and Markets Authority) or, within their respective fields of competence, sectoral regulators[142] may launch a market study, which is the equivalent[143] of a sector inquiry under EU competition law. Subject to compliance with various procedural requirements,[144] as a result of a market study, the CMA Board (or a sectoral regulator) may decide to refer a market for investigation.[145] This decision (not) to make a market investigation reference may be appealed.[146] Only the CMA enjoys the power to carry out market investigations. The CMA chair appoints a group of at least three CMA panel members who will conduct the market investigation.[147] Those panel members are independent experts and may include, for example, lawyers, economists, business consultants or accountants.[148] Panel members do not belong to the CMA staff, which, however, provides support for market investigations.

The market investigation aims to ascertain whether there are market features that 'create an adverse effect on competition' (AEC)[149] and, if so, to formulate appropriate remedies.[150] For this purpose, the investigation goes through various stages,[151] starting from an initial information gathering and an early statement of issues by the CMA (including 'theories of harm'). The CMA then collects evidence *inter alia* via market and financial questionnaires, site visits and parties' cross-examinations in formal hearings. After the publication of a provisional findings report and, where appropriate, an initial remedies notice, followed by responses and more hearings, the CMA will publish a provisional decision on remedies, which will be followed by more consultations with the parties potentially affected. Eventually,

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[140] See Richard Whish, 'Market Investigations in the UK and Beyond' in Massimo Motta, Martin Peitz and Heike Schweitzer (eds) *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press 2022) 216–290 (presenting the UK model and providing an outline of four instruments with similar market investigation powers (Greece, Iceland, Mexico and South Africa)).

[141] Whish (n 140) 221. Alternatively, the Secretary of State may make a reference: Whish (n 140) 235.

[142] Whish (n 140) 235.

[143] Amelia Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?', (2021) 12 *JECLAP* 44, 47. A notable difference is that, unlike the European Commission, the CMA has no power to carry out inspections.

[144] Whish (n 140) 220–221, 236–237.

[145] See Whish (n 140) 222–229 (on the criteria relevant for the decision to make a market investigation reference).

[146] Whish (n 140) 239–241.

[147] Whish (n 140) 238–239.

[148] The fact that there is no overlap of people between those who make the referral decision and those who later take the final market investigation decision is meant to avoid 'confirmation bias within the CMA'. Fletcher (2021) 12 *JECLAP* 44, 50.

[149] On the meaning of AEC see Whish (n 140) 253.

[150] See Whish (n 140) 231–234.

[151] Whish (n 140) 243–252.

no later than 18 months[152] after the referral decision, the CMA must issue a final report including the substantive findings and details on remedies to be imposed, which will subsequently be implemented by the CMA by way of an agreement with the relevant parties or by imposing orders.[153]

Remedies arising from market investigations may be of a structural nature,[154] but most often[155] are behavioural. Given that behavioural remedies that are based on a market investigation may, as a matter of principle, be addressed to all firms that were subjected to the investigation, such remedial action may effectively amount to regulation of a whole industry.[156]

3. Illustration: Retail Banking Market Investigation with Open Banking Remedies

The CMA's market investigation on retail banking is a good illustration of rulemaking through market investigation. In November 2014, after having concluded a market study that had been initiated by the OFT, one of the CMA's predecessor authorities, the CMA referred the retail banking market for investigation, appointed a market investigation group of five experts, and published a statement of issues.[157] In August 2016, after the investigation had gone through the various steps outlined above, the CMA published the final report of the market investigation including a package of remedies. Eventually, on 2 February 2017, the CMA published the Retail Banking Market Order 2017, which formally implemented the remedies announced in the final report and set out a timetable for key advances.

The Retail Banking Market Order addresses obstacles to the market entry of innovative newcomers to the payment services markets and, thus, tackles the same competition concerns that have been dealt with by the Bundeskartellamt in the case on payment initiation services and by the EU legislature through the PSD2. The order requires that the established banks to whom the order is addressed enable their customers to share their data securely with other banks and with third parties. Customers should be able to allow third parties to initiate payments on their behalf and to manage their accounts with multiple providers through a single digital 'app'. Thus, in line with PSD2, the CMA compelled banks to facilitate the market entry of providers of account information services and payment initiation services as well as of comparison tools and services offering targeted advice.[158]

To ensure proper implementation of these 'open banking' requirements, the order obliged the nine largest banks in the UK to develop and adopt an open application programming

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[152] Under certain circumstances, the period may be extended by another six months.

[153] See Fletcher (2021) 12 *JECLAP* 44, 47, note 9 ('Remedies can be agreed with firms through undertakings or imposed on firms through Orders').

[154] This may include divestment orders, i.e. full ownership separation, but also requirements of (only) operational separation.

[155] Fletcher (2021) 12 *JECLAP* 44, 48–49, 53.

[156] Fletcher (2021) 12 *JECLAP* 44, 48 ('It is worth noting that, where the orders arising from market investigations are behavioural, they effectively constitute a form of *ex ante* regulation in that they govern future firms' behavior').

[157] See the annex to this paper for a timetable depicting the most important steps of the investigation.

[158] Fabio Falconi and Lars Suhr, 'The Application of European Competition Law in the Financial Services Sector', (2018) 9 *JECLAP* 604, 606; Bruno Zeller and Brian Lynch, 'Challenges in Open Banking – What Are the Practical Steps to Be Taken Now?', (2021) 48 *University of Western Australia Law Review* 579, 589–590.

interface (API). The top nine UK banks were required to establish and maintain a new entity, which then had to manage the development of the open API, data and security standards, certain governance arrangements, and customer redress mechanisms. The thus-established Open Banking Implementation Entity (OBIE) continues to work under the CMA's oversight.

4. Market Investigations as a Hybrid of Competition Enforcement and Regulation: A Cure-All Tool?

a) Can Market Investigation Overcome the Limitations and Shortcomings of Competition Enforcement?

(1) Substantive Limitations of Competition Law. The imposition of remedies as a result of a market investigation requires that an AEC be ascertained. The CMA, thus, must show that market features prevent, restrict, or distort competition. A regulatory intervention resulting from a market investigation is, however, not dependent on a finding of a competition infringement. The CMA and its market investigation group are not constrained by the need to establish the exercise of market power or by established competition law doctrines on what constitutes an 'abuse' and the like. Within the boundaries of the market investigation, remedies may apply across the board irrespective of the addressees' individual market power. Therefore, market investigations are particularly well suited to designing and implementing market-opening measures such as in the open banking investigation.[159]

(2) Legal Uncertainty and Delayed Regulatory Effect. Until a court of last instance has developed a competition law rule that is sufficiently precise with regard for a certain scenario to be subsumed under it, the substance of competition law is subject to considerable legal uncertainty. In contrast, behavioural remedies defined by market investigation may contain precise commands and prohibitions. However, one must not expect market investigations to allow for short-term rulemaking. While the market investigation must be completed within 18 (or exceptionally 24) months,[160] it is typically preceded by a market study and remedies are formally adopted by a subsequent order of the CMA. Thus, in the case of the retail banking market investigation, there were more than three and a half years between the announcement of a market study by (then) the OFT in June 2013 and the publication of the CMA's order in February 2017.

The length of the process is due in part to the importance of repeated hearings with the firms under investigation and other mechanisms of stakeholder participation to ensure the legitimacy and quality of the remedies. As an observer well acquainted with the instrument has remarked: 'because the tool is potentially so powerful and flexible, it merits strong procedural checks and balances, to guard against confirmation bias or politicization'.[161]

(3) Institutional and Procedural Limitations of Rulemaking by Competition Enforcement. For various reasons – actual or presumed lack of expertise, resources, legitimacy, and/or 'regulatory spirit'[162] – competition authorities tend not to see themselves as being in a good

[159] Fletcher (2021) 12 *JECLAP* 44, 45.
[160] This period is perceived as quite narrow by observers familiar with the instrument. Fletcher (2021) 12 *JECLAP* 44, 51.
[161] Fletcher (2021) 12 *JECLAP* 44, 55.
[162] See above sub III.3.

position to draft, impose, and monitor (detailed) behavioural remedies, in particular remedies including access rights, data portability, etc. In contrast, the design of the market investigation procedure includes at various stages public hearings and the option for interested parties to comment on provisional findings and draft remedies. Moreover, similar to a legislative process, these materials are typically made publicly available on the CMA's website. Moreover, it has been observed that, in the context of market investigations, the competition authority's enforcement style differs from standard competition cases, namely by being less adversarial and less legalistic, but more participatory.[163]

Furthermore, flexible solutions appear to address the challenges of monitoring and possible revisions to remedies. This can be managed either by a sector regulator or by the CMA itself, which has an experienced and expert remedy monitoring team.[164] Most remarkable is the pragmatic solution found in the open banking case: the nine large banks to which the 2017 order was addressed had to set up and finance an entity that had to develop common technical standards for APIs and which was in a good position to use technical expertise to support this rulemaking process.

(4) Level Playing Field in the EU's internal market. Given its limited harmonizing effects, rulemaking via EU competition enforcement is not apt to remedy a fragmentation of the internal market caused by national regulatory interventions. While this could, as a matter of principle, be reached through an EU market investigation tool, there are significant obstacles to its adoption at the EU level. Thus, the idea of a 'New Competition Tool' as proposed in June 2020 by the European Commission for the regulation of the big digital gatekeepers[165] alongside the initiative for a 'Digital Services Act Package'[166] has not been taken up. While, in name, market investigations have been integrated into the DMA, in terms of function they only remotely correspond to a UK-style market investigation. In the context of the DMA, 'market investigations' have a narrow purpose as they are used to adapt few concepts essential to the DMA's scope of application to changed circumstances.[167]

Transferring the concept of a UK-style market investigation to the EU level is particularly challenging, first because the EU has no general competence to regulate the internal market. To provide the Commission with the power to impose possibly even quasi-regulatory remedies to make markets work would therefore be restricted by the conditions of Article 114 TFEU. While it seems viable to base the adoption of such an instrument on Article 352 TFEU, the political hurdles are high as that would require unanimous support in the Council.[168] Moreover, the Commission would get its hands on a very powerful instrument, which has the potential for comprehensive market regulation. However, the institutional

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[163] Fletcher (2021) 12 *JECLAP* 44, 50–51.
[164] Fletcher (2021) 12 *JECLAP* 44, 52.
[165] See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en> (accessed 22 June 2022).
[166] See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-internal-market-and-clarifying-responsibilities-for-digital-services_en> (accessed 22 June 2022).
[167] Massimo Motta, Martin Peitz, and Heike Schweitzer, 'Market Investigations in the EU: A Road Map' in Massimo Motta, Martin Peitz and Heike Schweitzer (eds), *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press 2022) 1, 8–12.
[168] Motta, Peitz, and Schweitzer (n 167) 5.

relations among the EU's institutions differ from the relationships between the corresponding institutions at the domestic level as, for example, between CMA and the UK legislature. A national legislature will, in principle, always have the power to supersede market regulation generated by market investigations through legislation or even to restrict the use of the instrument altogether. In contrast, the Commission's position in the architecture of the EU institutions is a much stronger one from the outset. Above all, the Commission plays a crucial part in EU legislation as it may decide which (new) legislative initiatives are needed and should be proposed.[169] Therefore, an implementation of market investigations at the EU level, including (quasi-)regulatory power equivalent to the one enjoyed by the CMA, would require further consideration as to which procedural safeguards could be adopted to maintain an institutional balance among the EUs lawmaking institutions.[170]

b) Complementing Competition Enforcement and Legislative Rulemaking

The above analysis has shown that market investigation may be a useful, albeit imperfect complement to competition enforcement. The latter is especially true because of the length of the procedure. Market investigation is a powerful instrument, allowing for rulemaking without involvement of the legislature and, therefore, requires procedural safeguards. Hence, whenever it is a matter of swiftly intervening in a market and establishing rules applicable across the board, legislative action will remain the first and possibly only choice.

While market investigations are thus a useful mechanism to complement competition enforcement and to compensate for its limitations and weaknesses as a rule-setting mechanism, thereby saving legislative resources, they cannot make legislative rulemaking unnecessary. Thus, it has been emphasized that market investigations do not allow for an adequate and legitimate balancing of competition goals against non-economic policy objectives such as environmental policy.[171] Moreover, it would be a particular challenge to install at EU law level a tool that is equivalent to the UK-style market investigation in terms of regulatory power and flexibility.

The complementary role of market investigation in relation to both competition enforcement and legislative rulemaking is also reflected in its mode of legitimization: on the one hand, a market investigation provides opportunities to involve regulatory addressees, stakeholders, and experts in the rulemaking process. This distinguishes market investigation from standard competition enforcement and lends established rules a broader basis of legitimacy. On the other hand, it will remain a less politicized and more technocratic rulemaking process than legislative rulemaking. Thus, while the functional quality of the established rules may partly help to ensure a comparatively high acceptance, especially among the addressees, and therefore lend legitimacy in a functional sense, understood as practical persuasion,[172]

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[169] Article 17(2) TEU.

[170] One option could be to grant the European Parliament and the Council a right to object market-wide remedies within a set period (cf. Article 290(2)(b) TFEU). Schweitzer has proposed that market-wide remedies come with a sunset clause and, hence, cease to have effect after a fixed period of possibly five years unless further legislative action is taken. See Heike Schweitzer, 'A European Market Investigation: Institutional Setup and Procedural Design' in Massimo Motta, Martin Peitz and Heike Schweitzer (eds) *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press 2022) 90, 145.

[171] Dunne (n 5) 293.

[172] See above n 93 and accompanying text.

rulemaking via market investigation naturally falls short of legislative rulemaking if viewed from the angle of a majoritarian conception of democracy in terms of legitimacy and accountability.[173]

VI. Summary of the Results

Where it is used to open markets and where it proves necessary to establish access rights, interoperability obligations, and the like, competition enforcement is constrained by various immanent limitations.

Substantive requirements.[174] Competition enforcement is subject to substantial preconditions that are relevant in this context. As a matter of principle, it requires that an anti-competitive use of market power can be shown in an individual case. Even if applied regarding market-dominant firms, only under strict conditions does competition law provide for rights to access competitors' facilities.

Legal uncertainty and delayed regulatory effect.[175] Until the courts of last instance establish relevant competition rules through adjudication, the substance of competition law related to a specific case or scenario is subject to significant legal uncertainty.

Institutional limitations.[176] For various reasons (lack of technical expertise, resources, legitimacy, and fear of a shift to a 'regulatory mindset'), competition authorities tend not to see themselves as being in a good position to regulate (in detail) the conditions and limits of rights to access competitors' facilities, the enabling of interoperability, etc. – even if this is considered necessary in principle.

Limited harmonizing effect.[177] Owing to its limited harmonizing effect, rulemaking via EU competition enforcement cannot prevent or remedy a fragmentation of the internal market caused by national regulatory interventions.

Acknowledging these inherent limitations is, on the one hand, important to calibrate the ambitions associated with competition enforcement. On the other hand, these findings indicate potential for improving the design of competition proceedings to facilitate their capacity to establish market-opening rules. Competition authorities' remedial power can be defined more clearly and more broadly.[178] An optional track could be added to competition proceedings that would allow for and facilitate stakeholder and external expert involvement, and which would provide for public hearings.[179]

Furthermore, we have seen that the availability of competition enforcement has at any rate to play an important role as a complement to pro-competitive regulation.

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[173] See Dunne (n 5) 294 ('there is a danger that prioritisation of effectiveness may weaken the legitimacy or rule-of-law compliance of State intervention, insofar as the basis for action reflects neither individual bad conduct nor any democratically accountable decision to further general welfare over private property interests').
[174] Section III.1.
[175] Section III.2.
[176] Section III.3.
[177] Section III.4.
[178] Section III.3.a).
[179] Section III.3.b).

Opportunity costs of legislative rulemaking.[180] Given the limited legislative resources, rulemaking via competition enforcement may be seen as 'politically' efficient.

Mode of legitimization.[181] In certain contexts, rulemaking through competition enforcement may be preferable and yield more acceptance by regulated market participants and stakeholders as it is based on a less politicized and more technocratic mode of legitimization.

Informing legislative rulemaking.[182] Competition procedures can be necessary or at any rate useful as they bring competitive deficits to the legislature's attention. What is more, they may bring to light the limited effectiveness of competition enforcement. It should therefore be appreciated and facilitated that competition authorities act as advocates of competition in the political sphere.

Competition enforcement as fallback option.[183] The practical effectiveness of pro-competitive legislation may be unsatisfactory owing to its limited scope or enforcement deficits. Competition enforcement can step in and close regulatory gaps and remedy enforcement deficits.

These findings reveal the various facets of complementarity between competition enforcement and pro-competitive regulation. Competition enforcement has an important role to play even if a legislature chooses to address competition deficits by means of regulation. Moreover, there is much to suggest that competition authorities should be given a more prominent role in the enforcement of pro-competitive regulation.[184]

Market investigations of the type available, for example, in the UK sit between competition enforcement and legislation and can usefully complement both mechanisms.[185] As a rulemaking mechanism, it is not conditioned by the substantive requirement of competition law. Moreover, it is an adequate instrument to impose detailed behavioural remedies that apply to (practically) all relevant market participants.

The UK's open banking initiative shows that market investigations may work particularly well when it comes to opening markets up and where competition enforcement often hits its limitations as a regulatory tool. Market investigations, compared to competition enforcement, offer more opportunities for (potential) addressees and stakeholders to get involved in the process of rulemaking. But this still means that the procedure tends to be less politicized and more technocratic than in the case of legislative rulemaking. However, the latter remains the first choice where the protection of competition requires a truly swift and market-wide intervention.

[180] Section IV.1.
[181] Section IV.2.
[182] Section IV.3.
[183] Section IV.4.
[184] Section IV.4.d).
[185] Section V.4.

Annex: Timelines of the Case Studies

1. Free Market Entry for Payment Initiation Services

Competition Enforcement	Timeline	Payment Services Regulation
	2005 Product launch of payment initiation services in Germany (based on screen scraping)	
	2006–2009 Umbrella association of German banking associations negotiates and finally recommends model online banking terms directed against payment initiation services	
Bundeskartellamt opens proceedings against banking associations and their umbrella association	15 July 2010	
Via the ECN, the Bundeskartellamt informs the EU Commission about the proceedings	25 March 2011	Via the ECN the Bundeskartellamt informs the EU Commission about the proceedings
Bundeskartellamt signals to the banks that their online banking terms infringes competition law	4 April 2011	
	February 2013	Impact Analysis PSD; reference to Bundeskartellamt's proceedings
	January 2016	PSD2 comes into force, facilitating market access of payment initiation services and account information services
	27 November 2017	Commission adopts RTS (regulatory technical standards for strong customer authentication and common and secure open standards of communication)
Decision of the Bundeskartellamt; finding of an infringement of, inter alia, Article 101 TFEU and section 1 of the German Competition Act	29 June 2016	
	13 January 2018	Transposition of PSD2 into German Law; duty to cooperate with payment initiation services (sections 48 to 52 PSSA); right of account holders to use payment initiation services (section 675f(3) of the Civil Code (BGB))
Higher Regional Court Düsseldorf rejects appeal against the decision of the Bundeskartellamt	30 January 2019	
Federal Court of Justice rejects appeal against the order of the Higher Regional Court Düsseldorf	7 April 2020	

2. Open Interfaces for Mobil Payment Services

Competition Enforcement	Timeline	Payment Services Regulation
	July 2018 Apple announces product launch of Apple Pay in Germany	

Commissioner Vestager signals Commission's mindfulness of Apple's restrictive NFC policy	October 2018	
	11 December 2018 Product launch of Apple Pay in Germany	
German Government states that assessment of Apple's NFC policy was a matter of competition enforcement	April and June 2019	
EU Commission investigates possible competition infringements in relation to Apple Pay	October 2019	
Commissioner Vestager clarifies that investigations in re Apple Pay concern also conditions to access Apple's NFC interfaces	7 November 2019	
	14 November 2019	German Bundestag adopts section 58a PSSA ('Lex Apple Pay')
	1 January 2020	Section 58a PSSA comes into force
EU Commission announces formal investigation against Apple	16 June 2020	
	15 December 2020	EU Commission proposes a Digital Markets Act; right to access NFC interfaces pursuant to Article 6(1)(f) in conjunction with Article 2(14) DMA proposal
	10 June 2021	German Bundestag adopts amendment to section 58a PSSA
	1 March 2022	Amendment to section 58a PSSA comes into force

3. CMA's Retail Banking Market Investigation with 'Open Banking' Remedies

Date	Market Investigation[186]
19 June 2013	OFT announces market study on SME banking
11 March 2014	OFT publishes an update on the market study and announces that the CMA will complete the study as part of a wider examination of competition retail banking
11 March 2014	CMA announces a short programme of work on banking. Building on the OFT's work in the sector, this should lead to a decision on whether or not to make a market investigation reference
18 July 2014	CMA publishes the results of a market study about personal current accounts (PCAs) and of another market study on banking services to SMEs CMA announces its provisional decision to initiate a market investigation and opens a consultation on the matter
6 November 2014	CMA refers the retail banking market for investigation CMA publishes 'Terms of reference' of the retail banking market investigation
12 November 2014	CMA appoints the market investigation group, consisting of Professor T A Hoehn (business consultant, visiting professor), Professor P Marsden (lawyer, professor of law), Mrs J May (non-executive director of CMA), Mr J E K Smith (business consultant), Professor M A Smith (chair) (professor of economics)
12 November 2014	CMA publishes a statement of issues that sets out the proposed scope of the investigation, and outlines possible concerns about competition in retail banking
21 May 2015	CMA publishes an updated issues statement
22 October 2015	CMA publishes its provisional findings and an initial list of remedies
7 March 2016	CMA publishes a supplemental notice of possible remedies

[186] For a detailed overview see <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk> (accessed 2 February 2022).

15 April 2016	CMA publishes an addendum to its provisional findings
17 May 2016	CMA publishes a provisional decision on remedies
9 August 2016	CMA publishes the final report of the market investigation including a wide-reaching package of reforms
2 February 2017	CMA publishes the Retail Banking Market Investigation Order 2017, i.e. the measure formally implementing the reforms announced in the final report, and sets out the timetable for introducing key advances